Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2774

Appeal MA11-234-2

City of Brampton

July 31, 2012

Summary: The appellant made a request to the City of Brampton for square footage and cost per square foot information relating to a revitalization project in the city's downtown area. The city located a responsive record and denied access, in full, claiming the application of the exemptions in sections 10(1) (third party information), 11(a) (valuable government information), 11(c) – (e) (economic and other interests) and 11(g) (proposed plans, projects or policies of an institution). During the mediation of the appeal, the appellant raised the application of the public interest override in section 16. In this order, the adjudicator finds that the exemptions in sections 10(1) and 11 do not apply to the record and orders the city to disclose the record to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 11.

Orders Considered: PO-2435, PO-2755.

OVERVIEW:

[1] This order disposes of the issues raised as a result of a decision made by the City of Brampton (the city) in response to an access request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

1. Provide "clarification" on how City staff calculated a total square footage of [a specified number] square footage for Phase 1 and 1a of the winning [named company] proposal (RFP-2009-072) as well,

2. Provide a clarification on how the [a specified amount] square footage price was calculated for Phase 1 and 1a of the [named company] proposal. [Named individual] addressed Council and audience and corrected delegations that presented different numbers for cost and square footage. These figures are not found in the final staff report to council and cannot be calculated from information contained in the report.

[2] The city located a responsive record and, following third party notification, issued a decision letter, denying access to the requested information, claiming the application of the exemptions in sections 10(1)(a), (b) and (c) (third party information) and 11(a) (valuable government information), (c), (d) and (e) (economic and other interests), and (g) (proposed plans, projects or policies of an institution) of the *Act*, noting the following:

> As you are likely aware, Brampton City Council has authorized the Corporation to commence the negotiation of contractual agreements with a Preferred Respondent, [named company], pursuant to the commercial negotiation stage of RFP 2009-072. I therefore cannot compromise this active and ongoing procurement process that may undermine the competitive position and economic interests of the City of Brampton or a third party.
>
> As is the case with many information access requests regarding procurement matters, a request for information may be pursued after the completion of the procurement process and final procurement decisions are made.

[3] The appellant appealed the city's decision to deny access to the record to this office.

[4] During the mediation of the appeal, the city advised that although it had provided notice to the organization whose interests may be affected by the outcome of the appeal (the affected party), it had not received any response. The mediator attempted to contact the affected party to obtain their views regarding disclosure but was unsuccessful.

[5] The appellant advised the mediator that, in his view, there is a compelling public interest in disclosure of the record at issue, and accordingly, section 16 was added as an issue in the appeal.

[6] The appeal then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator sought and received representations from the city, the affected party and the appellant. Representations were shared in accordance with this office's *Practice Direction 7*.

[7] The file was then transferred to me for final disposition. For the reasons that follow, I find that the exemptions in sections 10(1) and 11 do not apply to the record. Consequently, I do not uphold the city's decision and order the city to disclose the record, in full, to the appellant.

RECORD:

[8] The record at issue consists of a two page document entitled "RFP 2009-072, Volume 1 Southwest Quadrant Renewal Plan, Financial Submission Section 2.15-A Appendix – Schedule "A" Area Analysis." The record sets out the gross and net square footage of Phase 1 and 1a floor by floor as well as subtotal square footage by function and total square footage.

ISSUES:

A: Does the mandatory exemption at section 10(1) apply to the record?

B: Does the discretionary exemption at section 11 apply to the record?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) apply to the record?

Background

[9] The city advises that in 2009, city council passed a resolution to issue an RFP to solicit responses for a mixed-use revitalization project in the downtown core. The closing date for submissions in response to the RFP was February 11, 2010, and the city received three submissions.

[10] On March 28, 2011, city council approved the affected party as the successful proponent and directed city staff to proceed with the negotiation of a contract for the project.

