

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2884

Appeals MA11-495 and MA12-174

City of Toronto

May 24, 2013

**Summary:** The requester sought records related to the financial details of the successful bid for the Union Station Revitalization Project. The city denied access, citing the third party information exemption in section 10(1), the economic and other interests exemption in section 11 and the personal privacy exemption in section 14(1). This order determines that the information is not exempt, except for some information that is subject to section 14(1). This order also determines that certain information is not responsive to the request.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 10(1)(a), 10(1)(b), 10(1)(c), 11(c), 11(d), 14(1), 14(3)(d), 14(4)(a), 17.

**Orders and Investigation Reports Considered:** Order MO-2465.

### OVERVIEW:

[1] The City of Toronto (the city) received a 12-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to all documentation relating to the Union Station Revitalization Project (the project). Specifically, the request was for the following:

1. Copies of all the bidder documentation;
2. Copies of any documentation utilized in the decision process to award the electrical work for the contract including and without limiting any analysis or recommendation submitted by [named company]...;
3. Any pre-qualification documentation filed by any bidders;
4. Copy of letter stating which scope of work they intend to bid;
5. Copy of completed CCDC Document 11;
6. Copy of letter from a nationally recognized Surety Company stating availability of bonding and your company's total bonding limit;
7. Copy of the most recent form of CAD-7 calculations issued by WSIB and a current WSIB Clearance Certificate;
8. Copy of the description of company's Health and Safety Policy Program;
9. Copy of the name and resume of designated supervisor who has at least five (5) years experience constructing similar projects;
10. Copy of reference letters from three (3) previous Clients/Architects/Contractors indicating performance on past projects;
11. Copy of Certificate of General Liability Insurance in the amount of \$5,000,000.00; and
12. Copy of Quality Assurance/Quality Control policy and program.

[2] The city notified the electrical contractor for the project (the affected party) pursuant to section 28 of the *Act* providing it with the opportunity to make representations concerning the disclosure of its information in the records.

[3] Following consideration of the affected party's representations, the city issued a decision letter granting the requester partial access to the records. In particular, of the 688 responsive pages of records, the city disclosed 44 pages which were severed in part, denied access to 61 pages in full, and disclosed 583 pages in full to the requester.

[4] Access to the information in the records was denied pursuant to sections 10 (third party information), 11 (economic and other interests) and 14(1) (personal privacy) of the *Act*.

[5] The affected party appealed the decision of the city to disclose certain records and appeal file MA11-495 was opened.

[6] The requester appealed the decision of the city to disclose the records which were withheld and appeal file MA12-174 was opened.

[7] At the outset of mediation, the requester advised the mediator that he was only seeking information relating to the financial details relating to the bid as set out in the contract.

[8] During mediation, the city provided the requester with access to certain records which were severed in accordance with the affected party's representations and were not in dispute.

[9] The parties were unable to resolve this matter through the process of mediation. The file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. I sought representations from the city, the requester and the affected party. Representations were shared in accordance with *Practice Direction 7* and section 7 of the *IPC Code of Procedure*.

[10] As the affected party raised the issue of the responsiveness of pages 178, 227, 238, 244, 246, 259 and 295 of the records, this issue was added to the appeal.

[11] I then sent a Notice of Inquiry to the project's construction manager seeking its representations. The project's construction manager did not provide representations in response.

[12] In this order, I determine that the information at issue in the records is not exempt, except for some information that is subject to the personal privacy exemption in section 14(1). I also determine that certain information is not responsive to the request.

**RECORDS:**

[13] The information remaining at issue is set out in the following Index of Records:

<b>Page Number</b>	<b>Record Description</b>	<b>City's decision</b>	<b>Exemptions</b>
178	Award letter from project's construction manager to affected party, April 13, 2011, p. 1	Disclose	10(1), responsiveness
180 - 181	Record of Bid Review meeting, March 21, 2011, pages 1 to 2	Deny in part	10(1)
182	Record of Bid Review meeting, March 21, 2011, page 3	Disclose	10(1)
183 - 185	Email correspondence between affected party and project's construction manager, March 2011	Disclose	10(1)
202	Letter re contract recommendation to city, April 5, 2011	Deny in part	11
203	Tender opening record	Deny in part	10(1), 11
208	Stage 1, Work Package 3 Bid Summary	Deny in part	11

217	WP3 Appendix L form	Deny in part	10(1)
218 - 223	Supplementary Bid from affected party, Appendix F	Deny in full	10(1)
225	Section 300 Stipulated Price Bid form, p. 1	Disclose	10(1)
227	Section 300 Stipulated Price Bid form, p. 2	Deny in part	10(1), responsiveness
230 - 235	Section 300 Stipulated Price Bid form, p. 5 - 10	Disclose	10(1)
236	Section 300 Stipulated Price Bid form, p. 11	Deny in full	10(1)
237	Section 300 Stipulated Price Bid form (Appendix "I", Supervisory Staff), p. 12	Disclose	10(1)
238	Surety's Consent	Disclose	10(1), responsiveness
239-242	Experience of project staff	Deny in full	14(1)
244	Letter of June 28, 2011	Disclose	10(1), responsiveness
246	Executed contract, p. 6	Disclose	10(1), responsiveness
248	Executed contract, Appendix B, April 13, 2011	Disclose	10(1)
249	Correspondence re subcontract agreement, project's construction manager and affected party, May 16, 2011	Disclose	10(1)
250	Subcontract agreement, p. 1	Disclose	10(1)
251	Subcontract agreement, p. 2	Disclose	10(1)
255	Subcontract agreement, p. 6	Disclose	10(1)
259	Subcontract agreement, Appendix A, April 13, 2011	Disclose	10(1), responsiveness
295	Bid review, March 21, 2011, Attendance Sign-in Sheet	Disclose	10(1), responsiveness
297	Correspondence from affected party to general project's construction manager re staffing levels, March 17, 2011	Deny in full	10(1)
298	Union Station WP3 - Manpower Loading	Deny in full	10(1)
299 - 302	Bid review notes, March 21, 2011	Deny in part	10(1)
303	Record of Bid Review meeting, March 21, 2011, page 1	Deny in part	10(1)

313	Prequalification	Deny in full	10(1)
393-395	Project's construction manager's Qualification Statement, App A to C	Deny in full	10(1)
411 - 412	WSIB Certificate of Clearance & CAD-7 Calculations	Deny in full	10(1)
642-648	Resumes	Deny in full	14(1)
669-670	Financial reference letter	Deny in full	10(1)

[14] The affected party claimed the application of section 10 to pages 178, 180-185, 225, 227, 230-235, 237, 238, 244, 246, 248-251, 255, 259 and 295. Therefore, it did not claim the application of section 10 to the portions of following pages 203, 208, 217, 299-303 that the city has decided to disclose.

