Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3335

Appeal MA15-168

City of Toronto

July 21, 2016

Summary: The city received a request for records relating to a memorandum of settlement between the city and a named party. The named party appealed the city's decision to disclose some of the responsive records. The appellant argued all responsive records should be withheld under section 10 of the Act (third party information). The appellant also argued records should be withheld under the discretionary exemptions in sections 8 (law enforcement) and 12 (solicitor-client privilege). The adjudicator found section 10 did not apply to any of the records in issue and that, in the circumstances, the appellant could not raise the section 8 and 12 exemptions. Accordingly, except for a small amount of information that must be withheld under the mandatory exemption for personal information in section 14, the records are ordered disclosed.

Statutes Considered: *Day Nurseries Act (repealed), Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 1, 8, 10, 12, 14, 18, 21, 39.

Orders and Investigation Reports Considered: Orders P-493, PO-2675, 16, PO-1707, P-952, MO-1893, PO-3601, P-1137, M-430.

Cases Considered: *Canada Packers Inc. v. Canada (Minister of Agriculture),* [1989] 1 F.C. 47; *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII); *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII); *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23 (CanLII).

OVERVIEW:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all memoranda, e-mails and copies of transcripts of exchanges between:

- solicitors & officers of [named organization] & city solicitors; and
- managers representing children's services & day care facilities

  engaged in negotiations leading up to and concluding the Memorandum of Settlement to address issues investigated at [named organization]-run daycare centres and reported in the review reported to the Board [of the named organization] in August of 2014.

[2] The city notified the organization named in the request, pursuant to section 21 of the *Act*, and subsequently issued a decision letter granting partial access to the responsive records. Portions of the records were withheld pursuant to the mandatory personal privacy exemption at section 14(1) of the *Act* and the discretionary exemption for solicitor-client privileged information in section 12.

[3] The organization, now the appellant, appealed the city's decision to disclose some of the information at issue.

[4] During mediation, the appellant took the position that all the responsive information should be exempt from disclosure pursuant to the mandatory exemption for third party commercial information at section 10(1) of the *Act*. The appellant also objected to the disclosure of some of the information in the records on the basis that it was personal information and subject to exemption under section 14(1) of the *Act.*

[5] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the appeal process where an adjudicator conducts an inquiry. The adjudicator began the inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal, to the appellant. The appellant provided submissions.

[6] In its submissions, in addition to the mandatory exemptions previously raised (sections 10 and 14), the appellant argued that the discretionary exemptions for records subject to solicitor-client privilege (section 12 of the *Act)* and the exemptions at section 8(a), (b) and (c) of the *Act* for records relating to law enforcement applied to the records. The city and the requester were invited to make submissions on those issues in addition to the issues set out in the notice of inquiry sent to the appellant.

[7] The city and the requester provided submissions. The adjudicator sought reply submissions from the appellant, which they provided. Submissions were shared in accordance with the IPC's *Code of Procedure*. The appeal was subsequently transferred to me for disposition.

[8] In this order, I uphold the city's decision to disclose the records at issue, except for one piece of information the city agreed in its submission should be withheld under section 14(1) of the *Act*.

RECORDS:

[9] The records at issue in this appeal are:

a. an Investigation Report (report) prepared by the city about whether the appellant's enrolment and payment practices comply with the city's policies and practices; and

b. emails, some with attachments, between the city and either the requester or the appellant (or the appellant's representatives) and two letters from the city to the appellant (correspondence).[1]

ISSUES:

A. Does the mandatory exemption for third party information (section 10) apply to the records?

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the mandatory exemption for personal privacy (section 14(1)) apply to the records?

D. Is the appellant able to claim the discretionary exemptions in section 8 and/or 12 and if so, do either or both of these sections apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption for third party information (section 10) apply to the records?

[10] Section 10(1) states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

[1] The correspondence is identified by the city as "Emails pages 1-10 of 10" and then as "Emails pages 1-3 of 3" and "Emails page 1 of 1" rather than being numbered sequentially from pages 1-14.

> supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[12] 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.

[13] I will now consider whether the records meet the three-part test for section 10(1) to apply.

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[2] *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 Co.*).

[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[14] The appellant submits that the records contain commercial and financial information. The city disagrees, and further submits that as the appellant fails the first part of the test for section 10(1) to apply, there is no need to consider the second and third parts.

[15] I will now consider whether the information in issue contains commercial or financial information.

Commercial information

[16] In Order P-493, former Inquiry Officer Fineberg laid the foundation for the meaning of "commercial" information. She wrote:

> Although previous orders have dealt with the issue of whether information is "commercial" information, no one definition has been adopted.
>
> The Concise Oxford Dictionary (8th ed.) defines "commercial", in part, as follows:
>
> "of, engage in, bearing on, commerce"
>
> "Commerce" is defined, in part, as:
>
> "exchange of merchandise or services ... buying and selling"
>
> Black's Law Dictionary (5th ed.) defines "commercial" as:
>
> relating to or is connected with trade and traffic or commerce in general; is occupied with business and commerce; generic term for most aspects of buying and selling.
>
> In line with the narrow construction of the various categories of information contained in section 17, the term "commercial" should be interpreted as being distinct from the term "financial" or "trade secret".
>
> In my view, commercial information is information which relates solely to the buying, selling or exchange of merchandise or services.

[17] This characterization of commercial information as information that relates solely to the buying, selling or exchange of merchandise or services has been adopted in subsequent orders. This term has been applied to both profit-making enterprises and

non-profit organizations.[4]

[18] While not an exhaustive list, the types of information that fall under the heading "commercial" include price lists, lists of suppliers or customers, market research surveys, and other similar information relating to the commercial operation of a business.[5]

Parties' submissions

[19] The appellant submits that the information contained in, and the focus of, the records in issue is a contractual relationship between the city and the appellant, under which the city has made child care subsidy payments to the appellant. They say the information therefore relates to the buying and selling of child care services, so it qualifies as commercial information.

[20] The city says the report does not contain commercial information. It says that the sole purpose of the report is to determine whether the appellant's enrolment and payment practices comply with its policies and procedures. It says the report does not contain information on the number of children enrolled, the costs of enrolment, the "per diem" rate or any other information about the "buying and selling" of child care services and therefore does not contain commercial information.

[21] I will first consider whether the correspondence contains commercial information, before considering the report.