[11] The construction project underlying the subject matter of the appeal involves the construction of a new nine-storey building, including five levels of parking (Phase 1)

and a two-storey addition to the existing City Hall (Phase 1a). The estimated project cost is broken down as follows:

- $94 million in construction costs to be designed, constructed and financed by the affected party;
- a fixed annual occupancy cost to the city of $8.2 million dollars payable when the building is ready for occupancy; and
- an annual occupancy cost, fixed over a 25 year term, at the end of which ownership of the nine-storey building will revert to the city at no additional cost.[1]

[12] Plans for the nine-storey building can accommodate:

- 126,398 square feet for administrative space;
- 1,496 square feet for Peel Regional Police Services;
- 10,147 square feet for ground retail space;
- 10,545 square feet for multi-purpose meeting rooms; and
- 443 parking spaces on five levels of parking.[2]

[13] Plans for the two storey addition to the existing City Hall include accommodation for:

- 2,507 square feet for committee rooms; and
- 6,187 square feet for ground retail space.[3]

[14] On August 10, 2011, city council approved the terms of agreement for the plan. The city confirmed with staff from this office that the agreement was finalized.

[15] Both the city and the affected party claim that the record at issue is exempt under section 10(1)(a), (b) or (c) which states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[1] This information was obtained from the city's website (http://www.brampton.ca/EN/city-hall/swq-renewal).
[2] See note 1.
[3] *Ibid*.

> (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;

[16] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

[17] 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
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
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> 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), and/or (c) of section 10(1) will occur.

Part 1: Type of information

[18] The city submits that the information contained in the record was supplied to it by the affected party as part of the affected party's final offer submitted in response to the RFP issued by the city relating to the revitalization project.

[19] The city also submits that the information at issue consists of both commercial and financial information as defined in previous orders of this office. The city describes the information at issue as being square footage information "in aid of determining construction cost."

[20] The affected party submits that the information at issue consists of commercial and financial information, and also trade secrets. In particular, the affected party states

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[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing*).
[5] Orders PO-1805, PO-2018, PO-2184, MO-1706.

that the record shows the net and gross square footage per floor for each building proposed. The affected party argues that this information can be used in conjunction with other information in the public domain to infer the unit price, which is a component of building costs of the project. In addition, the affected party argues that conclusions respecting profitability and return on investment can reasonably be made using the information in the record.

[21] The affected party also argues that the record contains trade secrets, as it was produced using a costs and pricing method particular to it which is not generally known in the construction industry and which involved significant effort, time and resources expended by it to develop.

[22] The appellant submits that the argument that the cost per square foot is confidential or proprietary is unfounded, but his representations do not address whether the information in the record is commercial or financial information or contains trade secrets.

[23] The relevant types of information 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.[6]
>
> *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.[7]
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> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business;
>
> (ii) is not generally known in that trade or business;
>
> (iii) has economic value from not being generally known; and

[6] Order PO-2010.
[7] *Ibid*.

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[8]

[24] Based on my review of the record, I find that the record contains only the gross and net square footage of the two construction projects, broken down floor by floor, including subtotals of square footage by function and total square footage of the project, including parking. Both the city and the affected party argue that the information at issue, combined with other publicly available information would permit an individual to infer the unit cost of the project. In effect, they submit that disclosure of the information at issue would permit the appellant and others to arrive at accurate inferences about other information of the affected party. I decided to ask the affected party for further details in this regard. The affected party submits that the market prices for "input costs" such as the cost of labour, materials and equipment are available to the public through suppliers of these goods and services. The affected party goes on to state that if the information in the record is disclosed, the appellant could:

> [U]se its knowledge, both with respect to suppliers' standard pricing of "input costs" and with respect to the flexibility of "input costs" pricing, together with the confidential record, to come to a reasonably accurate inference of the degree of the [affected party's] competitive advantage when negotiating with its suppliers.

[25] I am not persuaded by the affected party that the square footage information, when combined with the publicly available information described above, would permit one to infer the unit cost of the building project. Market prices of labour, materials and equipment are subject to change due to any number of factors including time, season and availability of materials, for example. Consequently, the affected party's argument in this regard is too speculative.

[26] However, as commercial information can include the buying and selling of merchandise and services, and as the city has entered into a commercial relationship with the affected party to the extent that it will be paying the affected party occupancy costs with a view to complete ownership of the building, I find that the square footage of the project is relevant to those costs and conclude that the information at issue qualifies as "commercial" information for the purposes of section 10. Consequently part 1 of the test under section 10 has been met.