[15] The affected party also claims that the mandatory personal privacy exemption in section 14(1) applies to certain personal information that appears in page 237.

[16] The records identified by the city that concern the selection of a successful bidder are found at pages 178 to 298 of the records.

[17] The affected party's bid is contained in pages 311-313, 332-335, 390-395, 401-402, 410-412, 553-628, 640-648, 662-670, 676-677, 692-694 of the records. The city has further identified these pages as follows:

<b>Pages</b>	<b>Description</b>
311 - 313	Pre-qualification documentation
332 - 335	Scope of work
390 - 395	Completed CCDC [Canadian Construction Documents Committee] document
401 - 402	Surety
410 - 412	WSIB CAD-7 Response
553 - 628	Health and Safety Policy
640 - 648	Resumes
662 - 670	Reference
676 - 677	Insurance
692 - 694	Quality Assurance

**ISSUES:**

- A. Are pages 178, 227, 238, 244, 246, 259, 295, 313, 669 and 670 of the records responsive to the request?
- B. Does the mandatory exemption at section 10(1) apply to the records?
- C. Does the discretionary exemption at section 11 apply to the information at issue in page 208 of the records?
- D. Do pages 237, 239 to 242, 297 and 642 to 648 of the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?
- E. Does the mandatory exemption at section 14(1) apply to the personal information at issue?

**DISCUSSION:**

**A. Are pages 178, 227, 238, 244, 246, 259, 295, 313, 669 and 670 of the records responsive to the request?**

[18] Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
  - (a) make a request in writing to the institution that the person believes has custody or control of the record;
  - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;

...

- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[19] Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour.<sup>1</sup>

[20] To be considered responsive to the request, records must "reasonably relate" to the request.<sup>2</sup>

[21] The affected party submits that pages 178, 227, 238, 244, 246, 259, 295, 313, 669 and 670 of the records are not responsive to the request based on the requester's clarification of its request at mediation.

[22] In response, the city submits that these records remain within the scope of the request as originally received, as the mediation process did not resolve the appeal.

[23] The requester submits that it asked for information relating to the trade contract between the project's construction manager and the affected party, including financial information contained in the successful bid proposal of the affected party. Therefore, it states that the records at issue are responsive since they are either part of the final contract or part of the affected party's bid and proposal.

[24] The affected party did not provide reply representations on this issue.

### ***Analysis/Findings***

[25] The mediator's report in appeal file MA11-495 states that at the outset of mediation, the requester advised the mediator that he was only seeking information that pertains to the financial details of the bid as set out in the contract. Therefore, as the requester narrowed the scope of its appeal at mediation, I will only adjudicate upon records that contain information relating to the financial details relating to the bid as set out in the contract. This bid is the successful bid of the affected party to perform the electrical work for the project.

[26] The following chart describes the records which the parties disagree on with respect to their responsiveness:

<b>Page Number</b>	<b>Record Description</b>
178	Award letter from project's construction manager to affected party, April 13, 2011, p. 1
227	Section 300 Stipulated Price Bid form, p. 2
238	Surety's Consent

<sup>1</sup> Orders P-134 and P-880.

<sup>2</sup> Orders P-880 and PO-2661.

244	Letter of June 28, 2011
246	Executed contract, p. 6
259	Subcontract agreement, Appendix A, April 13, 2011
295	Bid review, March 21, 2011, Attendance Sign-in Sheet
313	Prequalification
669-670	Financial reference letter

[27] The affected party submits that page 178 is not responsive as it was prepared following the closing of the bidding process. However, I note that this record contains financial details relating to the affected party's successful bid which is part of the contract. Therefore, I find that this record is responsive to the request.

[28] The affected party submits that pages 227 and 238 are not responsive as they concern the affected party's relationship to other entities. However, both these records include financial details about the affected party's bid. Therefore, I find that they are responsive.

[29] The affected party submits that pages 244, 259 and 295 are not responsive but did not provide details as to why this is so. However, I note that these records do not contain any financial details. Therefore, I find that they are not responsive to the request.

[30] The affected party submits that page 246 is not responsive. Although it did not provide details as to why it considers this record non-responsive, it did state that this record contains information about its price for the bid. I find that this record contains financial details about the bid and is responsive to the request.

[31] The affected party did not provide specific representations on pages 313 and 669 to 670.

[32] Page 313 is referred to by the city as "Prequalification". Similarly, pages 393 to 395 are entitled "Principal projects completed in the last five years." These pages list the projects that the affected party has worked on and contains similar information that would be found on its website. It does not contain any financial details about the affected party's bid. Therefore, I find that pages 313 and 393 to 395 are not responsive to the request.

[33] Pages 669 to 670 are referred to by the city as "Financial Reference letter". It is a letter about the affected party's banking situation submitted in response to the bid. I find that it contains financial details about the affected party's bid. Therefore, I find that pages 669 to 670 are responsive to the request.



[34] In addition, I note that for page 203 of the records, the city has only claimed the application of section 10 to the base bid amount of an unsuccessful bidder for the project and section 11 for the budget amount for the project. As neither of these amounts in page 203 contains financial detail relating to the affected party's successful bid, I find that the information at issue is not responsive to the request.

[35] Similarly, the city has disclosed all of page 202 to the requester, except for one sentence that concerns another party's bid, for which the city has claimed the application of section 11. This page is a letter from the project construction manager regarding the contract recommendation. It does not contain the financial details relating to the successful bid, but concerns an unsuccessful bidder. I find that this information is also non-responsive to the request as clarified at mediation.

[36] In addition, the city has withheld portions of page 208, which is a bid summary for three types of work being performed on the project, namely demolition, mechanical and electrical work. The city has claimed the application of section 11 to the information. The successful bid in this appeal only concerned electrical work on the project. This record does not compare these three types of work with each other.

[37] Therefore, I find that the information in page 208 that does not concern the electrical bid of the affected party is not responsive to the clarified request. I will consider below whether the responsive information in this page is subject to section 11.

[38] In conclusion, I agree with the affected party that the information at issue in pages 244, 259, 295 and 313 of the records is not responsive to the request. I also find that the information at issue in pages 202, 203, 393 to 395, and parts of page 208 is not responsive to the request. Therefore, I will order the city not to disclose this information to the requester.

