Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2494

Appeal MA08-223

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The City of Toronto (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the "Street Furniture" contract (the Agreement) between the City of Toronto and a named company (the affected party).

The City located the responsive record and the requester was granted partial access to it. Access was denied to the remaining portions of the record pursuant to sections 10(1) (third party information) and 11 (economic and other interests) of the *Act*.

The requester (now the appellant) appealed the decision of the City to this office.

During mediation, the affected party agreed to the release of the following information: Section 1.1 (the list of Schedules only), Section 4.20, Sections 12.7(a) and 12.7(c), Section 16.1 and Sections 17.3(a) and 17.3(b) of the contract portion of the Agreement. The City subsequently released these portions of the Agreement to the appellant. The appellant advised the mediator that he was not seeking access to Schedule H of the Agreement.

The parties were unable to resolve the remaining issues through the process of mediation and the file was transferred to me to conduct an inquiry under the *Act*. I began my inquiry by sending a Notice of Inquiry setting out the facts and issues in this appeal to the City and the affected party seeking their representations, initially. I received representations from both these parties, copies of which were sent with a Notice of Inquiry to the appellant. Portions of the affected party's representations were withheld from the appellant due to my concerns about confidentiality. I received representations from the appellant. I sent a copy of the appellant's representations to the City and the affected party and sought and received reply representations from them.

Following receipt of the parties' representations, the affected party provided me with a complete copy of Schedule "E" (the Proposal) as well as another copy of a confidential portion of their representations (Appendix I) which contains the entire list of the portions of this schedule that remain at issue. In this appendix, the affected party identified certain portions of Schedule "E" that it claims are subject to the mandatory personal privacy exemption at section 14(1). Therefore, this exemption is also at issue in this appeal. The affected party also withdrew its objection to disclosure of the information at issue at pages 7 and 28 of Schedule "E," therefore this information is no longer at issue.

In its representations, the City stated that it was no longer denying access to the contract terms of the Agreement or to pages 201 to 243 and pages 344 to 345 of Schedule "E." However, as the affected party continued to object to disclosure to both the contract terms and to most of Schedule "E," this information remains at issue.

The City had only claimed section 11 for the severances to the contract portion of the Agreement. Section 11 is a discretionary exemption that seeks to protect certain economic interests of institutions and cannot be relied upon by the affected party. As the City is no longer denying access to the severed provisions of the contract section 11 is no longer at issue. At issue

in this appeal is section 10(1) for all of the third party information in the record, and section 14(1) for the personal information in Schedule "E" of the record.

RECORD:

At issue is this Agreement are:

- 11 severed pages of the contract;
- Schedule A "Street Furniture Elements and Specifications" (pages 72-107);
- Schedule E "Proposal" (section 10(1) is claimed for all or part of pages 6, 8, 12, 13, 15, 16, 20 to 23, 36 to 39, 43, 45 to 48, 50, 62 to 67, 70 to 74, 78 to 84, 88 to 98, 102 to 107, 110 to 112, 116 to 126, 130, 134, 138 to 150, 153 to 154, 170, 224 to 264, 273 to 279, 281 to 285, 287, 289, 290 to 515, 562 to 573, 596 to 599, 603 to 604, 626, 628, 639 to 1014; section 14(1) is claimed for all or parts of pages 29 to 33, 43 to 44, 49 and 50);
- Schedule J "Company Unsold Allocations" (page 579);
- Schedule K "Unit Prices" (page 580); and,
- Schedule L "Termination" (pages 581-586).

PRELIMINARY ISSUE:

IS THE APPELLANT BARRED FROM SEEKING ACCESS TO SCHEDULE "E"?

Res Judicata/Issue Estoppel

The affected party submits that I should bar the appellant from seeking access to Schedule "E" of the Agreement. Schedule "E" is a copy of the affected party's proposal that it originally sent to the City, in response to the City's Request for Proposals (RFP).

In an earlier case under the *Act*, the appellant had made a request to the City for access to the proposal, which at that time existed as a stand alone document. In the earlier case, the appellant had agreed to abandon his appeal on the basis of the City having provided him with a severed version of Schedule "E."

The affected party submits that, since the earlier appeal was resolved on the basis of the appellant being granted partial access to Schedule "E," the appellant should be barred from "re-litigating" his entitlement to access to that record, based on the doctrine of *res judicata*.

The doctrine of r*es judicata* or, more specifically, "issue estoppel," prevents a party from re-litigating an issue that a court or tribunal has decided in a previous proceeding [see *Minott v. O'Shanter Development Co.* (1999), 42 O.R. (3d) 321 at 329 (C.A.)]. The goal of issue estoppel

is to ensure judicial finality, and "reflects the law's refusal to tolerate needless litigation." The Supreme Court of Canada articulated the purpose of issue estoppel this way:

> The law rightly seeks a finality to litigation. To advance that objective, it requires litigants to put their best foot forward to establish the truth of their allegations when first called upon to do so. A litigant, to use the vernacular, is only entitled to one bite at the cherry . . . An issue, once decided, should not generally be re-litigated to the benefit of the losing party and the harassment of the winner. A person should only be vexed once in the same cause. Duplicative litigation, potential inconsistent results, undue costs, and inconclusive proceedings are to be avoided [*Danyluk v. Ainsworth Technologies Inc.*, [2001] S.C.J. No. 46 at para. 18].

To establish the application of issue estoppel, the affected party must satisfy the following three-part test:

> (i) The question to be decided in the second proceeding is the same question that was decided in the first proceeding;
>
> (ii) The decision in the first proceeding is final; and
>
> (iii) The same parties to the earlier decision or their privies are the same persons as the parties to the subsequent proceedings.
>
> [*Angle v. Minister of National Revenue*, [1975] 2 S.C.R. 248 at 253-4]

The affected party submits that the three-part test applies, for the following reasons:

> …disclosure of the Proposal [Schedule "E"] to [the appellant] has already been finally determined in [a] prior appeal. Subsequent to the mediation of this appeal and the prior appeal, [the appellant] advised the [Information and Privacy Commissioner/Ontario (the IPC)] Mediator that he was satisfied with the disclosure of the …Proposal and advised that he would not be seeking further access to [the] Proposal at…adjudication. At that time, [the appellant's] prior appeal, in respect of [the] Proposal, was fully and finally concluded…
>
> In this case, the question before the IPC Mediator in the prior appeal was clearly identical to part of the issue [the appellant] again raises in this proceeding - namely his entitlement to access [to the] Proposal...In disposing of that earlier appeal, the IPC Mediator stated:
>
> > Upon receipt of [the] additional information, the original requester advised the mediator that, as a result of the additional information provided in the teleconference, combined with the additional information released, he was satisfied to resolve this appeal.

> …It is equally clear that the decision reached in the prior appeal was a final decision and one that is binding on all of the parties to that appeal.
>
> Following the mediation on September 16, 2008 and the release of additional information to [the appellant], [he] advised the IPC Mediator that he was satisfied with the information disclosed to him, he would not proceed to adjudication to challenge his entitlement to receive the remaining portions of [the] Proposal and that his appeal would be closed.
>
> As a result of [the appellant's] decision not to proceed to adjudication in the matter of the Proposal, the IPC closed the prior appeal and the matter was finally concluded and [the appellant] should not be permitted to re-litigate this issue in a new proceeding. No part of the prior appeal was subsequently reviewed by the Divisional Court…
>
> In the instant case, the parties to both this appeal and as well as the previous appeal regarding [the] Proposal are exactly the same.
>
> Consequently, the current appeal by [the appellant], insofar [as] it again attempts to gain access to [the] Proposal, is issue estopped and should not be allowed to proceed.

I find that issue estoppel does not apply here, since the first two parts of the three-part test are clearly not satisfied.

(i) Same Question Already Decided

Although the information in Schedule "E" is the same information that was included in the Proposal at issue in the prior appeal, I find that the same question has not been decided by this office. The issue in the prior appeal was the applicability of the claimed exemptions to a proposal provided to the City by the affected party in response to Request for Proposals. This record in the prior appeal was a stand alone document. In this appeal, Schedule "E" is part of an agreement that was executed between the City and the affected party. It is referred to in the body of the Agreement. In the disclosed portion of the Agreement is the following clause:

> "Agreement," "this Agreement," "hereto," "hereof," "herein," "hereby," "hereunder," and similar expressions mean or refer to this Agreement as amended from time to time and any Agreement or instrument supplemental thereto and shall include the Schedules annexed hereto as follows:
>
> Schedule "A" - Street Furniture Elements and Specifications;
> Schedule "B" - Placement Guidelines;
> Schedule "C" - City Policies;
> Schedule "D" - Form Letter of Credit;
> Schedule "E" - Proposal;
> Schedule "F" - RFP;

Schedule "G" – St. Clair Avenue West Transit Route;
Schedule "H" - Implementation Schedule;
Schedule "I" - City of Toronto Geographic Area;
Schedule "J" - Company Unsold Allocations;
Schedule "K" - Unit Prices; and
Schedule "L" - Termination;

In many cases, this office has found that a particular record, or specific information, may be exempt or not exempt, depending on the form, context or circumstances in which the record or information appears. Specifically, in the context of commercial proposals and contracts, this office has ruled that a proposal submitted by a third party that may have been exempt at the time it was submitted did not qualify for exemption under section 10 of the *Act*, since it had, in effect, become a contract between the parties [see, for example, Order MO-1705].