Correspondence

[22] I find Order PO-2675[6] helpful in considering whether the correspondence contains commercial information. That order considered whether a regulator's records of student complaints about private training colleges was commercial information. Adjudicator Bhattacharjee found that the records of complaints that related to the quality of the private career college academic programs or instructors qualified as commercial information because the information was directly related to the service or product sold by the private career colleges, in that instance, targeted career education. Other types of complaints, such as complaints of harassment by instructors, were found not to be commercial information. Order PO-2675 demonstrates that opinions or findings about how services have been delivered can relate to the provision of those services and therefore can be commercial information.

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[4] Order PO-2010.

[5] Order 16.

[6] 2008 CanLII 31788 (ON IPC).

[23] Here, the city's investigation related to how the appellant delivered services it had contracted with the city to provide. Some information in the correspondence describes particular aspects of the appellant's service delivery that were the subject of the city's investigation. I am satisfied that where the correspondence describes or refers to particular aspects of the appellant's service delivery, that this information is commercial information, because it is information that relates to how the appellant delivered childcare services under an agreement with the city.[7] I find this is consistent with the approach taken in Order PO-2675.

[24] However, much of the information in the correspondence is not commercial information because the information does not relate to the manner in which the appellant delivers services. The emails are largely administrative and procedural in nature, for example, the city and the requester communicating about what stage the city's investigation is at, or the city arranging meetings with the appellant to discuss the investigation. Such communications disclose nothing related to the appellant's service delivery and therefore do not qualify as commercial information.

Report

[25] Most of the information in the report is commercial information because it describes or contains opinions about how the appellant, as a party to a contract with the city to provide childcare services, was conducting aspects of its operations.

[26] In particular, most of the information under a heading "Background" is commercial information because it contains detailed information about a complaint made about the manner in which the appellant was delivering its services. I find this information is analogous to the complaints found to be commercial information in Order PO-2675.

[27] Most of the remainder of the report comprises the city's view of how the appellant was conducting aspects of its childcare operations. In my view, to the extent the record contains details about how the appellant delivers its services, that is sufficient for it to fall within the definition of commercial information. This includes information about the services offered by the appellant, including the number of facilities it operates, the number of children it is licensed to care for, and whether its facilities have contracts with the city to provide services for a fee subsidy. The headings "Issue Identified", "Findings" and "Conclusions" recur several times in the report as particular aspects of the city's investigation are discussed. The information under these headings includes summaries of each issue investigated, a detailed assessment of the appellant's conduct, including the city's assessment of whether the appellant was complying with its contractual and legislative obligations, and the city's conclusions from its assessment. This information falls within the definition of commercial information

[7] Information on pages 1, 5, 6, 8, and 9 of 10 and some information on pages 1 and 2 of 3.

because it describes aspects of the appellant's service delivery or comments on how the appellant, who is in the business of delivering childcare services, has been delivering those services. A summary of some of this information under the heading "Summary of Key Findings" is also commercial information.

[28] Information under the heading "Recovery Amounts" also contains commercial information because it reveals information about the appellant's business operation.

[29] Not all of the information in the report is commercial information. Some information that does not fall within that definition is information under the recurring headings "relevant Children's Services Policy Statement(s)" which contains extracts from or summaries of city expectations or standards for child care providers. These are generic statements of expectations that do not cast light on how the appellant delivers services. Some information in the recurring methodology sections of the investigation report is not commercial information. The information describes particular steps taken by the city in its investigation that does not reveal or relate to the provisions of services by the appellant. Other information in the report that is not commercial information is the report's table of contents page.

[30] Given my findings below on the second and third parts of the section 10 test, it is not necessary to identify with further precision the information in the report that is and is not commercial information.

Financial information

[31] 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.[8] It includes information regarding the monetary resources of a third party, such as the third party's financial capabilities, and assets and liabilities, past or present.

[32] The appellant says the records contain financial information about it including information which informs the quantum of subsidies it received from the city.

[33] The city lists in its submission the documents the appellant provided it in the course of the investigation, including T4s for certain employees, organizational charts and minutes of staff meetings. It says that those documents, including any documents containing financial information in them, are not at issue in this appeal, are not part of the responsive records to the request, and the content of any of those documents has not been included in the report. It says the only financial information in the report is the amount of overpayment of childcare subsidies by the city to the appellant. The city's

[8] Order PO-2010.

position is that the amount is an aggregate figure from which it is not possible to calculate childcare or "per diem" rates or specific subsidy information. It is the city's submission that this information does not belong to the appellant but to the city and its taxpayers.

Correspondence

[34] Having reviewed the records and the submission of the parties I am satisfied that some information in the correspondence is financial information. Specifically, a letter at page 10 of 10 in the correspondence contains some information about a specific payment by the appellant to the city which is financial information. I note that in its submissions to this inquiry the city takes the position that this information could be withheld under section 12 (solicitor client privilege), though it had not initially taken that position. I will discuss this further when discussing the application of section 12 to the records.

[35] I find there is no other information in the correspondence that meets the definition of financial information.

Report

[36] I find that information under the recurring heading "recovery amount" ("recovery amounts" on page 5) in the report is financial information because it reflects the city's assessment of specific financial liabilities of the appellant. This information appears at pages 5, 7, 10, 12, 13 and 14 of the report.

Summary: commercial or financial information

[37] I find that some information in the correspondence is commercial information. A letter in the correspondence contains one piece of financial information.

[38] Much of the information in the report is commercial information. Some of the information relating to recovery amounts is financial information.

[39] The remaining information is not commercial or financial information and therefore cannot fall within the scope of section 10(1).

[40] I will now consider whether the information I found was commercial or financial information was supplied in confidence.

Part 2: supplied in confidence

[41] To satisfy part 2 of the three-part section 10(1) test, the appellant must prove that any commercial or financial information contained in the records at issue was "supplied" to the city "in confidence," either implicitly or explicitly.

[42] I will start by determining whether the commercial and financial information in the records at issue was "supplied" to the city. If I find that this information was "supplied" to the city, I will then determine whether it was supplied "in confidence."

Supplied

Parties' submissions

[43] The city's submissions do not directly address this second part of the section 10(1) test, because of their position that the records do not contain any commercial or financial information. However, the city's submissions about whether the records contain commercial or financial information are relevant to the issue of whether information was supplied. The city refers to documents, listed at pages 3-4 of the report, which the city says the appellant provided to it to conduct the investigation. The city says however that "the content of these documents has not been included in the investigation report in any way." It also says that certain information at page 5 of the report it identifies as financial information belongs not to the appellant but to the city and in turn, to taxpayers.