**B. Does the mandatory exemption at section 10(1) apply to the records?**

[39] Section 10(1) states in part:

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;

[40] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>3</sup> 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.<sup>4</sup>

[41] 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***

[42] The affected party submits that the records contain commercial information relating to prices, cost accounting, cost of labour, materials and services, suppliers and other particulars unique to the affected party’s business and practices.<sup>5</sup>

[43] The city submits that the records contain technical, commercial, or financial information.

[44] The requester did not address this issue directly.

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<sup>3</sup> *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.).

<sup>4</sup> Orders PO-1805, PO-2018, PO-2184, and MO-1706.

<sup>5</sup> Order MO-2176.

### *Analysis/Findings*

[45] The types of information raised by the affected party and the city have been discussed in prior orders:

*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.<sup>6</sup>

*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.<sup>7</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>8</sup>

*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.<sup>9</sup>

[46] Based on my review of the records at issue, I agree with the affected party and the city that they all reveal commercial information; therefore, part 1 of the test under section 10(1) has been met. All of the records contain information about the selling of services by the affected party to the city. As I have found that the records contain commercial information, there is no need for me to also consider whether they contain financial or technical information.

### ***Part 2: supplied in confidence***

#### *Supplied*

[47] 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.<sup>10</sup>

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<sup>6</sup> Order PO-2010.

<sup>7</sup> Order PO-2010.

<sup>8</sup> P-1621.

<sup>9</sup> Order PO-2010.

<sup>10</sup> Order MO-1706.

[48] 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.<sup>11</sup>

[49] 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.<sup>12</sup>

[50] 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 of change, such as the operating philosophy of a business, or a sample of its products.<sup>13</sup>

#### *In confidence*

[51] 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.<sup>14</sup>

[52] 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;

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<sup>11</sup> Orders PO-2020 and PO-2043.

<sup>12</sup> 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.).

<sup>13</sup> Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

<sup>14</sup> Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.<sup>15</sup>

### *Representations*

[53] The affected party submits that the records were supplied as part of a closed bid submission process, not a public tender, and the very nature of the process was confidential. It states that the maintenance of confidentiality is an important aspect of the construction industry and this type of contracting process is common and commonly understood to be confidential. The affected party also states that the records are not publicly available and have consistently been treated as confidential in other contracting situations with this affected party.

[54] Concerning the "supplied" component of part 2, the city states that the information was provided as part of the process under which an agreement was eventually reached with one of the parties who provided submissions in response to the city's competitive bidding process. It also states that many of the records would qualify as supplied, as these documents were submitted by the affected party, but are not specifically documents which form part of an negotiated agreement (for example the redacted portions of pages 180 to 181, or the "financial reference letter at pages 669 to 670, for which access was denied in full). It also submits that other records which would not qualify as supplied' would qualify for the "immutability" or "inferred disclosure" exclusions from the "supplied" requirement (for example, pages 411 to 412 "WSIB Certificate of Clearance & CAD-7 Calculations").

[55] Concerning the "in confidence" component of part 2, the city submits that, in the circumstances of competitive bid process, the affected party may have an expectation of confidentiality with respect to some of the information supplied to the city, such as financial information, which would lead to potential harms to the affected party.

[56] The requester submits that the records are all contractual documents of the successful bidder and none of the information contained in these documents is immutable. The requester submits that all of the pricing information submitted by the successful bidder constitutes the proposal attached to and forming part of the contract. The costs referred to (such as labour costs, manpower costs, prices, bonding rates, hourly rates) are not "fixed" or immutable per se, but rather the amount charged by the contracting party for providing a particular individual's services. Furthermore, it states that there cannot be an expectation of confidentiality for the successful bidder after the bidding cycle has been completed and closed because some of the information is otherwise available through other sources (such as, for example, the WSIB certificates).

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<sup>15</sup> Orders PO-2043, PO-2371 and PO-2497.

[57] In reply, the affected party submits that the disclosure of information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party. It also states that it is not correct to state that there is no information that is immutable. The names of suppliers and the types of services they would provide if the affected party's proposal is accepted and references to the affected party's "team" have been held to be immutable.

[58] In reply, the city states that the terms of the contract are not directly at issue, and that the records reveal pricing information or a contractual term in a traditional sense and factual information incorporated by reference, which are immutable.

[59] The city reiterates that many of the records contain immutable information. In addition, it submits that many of the records would qualify as supplied, as these documents were submitted by the affected party. It states that although information in the proposal may be incorporated by reference into the final agreement formed between the parties, many of the records are not specifically documents which would be seen to form part of a negotiated agreement in a traditional sense, but are documents attached (for example the redacted portions of pages 180 to 181 which are a "Record of Bid Review meeting, held" or the "financial reference letter" at pages 669 to 670).

*Analysis/Findings*

[60] The city and/or the affected party claim that the mandatory third party information exemption applies to the following information:

<b>Page Number</b>	<b>Record Description</b>	<b>City's decision</b>
178	Award letter from project's construction manager to affected party, April 13, 2011, p. 1	Disclose
180-181	Record of Bid Review meeting, March 21, 2011, pages 1 to 2	Deny in part
182	Record of Bid Review meeting, March 21, 2011, page 3	Disclose
183-185	Email correspondence between affected party and project's construction manager, March 2011	Disclose
217	WP3 Appendix L form	Deny in part
218-223	Supplementary Bid from affected party, Appendix F	Deny in full
225	Section 300 Stipulated Price Bid form, p. 1	Disclose
227	Section 300 Stipulated Price Bid form, p. 2	Deny in part

230-235	Section 300 Stipulated Price Bid form, p. 5 - 10	Disclose
236	Section 300 Stipulated Price Bid form, p. 11	Deny in full
237	Section 300 Stipulated Price Bid form (Appendix "I", Supervisory Staff), p. 12	Disclose
238	Surety's Consent	Disclose
246	Executed contract, p. 6	Disclose
248	Executed contract, Appendix B, April 13, 2011	Disclose
249	Correspondence re subcontract agreement, project's construction manager and affected party, May 16, 2011	Disclose
250	Subcontract agreement, p. 1	Disclose
251	Subcontract agreement, p. 2	Disclose
255	Subcontract agreement, p. 6	Disclose
297	Correspondence from affected party to project's construction manager re staffing levels, March 17, 2011	Deny in full
298	Union Station WP3 - Manpower Loading	Deny in full
299-302	Bid review notes, March 21, 2011	Deny in part
303	Record of Bid Review meeting, March 21, 2011, page 1	Deny in part
411-412	WSIB Certificate of Clearance & CAD-7 Calculations	Deny in full
669-670	Financial reference letter	Deny in full

[61] The records identified by the city that concern the selection of a successful bidder are found at pages 178 to 298 of the records.