Accordingly, whether the proposal on its own was found to be exempt in the earlier appeal, or whether it is found to be exempt in this appeal, are two different questions that may yield different results.

Therefore, I find that part (i) of the three-part test has not been satisfied.

(ii) First Decision is Final

I accept that the appellant's first appeal was finally concluded when he agreed to abandon it. However, I do not accept the affected party's characterization of the Mediator's role in that appeal. The role of IPC Mediators is described in section 40 of the *Act*, which reads:

> The Commissioner may authorize a mediator to investigate the circumstances of any appeal and to try to effect a settlement of the matter under appeal.

In accordance with section 40, the Mediator in the first appeal investigated the circumstances of the matter and made successful efforts to have the parties agree to a settlement of the appeal. This is reflected in the Mediator's Report.

In the context of the first appeal, the IPC Mediator was not empowered to exercise, and did not purport to exercise, any adjudicative or decision-making function. Contrary to the affected party's assertion, this office made no "determination" or decision as to whether the record was exempt or not exempt under the *Act*, nor did this office "dispose" of the appeal.

Accordingly, I find that neither the Mediator nor any other person within this office made any "decision," final or otherwise, with respect to the appellant's right of access to this record under the *Act*.

Therefore, I find that part (ii) of the three-part test has not been satisfied.

In the circumstances, it is not necessary for me to determine whether the parties in both appeals are the same parties.

To conclude, I find that issue estoppel has no application in the circumstances of this case.

Abuse of Process

In the alternative, the affected party submits that I should bar the appellant from seeking access to Schedule "E" based on abuse of process, for essentially the same reasons as described above.

As an administrative tribunal exercising quasi-judicial functions, this office is "master of its own process," and has the authority to take steps to limit or prevent any abuse of that process which would frustrate the intent of the Legislature in creating both a freedom of information regime and an office for its administration [see Order M-618, upheld on judicial review *Riley v. Ontario (Information and Privacy Commissioner)* (March 23, 1999), Toronto Doc. 59/98 (Ont. Div. Ct.); see also *Sawatsky v. Norris* (1992), 10 O.R. (3d) 67 at 77 (Gen. Div.)].

The affected party submits that I should find that the appellant is abusing the process of this office for the following reasons:

> …[E]ven if the requirements of issue estoppel are met in the instant case, the doctrine of abuse of process is nevertheless engaged to prevent the misuse of the IPC procedure in a manner that is manifestly unfair to [the affected party] and which brings the administration of justice into disrepute…
>
> If [the appellant] was of the view that he was entitled to receive any of the undisclosed portions of [the] Proposal…his available recourses were in the earlier proceeding and he ought to have advanced his claims to access [the] Proposal in his first appeal.
>
> Instead, [the appellant] opted not to adjudicate the issue of access to his entitlement to [the] Proposal and concluded his earlier appeal, presumably with the view to attempting to once again access to [the] Proposal in this current appeal and with the hope of being able to rely on the broader rights of access generally afforded to contractual documents.
>
> The nature of the confidential information contained in [the] Proposal and supplied in confidence to the City is not however changed or varied merely because this document is subsequently appended to a contractual agreement entered into by [the affected party] and the City. To allow [the appellant] the option of commencing duplicative proceedings and affording him multiple opportunities to advance essentially the same request is therefore an abuse of process which ought to be avoided.
>
> In the circumstances, [the appellant] should not be permitted to advance any further claim of entitlement to access of [the] Proposal when he has already abandoned an earlier appeal in this regard and has forced [the affected party] to incur both time and expense in making overlapping submissions to the IPC.

In response, the appellant provides the following detailed explanation:

> On February 21st, 2007, I submitted a … request for "Proposals submitted in response to Request for Proposals No. [#] (for: Co-ordinated Street Furniture Program)." This was three weeks after the RFP [Request for Proposals] submission deadline and roughly two months prior to the announcement of [the affected party] as the winning bidder. Due to the complicated process of contacting the third parties, the City did not issue a complete decision until December 3 of that year.
>
> By that time, two of the bidders had appealed the City's initial decision to grant me (partial) access, and later that month I, too, appealed…
>
> In early May 2008, I received a phone call from [a City employee] regarding my request for the final contract (the request currently under appeal), informing me that the original proposal was included as Schedule E of the contract and that the contract request would likely be held up until the appeal for the proposal had resolved. Being anxious to acquire what I could of the contract prior to the debut of the street furniture prototypes that month, I agreed to let her set aside Schedule E for the time being. I already knew I would likely appeal the decision to grant me incomplete access to the contract, and I was of the understanding that I would be able to continue to pursue that Schedule through the appeal.
>
> By June 27, 2008, the appeals for the proposals had progressed to the point that the City had issued a new decision letter, granting me access to greater portions of the records. On that day, I went in to City Hall to view the records - the proposals submitted by [three named companies] - and purchase photocopies of them.
>
> I then informed [the IPC mediator] that I would no longer be pursuing the remainders of the proposals submitted by [the two unsuccessful proponent companies] but that I was interested in seeing more of [the affected party's proposal].
>
> In September, [the mediator, the affected party] and I engaged in a conference call with regard to the appeals for both the proposal by itself and the final contract. At its conclusion, I informed [the mediator] that I would no longer be pursuing the appeal for the proposal itself, as I would be more likely to get that information in the context of the contract. She agreed.
>
> It wasn't until a phone call a month later, however, that [the mediator] and I learned we had misunderstood each other; [she] thought I had meant that I could better acquire the information from the rest of the contract, rather than from Schedule E itself. My intention, however, had been to pursue the proposal in the form of Schedule E; there was a stronger case for it to be disclosed in the context of its inclusion in the contract, as opposed to in the context of the RFP process. [She] informed me that because the City had not issued a decision with regard to

> Schedule E, I would be unable to appeal for it. I told her that if I had been aware that I would not be able to appeal for Schedule E, that I would not have concluded my appeal for the proposal. She felt bad about having inadvertently misinformed me and spoke with her supervisor; they then contacted the City, which generously agreed to issue a decision on Schedule E so that I might include that in my appeal. Hence it was certainly never my intention to "re-litigate the issues," nor mount a "collateral attack on the finality of the prior appeal." I had commenced the appeal on the proposal almost six months prior to learning that the proposal had been included as a schedule in the contract, and only opted to conclude it because I had been (accidentally) misinformed by the mediator that I would be able to continue to pursue it via the other appeal. Both the City and the IPC have agreed to my right to pursue Schedule E.

In reply, the affected party submits that:

> Regardless of whether [the appellant] attempts to gain access to [the] Proposal through the City's decision with respect to the release of Street Furniture Contract or through a separate decision regarding only Schedule E is immaterial. The relevant point is that the right access to [the] Proposal was conclusively determined in the prior appeal and it [is] not open to re-litigation in any subsequent appeal.
>
> [The appellant] cannot now resile from the consequences of his tactical decision to pursue only the current appeal and to finally conclude the prior appeal…
>
> Nor it is any answer to the application of res judicata principles for [the appellant] to argue that he has a greater possibility of obtaining a more favourable result by pursuing entitlement to access [to the] Proposal in the context of the present appeal as opposed to the prior appeal. One of the principal objectives of the doctrines of res judicata and abuse of process is to avoid litigat[ing] the same issue more than once and reaching inconsistent results. To now permit [the appellant] access to greater portions of the … Proposal than it was determined that he was entitled to in the prior appeal would result in the very kind of inconsistency in decision-making that the doctrine of res judicata was designed to prevent.
>
> In short, [the appellant] made a decision not to pursue the prior appeal and now remains bound by the results of the prior appeal, namely the extent to which he is entitled to access [the] Proposal under the [*Act*]. [The appellant] cannot now use the present appeal to mount what is essentially a collateral attack on the findings in the prior appeal in an attempt to gain greater access to [the] Proposal…

I accept that, in the appropriate case, this office could bar a requester from seeking access to a record that the requester has agreed in mediation not to pursue. For example, this office has, on several occasions, refused to make a determination on a record that the requester, in mediation on the same appeal, had agreed not to seek access to [see, for example, Order PO-1755, where

the Adjudicator stated that to hold otherwise "would compromise the integrity of the appeals process itself by allowing a party to unilaterally frustrate the timely and orderly resolution of the appeal"].

I find that the circumstances of this appeal do not support a finding that the appellant is abusing the process under the *Act*. First, there is no evidence before me that, as part of the settlement of the earlier appeal, the appellant expressly agreed not to seek access to Schedule "E" of the Agreement, as part of this appeal (both appeals existed at the time of the settlement). To the contrary, the appellant submits that his understanding was that he was *not* giving up his right to pursue access to Schedule "E." Second, as I stated above, the same record or information may yield different results under the *Act*, depending on the circumstances in which the record or information appears. I do not accept the affected party's suggestion that there is something inherently inappropriate or inconsistent with these differing results. Further, I am not persuaded that there was any intent on the part of the appellant to simply resile from his earlier position without good reason, as was the case in Order PO-1755, referred to above.