[44] The requester also does not directly refer to the supplied in confidence element in his submission. However, his submission states that the information was not voluntarily provided by the appellant, but that the appellant was required to provide it as a condition of receiving funds and as part of the city's efforts to assess and ensure compliance by the appellant. He says that the city is obliged to monitor, inspect and ensure compliance with conditions of the license and with the *Day Nurseries Act*. He also says that the operator is obliged to provide documentation that satisfies the conditions for maintaining the license and for receiving monies when eligibility is proven. He says such information is a prerequisite for receiving funds under contract. Further, he says the city must ensure compliance and to do that requires documentation and onsite verification. These submissions are relevant to the issue of whether records referred to in the report were supplied or not.

[45] The appellant's submissions directly address whether the correspondence and the report were supplied. The appellant says that the report is the product of a review of information, including information supplied by the appellant, and notes that the report itself references information supplied by it to the city. It says that the information supplied by the appellant is indivisible and incapable of severance from the report, therefore the report must be considered to be supplied by the appellant.

[46] In its reply submissions the appellant says the fact that information in the report has been processed, does not cleanse it of section 10(1) protections. It submits that information in the investigation report can be reverse engineered, or "unpacked" to reveal the contents of the source information, for example, a competitor could extrapolate from the information in the report information regarding the subsidies the appellant received from the city.

[47] Regarding the correspondence, it says that it is derivative of information in the report which was supplied by the appellant and is therefore entitled to be treated as supplied. The appellant says that the correspondence also contains additional information voluntarily supplied by the appellant's agent on its behalf.

Meaning of "supplied"

[48] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[9] In *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*[10] the Divisional Court upheld Order PO-2226, which had found that section 17(1) of *the Freedom of Information and Protection of Privacy Act*, the equivalent to section 10(1) of the *Act*, "is designed to protect the confidential "informational assets" of private businesses or other organizations from which the government receives information in the course of carrying out its public responsibilities."

[49] Information may qualify as "supplied" if it was 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.[11]

[50] In Order 16, former Commissioner Sidney Linden considered the meaning of "supplied" in dealing with a request for annual audit inspection reports prepared by inspectors under the *Meat Inspection Act*. In that case, he found that an inspector's assessment of a meat packer's operation, was not "supplied" by the affected persons, but rather, that the ministry obtained the information itself through inspections required by statute. The Commissioner quoted from the then recent decision in *Canada Packers Inc. v. Canada (Minister of Agriculture)* [12] to support this position. In *Canada Packers* the requesters made an access request for federal government meat inspection team audit reports about certain meat packing plants. The third party, Canada Packers Inc., resisted disclosure of the reports. The court discussed the meaning of the phrase "supplied to a government institution" in s. 20(1)(b) *Access to Information Act* and MacGuigan J. (as he then was) made clear that the portions of the audit reports in issue that comprised judgments were not supplied, saying the following:[13]

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[9] Order MO-1706.

[10] 2005 CanLII 24249 (ON SCDC).

[11] Orders PO-2020 and PO-2043.

[12] [1989] 1 F.C. 47. See also Order 16.

[13] At para. 12 (F.C.J.).

> Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts, and therefore paragraph 20(1)(b) is irrelevant in the cases at bar.

[51] In addition to inspector or auditor judgments not being considered to be supplied, factual information in an inspection report may also not be supplied because it is obtained through independent inquiry by the auditor, rather than being supplied in confidence by the inspected entity. Viewed this way, the inspector of their own initiative takes or gathers information from the entity or its information systems, and uses this information to complete the inspection report. The inspector is not merely reviewing information supplied to the inspector by the inspected entity. To do the latter could undermine the rigor of the inspection, which requires independent inquiry and fact gathering to inform an independent assessment of an entity. Order PO-1707 illustrates the application of this analysis to records. It dealt with a request for, among other records, an inspection report prepared by a ministry employee pertaining to an appellant's coke oven operation. Order PO-1707 considered Order 16 and the quote from *Canada Packers* above, but also Order P-952, in which former Adjudicator Fineberg dealt with records which had been obtained by a search warrant. It was noted that in Order P-952 Adjudicator Fineberg analogized obtaining records through investigations or inspections to cases in which they are obtained through search warrants, stating:

> The fact that [records] were received by virtue of a search warrant, in my view, makes them more analogous to information obtained by an institution itself, through investigations or inspections, than to information provided to an institution pursuant to a mandatory reporting requirement.

[52] In Order PO-1707, after considering the interpretation of the term "supplied in confidence" and reviewing the records and the representations, the adjudicator concluded that the appellant did not provide the information in the inspection report to the ministry. Rather, the appellant provided access to its premises in order to enable the ministry's employees to conduct an investigation into the appellant's coke ovens.

[53] Despite these considerations, which suggest information in an inspection report is commonly not supplied, the content rather than the form of the information is the important factor.[14] It is not simply that information is in an inspection or audit report that means that the information is not "supplied," but that such a report is generally

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[14] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 (CanLII), at para. 157.

comprised of either an inspector or auditor's judgment or information obtained by the inspector's own inquiry. Even in *Canada Packers*, as the excerpt quoted above records, some information in the audit reports was found to be supplied.

[54] Order MO-1893 illustrates how some information in a report can be supplied even when most is not. The record in issue was an audit report. After considering Order 16 and the quote from *Canada Packers* above, most information was found not to reveal or contain information "supplied" by the appellant. This included the portions of the audit report discussing the results of the institution's auditors' review and testing of the appellant's records, and interviews with the appellant's employees. Information in the report that was found to be supplied comprised internal audit reports that had been completed by the appellant and appended to the institution's report and the parts of the institution's report where the contents of the appellant's own reports were reproduced.

[55] Therefore, though the report in issue here was drafted by the city, it can still contain "supplied" information because the report can include (or repeat) information extracted from documents which were "supplied to" the institution by the appellant. It is the appellant's submission that in fact none of the information in the report can be separated from information it says it supplied.

[56] I will now consider whether the commercial and financial information in the correspondence and report was supplied. In light of the appellant's arguments about the relationships between the report and the correspondence, I will consider the report first.

The report

[57] The appellant acknowledges that the report itself is not supplied, as it was clearly drafted by the city, but says that the report is comprised of supplied information.