[62] Of the records at issue, the affected party's bid is contained in pages 411 to 412, and 669 to 670 of the records.

[63] The affected party claimed the application of section 10 to pages 178, 180 to 185, 225, 227, 230 to 235, 237, 238, 244, 246, 248 to 251, 255, 259 and 295. Therefore, it did not claim the application of section 10 to the portions of following pages 203, 217, 299 to 303 that the city has decided to disclose.

[64] I will consider whether the information in each type of record was supplied in confidence by the affected party to the city.

Page 178

[65] This page consists of the first page of a letter from the project's construction manager to the affected party. The second page of the letter at page 179 has already been disclosed to the requester. The requester states that this letter is part of the final contract for the project. Page 259 of the records confirms that this letter formed part of the subcontract agreement between the affected party and the project's construction manager. The subcontract agreement formed part of the contract between the city and the project's construction manager. The affected party states that page 178 contains information about the price the affected party was paid for its services. The city has decided to disclose this page in its entirety.

[66] I find that the information in page 178 was not supplied by the affected party for the purpose of section 10(1). This information was contained in the contract with the city for the project. The "inferred disclosure" exception does not apply. From a review of this letter and the affected party's representations, I find that there is no evidence that this page contains immutable information or information that would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party.

[67] Even if I found that the information in page 178 was supplied, I would not find that it was supplied in confidence. This letter does not contain any indication that it was sent to the affected party in confidence. According to page 179 of the records, this letter was copied to a number of other persons within the project's construction manager's organization. I find that it was not prepared for a purpose that would not entail disclosure.

[68] Therefore, part 2 of the test has not been met for page 178. As no other exemptions have been claimed for this page, I will order it disclosed.

Pages 180 to 182

[69] These pages are titled "Record of Bid Review Meeting". The city has denied access to portions of pages 180 and 181 and has decided to grant access to all of page 182. The affected party states that disclosure of page 180 would permit the requester to draw accurate inferences concerning the affected party's pricing, costing, suppliers and practices in submitting proposals. It states that the information on page 180 includes details of the affected party's relation with other contractors, the identity of these contractors and how it intends to fulfill manpower requirements.

[70] The affected party states that the information on page 181 includes detailed financial information relating to the affected party's practice in submitting the proposal.



[71] The affected party states that the information on page 182 will permit the requester to draw accurate inferences concerning its pricing, costing, suppliers and practices in submitting a proposal.

[72] I find that the information in pages 180 to 182 was not supplied by the affected party. These three pages were attached to the letter found at pages 178 to 179 of the records, referred to immediately above. I found above that these records formed part of the subcontract agreement and were contained in the contract with the city for the project. Nor do the "inferred disclosure" and "immutability" exceptions apply. Pages 180 to 182 reflect the outcome of a meeting to review the affected party's bid and the information therein reflects the final terms of the negotiated agreement.

[73] Even if I found that the information in pages 180 to 182 was supplied, I would not find that it was supplied in confidence for the same reason that I found that the cover letter at pages 178 to 179 not supplied in confidence above.

[74] Therefore, part 2 of the test has not been met for pages 180 to 182. As no other exemptions have been claimed for these pages, I will order them disclosed.

#### Pages 183 to 185

[75] These pages contain three emails between the affected party and the project's construction manager. The city has decided to disclose these emails. The affected party states that these emails are confidential communications relating to price calculations and its strategies in pricing.

[76] The requester did not provide representations on these emails.

[77] These emails are a series of emails initiated by the project's construction manager. The initiating email was sent to an individual working for the affected party and copied to eight other individuals. The affected party responded twice to the initiating email and copied the same individuals. The emails contain information about the services to be provided by the affected party under the contract. No specific prices are listed in the emails.

[78] As the emails contain information about what is to be included in the contract and were circulated among so many individuals, I find that both components of part 2 of the test have been met.

[79] Therefore, part 2 of the test has not been met for pages 183 to 185. As no other exemptions have been claimed for these pages, I will order them disclosed.

Page 217

[80] This page is listed in the city's index as "WP3 Appendix L form." The city has denied access to certain portions of this record. The affected party has not appealed the city's decision to disclose the remainder of this record. The affected party relies on its representations made in support of pages 180 to 181.

[81] The information at issue in page 217 is not the affected party's prices but contains the information of the project's construction manager. As stated above, the project's construction manager did not provide representations.

[82] I do not have any specific representations on this page from the city or the affected party. As this document is entitled "Appendix L" it appears to have formed part of the project construction manager's contract with the city. The information in this page does not appear to me to fit within the immutability or inferred disclosure exceptions.

[83] I find that this information was not supplied in confidence and that part 2 of the test under section 10(1) has not been met. As no other exemptions have been claimed for this page, I will order it disclosed.

Pages 218 to 223

[84] These pages consist of a supplementary bid form from the affected party. This form states that it is an integral part of the affected party's bid. These pages are being withheld in full by the city. The affected party relies on the representations it provided for pages 180 and 181. Neither the city nor the requester provided specific representations on these pages.

[85] As it is part of the successful bid, this information formed part of the contract. It does not appear to contain information that is subject to the inferred disclosure or immutability exceptions. I find that the information at pages 218 to 223 was not supplied and part 2 of the test has not been met. As no other exemptions have been claimed for this information, I will order it disclosed.

Pages 225, 227, 230 to 237

[86] Pages 225 to 237 consist of a form entitled "Stipulated Price Bid Form" which formed part the affected party's bid. At issue are pages 225, 227, 230 to 237. The requester already has copies of pages 225 and 227 (less the monetary amounts) and pages 230 to 235 and 237 (less the response of the affected party).

[87] The affected party states that page 225 will disclose its pricing information and will permit the requester to draw accurate inferences about its pricing, costing,

suppliers and practices in submitting a proposal. It states that page 227 is its commercial and financial information. It further states that pages 230 to 235 relates to its particular processes, practice and tactics in responding to proposals. It states that page 237 contains information identifying employees and staff and is personal information which is properly exempt under the mandatory personal privacy exemption in section 14(1) of *MFIPPA*.

[88] I do not have any specific representations on these pages from the city or the requester.

[89] This record formed part of the project construction manager's contract with the city and does not appear to fit within the immutability or inferred disclosure exceptions.