[27] Further, it is not necessary for me to determine whether the record also contains financial information or trade secrets, although I note that the city did not provide any evidence that the record contained trade secrets. With regard to the affected party's position that the record contains trade secrets, I do not accept that the square footage

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[8] *Ibid.*

information in the record reveals a costs and pricing method particular to it, which is not generally known in the construction industry.

Part 2: Supplied in confidence

[28] 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.[9] 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.[10]

[29] 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 the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[30] This approach was approved by the Divisional Court in *Boeing*, cited above.[11]

[31] There are two exceptions to this general rule which are 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 is not susceptible to change, such as the operating philosophy of a business, or a sample of its products.[12]

[32] 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.[13]

[33] 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:

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[9] Order MO-1706.
[10] Orders PO-2020, PO-2043.
[11] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.).
[12] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).
[13] Order PO-2020.

- 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; and

- prepared for a purpose that would not entail disclosure.[14]

[34] The city submits that the record was supplied to it by the affected party as part of the affected party's final offer in response to the RFP issued by the city. Further, the city submits that the record was "supplied in confidence," and that portions of the RFP set out the confidentiality of the process as follows:

- Competitive Dialogue is achieved through a structured procedure that maintains competitive integrity throughout and respects commercial confidentiality;[15] and

- Respondents shall not discuss, share information, or communicate with any other [r]espondents concerning their respective [s]ubmission, the contents of which shall remain the sole confidential and undisclosed information of each [r]espondent.[16]

[35] The affected party submits that it produced the record and supplied it to the city in response to the RFP and that it had a reasonable expectation of confidentiality based on the language of the RFP document itself. The affected party states:

> Implicit in the RFP document was the idea that confidentiality lies at the core of "Competitive Dialogue." Discussions took place between the [c]ity as the institution awarding the contract and [the affected party] as respondent in the RFP process. [The affected party] has not participated in any discussions among the [c]ity and another competitor in the RFP process regarding the contents of [the affected party's] submissions.

[36] The affected party argues that this office has previously held that confidentiality is implicit where proposals are prepared and supplied to a government institution in the course of an RFP process.[17]

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[14] Orders PO-2043, PO-2371, PO-2497.
[15] RFP, Section A4, The RFP Process at para. 2.
[16] RFP, Section J6, Restrictions on communications between respondents – no collusion at para. 1
[17] Order MO-1504.

[37] The appellant submits that the square footage of a building is not confidential and is, in fact, public information. The appellant states that an individual can submit a request to the planning and building department in any municipality and be granted access to the total gross square footage of any building where a permit application was made.

[38] In addition, the appellant states that he attended the city council meeting held on March 28, 2011 and that during the meeting a city staff member, in response to a question, disclosed the total square footage of Phase 1 and 1a and also disclosed the cost per square foot of the project.[18]

[39] In Order PO-2755, Adjudicator Diane Smith dealt with the issue of whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of the equivalent provision to section 10(1) in the provincial *Act*. She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption. I adopt Adjudicator Smith's approach for the purpose of this appeal.

[40] In this case, the record at issue is not a final agreement between the affected party and the city; rather, it is part of the proposal containing terms proposed solely by the affected party. Applying Adjudicator Smith's approach, the record was not the product of negotiation and, consequently, was not mutually generated by the city and the affected party.

[41] Further, the record at issue contains information that the affected party provided to the city for the purpose of constructing a new building and adding to the existing city hall. I have found this information to qualify as commercial information belonging to the affected party. In my view, the information contained in the record is immutable, underlying non-negotiated information that belongs to the affected party and would not have been known to the city had it not been supplied to it.

[42] Therefore, I am satisfied that the record was supplied to the city by the affected party for the purpose of section 10(1) of the *Act*.

[43] With respect to whether the record was supplied "in confidence," by the affected party to the city, I have considered the representations of the parties and the confidentiality provisions of the RFP document. In the circumstances of this appeal, I accept the position of the city and the affected party that the record was supplied to it

[18] The appellant provided a copy of a DVD of the council meeting. In the DVD a city representative states the cost per square foot and the total square footage of the project. The minutes from the council meeting simply state that staff provided a breakdown of costs related to pricing per square footage.

with a reasonably-held expectation of confidentiality for the purposes of section 10(1) of the *Act* and that part 2 of the test has been met with respect to it.