[58] The report describes some records listed in it as being "provided by the [appellant]." It is not clear from the evidence whether those records were provided on the appellant's own initiative, whether the appellant provided the records voluntarily but in anticipation of the city exercising a power to compel the information, or whether the appellant provided the records only in the sense that the city exercised powers pursuant to a contract or under legislation to take the records from the appellant. The city's submissions do not provide that level of detail. I note that the city's submissions refer to it being a "delivery agent" under the *Day Nurseries Act* and a "consolidated municipal service manager" responsible for managing child care services. As the requester discusses in its submissions, the *Day Nurseries Act* (and its successor[15]) provide the city

[15] That Act has subsequently been repealed, its successor legislation, effective August 31, 2015 is the *Child Care and Early Years Act* under which municipalities like the city are now a "service system manager."

with the power to enter agreements that could in turn empower the city to inspect, and compel for inspection, records from child care providers like the appellant. This makes it possible that the records "provided by the [appellant]" were compelled by the city and would therefore, following the orders and cases discussed above, not be supplied to the city for the purposes of section 10(1). Certainly this is the thrust of the requester's submission. While not directly referring to the supplied element it says the appellant was required to provide information as a condition of receiving funds and as part of the city's efforts to assess and ensure compliance by the appellant. It specifically refers to the city's obligations to monitor, inspect and ensure compliance with conditions of the license and with the *Day Nurseries Act*.

[59] However, the city refers to these records as being "provided by the [appellant]" in the report itself and its *submissions* also state the referenced records were provided by the appellant. The appellant's submission is that these records were voluntarily supplied by it to the city for the purpose of section 10(1). Therefore, I will proceed on the basis that those records the report describes as being "provided by the [appellant]" were supplied to the city for the purpose of section 10(1) ("supplied records").

[60] The appellant's argument is that the supplied records are indivisible and incapable of segregation from the report and its conclusions and that therefore the report is supplied for the purpose of section 10(1). The city's submission is that "the content of [the supplied records] has not been included in the investigation report in any way." The city does not elaborate on this further, except to restate the purpose of the report and to state that the more detailed information in the supplied records such as enrollment numbers is not contained in the report.

[61] I do not accept the appellant's submission that the supplied records are indivisible and incapable of severance from the report and its conclusions and that therefore the entire report is supplied for the purpose of section 10(1) for several reasons.

[62] First, the appellant has not provided evidence of the link between the supplied records and the report necessary to establish that the report reproduces, contains or reveals the content of the supplied records. The supplied records are not before me and the appellant has not provided any detail about the content of them. I only have information about their content from the short description of them in the report. From this description, several of the supplied records appear to comprise background information about the appellant, for example organizational charts and bylaws. The report contains little in the way of background information of this sort, being comprised mainly of the city's expectations as found in city policy statements, and findings regarding the appellant's compliance with those expectations. The notable exception to the supplied records being characterized as background information are attendance records and admission and withdrawal forms, which, as I will discuss further below, appear to have been important in creating the report.

[63] Without evidence of the connection between the supplied records and the report I cannot conclude that the report contents are indistinguishable from the supplied records. This is particularly so because, as the appellant acknowledges in its submissions, the report itself cites multiple other sources of information as forming the basis of the investigation other than the supplied records, including interviews and the city's own budget and program files. In particular, it is clear to me from the format and content of the report that in regards to source documents, the city drew heavily on its own policies, standards and records regarding the appellant in creating the report.

[64] I have also considered the city's submission that "the content of [the supplied records] has not been included in the investigation report in any way". The point of the city's submission I believe is to distinguish between the report containing information from the supplied records and the report containing analysis and findings which may be in part based on, but which do not reveal, the actual content of any supplied records. As I have already noted, the report largely comprises the city's assessment of the appellant's practices; information that would not appear in the supplied records. The supplied records are, at most, more akin to raw data or facts.

[65] Ultimately, the report is almost entirely comprised of the city's own fact-gathering, analysis, and judgment regarding the appellant's business practices. Therefore, the analysis and judgment that comprises the bulk of the report cannot have been supplied by the appellant.

[66] However, a close review of the content of the report reveals some small portions of the report that I conclude reproduce or reveal information in the supplied records. For example, the report contains quotes from a parent handbook, and parent handbooks are records that are listed in the report as supplied records. Information in the report reproduced from the parent handbook is therefore supplied. There is a small amount of information about staff on page 8 of the report that the report suggests comes from staffing records that were supplied. The report also reproduces information about attendance numbers. It is apparent from the context in which these attendance numbers appear that the information comes from attendance records, which are also supplied records. The attendance numbers information in the report can be attributed to the supplied records because the "detailed methodology" section, which describes how the city reached conclusions about some of the issues covered in its investigation, acknowledges that a review of attendance records was part of the methodology for examining particular issues in the investigation. This supports the conclusion that where detailed factual information about attendance appears in the report it is reproduced from these supplied records.

[67] The information in the report that I find is supplied because it comes from attendance records comprises a small portions of the report. Most references to attendance are findings or evaluative statements that may have been informed by a review of the supplied records but do not disclose or allow an accurate inference about the contents of the attendance records.

[68] In summary, I do not accept the appellant's submission that the supplied records referenced in the report are indivisible and incapable of severance from the report and its conclusions. Other than the specific records referenced above, I do not have sufficient evidence about the content of the supplied records that enables their contents to be linked to the content of the report. The description of the supplied records in the report, suggest most of the supplied records are background documents, the contents of which are not reproduced in the report. Further, it is clear from the report itself that the city drew from sources other than the supplied records to create the report. Finally, there is the city's submission that none of the supplied records appear in the report. This is true to the extent that the report largely comprises the city's own judgment or analysis.

[69] However, as described above, a close review of the report reveals small amounts of information that are direct quotes from supplied records such as the parent handbook, or which, in context, reveal information from supplied records, namely attendance records and some information about staff. These small portions of the report are therefore supplied for the purpose of section 10(1).

[70] Lastly, with respect to the portion of the report that summarizes the details of an anonymous complaint, I find below that this information was not "supplied in confidence" and that it therefore does not qualify for exemption under section 10(1).

The correspondence

[71] As noted above, the appellant says that the correspondence is supplied because it is derivative of information in the report the appellant supplied and therefore entitled to be treated as though it were supplied. They also say that the correspondence contains additional information voluntarily supplied by the appellant's agent on its behalf.

[72] In regards to the additional information, the appellant does not provide further particulars on what additional commercial or financial information is supplied in the correspondence.

[73] It is clear that much of the correspondence is not supplied. Some of the emails comprise communication between the city and the requester about the investigation of the appellant and, as discussed above, do not disclose substantive information about the appellant's operations. There is no information supplied by the appellant in these emails except for a news release made by the appellant attached to an email sent by the appellant to the city. While that news release does contain information supplied by the appellant, it clearly lacks a confidential character. It is written in the style of a news release, contains the words "FOR IMMEDIATE RELEASE" at the top of the record and the name and phone number of a contact for the appellant at the bottom. I note that the one piece of financial information that appears in a letter is not supplied, because the amount was generated by the city as a result of its own analysis. I also note that

although the letter refers to receipt of money, it is the money that is supplied to the city, not the information itself.