[90] I find that this information was not supplied in confidence and that part 2 of the test under section 10(1) has not been met. As no other exemptions have been claimed for these pages, I will order them disclosed, other than the information on page 237 that the affected party claims to contain personal information. I will consider below whether the information at issue on page 237 is subject to the mandatory personal privacy exemption in section 14(1).

#### Pages 238

[91] This page is the surety's consent. The city has decided to disclose this page and the affected party has claimed that section 10(1) applies to it.

[92] Only the requester provided specific representations on page 238 and states that a valid surety certificate and consent was a requirement of the bid proposal. It also states that it is not confidential information as trades are generally required to present valid surety documents in order to even bid on a contract. Neither the affected party nor the city provided reply representations on this page.

[93] Page 238 was prepared by an insurance company and not the affected party. It refers to both the affected party and the project's construction manager. According to page 407 of the records, the surety's consent was a requirement of the bid process.

[94] Based on my review of page 238, I find that the in confidence component of part 2 of the test has not been met. I do not have sufficient evidence to find that this page was communicated to the city on the basis that it was confidential, treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the city and that it was to be kept confidential and was prepared for a purpose that would not entail disclosure.

[95] I find that part 2 of the test has not been met for page 238 and, as no other exemptions have been claimed for this page, I will order it disclosed.

Pages 246, 248, 250, 251, 255,

[96] These pages are from the executed subcontract agreement between the project's construction manager and the affected party. The city has decided to disclose these pages and the affected party has claimed that section 10(1) applies to them. The affected party did not provide specific representations on them.

[97] As the subcontract formed part of the contract with the city, I find that these pages were not supplied for the purposes of section 10(1). Nor do I find from a review of these pages that the inferred disclosure or immutability exceptions apply to the information in them.

[98] I find that part 2 of the test has not been met for pages 246 and 248 and, as no other exemptions have been claimed for these pages, I will order them disclosed.

Page 249

[99] This page is a letter from the project's construction manager to the affected party enclosing a copy of the unsigned subcontract agreement and asking for certain documents to be provided. The city has decided to disclose this page and the affected party has claimed that section 10(1) applies to it. The affected party did not provide specific representations on this page.

[100] Based on my review of page 249, I find that the in confidence component of part 2 of the test has not been met. I do not have sufficient evidence to find that this page was communicated to the city on the basis that it was confidential, treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the city and that it was to be kept confidential and was prepared for a purpose that would not entail disclosure.

[101] I find that part 2 of the test has not been met for page 249 and, as no other exemptions have been claimed for this page, I will order it disclosed.

Page 297

[102] This page is an email from the affected party to the project's construction manager about staffing levels sent prior to the awarding of the bid. The city has denied access to this email under section 10(1). Neither the city nor the affected party provided representations on this specific email, nor has the city provided an explanation as why it decided to disclose similar emails at pages 183 to 185, yet has decided to deny access to the email at page 297.

[103] There is no indication in either the party's representations or in this or the other emails at pages 183 to 185 as to how the city would have obtained a copy of these emails.

[104] I find that I have not been provided with sufficient evidence to find that the in confidence component of part 2 of the test under section 10(1) has been satisfied. In particular, I do not have sufficient evidence to find that:

- the information was communicated to the city 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 party prior to being communicated to the city; and
- prepared for a purpose that would not entail disclosure.

[105] I find that the in confidence component of part 2 of the test under section 10(1) has not been met for page 297. I will, however, consider the application of the mandatory personal privacy exemption in section 14(1) to this page as it contains similar information to that in page 237 for which the affected party has claimed the application of this exemption.

#### Page 298

[106] This page is a chart and was an attachment to the email at page 297. The city has denied access to this email under section 10(1). None of the parties provided representations on this chart.

[107] For the same reasons as in the case of page 297, I find that the in confidence component of part 2 of the test has not been met. As no other exemptions have been claimed for this page, I will order it disclosed.

#### Pages 299 and 300

[108] These two pages are handwritten notes and are referred to in the city's index as "Bid Review Notes". The city has decided to disclose these notes except for applying section 10(1) to hourly wage rate and percentages on page 299 and the name of an employee of the affected party on page 300. The city did not provide representations as to why it made these specific severances. The affected party did not appeal the city's decision to disclose the remainder of this record.

[109] According to page 295 of the records, the bid review meeting was attended by representatives from the project construction manager, the affected party, the city, and another company.

[110] As the information is part of the successful bid which became part of the contract with the city and the immutability and inferred disclosure exceptions do not appear to apply to this information, I find that it was not supplied within the meaning of section 10(1).

[111] For the same reasons as in the case of page 297, I also find that the in confidence component of part 2 of the test has not been met. As no other exemptions have been claimed for these pages, I will order them disclosed.

#### Pages 301 and 302

[112] These two pages are a chart and are referred to by the city in its index as "Bid Review Notes". The city has decided to disclose these notes except for applying section 10(1) to some small severances on both pages. The information severed appears to be information that would have been included in the affected party's successful bid. The affected party did not appeal the city's decision to disclose the remainder of this record. Neither the affected party nor the city provided an explanation as to why this information is being severed.

[113] As the information is part of the successful bid which became part of the contract with the city and the immutability and inferred disclosure exceptions do not appear to apply to this information, I find that it was not supplied.

[114] For the same reasons as in the case of page 297, I also find that the in confidence component of part 2 of the test has not been met. As no other exemptions have been claimed for these pages, I will order them disclosed.

#### Page 303

[115] This page is the first page of a document titled "Record of Bid Review Meeting". The city has decided to disclose this document, except for the names of two subcontractors and the project construction manager's expectation regarding the number of workmen needed for the project. Neither the affected party nor the city provided an explanation as to why this information is being severed.

[116] As the information is part of the successful bid which became part of the contract with the city and the immutability and inferred disclosure exceptions do not appear to apply to this information, I find that it was not supplied.

[117] For the same reasons as in the case of page 297, I also find that the in confidence component of part 2 of the test has not been met. As no other exemptions have been claimed for this page, I will order it disclosed.

Pages 411 to 412

[118] These pages are referred to by the city as WSIB Certificate of Clearance & CAD-7 Calculations. The city submits that these pages do not contain information that is susceptible to change through any negotiation process or otherwise and is immutable, underlying non-negotiated information that belongs to the affected party. The city states that it would not have otherwise known this information.

[119] The affected party submits that the information is subject to inferred disclosure and immutability exceptions.