Part 3: Harms

[44] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[19]

[45] 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.[20]

[46] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[21]

[47] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[22]

[48] The city submits that section 10(1)(a) applies to the record, as the competitive position of the affected party can reasonably be expected to be compromised by disclosure of commercially confidential information. In particular, the city argues, the disclosure of detailed pricing can represent an interference with the ability to negotiate the cost of services with other customers.[23]

[49] The city also submits that section 10(1)(b) applies, as disclosure of information tendered with an expectation of confidentiality would affect the willingness of bidders to provide detailed information, or would deter bidders from participation in municipal procurements.

[50] Lastly, with respect to section 10(1)(c), the city states:

> Loss of competitive advantage should not be the price of participating in public sector procurements.

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[19] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[20] Order PO-2020.
[21] Order PO-2435.
[22] Order PO-2435.
[23] Order PO-2164.

[51] The affected party submits that calculations on a construction cost per square foot may provide competitors an advantage regarding unit pricing information within the total bid price provided by it, which would, in turn, prejudice the affected party.

[52] The affected party further submits that the harm set out in section 10(1)(a) is applicable as disclosure of the record will interfere significantly with the contractual negotiations it will enter into with sub-trades in connection with the project. In particular, it argues that should sub-trades be made aware of the cost breakdown set out in the record, they will use those figures to improve their position in the bargaining process by extracting higher fees from the affected party. In addition, the affected party states that disclosure of the record will interfere with its ability to effectively negotiate subsequent phases of the revitalization project, as it would permit competitors to undercut its negotiating position with the city for future work.

[53] Turning to section 10(1)(b), the affected party submits that if the record is disclosed, fewer companies will be willing to participate in future RFP processes with the city. The affected party states:

> Prospective RFP participants, being for-profit enterprises that must always be aware of cost considerations, will weigh the costs and benefits of making RFP submissions and conclude the costs of disclosure outweigh the benefits of participation. While participation may yield short-term benefits such as being awarded the contract in question, companies will conclude that the consequences of disclosure will undermine their long-term profitability. As a result, similar information will no longer be supplied to the [c]ity because prospective participants will decide not to engage in the RFP process.

[54] Further, the affected party argues that the public has an interest in ensuring the best candidates participate in the city-run RFP process and that disclosure of the record will reduce the number of qualified, expert and cost-effective proposals being supplied to the city, resulting in increased long-term costs to the public.

[55] With respect to section 10(1)(c), the affected party submits that if the record is disclosed, its competitors would be privy to its costs and pricing methods and conclusions, in which it has invested significant time, effort and resources to develop. Competitors, the affected party argues, would then adopt the same approach, as it has been proven to be a successful approach, and would then proceed to offer services at a lower price than the affected party, causing a loss of revenue to the affected party.

[56] Lastly, the affected party states that its existing and future clients may feel they have been treated unfairly in previous commercial engagements, even though services provided to them may be entirely different than this project. In turn, the affected party

submits, its reputation in the industry would be irreparably harmed, jeopardizing its competitive position.

[57] The appellant submits that square footage and the cost per square foot is not confidential proprietary information. Square footage information, the appellant submits, can be found on publicly available building permit applications. In addition, the appellant argues that the fact that the cost per square foot was verbally disclosed during the council meeting previously referred to has eliminated any "secrecy to trades or sub-contractors."

Analysis and findings

[58] As previously stated, to meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[24]

[59] Having carefully reviewed the representations of the parties and the contents of the record, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 10(1)(a), (b) or (c) of the *Act*.

[60] First, I have already found that the square footage information does not reveal pricing information, nor can pricing information be inferred. The square footage numbers do not provide, on the evidence presented, any insight into the methodology behind the price. I recognize that both the city and the affected party have provided representations regarding the harms that could accrue under sections 10(1)(a), (b) and (c) should this information be revealed. The city uses broad language to describe the harms that could accrue to the affected party in the event of disclosure. Further, its representations address the harm that could arise from the disclosure of square footage pricing information, as opposed to disclosure of square footage information itself. Therefore, I find the city's representations vague and lacking in necessary specificity.