The affected party submits that the appellant is "mounting a collateral attack" on the "findings" in the earlier appeal. This submission has no merit, for the reasons cited above under "issue estoppel."

Finally, I note that the courts in this province have urged a fair, large and liberal construction of the access to information provisions of the *Act*. To illustrate, in a recent decision, the Court of Appeal for Ontario stated:

> . . . [A]ny question of statutory interpretation must begin with a consideration of the purpose and intent of the legislation. Here, s. 1 of the *Act* takes the mystery out of that exercise. In particular, ss. 1(a)(i) and (ii) state that the purpose of the *Act* is to provide the public with a right of access to information under the control of municipal government institutions, in accordance with the principle that information should be made available subject only to limited and specified exemptions.
>
> That approach - one of presumptive access - reflects the fact that, because municipal institutions function to serve the public, they ought in general to be open to public scrutiny. In this regard, I agree with the submissions of the intervener that in enacting the *Act*, the legislature "wanted to improve the democratic process at the municipal and local board level" by ensuring members of the public would be able to access information needed "to participate in our democratic process in a worthwhile manner..."
>
> Along these same lines, the Supreme Court of Canada has recognized that the overarching purpose of "access to information" legislation is to facilitate democracy. It does so in two ways - first, it helps to ensure that citizens have the information required to participate meaningfully in the democratic process and second, it helps ensure that politicians and bureaucrats remain accountable to the

> citizenry: *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403, at para. 61.
>
> *Toronto (City) Police Services Board v. Ontario (Information and Privacy Commissioner)*, [2009] O.J. No. 90 (C.A.) at paras. 44-46

In my view, a similar approach should be taken by this office in exercising its discretionary powers to control its own process.

The purpose of the *Act*'s access provisions is not solely about individual rights, but extends to whether the "public" has a right to view records. As stated by former Assistant Commissioner Tom Mitchinson in Order M-96 (upheld on judicial review in *O.S.S.T.F., District 39 v. Wellington (County) Board of Education*, Toronto Doc. 407/93 (Ont. Div. Ct.), leave to appeal refused, Doc. M15357 (C.A.)):

> Disclosure of a record under Part I of the *Act* is, in effect, disclosure to the world and not just to the requester.

Accordingly, taking a strict approach as to whether the appellant has bargained away his right to a determination of whether Schedule "E" is exempt would undermine this aspect of the legislation [see also Order MO-2227].

I conclude that the affected party has not established a reasonable basis for a finding that the appellant is abusing the process of this office or the *Act*.

DISCUSSION:

THIRD PARTY INFORMATION

The City and the affected party provided representations on the application of sections 10(1)(a) to (c). Section 10(1) states in part, as follows:

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

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

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184 and MO-1706].

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

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

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

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

Both the City and the affected party submit that the information meets the definitions of commercial, financial and technical information. These types of information as listed in section 10(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field

> and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

The City states that:

> The information at issue includes information relating to the "buying, selling or exchange of merchandise or services" relating to street furniture including the financial component, added value services, negotiated discounts, occupancy levels, the actual cost or percentage costs, unit pricing, advertising strategies, installation schedules, maintenance program, quality assurance processes, methodology, proposed service amenities, recycling construction and installation schedules, maximum guaranteed annual revenue, proposed percentage of gross annual advertising revenue payable to the City, and elements and technical specifications of street furniture, including drawings.

The affected party submits that the record contains commercial information regarding the use and distribution of unsold allocations of advertising spaces, the payments owed to it in the event of breach of contract by the City and the termination payments owed to it in the event of early termination of the agreement by the City.

The affected party also submits that the record contains financial information regarding specific data as to the affected party's pricing practices, profits and losses, operating costs, payment formulas, as well data concerning the use and distribution of money pursuant to the terms of the Street Furniture Contract.

Finally, the affected party submits that the record contains technical information regarding the architecture and engineering of various street furniture products, including material specifications for those products.

The appellant acknowledges that the record may contain information that is a trade secret or technical, commercial, and/or financial information.

Analysis/Findings

The record concerns various aspects of the buying and selling of street furniture, the pricing of this furniture and the costs to operate or maintain this furniture, as well as details about the construction and operation of this furniture. Both the City and the affected party have provided a comprehensive description of the types of information in the record. Based on my review of the record, I agree with the City and the affected party that the record contains commercial, financial and technical information as contemplated by section 10(1).

Therefore, part 1 of the test under section 10(1) has been met with respect to the record.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020 and PO-2043].

The City does not object to disclosure of the 11 severed pages of the contract portion of the Agreement, as well as to pages 201 to 243 and pages 344 to 345 of Schedule "E." Concerning the remaining information at issue which is contained in Schedules "E," "J," "K" and "L," it submits that:

> …the schedules to the contract containing financial/commercial/technical information including the design specification, financial data such as pricing, marketing, and maintenance strategies, termination formula, strategies and methodology were supplied to the City as part of the [affected] party's RFP. Even though they are appended to the contract, the information that they contain was not negotiated.

The affected party submits that:

> With respect to the Schedules in issue in this proceeding …these materials cannot reasonably be considered as having been generated as part of the contractual negotiation process since they were created by [the affected party] during, or subsequent to, the RFP and supplied by [it] to the City.
>
> When viewed in total, each of the Schedules are stand-alone documents generated by either the City or by [the affected party] and contain only the information supplied by one or the other of the two parties. For example, Schedules B, C, D, F, G and I all contain information supplied by the City to [the affected party] whereas Schedules A, E, H, J, K and L contain information supplied directly by [the affected party] to the City. To strip these documents of their section 10 protections merely because they were included as attachments to the Street Furniture Agreement when these documents do not form the substance of the contractual rights and obligations between the parties would run contrary to the stated purpose of section 10 - namely to protect the informational assets of private parties who conduct business with municipal institutions.

The appellant submits that:

> As the records at issue constitute a contract mutually agreed upon and generated by the City and [the affected party], they cannot be deemed to have been supplied. The very inclusion of a record as part of a contract (even in its schedules) implies mutual agreement and is thus the product of negotiation; it is not as though one party imposed a portion of the records on the other. Every element of the Agreement, including the schedules, is mutually binding and was therefore subject to the consent and approval of both parties…
>
> Further, the City states [in] its representation that
>
> > ...the schedules include the proprietary information of the successful proponent. The disclosure of this information, however, would also reveal the basis upon which the City was prepared to negotiate, for example the percentage advertising revenue that was acceptable, including the minimum annual guaranteed revenue, the up front lump sum payment, the amount of advertising space for the City and so on. The City believes that an astute review of such information could provide knowledge of the City's strategies in its negotiations with the successful proponent, which in future could be used by other third parties in the preparation of their RFP's and in their negotiations with the City...
>
> Here, the City is explicitly recognizing that the information contained in the schedules was the product of negotiation...
>
> If, as the City claims, one could infer from the schedules the "City's strategies in its negotiations," then the Schedules are inherently the product of negotiations.
>
> [The affected party] claims that "each of the Schedules are stand-alone documents" and that they "do not form the substance of the contractual rights and obligations between the parties." Yet on page 3, the Agreement itself defines the term "Agreement" as including both the Agreement and the twelve schedules attached to it…
>
> And under the heading "ENTIRE AGREEMENT," clause 25 (on page 55) states that
>
> > Except as explicitly set out herein, this Agreement, upon execution by the parties, shall constitute the entire agreement between the parties pertaining to the subject matter hereof and shall supersede all prior agreements, understandings, negotiations, and discussions, whether oral or written, of the parties pertaining to such subject matter, including any previous agreement between the Company and the City. There are no warranties, representations or other

> agreements between the parties in connection with the subject matter hereof except those specifically set out herein. The execution of this Agreement has not been induced by nor do any of the parties rely upon or regard as material any representations not included in this Agreement.

Thus the entirety of the contract is legally binding, regardless of the purpose of including any particular portion.

The schedules are also necessary to interpret the contract. Clauses 4.1, 4.2, 4.3, 4.5, and 4.16, for example, are virtually meaningless unless they can be viewed in conjunction with Schedule A. These are the key paragraphs setting out the obligations surrounding "Street Furniture Design," and they rely upon the presumption that the reader has access to Schedule A. Section 19.3 integrates Schedule L in a similar way. It can be argued that the primary reason Schedules A and L were included as appendices, rather than being integrated into the main contract body, is simply that they consist of information that is more clearly expressed in chart form (as opposed to as paragraphs of text). The division of information for the purpose of organization should not in itself be taken to mean that one portion is less deserving of disclosure than another; exemptions should not be determined by quirks of layout.

I would also not be surprised if Schedules E, H, J, and K are similarly referred to and relied upon by paragraphs in the contract body that have been severed from the version provided to me.