[74] There is one email from the appellant to the city (at page 6-7 of 10) that is clearly supplied but the commercial information in it is not, as it only restates the nature and scope of the city's investigation, which is information that was determined by the city, not supplied by the appellant. Clearly the appellant did not supply the terms or determine the scope of the city's investigation; the city determined the scope of its own investigation.

[75] Page 1 and 2 of 3 contain email exchanges between the appellant and the city. The emails from the appellant are supplied. There is one small piece of commercial information in one of the appellant's emails at page 2 of 3.

[76] Next I will consider whether the small amount of commercial or financial information I found was supplied, was supplied in confidence.

In confidence

[77] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[16]

[78] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[17]

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[16] Order PO-2020.

[17] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

Report

[79] The appellant submits that it supplied the records to the city on the understanding that the information supplied was to be held in confidence, and used only for assisting in the completion of the report.

[80] Neither the city nor the appellant directly address whether the supplied records were provided confidentially. However, the requester observes that the city publishes a list of all the licensed day care centres on its website and ranks them according to a list of criteria. The suggestion is that this publically available information is based on the sort of information the appellant claims it supplied.

[81] In relation to the small amount of information in the supplied records that I found was reproduced in the report or revealed information in the supplied records I find that some of the information was not supplied in confidence because it is publically available. Parent Handbooks, for example, are obviously distributed to parents of children attending the appellants centres, resulting in a wide distribution which makes it difficult to conceive of their contents as confidential. Of the information in the report that there is sufficient evidentiary basis to conclude contains or allows an accurate inference about supplied records, the information that I accept as objectively confidential in nature is some information about staff on page 8 of the report that the report suggests comes from staffing records that formed part of the supplied records, and information in one bullet on page 9 that I find allows an accurate inference about attendance records that were also part of the supplied records. As noted above, while the report contains other references to attendance, there is insufficient evidence to link those references to the contents of a supplied record or to conclude that the information allows an accurate inference about a supplied record. Much of the discussion of attendance is in the context of making findings, which are based on the city's own records and investigation.

[82] The complaint information in the report was provided anonymously, but there is no evidence before me that it was supplied confidentially. The fact that the complainant wished to be anonymous suggests that they provided it with the expectation it would be shared, certainly with the appellant and perhaps others. Further, the city did in fact share the information with the appellant and it is in the report which was shared with the appellant. If the city had considered the supplied information to have been supplied in confidence it would likely have not shared it with the appellant and certainly not in the report, when there was a reasonable prospect the report would be shared with others. I therefore conclude that the complaint information was not supplied in confidence.

Correspondence

[83] The appellant submits that the information supplied was provided to the city on the understanding that it was to be held in confidence and only used to assist in

completing the report.

[84] The appellant states that as the correspondence was for the purpose of preparing a memorandum of settlement (a record withheld by the city and not in issue in this appeal) it is part of a continuum of records which were supplied in confidence and treated by the city and the appellant as confidential.

[85] I found above that the only piece of commercial or financial information in the correspondence that was supplied appears in an email from the appellant to the city at page 2 of 3. I accept that this piece of information was supplied in confidence to the city in the context in which it appears. However, the information in issue is referenced in the news release, and it is apparent from the requester's submission that it knows the information, which evidence together supports my conclusion that the information is objectively not of a confidential character.

[86] In summary, there are two pieces of information that contain commercial information that was supplied in confidence, both are contained in the report. I will now consider the final part of the section 10(1) test for those two pieces of information and also consider generally the appellant's evidence of harms.

Part 3: harms

General principles

[87] The party resisting disclosure must provide evidence about the potential for harm. In two decisions of the Supreme Court of Canada,[18] the Court described the exception as requiring a reasonable expectation of probable harm from disclosure of the information.[19] As the Court noted, the wording of a provision requiring a "reasonable expectation of harm" tries to mark out a middle ground between that which is probable and that which is merely possible.[20] An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground.[21] The inquiry is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and

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[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) and *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII) ("Merck Frosst").

[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*.

[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*.

[21] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst* at paras. 197 and 199.

"inherent probabilities or improbabilities or the seriousness of the allegations or consequences."[22]

[88] The failure of a party resisting disclosure to provide evidence to meet this standard will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[23]

[89] In the present case, the appellant submits that the disclosure of the information at issue would result in significant prejudice to its competitive position (section 10(1)(a)) and/or result in it suffering undue loss (section 10(1)(c)).

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

[90] The appellant submits that disclosure of the records would significantly prejudice its competitive position. It submits that its business, as a charity, is to perform services for the community on a not-for-profit basis. It says that to perform its services it needs to maintain the confidence of the members of the community it serves. It says disclosing the records would damage its reputation and erode the community confidence that it has established over many years. It says this decline in confidence will result in reduced donations which may imperil funding for critical community programs which will have a compounding effect on revenue generation in the future, causing further detriment to the community.

[91] The requester's submission observes that the fact of the city's investigation is a matter of public record. It says that the city's investigation of the appellant was reported in a major newspaper and that the appellant itself has convened several public meetings regarding the investigation. That the investigation is public information is supported by the appellant's news release regarding the investigation that is part of the records.

[92] I find that the evidence of the appellant does not meet the standard for establishing the named harm to the requisite standard. The appellant's evidence is speculative, lacks specifics, and lacks evidence of the link to the specific harm it claims will occur from disclosure, namely prejudice to its competitive position. For example, the appellant has not provided any evidence about the competitive environment in which it operates or its competitors.

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[22] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at para. 54 citing *Merck Frosst*, at para. 94, citing *F.H. v. McDougall*, 2008 SCC 53 (CanLII), at para. 40.

[23] Order PO-2435.

[93] In any event, only the information that I found met the first two parts of the three-part section 10(1) test needs to be weighed when considering harm. I do not find there is sufficient evidence that harm could result from disclosure of the small amounts of information that meet the first two parts of the section 10(1) test.

[94] Specifically, for the commercial information that I found was supplied in confidence I do not consider the harms threshold is met. One piece of information names two staff members of the appellant. I do not consider any harm will flow from disclosure of these names, which information may well be already publically available. The other piece of information reveals attendance numbers for a particular week at the appellants' centre in 2010. Given the information relates to only one week, that the week was during March break when attendance at the child care facility was atypical, and the historic nature of the record, I do not consider that disclosure of this information will cause harm to the appellant. While disclosure of attendance numbers more broadly and that are more current might disclose commercial information that could give competitors useful information and potentially lead to harm, this small snippet of information is not of that type.