[61] While I acknowledge that the affected party has described harms in its representations, again, its representations focus on the potential harm from disclosure of pricing figures or pricing methodology. Its representations fail to convey how the information at issue could reasonably be expected to lead to these harms. Based on the evidence before me, the commercial information at issue does not convey pricing figures or strategies.

[62] Proponents compete for the city's business and not the other way around and I have not been provided with detailed and convincing evidence to show that disclosure

[24] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

would deter proponents from doing business with the city and, as part of that process, providing information to it in response to an RFP. In addition, I have no evidence before me that there would be a decrease in the number of qualified, expert and cost-effective proposals being supplied to the city in future projects. Further, the affected party and the city have not provided the requisite "detailed and convincing" evidence that disclosure of the square footage of the project would significantly prejudice its competitive position or result in undue loss to it.

[63] Some of the square footage information contained in the record has already been publicly disclosed on the city's website and in the March 28, 2011 city council meeting.

[64] It may be a case where harm to the affected party has already occurred as a result of this public disclosure, but I have no evidence of such harm before me.

[65] Consequently, I conclude that the city and the affected party have not provided me with "detailed and convincing" evidence that sections 10(1)(a), (b) or (c) apply to the square footage information contained in the record.

[66] Accordingly, I find that the requirements of the part 3 harms component of sections 10(1)(a),(b) and (c) have not been satisfied.

[67] In summary, I find that part 3 of the section 10(1)(a), (b) and (c) test has not been established by the city and the affected party. Because all three parts of the test must be established in order for a record to qualify for this exemption, I find that the record is not exempt under section 10(1).

Issue B: Does the discretionary exemption at section 11 apply to the record?

[68] The city has claimed the application of the exemption in sections 11(a), (c), (d), (e) and (g) which state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

Section 11(a): information that belongs to government

[69] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

Part 1: Type of information

[70] The city submits that the record contains commercial and financial information as the information in the record, when linked to the final cost of the project may result in more detailed commercial and financial information being made available. As set out in my analysis of the application of the exemption in section 10(1), I find that the record contains "commercial" information.

Part 2: Belongs to

[71] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[72] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,[25] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.[26]

[73] The city submits that the record is in the city's possession, but that it did not generate the information. The city states that the affected party submitted the record as part of its final offer in response to the RFP. However, the city further states that the RFP stipulates that all information obtained by the respondent in connection with the submission is the property of the city and shall be treated as confidential and not used for any purpose other than for replying to the RFP and for fulfilling any subsequent contract.[27]

[74] In my view, the city cannot be said to have acquired an ownership interest in the information in an intellectual property or confidential business information sense. There is nothing in the representations before me to indicate that the city has expended money or applied skill and effort to develop the information, or that there is an additional "value-added" component to it, which might suggest that it "belongs to" the city. In fact, the city submits that the affected party generated the information. There is no evidence to suggest that the square footage of the buildings is the intellectual property or trade secret of the city.

[75] In addition, if the record belonged to the city as contemplated by section 11(1)(a), the city would have ownership of the record and would be able to sell the record, as the record itself would have monetary value. The only evidence the city has provided is the excerpt from the RFP which states that all information obtained by the respondent is the property of the city, but is not used for any purpose other than for replying to the RFP or fulfilment of any subsequent contract. In my view, the RFP contemplates that the information is to be used only for the building project, but does not convey "ownership" of the record to the city as contemplated by section 11(1)(a).

[76] Therefore, I find that the city has not met the second part of the test and that the exemption in section 11(1)(a) is not applicable.

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[25] Order P-636.

[26] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.

[27] RFP, section A6, Freedom of Information at page 4.

[77] The city has also claimed the application of the exemption in sections 11(c), (d), (e) and (g) and has combined its representations on these exemptions. The city states:

> Failure to protect commercial confidentiality can reasonably be expected to prejudice the City's economic and financial interests which are dependent upon meeting the reasonable expectations of the participants in a competition.
>
> To meet is needs cost effectively it is imperative that the City attract supplier and bidders to participate in competitions for required services.
>
> Protection of the commercial confidentiality of information provided by a bidder protects the integrity of the procurement process.
>
> Disclosure of information tendered in an expectation of confidentiality would affect the willingness of bidders to provide detailed information, or to deter bidders from participation in municipal procurements.
>
> The cost of City projects can be expected to rise and the City's ability to undertake substantial projects inhibited where the pool of bidders is diminished by reason of inability to protect commercial confidentiality.
>
> . . .
>
> Municipalities compete for bidders. A reduction in the number and quality of bidders can be expected, for example, where the RFP and contractual terms unduly favour the purchasing municipality over the successful bidder, and here, if the municipality is unable to protect information submitted expected to be held confidential. The assumption of greater risk by bidders translates into higher bids, which is particularly concerning in large projects.