In reply, the City submits that:

> Although the records at issue are appended to the Agreement, they do not contain information that has been negotiated between the City and [the affected party], i.e., this information was not "determined by give and take"; rather these schedules contain proprietary information that was supplied in confidence as part of the Request for Proposals process. Schedule E constitutes [the affected party's] proposal itself and the other schedules contain supplementary information relating to the proposal. They contain proprietary information such as methodology, formulae, unit prices, design specifications, etc. (please see original representations). This type of information is not the same as or similar to the terms of contract and therefore should be treated differently from the main contract portion of the Agreement.

The affected party did not provide reply representations on whether the information at issue in the record was supplied.

Analysis/Findings re: Supplied

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706 and PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851; motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution." The "immutability" exception applies to information that is immutable or not susceptible to change, such as the operating philosophy of a business, or a sample of its products.

If an affected party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" for the purpose of section 10(1) [Order PO-2384].

In Order PO-2435, Assistant Commissioner Brian Beamish also addressed the issue of whether information provided by one party but incorporated into a contract was "supplied." In that order the Ministry acknowledged that the records at issue in that appeal were contracts, but explained why it believed they still qualify as "supplied." It argued:

> Although the Record … consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item….. Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety.

Assistant Commissioner Brian Beamish rejected that approach to part two of the test, and stated:

> As in Order MO-1706, just because [the terms of a contract] may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by [the Ministry], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into [an agreement] with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by [the Ministry] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of [the Ministry] process cannot then be relied upon by the Ministry … to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of [these agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

The onus is on the parties resisting disclosure to show immutability [*Canadian Medical Protective Association v. Loukidelis*, (2008) CanLII 45005 (ON S.C.D.C.)].

Taking into account the above-mentioned orders, I find that the Agreement is a negotiated contract. I will now consider whether the information at issue in the Agreement was "supplied" by the affected party to the City, as being subject to the "inferred disclosure" and "immutability" exceptions, referred to above. As stated above at issue in this appeal are the following: 11 severed pages of the contract and Appendices: Schedule "A," most of Schedule "E," Schedule "J," Schedule "K" and Schedule "L."

Severed pages of the contract

The affected party provided specific representations concerning each of the severances in the contract.

> The first provision in issue is section 11 of the Street Furniture Contract "Public Service/Unsold Advertising." [The affected party] has not consented to the disclosure of any portion of this provision on the basis that it contains commercial and financial information governing the use and distribution of advertising faces…

> Portions of sections 11.A.1 and 11.A.3 of the Street Furniture Contract are also in dispute as [the affected party] has not consented to the disclosure of certain specific financial figures contained therein…
>
> Similarly, in section 17.2 of the Street Furniture Contract, [the affected party] has not consented to the release of the specific financial figures found in that section … which set out the minimum guaranteed annual revenue stipulated under the agreement…
>
> The specific pricing figures found in section 17.3 of the Street Furniture Contract are also in dispute in this proceeding...
>
> Section 19.3(b) of the Street Furniture Contract is also at issue in this proceeding and [the affected party] has not consented to its disclosure. The contested portion of this provision provides the financial formula applicable to determine [the affected party's] payment entitlement in the event that the City exercises its rights of early termination of the Street Furniture Contract…

Based upon my review of the Agreement, I note certain information at issue in the contract portion of the Agreement is also found in Schedule "E," which is the Proposal submitted by the affected party in response to the RFP. For example, many of these severances to the contract are reflected in the affected party's Proposal at pages 69 to 71 (Pages 275 to 277 of Schedule "E"). This portion of the Proposal indicates that the terms severed from the contract are terms proposed by the affected party to the City.

Based upon my review of the information at issue and the affected party's representations, I find that I do not have sufficient information to make a determination that the information in the severed pages in the contract is not the product of a negotiation process [Orders MO-1706, PO-2371 and PO-2384]. In this appeal, terms from the proposal were transferred into the full contract along with the addition of a number of significant other terms. This contract was then read and signed by both parties. This indicates that the contents of the contract were subject to negotiation and that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions [Order PO-2435]. Therefore, I find that the 11 severed pages of the contract forms part of the body of a negotiated contract.

Therefore, I find that the severed information in the contract portion of the Agreement is not supplied.

Schedule "A" - Street Furniture Elements & Specifications:

The affected party states that this Schedule contains a variety of technical information including specifications and designs for various street furniture fixtures.

As stated above, the "immutability" exception applies to information that is immutable or not susceptible to change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706 and PO-2371]. Based on my review of the information in Schedule "A," I find that it consists of the specific technical details for samples of the affected party's product,

including the actual designs for the affected party's products. Therefore, I find that this information qualifies as immutable and constitutes an exception to the general principles surrounding the disclosure of information contained in a contract. As a result, I conclude that it was supplied by the affected party to the City.

Schedule "E" - The Proposal

This Schedule contains a variety of personal, technical, financial and commercial information. According to the affected party, the following information is subject to section 10(1):

Page Number at Issue	**Information at Issue**
Page 6	Part of one sentence in paragraph 4
Page 8	Section 15
Page 12	Entire page, except first paragraph
Page 13	First column
Page 15	First column, paragraph 4, one number; Second column, paragraphs 2 and 3
Page 16	First column, starting in the second paragraph to the bottom of this column; Second column
Page 20	Second column, paragraph 2
Page 21	Information in columns 2 and 5 of Chart; First column, paragraph 2 and Second column, paragraph 1
Page 22	First column (all but first paragraph)
Page 23	3 numbers
Page 36	Column 2, paragraph 2; Column 3, paragraph 1
Page 37	Entire page
Page 38	One number in the first column and the entire second column
Page 39	One bullet point
Page 43	Column 1, paragraph 1
Page 45	Column 3, paragraph 3
Page 50	Column 2, paragraphs 2 to 4 and Column 3

Pages 46 to 48, 62 to 67, 70 to 74, 78 to 84, 88 to 98, 102 to 107, 110 to 112, 116 to 126, 130, 134, 138 to 150, 153 to 154, 170, 224 to 264, 273 to 279, 281 to 285, 287, 289, 290 to 515, 562 to 573, 596 to 599, 603 to 604	Entire pages
Page 626	One number
Page 628	One number
Pages 639 to 1014	Entire pages

In the confidential portions of the affected party's representations, it essentially repeats the information at issue in this portion of the record. In the non-confidential portions of its representations, although it provided general representations as to its position as to why all of the information in the Agreement was supplied (as set out above), it did not provide specific representations concerning the portions at issue in Schedule "E."

In particular, the affected party did not provide representations in either the confidential or the non-confidential portions of its representations as to why it believes that the "inferred disclosure" and "immutability" exceptions apply to the information at issue in Schedule "E." As stated above, the onus is on the affected party to show immutability [*Canadian Medical Protective Association v. Loukidelis*, cited above].

Adjudicator Colin Bhattacharjee in Order MO-2435 considered the issue of "supplied" concerning a proposal that later formed part of an agreement between the institution and two affected parties. Relying on Orders PO-2018, MO-1706, PO-2371 and PO-2435, Adjudicator Bhattacharjee stated that:

> [The Region] submits that the information in the contracts that were executed between itself and the two companies was not negotiated and "simply directly copied from the Proposal into the contract document." Consequently, it appears to be suggesting that the two companies "supplied" the information in the contracts to the Region, for the purposes of section 10(1)...
>
> Although the Region submits that the information in the contracts was "simply directly copied from the Proposal," this does not mean that the information in the contracts was not subject to any negotiation…
>
> In my view, if the Region had judged the two companies' joint bid to be too high in terms of price or otherwise unacceptable, it had the option of not selecting that bid and not executing contracts with the two companies. In other words, the Region had the opportunity to accept or reject the bid, which is a form of negotiation. In such circumstances, I find that the information in each contract,

> including the pricing information, was mutually generated rather than "supplied" by the two companies…
>
> In my view, none of the information in the contracts falls within the scope of these two exceptions. In short, I find that the information in the contracts was the product of a mutual negotiation process between the Region and the two companies. It cannot be said that these companies "supplied" the information in these contracts to the Region. Part 2 of the section 10(1) test has, therefore, not been satisfied with respect to this information.