[95] While I found that no commercial or financial information was supplied in confidence in the correspondence, I observe that the one piece of commercial information that I consider was supplied, even if it were supplied in confidence, does not meet the threshold for harm. The information is of a general nature, and similar information is contained in one of the appellant's own news releases, so I do not find that disclosure of the supplied information meets the threshold for harm. I further observe that, disclosure of the correspondence, which is mostly administrative in nature, for example arranging meetings and updating on progress, does not have the potential to cause harm of the type contained in section 10(1).

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

[96] The question under section 10(1)(c) is whether disclosure of the record could result in undue loss or gain to any person, group, committee or financial institution or agency.

[97] As I found above, I find the appellant's evidence speculative and lacking in the specifics sufficient to establish harm to the required standard. The appellant does not address this harm separately from its submission above.

[98] The harm the appellant points to occurring as a direct result of disclosure is damage to its reputation and erosion of the community's confidence in it. This it suggests will then lead to a cascading series of additional harms. I observe that the appellant does not provide evidence to suggest that any damage to its reputation and erosion of confidence in the community would be undue. To the extent the report contains negative findings about the appellant that cause the impact the appellant states, I do not consider this would be undue. Further, as the requester has observed,

the fact of the investigation and some information about its outcome is already a matter of public record. The appellant has not provided any evidence to suggest that disclosure of the record would cause it harm of the type it describes beyond that which may already have occurred as a result of the information about the investigation already being in the public realm.

[99] In summary, I do not find that section 10(1) applies to any of the information in issue.

Issue B: Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[100] 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) and includes the following relevant excerpts:

> "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,
> >
> > …
> >
> > (h) the individual's name if 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;

[101] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information.

[102] The city withheld some information on page 2 of 3 in the correspondence relating to an individual's vacation plans, that information is not at issue in this appeal.

[103] The appellant identified one piece of information at page 8 of the report that it submitted was personal information because it revealed the marital status of an individual and, indirectly, the identity of another individual. It submitted that the information was personal information for the purposes of the *Act* because marital and family status are listed as examples of personal information under the definition of personal information in the *Act*. In it's submissions the city agreed with the appellant that the information on page 8 identified by the appellant was personal information. I agree with the analysis of the appellant and the city that this information is personal information.

[104] The parties do not submit that any other information in issue is personal information, and I am satisfied that no other personal information is contained in the records.

Issue C: Does the mandatory exemption for personal privacy (section 14(1)) apply to the records?

[105] 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.

[106] The appellant submitted that disclosure of the personal information described above (at page 8 of the report) would be an unjustified invasion of personal privacy under section 14(1).

[107] In it's submissions, the city agreed with the appellant that section 14(1) applied to information at page 8 of the report and decided to withhold it. I agree based on my review of the records that section 14(1) requires the city to withhold the information it agreed in its submission to withhold on page 8 of the report. In the absence of submissions from the requester on this, and on my review of the information at issue, I find that there are no factors in favour of disclosing the information, and that disclosure of it would be an unjustified invasion of personal privacy under section 14(1).

Issue D: Is the appellant able to claim the discretionary exemptions in section 8 and/or 12 and if so, do either or both of these sections apply to the records?

[108] The appellant's initial submissions argue that the section 8(1)(a), (b) and (c) and section 12 discretionary exemptions apply to some of the records in issue in this inquiry, though the city had not claimed them for the records at issue before me.[24] The appellant also states that the city has failed to appropriately exercise its discretion in not applying the exemptions to the records.

[109] As a result of the appellant's submissions that the section 8 and 12 discretionary exemptions applied to the records, the city and the requester were invited to make submissions on whether, as a third party, the appellant was entitled to raise the possible application of a discretionary exemption. In particular, the parties were invited to address why or why not this appeal might constitute the "most unusual of circumstances," which was cited as the threshold for the IPC to permit the appellant to raise a discretionary exemption. The appellant was then invited to reply to the city and requester's submissions.

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[24] The city has withheld some other records responding to the request under section 12, and they are not in issue in this inquiry.

[110] The parties provided submissions on these issues, which I review below.

Introduction

[111] The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption requires that a head of an institution "shall" refuse to disclose a record if the record qualifies for exemption under that particular section. Discretionary exemptions provide that a head "may refuse to disclose…." With discretionary exemptions, the *Act* expressly contemplates that the head of an institution is given the discretion to claim, or not claim, these exemptions.

[112] Generally, affected parties and third party appellants have not been permitted by the IPC to claim discretionary exemptions not relied upon by an institution. This office's approach to the issue of whether an affected party is entitled to rely on a discretionary exemption not raised by the institution was recently summarized in Order PO-3601:[25]

> As a general rule, the responsibility rests with the head of an institution to determine which, if any, discretionary exemptions should apply to a particular record. The Commissioner's office, however, has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme. In discharging this responsibility, there may be rare occasions when the Commissioner or his delegate decides that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal. This result would occur, for example, where release of a record would seriously jeopardize the rights of a third party.

[113] In other IPC decisions, the following quote from Inquiry Officer Anita Fineberg in Order P-1137 is the origin of a "most unusual of circumstances" phrase that has been cited as the test for allowing an affected party to raise a discretionary exemption not claimed by the head of an institution:

> Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

The threshold for raising discretionary exemptions

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[25] At para. 89, quoting Order M-430 and referring to Orders P-257, M-10 and P-1137.

[114] The city submits that the statement in Order P-1137 above that "the purpose of the discretionary exemptions is to protect institutional interests" is incorrect. It states that it is clear that some discretionary exemptions protect other interests, in addition to an institution's interest. It cites as examples, cases where the law enforcement and solicitor-client privilege exemptions[26] were recognized as serving a broader public interest.

[115] On this basis, the city submits that the "most unusual of circumstances" threshold applied in previous orders is not the correct threshold, and argues that a "reasonable basis for relevance" test should be adopted as the threshold for allowing third parties to raise discretionary exemptions.[27]

[116] I accept the city's position that the discretionary exemptions are capable of serving a broader public interest or the interests of a party other than the institution. As the Supreme Court of Canada stated in relation to the law enforcement exemption:

> "The main purpose of the exemption is clearly to protect the public interest in effective law enforcement. However, the need to consider other interests, public and private, is preserved by the word "may" which confers a discretion on the head to make the decision whether or not to disclose the information."[28]

[117] I note that the public interest will often, but not always, overlap with an institution's interests.

[118] While recognizing the various interests that can be protected by the discretionary exemptions, I will continue to apply the threshold test established by this office as set out in M-430. My reasons for doing so follow.