[120] Page 412 is a Certificate of Clearance from the Workplace Safety and Insurance Board of Ontario (WSIB) addressed to the affected party. A Certificate of Clearance is:<sup>16</sup>

... a document issued free of charge by the Workplace Safety and Insurance Board (WSIB). It provides you assurance that the contractor or subcontractor:

- is registered with the WSIB
- has filed all premium remittance forms and reconciliation forms, and
- has paid all premiums owing to the WSIB based on payroll reported.

[121] The WSIB website indicates that these certificates can be viewed online. I find that this page was prepared for a purpose that would entail disclosure. Therefore, I find that it was not supplied in confidence to the city and section 10(1) does not apply to this information. As no other exemptions have been claimed for this page, I will order it disclosed.

[122] Page 411 is the CAD-&-Calculations form also issued by the WSIB. It is dated September 18, 2009, well before the bid submission date. It contains information related to the WSIB premiums paid by the affected party. I find that this information is immutable and was supplied in confidence and that part 2 of the test has been met for page 411. I will consider whether part 3 of the test is met for this page below.

Pages 669 to 670

[123] These pages are referred to by the city as Financial Reference Letters. The city submits that these pages do not contain information that is susceptible to change through any negotiation process or otherwise and is immutable, underlying non-negotiated information that belongs to the affected party.

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<sup>16</sup> See Order MO-2801 and section 141.2 of the *Workplace Safety and Insurance Act, 1997*.

[124] The affected party submits that the information is subject to inferred disclosure and immutability exceptions.

[125] Based on my review of these two pages, I find that they contain information that is immutable. In particular, these pages contain the details of where the affected party banks, the type of accounts it holds, and the financial aspects of its bank account accounts.

[126] I find that pages 669 to 670 were supplied in confidence and that part 2 of the test has been met for these pages. I will consider whether part 3 of the test is met for these pages below.

### *Conclusion*

[127] In conclusion, I find that only pages 411 and 669 to 670 meet part 2 of the test under section 10(1). As such, the remaining records for which only section 10(1) have been claimed do not meet part 2 of the test and I will order them disclosed.

### ***Part 3: harms***

[128] 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.<sup>17</sup>

[129] 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.<sup>18</sup>

[130] 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).<sup>19</sup>

[131] 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*.<sup>20</sup>

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<sup>17</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>18</sup> Order PO-2020.

<sup>19</sup> Order PO-2435.

<sup>20</sup> Order PO-2435.



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

[132] The affected party submits that the records contain detailed information descriptive of its business and disclosure would reveal the approach it takes to compete in a very competitive construction market, including the way it responds to contracting requests. It states that disclosure of the records will reveal its ideas, processes, procedures and strategies and that through its competitors will gain important business information that will be used against the affected party in the future. It states that:

Competitors can copy the information or use it to under-bid the affected party. Suppliers can use it to obtain contracts less favourable to the affected party. Customers can use the information to obtain better pricing or terms in their contracts.

[133] The city states that the requester and the affected party are in a competitive position vis-à-vis each other both generally, and with respect to the "Union Station Revitalization Project" specifically. Therefore, it submits that it would be in the private interest of the requester to prejudice the interest of its competitor, the affected party. The city submits that the affected party's "informational assets" could be exploited in the future by its competitors.

[134] The requester states that there is no evidence or even "rational basis" adduced that the disclosure of the information would put the successful bidder to an unfair disadvantage in the competitive bidding process as the competition is now closed. As for future similar competitive processes, it states that a similar trade contract (in this instance, it was for the revitalization of Union Station in downtown Toronto) will be a rare and unlikely occurrence in the same geographic area. Not only is there a slim likelihood of a similar contract coming about in the future, but by the time such a contract comes around, economic circumstances and the requirements of the party receiving the bid submissions will have changed significantly such that the requested information will be neither relevant nor prejudicial to the successful bidder at that point in time.

[135] In reply, the affected party states that the requester is a competitor with the affected party, not only in relation to public competitions with municipal or public organizations, but also respect to private competitions and that disclosure would cause harm to the affected party in its ongoing efforts to secure work in that sector.

[136] In reply, the city states that the disclosure would likely result in the possibility that the affected party's competitors, including the requester, would utilize this information to frustrate or encumber its ability to successfully negotiate or manage other agreements (either in relation to public procurement processes, or otherwise).

### Analysis/Findings

[137] Remaining at issue are pages 411 and pages 669 to 670. Page 411 contains information related to the WSIB premiums the affected party paid in 2009. Pages 669 to 670 contain information about which bank the affected party used in 2009 and general details about its relationship with that bank. I find that neither of these records could reasonably be expected to disclose the approach the affected party takes to compete in the construction market, including the way it responds to contracting requests. Based on my review of these records, I find that this information is the type of information that would be provided as part of the bidding process and is the type of information that would change over time.

[138] I find that disclosure of these pages of the records, which contain information on WSIB premiums and general banking information from 2009, could not significantly prejudice the competitive position of the affected party; nor could it interfere significantly with the contractual or other negotiations of the affected party. This information is no longer current. This information could not now be used by the affected party's competitors to frustrate or encumber its ability to successfully negotiate or manage other agreements.

[139] Therefore, I find that section 10(1)(a) does not apply to the information in pages 411 and 669 to 670 of the records.

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

[140] The affected party states that if a party risks exposure of its competitive trade information by taking part in municipal contracting, it will be reluctant to do so again. This will be detrimental to the contracting process, which will then become less competitive.

[141] The city states that disclosure could result in parties, such as the requester and the affected party, no longer disclosing the same degree or nature of information to it in future procurement processes.

[142] The requester provided the same representations that it did for section 10(1)(a).

### *Analysis/Findings*

[143] I have not been provided with specific representations from the city or the affected party that disclosure of pages 411 and 669 to 670 in particular could reasonably be expected to result in similar information no longer being supplied to the city. In particular, I have not been provided with representations as to the harm that would result if similar information was no longer supplied to the city. Nor have I been

provided with representations as to why it would be in the public interest that similar information continue to be supplied.

[144] As stated above, the information is from 2009 and consists of details of WSIB premiums or a general letter from the affected party's bank. I find that I have not been provided with detailed and convincing evidence to establish a reasonable expectation of harm under section 10(1)(b) from disclosure of this information, nor can I make such a determination on the basis of what is contained in these two records. Therefore, I find that section 10(1)(b) does not apply to the information in pages 411 and 669 to 670 of the records.

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

[145] The affected party states that it has spent time and effort to price and prepare proposals, which result from experience, effort and education. It states that disclosure of records would enable its:

- competitors to the obtain information without incurring any of those costs,
- suppliers to increase their pricing to the affected party, and
- other customers to obtain advantages in the pricing and terms of contracts.