In Order MO-2299, Adjudicator Frank DeVries considered whether a proposal, which was appended as a series of schedules to an agreement, was supplied. He stated:

> …the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly refers to these three schedules as forming part of the agreement, and as containing certain terms of the agreement.
>
> In my view, by incorporating these documents in to the agreement, and by having them form part of the agreement, these documents can no longer be considered to have been "supplied" by the third party. Rather, these documents constitute the agreed, negotiated terms of the agreement.
>
> Again, I have also carefully reviewed these records to determine whether any portions of them fit within the situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply (the "inferred disclosure" and "immutability" exceptions). On my careful review of these records, I find that the exceptions do not apply to any of the information contained in them. These three schedules, which form part of the agreement, do contain some "background" information as to why these records were provided, and the basis upon which some of the information in them is provided. I consider this information to be in the nature of the type of information found in a "preamble" to a contract, which essentially sets the framework for why the clauses in the contract were negotiated. I do not consider these portions of the schedules to fit within the "inferred disclosure" and "immutability" exceptions.
>
> I have also carefully examined the table which forms part of Schedule F, as well as various references to amounts set out in some portions of the schedules (particularly Schedule F). As identified above, if a third party has certain fixed costs that determine a floor for a financial term in the contract, the information setting out the fixed or "overhead" cost may be found to be "supplied" for the purpose of section 10(1). Accordingly, I carefully considered whether the various amounts referred to in the schedules (including identified "base amounts" and other references to various costs) identified any such "fixed" costs. However, on my review of this information, including a reference to an amount in Schedule F which suggests that the "base amounts" are not fixed costs but calculated

> estimates, and in the absence of any other specific evidence on this issue from the parties, I find that none of the information fits within the exceptions. In addition, although there is a reference to certain identified costs in Schedule F, and the proposed methods of resolving issues surrounding those costs, by incorporating Schedule F and its terms into the contract, the parties have negotiated these amounts and issues. In my view, the exceptions identified above do not apply to the information in Schedules F, G and H, and I find that they were not "supplied" by the third party for the purpose of section 10(1).

I adopt this reasoning of Adjudicator Bhattacharjee in Order MO-2435 and Adjudicator DeVries in Order MO-2299. Therefore, subject to the "inferred disclosure" and "immutability" exceptions, I find that the information at issue in Schedule "E" forms part of the negotiated agreement between the parties and was not supplied by the affected party to the City for the purpose of section 10(1).

I will now review the particular information at issue in each part of Schedule "E" to determine whether the "inferred disclosure" and "immutability" exceptions apply.

Page 6 Part of one sentence in paragraph 4;
Page 15 Second column, paragraphs 2 and 3;
Page 20 Second column, paragraph 2;
Page 21 Information in columns 2 and 5 of Chart;
Page 36 Column 2, paragraph 2; Column 3, paragraph 1;
Page 38 the entire second column;
Page 39 One bullet point;
Page 43 Column 1, paragraph 1;
Page 45 Column 3, paragraph 3;
Pages 46 to 48;
Page 50 Column 2, paragraphs 2 to 4 and Column 3;
Pages 102 to 107:
At issue are the names of certain suppliers and the type of services they would provide if the affected party's proposal was accepted. I find that this information is immutable as this information is not capable of negotiation.

Page 8 Section 15:
The information at issue consists of an entry in the index of the Proposal. This information, along with the information that this severance indexes, is information that is proposed by the affected party. I find that this information has not been supplied.

Page 12 Entire page, except first paragraph;
Page 13 First column:
This information is severed from the Executive Summary portion of the Proposal. The RFP (Schedule "F") requires this portion to indicate the affected party's "understanding of the scope,

and approach to managing the deliverables defined in this RFP." Upon my review of this information at issue, I find that it has been proposed by the affected party and has not been supplied.

Page 15 First column, paragraph 4, one number:
This number refers to the size of the affected party's team. It is part of a sentence that states: "This team of more than (# at issue) dedicated professionals has worked together on (several types of projects)." I find it is immutable and has been supplied.

Page 16 First column, starting in the second paragraph to the bottom of this column and Second column;
Page 21 First column, paragraph 2 and Second column, paragraph 1;
Page 37 Entire page:
Most of this information is background information about the affected party, except for the third severed paragraph on Page 16 and the first paragraph on Page 37. I find that this information (except for the third severed paragraph of Page 16 and the first paragraph on Page 37) is immutable. The third severed paragraph of Page 16 and the first paragraph on Page 37 contain information that has been proposed by the affected party and has not been supplied.

Page 22 First column (all but first paragraph):
This information is information proposed by the affected party and has not been supplied.

Page 23 Three numbers;
Page 38 One number in the first column:
The first number on Page 23 is contained in a sentence that states that the affected party "employs more than (# at issue) people across Canada." The second number on Page 23 is a number contained in a sentence: "Fiscal 2006 record revenues of (# at issue)." The third number on Page 23 is contained in a sentence that states: "Total market capitalization of more than (# at issue)." The number on Page 38 is part of a sentence that states: "…a comprehensive team of more than (# at issue) professionals who have worked together…." I find that these numbers are immutable and have been supplied.

Pages 62 to 67:
These pages concern the affected party's advertising strategy for the project. Most of this information is background information about the affected party, except for the information on Page 63, the last paragraph of Page 64, the first column on Page 66. Accordingly, I find that the information, on Page 62, Page 64 except for the last paragraph, Page 65, the second column on Page 66 and Page 67 is immutable. The information on Page 63, the last paragraph of Page 64 and the first column on Page 66 is information that has been proposed by the affected party and is information that has not been supplied.

Pages 70 to 74:
These pages concern the affected party's installation schedule for the project. This information has not been supplied as it is the actual proposed terms of the affected party as to how and when it intends to install the street furniture.

Pages 78 to 84:
These pages concern the affected party's maintenance program for the project. This information has not been supplied as it is the actual proposed terms of the affected party as to how and when it intends to maintain the street furniture.

Pages 88 to 98:
These pages concern the affected party's financial component for the project. Some of this information is immutable, namely the information at Page 88, the top half of Page 89, the first column on Page 90, the second column on Page 92 and the second column of Page 97 as it consists of the affected party's financial position and other background information. The remaining information in these pages has not been supplied as it is the actual proposed terms of the affected party as to how it intends to price and market the advertising connected with the street furniture, as well as other proposed financial information concerning the project.

Pages 110 to 112:
These pages concern the affected party's advertising and sales experience it is dedicating to the project. Some of this information is immutable, as containing details about the existing advertising business of the affected party, namely the information in the second columns of Pages 110 and 111. The remaining information in Pages 110 to 112 has not been supplied as it is the actual proposed terms of the affected party as to how it intends to market the project.

Pages 116 to 126:
These pages concern the affected party's quality assurance program for the project. Some of this information is immutable, as providing details of the existing quality assurance program of the affected party, namely the information at Pages 116, 117, 120, the first column of Page 121 and Page 125. The remaining information in Pages 118, 119, the second column of Page 121, 122 to 124 and 126 are the actual proposed terms of the affected party as to how it intends to maintain the quality of the project and has not been supplied.

Page 130;
Page 287:
These pages reflect the terms of the Bid Security. This information has not been supplied by the affected party as it is information set out in the RFP (Schedule "F").

Page 134:
This page details the Agreement requirements. I find that this information has not been supplied by the affected party.

Pages 138 to 150:
These pages concern the affected party's methodology for the project. Some of this information is immutable, as providing details of the existing methodology of the affected party, namely the information at Pages 139. The remaining information has not been supplied as containing the actual proposed terms of the affected party as to the methodology of the project.

Pages 153 to 154:
This information is the proposed service amenities for the project and has not been supplied.

Page 170;
Pages 224 to 264:
These pages contain financial statements of the affected party, which is immutable information.

Pages 273 to 279:
These pages contain proposed project plan timetable charts. This information has not been supplied.

Pages 281 to 285:
These pages contain proposed financial details for the project. This information has not been supplied.

Page 289:
This page contains the affected party's proposed exceptions to the Agreement. This information has not been supplied.

Pages 290 to 515:
These pages outline the specific details of the designs for the street furniture. Certain pages are the same as Schedule "A," namely, the detailed drawings for the street furniture. For the same reasons as outlined for Schedule "A" above, I find that the information on these pages is immutable and has been supplied.

Pages 562 to 573:
These pages contain one of the affected party's business guides. I find that this information has been supplied.

Pages 596 to 599;
Pages 603 to 604:
These pages contain general drawings and maps. One of these pages states that the information therein is subject to change. I find that this information has not been supplied.

Page 626 One number;
Page 628 One number:
I find that in the context of this page, the information has not been supplied. The information on this page is part of the proposed terms of the affected party for the provision of street furniture to the City.

Pages 639 to 1014 Entire pages:
Pages 640 to 662 are letters of reference. I find that these letters have been supplied. Pages 663 to 991 appear to contain information about past projects and financial statements for 2006 and earlier, before the submission of the RFP and have been supplied. Pages 992 to 1014 are letters and other information from suppliers to the Project containing information about their services or products. I find that the information on these pages has been supplied.

Schedule "J" - Company Unsold Allocations

The affected party states that this Schedule includes confidential "commercial and financial information regarding the annual percentages of inventory [it] is permitted to utilize, less the percentage of advertising faces already allocated to the City and local improvement projects."

As stated above, the "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution" and the "immutability" exception applies to information that is immutable or not susceptible to change. Based upon my review of the information in this record, as well as the related information concerning this record in a section of the contract, I find that neither exception applies to the information at issue in Schedule "J." Furthermore, the information in Schedule "J" refers to percentages and does not reveal fixed costs that determine a floor for a financial term [Order PO-2384]. Therefore, I find that Schedule "J" does not contain information that was supplied for the purposes of section 10(1).