[78] In addition, the city submits that the affected party is fully responsible for the construction of the buildings at its cost, not the city's cost. The city states that neither the RFP nor the contract with the affected party require the city to bear any risk of construction cost increases and the city is only responsible for making annual occupancy cost payments over the 25 year lease term.

[79] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980* vol. 2[28] (the Williams

[28] (Toronto: Queen's Printer, 1980).

Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

Sections 11(c) and (d): Prejudice to economic interests and injury to financial interests

[80] For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[29]

[81] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[30]

[82] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[31]

[83] The purpose of section 11(c) in particular is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[32]

[84] The city's argument is, essentially, that if the information contained in the record is disclosed, the integrity of the RFP process will be compromised, which may deter future proponents from submitting bids in response to RFPs, thus diminishing the pool of proponents. The end result, the city argues, is that the assumption of the risk of

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[29] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[30] Order MO-2363.
[31] Orders MO-2363 and PO-2758.
[32] Orders P-1190 and MO-2233.

disclosure by the proponents, in conjunction with the diminished pool will result in higher bids and increased cost to the city.

[85] In my view, the city has provided speculative, unsupported assertions of economic and financial harms in the event the information in the record is disclosed. The suggestion that disclosure will place a chill over third parties when they consider participating in future RFPs and that future bids will be higher as a result of disclosure is self-serving and lacks the requisite detailed and convincing evidence to establish a reasonable expectation of harm. In addition, some of the information in the record has already been publicly disclosed and the city has not provided any evidence that harm has resulted from that disclosure. To conclude, the city has not met the harms test under sections 11(c) and (d) and I, therefore, find that these exemptions do not apply to the record at issue.

Sections 11(e) and (g): Positions, plans, procedures, criteria or instructions and proposed plans, policies or projects

[86] In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions;

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;

3. the negotiations are being carried on currently, or will be carried on in the future; and

4. the negotiations are being conducted by or on behalf of an institution.[33]

[87] As referenced above, the city must satisfy a four-part test in order for section 11(e) to apply. Although the city has raised this exemption, it has not provided any evidence to support its claim and the record itself does not, on its face, provide the necessary evidence to satisfy the section 11(e) test. In addition, as previously stated, the city and the affected party are not currently in negotiations with respect to Phase 1 and 1a of the project, as they have finalized an agreement. Accordingly, I find that section 11(e) does not apply to the record at issue in this appeal.

[88] In order for section 11(g) to apply, the institution must show that:

[33] Order PO-2064.

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

   (i) premature disclosure of a pending policy decision, or
   (ii) undue financial benefit or loss to a person.[34]

[89] For this section to apply, there must exist a policy decision that the institution has already made.[35]

[90] As was the case with section 11(e), although the city has raised the exemption in section 11(g), it has not provided any evidence to support its claim and the record itself does not, on its face, provide the necessary evidence to satisfy the section 11(g) test, set out above. In particular, the city has not demonstrated that the record is a proposed plan, policy or project, the disclosure of which would result the premature disclosure of a policy or undue financial benefit or loss to a person. Accordingly, I find that section 11(g) does not apply to the record at issue in this appeal.

[91] In conclusion, I find that the record is not exempt under sections 10(1) and 11 of the Act. Consequently, it is not necessary to determine whether the city properly exercised its discretion or the application of the public interest override at section 16.

[92] Therefore, I do not uphold the city's decision and order it to disclose the record, in full, to the appellant.

ORDER:

1. I order the city to disclose the record to the appellant by **September 6, 2012** but not before **August 31, 2012**.

2. In order to verify compliance with order provision 2, I reserve the right to require that the city provide me with a copy of the record sent to the appellant.

Original signed by: July 31, 2012
Cathy Hamilton
Adjudicator

[34] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)
[35] Order P-726.