[146] The city and the requester rely on their representations in support of section 10(1)(a).

*Analysis/Findings*

[147] I have not been provided with representations as to how the information at issue could reasonably be expected to result in undue loss or gain to the affected party. The information is specific to the affected party as of 2009 and concerns WSIB premiums and general banking information. I find that this information, which does not reveal the affected party's pricing, would not be useful to the affected party's competitors, suppliers or other customers.

[148] I find that I have not been provided with detailed and convincing evidence to establish a reasonable expectation of harm under section 10(1)(c) from disclosure of the information in pages 411 and 669 to 670, nor can I make such a determination on the basis of what is contained in these two records. Therefore, I find that section 10(1)(c) does not apply to the information in pages 411 and 669 to 670 of the records.

## **Conclusion**

[149] As part 3 of the test under sections 10(1)(a), (b) or (c) have not been met for pages 411 and 669 to 670, and as no other exemptions have been claimed, I will order this information disclosed.

### **C. Does the discretionary exemption at section 11 apply to the information at issue in page 208 of the records?**

[150] The city relies on sections 11(c) and (d), which read:

A head may refuse to disclose a record that contains,

- (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;

[151] 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<sup>21</sup> 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.

[152] 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.<sup>22</sup>

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<sup>21</sup> Toronto: Queen's Printer, 1980 (the Williams Commission Report).

<sup>22</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[153] 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 11.<sup>23</sup>

[154] 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*.<sup>24</sup>

[155] 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.<sup>25</sup>

[156] I found above that the information related to bids other than that of the affected party was not responsive to the request as clarified by the requester at mediation. The information that remains at issue in page 208 consists of two dollar amounts, namely, the construction project manager's estimate of the cost of the project's electrical work and the amount that the affected party's bid varied from this estimate.

[157] The city provided both confidential and non-confidential representations on this issue. In its non-confidential representations, it states that:

All of the documents in question contain information concerning the city's considerations and issues to be used in the process of finalizing a stage in the public procurement matter. Such harm may be established through examination of the redacted portions of the documents in question, as they are the information on the financial restrictions and considerations of the city in implementing the retention of a service provider...

[T]hese documents contain the city's valuation of the results of the various decisions, the financial framework available for this type of project and as a result, it is prima facie established that disclosure of these documents would lead to a reasonable expectation of harm to the public interest - reflected by the financial and economic interests of the city in undertaking a project to utilize public funds for the provision of a public benefit - in this case a "revitalized" Union Station. Disclosure of these documents would prejudice the manner in which the City would proceed to attempt seek to obtain the greatest return for the City and, resultantly, the public at large. This disclosure would lead to prejudice the City's financial/economic position...

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<sup>23</sup> Orders MO-1947 and MO-2363.

<sup>24</sup> Order MO-2363.

<sup>25</sup> Orders MO-2363 and PO-2758.

[158] The requester states that the city has not demonstrated through any detail or specificity what the harms would be upon disclosure. It also states that disclosure of the information at issue for which section 11 has been claimed will not be useful to the requester or even pertinent to the city in future bidding cycles in relation to a different project.

[159] The requester also states that the revitalization of Union Station is a very specific project and it is unlikely that any of the information contained in the records at issue is information that the city will see repeating itself in other bidding cycles and other city-initiated projects in the future. It also states that as the contract has been finalized, there is no risk to the city by reason of disclosure.

[160] In reply, the city states that the information at issue deals with the projected budget for a varying scope of work, and the base bids and option pricing details upon which additional work could be performed. According to the city, this would result in harms if additional work is to be performed on the project.

### ***Analysis/Findings***

[161] The purpose of section 11(c) 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.<sup>26</sup>

[162] This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.<sup>27</sup>

[163] Based on my review of the two dollar amounts at issue, I find that disclosure of these amounts could not reasonably be expected to prejudice the city's economic interests or competitive position under section 11(c); nor could disclosure reasonably be expected to be injurious to the financial interests of the city under section 11(d). This information is very specific to the project and the bid that was made by the affected party.

[164] I find that the city has not provided sufficiently "detailed and convincing" evidence required to demonstrate that the harms it alleges are not merely speculative. The affected party has already entered into a contract with the city. The record is over

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<sup>26</sup> Orders P-1190 and MO-2233.

<sup>27</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

two years old. I have no evidence that the affected party's proposal is the subject of any ongoing negotiations. This tends to refute any claims of prejudice to any future negotiations or renegotiations.<sup>28</sup>

[165] Any further electrical work on the project not completed by the affected party would require new bids for the work that would be needed to be completed. The city would then need a new budget for this work and would also need to solicit new bids. I agree with the findings in Orders MO-2496-I and MO-2700 that providing the requester and the public with insight into the city's evaluation process could not reasonably be expected to cause the harms outlined in these exemptions.

[166] Accordingly, I find that sections 11(c) and (d) do not apply to the two dollar amounts I found responsive in page 208. As no other exemptions apply, I will order this information disclosed.

**D. Do pages 237, 239 to 242, 297 and 642 to 648 of the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?**

[167] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

"personal information" means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (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,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,

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<sup>28</sup> Orders PO-2226, PO-2289 and MO-2700.

- (e) the personal opinions or views of the individual except if they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (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;

[168] 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.<sup>29</sup>

[169] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

(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 (3) 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.

[170] 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.<sup>30</sup>

[171] 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.<sup>31</sup>

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<sup>29</sup> Order 11.

<sup>30</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>31</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.



[172] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>32</sup>

[173] The city submits that pages 239 to 242 and 642 to 648 contain employment and educational history of individual employees, as these pages contain summaries of the work performed by these employees and their resumes. Also, it states that these records may express opinions about these employees.

[174] The requester submits that the information is not personal information as it identifies individuals in a professional or business capacity and disclosing this information does not reveal anything of a personal nature about these individuals. The requester also states that the records could be released without disclosing the names of the individuals; therefore, it is not likely that the individuals could be identified.

[175] The requester points out that it and the affected party are members of the same industry of electrical contractors and, therefore, it is very likely that there is already some public knowledge about individuals' names, positions, and general experience.

[176] In reply, the affected party states that even if the records were disclosed without names, individuals will still be identifiable as the requester has some knowledge of individual's personal information from being in the same industry.

[177] In reply, the city points out that the requester did not dispute that pages 239 to 242 and 642 to 648 contain educational and employment history of specific named individuals and express opinions about individuals.