Schedule "K" - Unit Prices

The affected party states that this Schedule contains the pricing values of each of the street furniture elements. Relying on the reasoning of Assistant Commissioner Beamish Order PO-2435, Adjudicator Colin Bhattacharjee in Order MO-2435 stated that:

> In my view, if the Region had judged the … bid to be too high in terms of price or otherwise unacceptable, it had the option of not selecting that bid and not executing contracts with the [third party]. In other words, the Region had the opportunity to accept or reject the bid, which is a form of negotiation. In such circumstances, I find that the information in each contract, including the pricing information, was mutually generated rather than "supplied" by the [third party].

I adopt this reasoning of Adjudicator Bhattacharjee and find that the information in Schedule "K" was not supplied by the affected party to the City for the purposes of section 10(1).

Schedule L – Termination

The affected party states that this Schedule contains the financial formulas used to calculate termination payments if the Street Furniture Contract is terminated by either the affected party or the City. Based upon my review of these formulas, as well as the related information concerning this record in a section of the contract, I cannot find that this information reveals non-negotiated confidential information supplied by the affected party to the institution nor is this information immutable. Therefore, I find that Schedule "L" does not qualify as having been supplied by the affected party to the City.

Conclusion re: Supplied

On my careful review of the information at issue in the record, I find that the only information that has been supplied in this appeal is Schedule "A," entitled: "Street Furniture Elements and Specifications" (pages 72-107) and certain portions of Schedule "E."

The information in Schedule "E" that I have found to be supplied as being subject to the immutable or inferred disclosure exceptions consists of the affected party's background information, its financial position, financial statements, business guides, details of its advertising business, methodology, quality assurance program and supplier information existing at the time it submitted the Proposal, the detailed drawings for the street furniture and letters of reference.

In finding that the remaining portions of Schedule "E" have not been supplied, I have taken into account the fact that Schedule "E" is the proposal prepared by the affected party and initially provided by it to the City. In my view, by incorporating this document into the Agreement, and by having it form part of the Agreement, I find that, other than the information that is immutable or subject to the inferred disclosure exceptions, the remainder of the Proposal can no longer be considered to have been supplied by the affected party. Rather, this information constitutes the agreed, negotiated terms of the agreement. Therefore, I conclude that this remaining information in Schedule "E," as well as the information at issue in the contract portion of the Agreement and Schedules "J," "K" and "L," consist of mutually generated, essential terms that I find to be the product of a negotiation process between the City and the affected party.

Accordingly, in the circumstances of this appeal, I find that the severed portions of the contract, certain portions of Schedule "E," and all of Schedules "J," "K" and "L" were not supplied by the affected party for the purposes of part 2 of the section 10(1) test. As all three parts of the three-part test set out in section 10(1) must be met, I find that this information does not qualify for exemption under section 10(1).

I will now determine whether Schedule "A" and the portions of Schedule "E" that I have found to be supplied, were supplied in confidence.

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure [Order PO-2043]

The City submits that:

> The third party states that this information was supplied "in confidence to the City as part of a [RFP] process". Staff of the relevant program area has confirmed that there was assurance that the information in the schedules was confidential. This information has always been treated in confidence and has not been disclosed to the public at any time.

The affected party submits that the supply of this information by it to the City:

> (a) Occurred either during or after a competitive bidding process wherein [the affected party] was competing with two other competitors for the award of an important business contract;
>
> (b) Occurred in circumstances where [the affected party] was selected over the two other bidders as successful proponent on the basis of the information supplied to the City and the overall competitive formula it has established; and
>
> (c) Includes pricing information (including all actual values and formulas) as well as the technical and commercial information contained in [the affected party's] Proposal, that has been consistently treated as confidential by [the affected party] and has not been publically disclosed to any unrelated third party.
>
> Consequently, in the circumstances surrounding the RFP process, as well as the subsequent execution of the Street Furniture Contract, it has been [the affected party's] expectation that the technical, financial and commercial information currently at issue would be protected from public dissemination. Such information is integral to the success of [the affected party's] business operations and in light of its importance was provided on the understanding that it would not be made available to [the affected party's] competitors; the inclusion of this information in the Street Furniture Contract is simply an effort to create a complete understanding of the parties' relationship and not a concession that this information was not supplied to the City in confidence.

The appellant submits that:

> Under the heading of "CONFIDENTIALITY," clause 22 (on page 53) of the Agreement explicitly states that, "The Company and the City agree that this

> Agreement is not subject to any covenant of confidentiality and that it may be disclosed by either party to a person not a party to this Agreement without the requirement for consent."
>
> I must once again note that the Agreement itself (on page 3) defines the term "this Agreement" as including both the Agreement and all twelve schedules attached to it. Thus neither party had a reasonable expectation of confidentiality regarding the Agreement and the Schedules.
>
> The City claims in their representation that, "Staff of the relevant program area has confirmed that there was assurance that the information in the schedules was confidential."
>
> But because of the "ENTIRE AGREEMENT" clause (section 25, cited above), section 22 ("this Agreement is not subject to any covenant of confidentiality") supersedes any previous "assurance" given by City staff regarding the confidentiality of the records contained therein. Even if portions of the records are deemed to have been supplied, whether as part of the RFP process or at any other time, their inclusion in the total Agreement nullifies any claim of an expectation of confidentiality, despite anything that may have been said or implied previously.

In reply, the City states that:

> Proponents are advised that the documentation comprising any proposal submitted in response to an RFP is subject to [the *Act*] and may be released unless the Proponent identifies in their proposals any proprietary or similar confidential information that could cause them harm. The [affected] party has clearly indicated that they do not wish to have the information contained in the Schedules and which has been withheld to be released. The [affected] party reconfirmed this during the mediation of Appeal [#].
>
> The City acknowledges that either party can disclose the Agreement without consent of the other party. Neither party, however, wishes to disclose the information still at issue in the Schedules.
>
> The City does not dispute that in the past it released the contracts of the previous vendor [named company]. However, only the contract terms of the agreements were released. There were no schedules attached to the agreements and therefore no similar information as contained in the Schedules of the [affected party's] Agreement was ever released.

In reply, the affected party submits that:

> While Section 22 of the Street Furniture Contract deals with issues of confidentiality, it cannot be read in a vacuum. The well-established principles of contractual interpretation require any commercial agreement, such as the Street

Furniture Contract, to be interpreted: (i) with regard to the objective evidence of the factual matrix underlying the negotiation of the contract (but without reference to the subjective intention of the parties); and (ii) in a fashion that accords with sound commercial principles and good business sense, and that avoids a commercial absurdity.

The written submissions of both [the affected party] and the City have made clear that it was the expectation of both parties that the terms of the Street Furniture Contract, and particularly the information contained in the Schedules, would generally be treated as confidential. While the subjective views of the parties are of limited utility in interpreting a contract, in this case, these stated expectations of confidentiality accord with the objective evidence surrounding the formation of the Street Furniture Contract including the facts that:

> (a) The Contract was entered into after a highly competitive bidding process in which [the affected party] was selected as the successful proponent; and
>
> (b) The Contract was formed on the basis of, and including, specific pricing, technical, financial and other commercial information of [the affected party] which is proprietary information of [the affected party] and has not been publically disclosed.

In addition to the objective evidence of confidentiality, the commercial purpose underlying Section 22 must also be considered to ensure that the Street Furniture Contract is read with a view to producing a commercially sensible result. While Section 22 could be read broadly to negate expectations of confidentiality, such a reading would produce an absurd result.

To better accord with commercial practice and sound business sense, Section 22 must be read more narrowly and with regard to the purpose of Section 22 of the Street Furniture Contract. Specifically, Section 22 removes the requirement that [the affected party] and the City seek consent from each other … prior to disclosure of portions of the Street Furniture Contract principally for reasons of business efficacy. Given that the Street Furniture Contract contemplates that [the affected party] will employ third party subcontractors to fulfill some of its obligations under the Agreement, this provision simply allows [the affected party] to deal efficiently with third party subcontractors and share whatever information is necessary to ensure that [the affected party's] contractual obligations are met.

Section 22 was not envisioned, nor should it be construed, as a provision which signals that the information contained in the Street Furniture Contract was not considered by the parties to be of a non-confidential nature.

Analysis/Findings re: In Confidence

I found above that according to the definition of the term "Agreement" in the contract, the Agreement includes both the contract portion and the Schedules to the Agreement.

As pointed out by the appellant, section 22 of the contract portion of the Agreement states that:

> The Company and the City agree that this Agreement is not subject to any covenant of confidentiality and that it may be disclosed by either party to a person not a party to this Agreement without the requirement for consent.

I have not been directed by the City or the affected party to any written provision in the RFP, the Proposal or the Agreement that indicates that an expectation of confidentiality existed in this RFP.

I also note that the RFP (Schedule "F" to the Agreement) contains the following clause:

> 14. Ownership and Disclosure of Proposal Documentation
> The documentation comprising any Proposal submitted in response to this RFP, along with all correspondence, documentation and information provided to the City by any Vendor in connection with, or arising out of this RFP, once received by the City:
>
> a) shall become the property of the City and may be appended to the Agreement and/or Purchase Order with the Successful Vendor; and
>
> b) shall become subject to the *Municipal Freedom of Information and Protection of Privacy Act* [the *Act*], and may be released, pursuant to that Act.
>
> Because of [the *Act*], prospective Vendors are advised to identify in their Proposal material any scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause them injury.
>
> Each Vendor's name at a minimum shall be made public. Proposals will be made available to members of City Council on a confidential basis and may be released to members of the public pursuant to [the *Act*].