[119] To begin, as the purposes of the *Act* set out in section 1 make clear, the *Act* is designed to promote access to information, while recognizing that limited and specific exemptions from access are needed to protect various interests, including personal privacy. More specifically, the *Act* achieves this balancing in the scope of the exemptions to access it provides, and who is empowered to determine whether an exemption applies and will be applied to requested records. The *Act* clearly identifies

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[26] In the Supreme Court of Canada decision in *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23 (CanLII), and in respect of the solicitor-client privilege exemption (section 12 of the Act) in the Ontario Court of Appeal decision in *Ontario (Liquor Control Board) v. Magnotta Winery Corp.,* 2010 ONCA 681 (CanLII).

[27] The city argues that such a test would better recognize that interests of parties other than the institution may be at stake when considering an access request.

[28] *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23 (CanLII) at para. 47.

that the head of the institution has the authority to determine whether to apply discretionary exemptions to requested records[29] and this has been recognized by the Supreme Court of Canada, even while recognizing that the exemptions may primarily serve the public interest.[30] As Order MO-2635 observes, an affected party's concerns stand to be addressed in the very existence of the discretionary exemptions which the institution should consider and, at its discretion, apply when making a decision regarding an access request. The *Act* does not prevent institutions from considering other affected parties' interests before responding to an access request,[31] in fact that is part of the institution's function. The city's detailed submissions about the factors they weighed in reaching their decision to disclose the records in issue, is a good example of an institution exercising its obligations under the *Act*. The city's submissions outline how it considered the application of the section 8 and 12 exemptions, including the interests of the appellant, before making its decisions regarding the records.

[120] Further, section 39(1) of the *Act* identifies the only parties who can appeal a head's decision to this office. It reads:

> A person may appeal any decision of a head under this Act to the Commissioner if,
>
> > (a) the person has made a request for access to a record under subsection 17(1);
> >
> > (b) the person has made a request for access to personal information under subsection 37(1);
> >
> > (c) the person has made a request for correction of personal information under subsection 36(2); or
> >
> > (d) the person is given notice of a request under subsection 21(1).

[121] Section 21(1), referenced in section 39(1)(d), reads:

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[29] See section 19 and the wording of the exemptions, excepting the mandatory exemptions in sections 10 and 14. See also *Ontario (Public Safety and Security) v Criminal Lawyers' Association*, 2010 SCC 23 (CanLII) at para 45 in discussing the law enforcement exemption: "by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head."

[30] See the quote from *Ontario (Public Safety and Security) v Criminal Lawyers' Association,* 2010 SCC 23 (CanLII) at para 47 above and also in that decision at para. 45: "by stipulating that "[a] head may refuse to disclose" a record in this category, the legislature has also left room for the head to order disclosure of particular records. This creates a discretion in the head."

[31] Subject to the need to preserve the anonymity of the requester.

> A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record,
>
> > (a) that the head has reason to believe might contain information referred to in subsection 10(1) that affects the interest of a person other than the person requesting information; or
> >
> > (b) that is personal information that the head has reason to believe might constitute an unjustified invasion of personal privacy for the purposes of clause 14(1)(f).

[122] The *Act* does not provide a universally available process for third parties to appeal access decisions which would allow them to raise discretionary exemptions at the inquiry stage. Under the *Act*, unless an institution notifies a party with a possible section 10(1) or 14(1) interest (as it has in this appeal), a third party cannot appeal an institutions' access decision under the *Act*.

[123] As I have noted above, in determining whether to apply a discretionary exemption, an institution can take into account the interest of third parties. However, the *Act* limits the institution's notification requirements to those set out in section 21(1). Similarly, although the *Act* identifies that another institution may have a greater interest in a record, the *Act* gives the institution that initially receives the request the discretion whether to transfer the request or not.[32] The legislation clearly provides the *head* with the discretion to make an access decision on records, notwithstanding the possible interest others may have in the decision.[33]

[124] Furthermore, as Order M-430 and the subsequent orders following that observe, in the event of an appeal, this office has an inherent obligation to uphold the integrity of Ontario's access and privacy scheme, and can decide that it is necessary to consider the application of a discretionary exemption not originally raised by an institution during the course of an appeal.

[125] Accordingly, I find that the threshold set out in Order M-430 and applied in numerous orders since then is the appropriate standard and I will apply it in the circumstances of this appeal.

Application of the threshold to the circumstances of this appeal

[126] The city submits, that even if the "most unusual of circumstances" threshold

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[32] Section 18(3).

[33] One possible reason why the *Act* proscribes the formal consultative process for access requests in this way could be that access typically must be timely in order to be valuable.

applies, that the threshold is met, because the exemptions raised by the affected party address matters of importance to the public at large. It also states that due to the nature of the records for which the section 12 exemption has been raised, the affected party has a specific interest which the section 12 exemption seeks to protect.

[127] The appellant's submissions do not directly address whether they meet a threshold requirement to raise discretionary exemptions not raised by the city. The appellant's apparent rationale for raising the discretionary exemptions is that the city has failed to comply with obligations to protect the appellant's interests which the city has under an agreement with the appellant. The appellant says the agreement obliges the city to apply any applicable discretionary exemptions to the records in issue. I am satisfied that the city did not enter into an agreement which has this effect.[34] Further, even if the city had entered into such an agreement, it cannot be effective to the extent it attempts to fetter the city's exercise of its responsibilities under the *Act*, which the appellant itself acknowledges in its submissions. Finally, even if such an agreement existed and could be effective, I do not consider that this alone would be a factor that has sufficient weight to meet the threshold, particularly when the evidence before me suggests that the institution has turned its mind to the interests of the affected party before deciding whether to apply the discretionary exemptions in issue to the records.

[128] More specifically, I am satisfied that, in regards to the section 8 exemption, the affected party does not meet the threshold necessary to raise the discretionary exemption. Despite the city's argument that section 8 can be in the public interest, there is nothing to suggest that the city is unaware of, or has failed to consider whether section 8 applies to any records. Even with the benefit of the affected party's submission on section 8 during the inquiry, the city is satisfied that section 8 does not apply to the records. While section 8 might serve a broader public interest, that public interest overlaps with the institution's own interests to a great extent, if not entirely. It would be a rare occasion where an institution does not believe section 8 harms are in play in respect to itself as an institution, but there exists a separate public interest that did need to be protected.[35] Certainly, for the purposes of this inquiry, I am satisfied that such a scenario does not exist. The city's investigation was a fairly routine compliance investigation, of the type regularly carried out by public bodies such as regulators. The city's position is that the appellant's submissions do not establish a sufficient basis that any of the exemptions in section 8 apply to the records generally or to any one of them. From my review of the records, which, as I noted, concern a fairly routine complaint investigation, I am satisfied that there are no matters of public interest separate and

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[34] I cannot elaborate on this finding because of confidentiality concerns.