### ***Analysis/Findings***

[178] At issue is information contained in pages 237, 239 to 242, 297 and 642 to 648 of the records.

[179] I agree with the affected party that even if the names of the affected party's employees were severed from the records at issue, these individuals would still be identifiable as the records contain other information that could identify who the information belongs to.

[180] Page 237 is a list of supervisory staff and their employment responsibilities on the project. It also refers to the resumes found at pages 239 to 240 and 645. Other than page 297, the remaining pages at issue are also resumes.

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<sup>32</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[181] Page 297 is an email from affected party to the project's construction manager regarding staffing levels. It contains some of the names of the affected party's staff and their titles and employment responsibilities on the project.

[182] I find that the information at issue in pages 237 and 297 that consists of the names and titles of the affected party's employees and identifies these individuals in a business capacity. By reason of section 2(2.1) of the *Act*, this information is not personal information and, as no other exemptions have been claimed for these names and titles, I will order them disclosed. The remaining information in these records consists of a brief general statement of the employment responsibilities of these individuals on the project. I find that the employment responsibilities information in these two records is not personal information.

[183] In this regard, I agree with and adopt the findings of Adjudicator Catherine Corban in Order MO-2465, where she stated:

...I find that the individuals' titles and brief description of their responsibilities within the company qualifies as information about those individuals in their professional capacity. As noted above, pursuant to sections 2(2.1) of the *Act*, personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a professional capacity. Additionally, prior orders have found that descriptions of an individual's employment responsibilities or position is not information of a personal nature, but may be more appropriately described as being related to the employment or the professional responsibilities of the individual [Reconsideration Order R-980015 and Order P-1180]. Therefore, I find that the individuals' titles and the brief description of their responsibilities within the company do not qualify as personal information within the meaning of the term as defined in section 2(1) of the *Act*.

[184] The remaining pages at issue consist of resumes of the affected party's employees. I find that the names, titles or designations on the resumes identify individuals in a business capacity only. By reason of section 2(2.1) of the *Act*, this information is not personal information. As no other exemptions have been claimed for this information, I will order the names, titles and designations in the resumes disclosed.

[185] I find that the remaining information in the resumes is personal information as it contains the employment and educational history of identifiable individuals in accordance with paragraph (b) of the definition of personal information in section 2(1)

of the *Act*. This finding is supported by previous orders that have found that resumes contain personal information as that term is defined in section 2(1).<sup>33</sup>

[186] I will now consider whether the personal privacy exemption in section 14(1) applies to the information in the resumes at pages 239 to 242 and 642 to 648, other than the names, titles or designations.

**E. Does the mandatory exemption at section 14(1) apply to the personal information at issue?**

[187] 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. In this appeal, only the exception in section 14(1)(f) could apply. This section 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.

[188] 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).

[189] The city submits that section 14(4) does not have applicability. The city states that the presumption in section 14(3)(d) applies as the records at issue are resumes and summaries of educational experience of specific individuals. This section reads:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the information,

relates to employment or educational history.

[190] In the alternative, the city submits that a review of the factors in section 14(2) support nondisclosure of this information. In particular, the city submits disclosure of the personal information will not promote public health and safety, or an informed choice in the purchase of goods and services, nor would it lead to the ability for the public to expose the operations of government to increased public scrutiny. The city also notes that it is likely that the information would be accurate or reliable, as of the date of the collection, but due to the passage of time some of the information may now be out of date. The city also submits that there is no basis to believe that the requester

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<sup>33</sup> Orders P-727, MO-1444, MO-2151 and MO-2856.

is seeking to obtain the disclosure of the personal information in these records for the purpose of obtaining a fair determination of its rights. However, the city states that disclosure of this information will expose individuals to a loss of privacy concerning their personal affairs, which cannot be justified.

[191] The requester submits that there is no personal harm or risk by the release of any of this professional information. It points out that people upload their resumes for public viewing on websites such as LinkedIn, and companies upload the curriculum vitae and the biographies of their staff members on websites.

[192] In reply, the affected party states that there is nothing to suggest that the individuals or affected party uploaded their personal information to websites such as LinkedIn.

### ***Analysis/Findings***

[193] 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).

[194] If section 14(4) applies, disclosure is not an unjustified invasion of personal privacy and the information is not exempt under section 14. In this appeal, I find that section 14(4) does not apply.

[195] The information at issue consists of resumes of the affected party's employees. I have already determined that these employees' names, titles and designations are not personal information. Previous orders have found that information contained in resumes falls within the scope of the presumption in section 14(3)(d).<sup>34</sup>

[196] I find that the remaining information in the resumes comes within the presumption in section 14(3)(d) as this information consists of educational and employment history. Accordingly, I find that the presumption against disclosure in section 14(3)(d) applies to the personal information contained in the resumes.

[197] 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.<sup>35</sup> I found above that section 14(4) does not apply to the personal information in the resumes. In addition, the public interest override in section 16 has not been raised as an issue in this appeal.

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<sup>34</sup> Orders M-7, M-319 and M-1084.

<sup>35</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

[198] 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).<sup>36</sup>

[199] Accordingly, I find that the information in the resumes at pages 239 to 242 and 642 to 648, other than the names, titles or designations of the affected party's employees, is exempt by reason of the mandatory personal privacy exemption in section 14(1).

**ORDER:**

1. I order the city not to disclose to the requester the information that I have found non-responsive in pages 202, 203, 208, 244, 259, 295, 313 and 393 to 395 of the records. As parts of the information at issue in page 208 is responsive, I will provide the city with a copy of page 208, highlighting the information in that record that I have found not responsive.

2. I uphold the city's decision that the information in the resumes at pages 239 to 242 and 642 to 648, other than the names, titles or designations of the affected party's employees, is exempt by reason of section 14(1).

3. I order the city to disclose to the requester the responsive information in page 208 and the information in pages 178, 180 to 182, 183 to 185, 217, 218 to 223, 225, 227, 230 to 236, 237, 238, 246, 248, 249, 250, 251, 255, 297, 298 to 303, 411, 412, 669 to 670, and the names, titles and designations in the resumes at pages 239 to 242 and 642 to 648 of the records, by **July 3, 2013** and not before **June 24, 2013**. For ease of reference, I will provide the city with a copy of these resumes with the information to be disclosed highlighted.

4. In order to verify compliance with the terms of this order, I reserve the right to require the city to provide me with a copy of the records as disclosed to the requester.

Original signed by: \_\_\_\_\_  
Diane Smith  
Adjudicator

\_\_\_\_\_ May 24, 2013

<sup>36</sup> *John Doe*, cited above.