I also have not been directed to any areas in Schedule "E" (the Proposal), or to any other information, including Schedule "A," where the affected party advised the City at the time of the submission of the Proposal, that the record contained confidential scientific, technical, commercial, proprietary or similar confidential information, the disclosure of which could cause it injury.

Accordingly, based on the foregoing analysis, I find that the language of provision 14 of the RFP and section 22 of the Agreement demonstrate that the affected party did not have a reasonable expectation of confidentiality at the time Schedules "A" and "E" were provided to the City [Order PO-2020]. As well, on a reading of section 22 in its entirety, I do not agree with the affected party that this section only meant that the parties did not require consent of the other party to disclose the information in the Agreement.

In addition, concerning Schedule "E" in particular, besides not being supplied in confidence by reason of provision 14 of the RFP and section 22 of the Agreement, I find that much of the information at issue in Schedule "E" is either:

- contained in the parts of the Agreement that are not at issue;
- information that would be publicly available by reason of the existence of street furniture;
- information that would be publicly available on the affected party's own website or other websites referred to in Schedule "E"; or,
- information that the affected party would have been required to disclose publicly by law.

Therefore, I find that the information that I have found to have been supplied in Schedules "A" and "E" was not supplied to the City in confidence. Furthermore, even if I had found that the information at issue in the remaining portions of the Agreement had been supplied, I would have also found that it had not been supplied in confidence by reason of provision 14 of the RFP and section 22 of the Agreement.

As all three parts of the three-part test set out in section 10(1) must be met, and part 2 of the test has not been met for the information at issue in this appeal, I find that none of the information at issue in the record qualifies for exemption under section 10(1). Nevertheless, for the sake of completeness, I will consider part 3 of the test to the information that I have found to have been supplied by the affected party to the City.

Part 3: harms

To meet the harms part of the test, the institution and/or the affected party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Section 10(1)(a): prejudice to competitive position

The City submits that:

> The disclosure of the information at issue could reveal the third party's strategic marketing, advertising, and financial activities and therefore could significantly prejudice its competitive position by providing its competitors with the knowledge of its methodologies, innovative design specifications, scheduling, sale and pricing strategies. For example, the disclosure of sensitive unit price information, operational costs, pricing practices, inflationary assumptions, projected profits etc. would reveal not only important financial components of the third party's RFP submission but also other financial activities. The disclosure of such information could undermine and undercut the third party's position in competitive markets, provide an advantage to the third party's competitors in bidding on other projects or prejudice its pricing practices with existing clients.

The affected party submits that it will suffer prejudice to its competitive position because:

> …the information contained in Schedules "A" and "E" are comprised solely of information generated for the street furniture project [and] was specifically created to reflect its design and expertise in the subject matter of the contract. The disclosure of these Schedules to [the appellant]; without knowing for what use or purpose [he] intends to put these materials, gives rise to a reasonable apprehension that this information may be widely disseminated and attract the attention of [the affected party's] competitors. If this information were to become widely known by [the affected party's] competitors, it is reasonable to believe that [it] would be deprived of its ability to advance its designs and competitive formula on any similar projects in the future.
>
> [D]isclosure of pricing and related financial information has been found to give rise to a reasonable risk that a party will suffer competitive prejudice as a result. Information such as the financial and commercial material found in Sections 11, 11A.1, 11A.3, 17.2, 17.3, 18.4, 19.3(b) and Schedules J, I, and L can be used by [the affected party's] competitors to tailor their bids on similar projects and damage [the affected party's] ability to remain a viable contender in future tender processes [Orders MO-1536-F and MO-2262]. The financial information in these portions of the Street Furniture Contract, which is not otherwise publicly available, would give a financial advantage to [the affected party's] competitors allowing them to undercut [the affected party's] pricing.

The appellant submits that:

> [The affected party] has secured an exclusive twenty-year contract (expiring August 31, 2027) to supply street furniture and maintain advertising space on the public right-of-way. Presuming there is no early termination of the Agreement, the City would likely not put out a new tender for such services prior to 2026; as

> such, neither [the affected party's] nor the City's competitive position could be prejudiced, as the context in which a future tender might be issued is subject to unforeseeable developments in technology, the advertising market, governance, and other areas.

In reply, the affected party submits that:

> …[it] and its competitors operate in markets other than Toronto. [I]f the information sought in this appeal is disclosed, there is a real risk that [the affected party's] competitors will be able to use [its] success in Toronto to undercut [the affected party] for similar contracts in other markets, resulting in [a] competitive disadvantage of the [affected party].

Analysis/Findings

The only information at issue that I would find meets the harms test in section 10(1)(a) is Schedule "A," the actual street furniture designs and the duplication of these designs in Schedule "E." If this information were to become widely known by the affected party's competitors, it is reasonable to believe that they could copy these designs and prejudice significantly the affected party's competitive position by depriving it of its ability to advance its designs and competitive formula on any similar projects in the future.

I am not satisfied that the other portions at issue in the record qualify for exemption under section 10(1)(a). In my view, these portions of the record do not contain information which, if disclosed, could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. I find that I have not been provided with sufficiently persuasive representations which satisfy me that the information contained in these portions of the record qualify for exemption under section 10(1)(a). Some of the information is information about the affected party and its associates history, experience and qualifications. This information appears to be of a public nature, and I have not been provided with sufficiently detailed and convincing evidence supporting the position that the disclosure of this information could reasonably be expected to result in the harms set out in section 10(1)(a) [Order PO-2478].

Other information at issue is information about the manner in which the affected party proposes to meet the requirements of the project, including pricing. The affected party has made general representations with respect to the concern that disclosure of the proposal would result in the identified harms. However, the contract concerns a comprehensive long term project that is ongoing and specific to the City of Toronto. The pricing for this project is unique for the various types of street furniture being provided and the period over which it is being provided. I do not agree that disclosure of the information at issue in the record, other than the street furniture designs in Schedules "A" and "E," "would give a financial advantage to the affected party's competitors allowing them to undercut the affected party's pricing."

Section 10(1)(b): similar information no longer supplied

The affected party submits that similar information will no longer be supplied to institutions in the future because:

> …the release of the disputed portions of [the] record also gives rise to real concern that, if a company's confidential information which is supplied to the City in the course of a tendering process is routinely released to requesting parties, companies and organizations such as [the affected party] will justifiably become increasingly reluctant to conduct business with municipalities within Ontario. This will unduly reduce the competitiveness and quality of submissions made in [the] tender processes.
>
> The conduct of fair tender processes by municipalities and other institutions are generally in the public interest as they create a competitive environment that stimulates the provision of low-cost, but high quality, services to the public.
>
> Bidders are encouraged to submit their most cost-effective proposals in hopes of winning large contracts with municipalities and therefore strive to formulate attractive proposals at costs lower than their competitors. If however a proponent's technical, commercial and financial "secrets to success" are ultimately released to other competitors who can then use that information to win future contracts, the incentive to participate in such processes is significantly diminished.

The appellant submits that:

> Disclosure of the records would not result in similar information no longer being supplied to the City (though I of course do not consider this information to have been supplied in the first place). In any future agreement, the City would still be able to dictate the terms under which a third party might enter into an agreement with it. The exclusive right to advertise on the right-of-way is an extremely valuable commodity, which many companies would be willing to meet any number of conditions to obtain.
>
> It is in the public interest that the City [has] access to all information it deems necessary to oversee and manage such a project, but it is also in the public interest that such information be made available to the public so that the public may, if necessary, oversee the overseers, as it were. If similar information were no longer supplied to the institution, then a greater portion of the management of such a project would be centralized in the private third party.

In reply, the City acknowledges that:

> The City believes that if the information contained in the Schedules were to be released, the additional information would reveal further information that would

> affect the City's ability to negotiate in the future, should for some reason the agreement with [the affected party be] terminated... This belief, however, does not mean that the information provided during the RFP process and which has been withheld is information that has been negotiated. This is not the case. Moreover, the appellant's assumptions about the future of the City's street furniture program are simply that. The City remains of the view that the disclosure of the information still at issue in the Schedules could reasonably affect its interests.

The affected party did not provide reply representations specific to the harms in section 10(1)(b).

Analysis/Findings

I am not satisfied that disclosing the information at issue could reasonably be expected to result in similar information no longer being supplied to the City in the future, as contemplated by section 10(1)(b). In my view, companies doing business with public institutions, such as the City, should understand that certain information regarding how the institution plans to carry out its obligations will be public. Furthermore, the information in this appeal is unique to the street furniture needs of the City at the time the Agreement was entered into in September 2007. The Agreement is a long term agreement, for twenty years, with very specific information concerning the manufacture, operation and maintenance of specific types of street furniture for the City for a specified period of time. The information at issue is not the same information that would be submitted by a competitor seeking to be awarded a street furniture contract with the City in the future, even if for some reason the Agreement is terminated early.