[35] An example of one of the rare circumstances where another party may raise the discretionary section 8 exemption may be where the institution that received the request does not have an "ongoing law enforcement investigation," but another law enforcement agency does, and disclosure may interfere with that agency's investigation.

distinct from the institution's interest that would merit consideration of the appellant's section 8 arguments further.

[129] I am satisfied that my conclusion accords with the purposes of the *Act* and of section 8.

[130] For largely the same reasons, I am satisfied that the affected party's submissions on section 12 do not meet the threshold to be considered in this inquiry.

[131] As discussed above, the purpose of the *Act*, particularly as revealed in its wording, place the power to apply section 12 to records firmly with the institution receiving the request.

[132] The city says that due to the nature of the records for which the section 12 exemption has been raised, the affected party has a specific interest which the section 12 exemption seeks to protect. The city does not elaborate further on this submission.

[133] I am not satisfied that the issues raised in the current appeal are any different from any other scenario where an institution considers and dismisses section 12 as the basis for withholding requested records. The *Act* clearly grants the head of the institution the discretion to apply that section. The city chose to apply the exemption to some records, including some information in the records in issue, but not to apply the exemption to the remaining information in issue, even with the benefit of the appellant's submissions regarding the application of section 12.

[134] One further observation regarding section 12 relates to the scope of the appellant's argument regarding the application of section 12. The appellant's argument is that section 12 applies to a document that is not at issue in this appeal (because the city has withheld it under section 12) and some correspondence between it and city legal counsel. The appellant does not argue that section 12 applies to the report. Therefore, the records in issue in relation to section 12 only relate to the correspondence. As I found in considering section 10, the correspondence is mostly administrative in nature. The scope and content of the records that remain in issue for the appellant to argue section 12 applies to is very limited, and I am not satisfied based on my review of those records that the disclosure of them raises a significant enough issue to meet the threshold for considering that section 12 may apply to these remaining records.

[135] I am not satisfied that the circumstances of this appeal is a "rare occasion" where it is necessary to permit a third party to raise a discretionary exemption.

[136] The city's initial position was that section 12 did not apply to the records in issue in this inquiry. However, the city changed its position to accept that section 12 may apply to some records at issue after receiving the appellant's submission regarding section 12. It took the view that while section 12 may apply to some of the records it had properly exercised its discretion to disclose them.

[137] Because of the city's revised position with respect to the application of section 12 to the records in issue during the inquiry, and because the appellant takes the position that the city improperly exercised its discretion making this decision, I will consider whether the city properly exercised its discretion regarding the records in issue which it accepts may be subject to section 12.

Exercise of discretion

[138] The section 12 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[139] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[140] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[36] This office may not, however, substitute its own discretion for that of the institution.[37]

Relevant considerations

[141] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[38]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific

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[36] Order MO-1573.

[37] Section 43(2).

[38] Orders P-344 and MO-1573.

    - the privacy of individuals should be protected

- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[142] As noted above, the city conceded during the inquiry that some information in issue could have been withheld under section 12 (in addition to the information it decided to withhold under section 12, which is not at issue in this appeal), but that it exercised its discretion to disclose it.

[143] The appellant's initial submissions regarding the exercise of discretion by the city is that the city failed to exercise its discretion by not according any weight to its submissions, despite a contractual obligation to do so.

[144] The city's submission is that it did properly exercise its discretion, including considering the interests of the affected party.

[145] The city submits that in keeping with previous orders, the city is not required to disprove specific allegations made by other parties with respect to the institutions' exercise of discretion. It is the institution's responsibility to establish that on a balance of probabilities its exercise of discretion did not contain an error.

[146] In its reply submission the appellant says the city has failed to exercise its discretion and that it did so for an improper purpose.

[147] The appellant argues that the city fettered its discretion before the access request was made. To support this position, it cites an email from the city to the requester which suggests the requester consider filing an access request for a record. The appellant says this indicates the city was actively encouraging an access request.

They appellant also says that it was in breach of a confidentiality agreement it entered with the city.

[148] I do not accept the appellant's submissions. The city's actions in advising the requester about its right to make an access request simply pointed out an option that was available to the requester. In my view, such an action is consistent with an institution's contribution to achieving the purposes of the *Act,* by making information available to the public. More importantly, nothing in the city's statements to the requester suggest that it will disclose information that is the subject of a request. In fact at that point, any request, including its potential scope, was a hypothetical future event and outside the control of the institution. The city's correspondence with the requester is no indication of the city's intention not to apply exemptions to records responsive to any request it may receive. In fact, as previously noted, the city did apply exemptions to responsive records and the scope of this inquiry is accordingly limited to the subset of records that the city did not withhold. Further, as is plain, and the appellant's submission appears to acknowledge, the city cannot contract out of the *Act*. While I cannot provide detail without disclosing the content of a withheld record, I am satisfied from the evidence before me that the city knew that it could not contract out of the *Act* and that it made it clear to the appellant that it was not attempting to do so.

[149] Therefore, I conclude that there is nothing before me that suggests the city fettered its discretion by its actions.

[150] It is apparent from the city's submissions that it exercised its discretion. I am satisfied that in doing so it considered relevant factors consistent with the purposes of the *Act* and the section 12 exemption including the interest in protecting solicitor-client privileged communications. Other factors the city cites as factors it considered in its decision are:

- the interests of the affected party in the information
- that disclosing the records could increase public confidence in the city;
- the relative age of the information; and
- the historic practice of the city regarding the type of records in issue

[151] I am satisfied that the city did not base its exercise of discretion on irrelevant factors.

[152] Overall the city's submission demonstrates that in its decision regarding the records it balanced the competing interests in issue. I therefore uphold the city's exercise of discretion in relation to section 12.

ORDER:

1. I order the city to withhold under section 14 of the *Act* the information on page 8 of the report the city agreed in its submission should be withheld under that exemption.

2. I uphold the city's decision to disclose the remaining information in issue in this appeal.

3. I order the city to disclose the information at issue, except the information to which section 14 applies, to the requester by **August 26, 2016**, but not before **August 22, 2016**.

4. In order to verify compliance with provision 3, I reserve the right to require the city to provide me with a copy of the record which is disclosed to the requester.

Original Signed by: July 21, 2016

Hamish Flanagan
Adjudicator