Accordingly, I am not satisfied that it is reasonable to expect that the disclosure of this information will have the effect that companies will no longer supply similar information to the City. Therefore, I find that the requirements for section 10(1)(b) have not been met.

Section 10(1)(c): undue loss or gain

The City submits that:

> The third party has also expended significant amounts of money to research and develop its products. The disclosure of the technical specifications, including the drawings at issue could allow its competitors to develop their own similar products without the same expenditures involved. This could put the third party at a financial and commercial disadvantage and could result in an undue loss to the third party.

The affected party submits that:

> …the release of the information at issue on this appeal, including [the affected party's] Proposal, design specifications, pricing information and revenue sharing arrangements, would allow [the affected party's] competitors access to what

> amounts to [its] own unique business strategy which has proven to be quite successful for the company.
>
> It seems to be inevitable that if [the affected party's] business information is publicly released some one or other of its competitors will adopt, in whole or in part, [the affected party's] formula for success, thereby undermining [the affected party's] own unique market position.

The appellant submits that:

> …the agreement was entered into without any covenant of confidentiality on the part of either party. As either party may disclose the records to any third party without the consent of the other, no consequences of the records' disclosure could be deemed to have been undue.

In reply, the City acknowledges that:

> …either party can disclose the Agreement without consent of the other party. Neither party, however, wishes to disclose the information still at issue in the Schedules.

In reply, the affected party submits that:

> [it] is in the "business" of responding to requests for proposals/ tenders issued by public institutions, such as the City and other municipalities. The information contained in the Street Furniture Contract that has not been disclosed in this process is sensitive commercial information specific to [the affected party] and which represents [its] model, recipe or formula for responding, in many cases successfully, to such calls for tenders or expressions of interest. If this information becomes public and available to [the affected party's] competitors, there is little doubt that this disclosure will seriously and negatively impact [its] business.

Analysis/Findings

Concerning Schedule "A," the street furniture designs and the duplication of these designs in Schedule "E," I agree with the affected party that this information is sensitive commercial information specific to the affected party and which represents its model or formula for responding to the RFP requirements for specific street furniture. Disclosure of this information could result in undue loss to the affected party and undue gain to a competitor.

In the circumstances of this appeal, I am not satisfied that the remaining information qualifies under section 10(1)(c). In my analysis under section 10(1)(a), I stated that the information remaining at issue includes information about the affected party and its associates history, experience and qualifications. The remaining information at issue also concerns the affected party's procedure which is either generally known or general in nature, or is specific to this

project and therefore would not result in the section 10(1)(c) harms. In my view, for the same reasons discussed above for section 10(1)(a), the disclosure of information of this nature could also not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

In Order PO-2435 Assistant Commissioner Brian Beamish stated:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept the position taken by Assistant Commissioner Beamish. In my view, the arguments put forward by the City and affected party regarding the information at issue, other than Schedule "A" and the corresponding designs in Schedule "E," including pricing information and revenue sharing arrangements, to potential competitors on future projects is not sufficient, in and of itself, to result in the harms identified in section 10(1)(c) in the circumstances of this appeal.

In summary, if I had found that part 2 of the test had been met, I would have found that part 3 of the test would have been met only for the detailed street furniture designs located in Schedules "A" and "E" under sections 10(1)(a) and (c). However, as all three parts of the test under section 10(1) must be met, all of the information at issue contained in the record does not qualify for exemption under section 10(1).

Conclusion

As a result of the City's decision to not object to disclosure of the severed contract provisions, no other exemptions, other than section 10(1) are at issue in this appeal. I found above that part 2 of the three-part test set out in section 10(1) has not been met for all of the information at issue in the record. Therefore, the information at issue in the record does not qualify for exemption under section 10(1). I will order the information in the record disclosed, except for the information subject to the personal privacy exemption in section 14(1).

PERSONAL INFORMATION

I will now determine whether pages 29 to 33, 43 to 44, 49 and parts of 45 and 50 contain "personal information" as defined in section 2(1) and, if so, to whom it relates. The affected party submits that these pages contain personal information in accordance with the definition of that term in sections 2(1)(b) and 2(1)(h), which read:

> "personal information" means recorded information about an identifiable individual, including,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

> ……
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.
>
> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling. To qualify as personal information, the information must be about the individual in a personal capacity.

As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225 and MO-2344].

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

The affected party submits that the information at issue in Schedule "E" relates to the education and employment history of the individuals named therein; as well as containing information that identifies named individuals and their personal information. It submits that:

> The claimed personal information can be separated into two principal components: (i) biographic information in respect of the employment and educational histories of various individuals employed with [the affected party] or

> associated with one of [the affected party's] strategic partners; and (ii) reference information for each of the individuals mentioned in [Schedule] E…
>
> [T]he information is similar in nature to information typically found on an individual's resume, as it details the listed individuals' educational credentials and provides specific information about those individuals' previous work histories. Accordingly, this information is inherently of a personal nature as it describes the identified individuals "educational histories" and/or the "employment histories"…
>
> With respect to the references listed in the claimed personal information, the Information and Privacy Commission has held that the identity and contact information of references in a proposal submitted to an institution qualifies as "personal information" notwithstanding the fact that the record identifies the individuals in their professional capacities [Order M-290]…
>
> Accordingly, the name, titles, addresses and telephone numbers of the references … qualifies as "personal information" under the *Act*.

Analysis/Findings

Concerning the reference information for each of the individuals mentioned in Schedule "E," the affected party relies on the findings in Order M-290 concerning each reference's name, title and contact information. In that case, Inquiry Officer Laurel Cropley stated:

> The affected persons are identified in the proposal in their professional or employment capacities. In his representations, one affected person indicates that he knew the principal personally and professionally and had kept in contact with him and his professional activities. The other affected party also indicates that he knew the principal but is not sure whether or not he had provided a reference for him.
>
> Despite the fact that the proposal identifies the professional credentials of the affected persons, the evidence before me does not support the view that they were providing references as part of their employment responsibilities or within their professional capacities. In my view, the identity of the references qualifies as their personal information [emphasis added].

The circumstances surrounding the references in this appeal are different from those in Order M-290. Based upon my review of the information concerning the references, it is clear that these references were providing their names, titles and business addresses as a reference in their business capacity. Therefore, this information concerning the references is not personal information.

Concerning "biographic information" of various individuals employed or associated with the affected party, I find that section 2(2.1) applies to these individuals' names, titles, contact information or designation. As stated above, section 2(2.1), reads:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

Therefore, I find that the name, title, contact information or designation of these individuals in the record is not personal information.

The remaining information is also information associated with these individuals in their business capacity, other than the information pertaining to the employment and educational histories of these individuals named in the record. The employment and educational histories qualifies as personal information under the definition of that term (section 2(1)(b)). This information is about individuals in their business capacity and does reveal something of a personal nature about them.

PERSONAL PRIVACY

I will now determine whether the mandatory exemption at section 14(1) applies to the employment and educational histories of the individuals identified in Schedule "E" of the record.

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

In the circumstances, it appears that the only exception that could apply is paragraph (f), which reads:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

If any of paragraphs (a) to (c) of section 14(4) apply, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. Based on my review of the information at issue, paragraphs (a) to (c) of section 14(4) do not apply.

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information*

and Privacy Commissioner) (1993), 13 O.R. (3d) 767]. Section 16 has not been raised by the appellant.

Once a presumed unjustified invasion of personal privacy is established under section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above].

The affected party relies on the presumption in section 14(3)(d), which reads:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> relates to employment or educational history;

The affected party submits that the majority of the claimed personal information in Schedule "E" details the employment and educational histories of various individuals employed or associated with it.

Analysis/Findings

I have reviewed the pages at issue in Schedule "E" and conclude that they contain personal information relating to the educational and employment history of several persons employed or associated with the affected party.

Having reviewed the record, I find that these individuals' education and employment information, including the number of years they have been with either the affected party or other employer companies, constitutes the educational and employment history of the individuals to whom this information relates. Previous orders issued by this office have found that information contained in resumes and work histories falls within the scope of section 14(3)(d). Therefore, I find that disclosure of this personal information in the record would constitute a presumed unjustified invasion of privacy under section 14(3)(d) of the *Act* [Orders M-7, M-319, M-1084, MO-2176 and PO-2756].

Therefore, I find that the education and employment history information in the pages at issue in Schedule "E" are exempt from disclosure under section 14(1). For ease of reference, I will provide a highlighted copy of the pages at issue of Schedule "E" indicating those portions that I have found to qualify for exemption under section 14(1).

ORDER:

1. I order the City to disclose by February 26, 2010 but not before February 19, 2010 the record to the appellant, except for the educational and employment history of the individuals identified in the record as highlighted on pages 29 to 33, 43 to 45 and 49 to 50 of Schedule "E" of the record that accompany this order sent to the City.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original signed by: January 22, 2010
Diane Smith
Adjudicator