Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3583-I

Appeal MA15-242

City of Windsor

March 28, 2018

Summary: The appellant requested copies of commercial services agreements between the city, an airframe maintenance company and other parties for the provision of services at the city-owned airport. He particularly seeks access to information about job creation obligations on the part of the company and any penalties for not meeting job targets, claiming a public interest in disclosure of this information. The city denied access to portions of three agreements on the ground they are excluded from the operation of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) by virtue of section 52(3)3 (labour or employment relations exclusion), and, in the alternative, based on exemptions at sections 10(1) (third party information) and 11(c) and (d) (economic or other interests) of the *Act.*

In this order, the adjudicator finds that section 52(3)3 does not apply to records about labour or employment-related matters in which the city is not acting as an employer. She finds that section 10(1)(a) applies to discrete portions of the records, and that the public interest override at section 16 does not apply to these portions. She finds that sections 10(1) and 11(c) and (d) do not apply to the remainder of the records, and orders their disclosure. She defers consideration of the appellant's right of access to the name and identifying information about a third party in the records who has not been notified of the appeal.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 10(1), 11, 16, 52(3)3.

Orders and Investigation Reports Considered: Order PO-2569.

Cases Considered: *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner,* 2010 ONSC 991 (Div. Ct.); *Ontario (Solicitor General) v. Ontario*

(Assistant Information and Privacy Commissioner), (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.

OVERVIEW:

[1] The appellant made the following request to the City of Windsor (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I request a copy of the commercial services agreement between the city, [a named airport operator] and the tenant, [a named airframe maintenance company], occupying the Maintenance, Repair and Overhaul building on city-owned airport land.
>
> I request specific information on the number of jobs [the airframe maintenance company] is required to create, if any, at the end of 2013, 2014 and 2015.
>
> As well, I request any job projections throughout the life of the contract. Specifically I request any guarantees of job creation numbers that exist in the contract, and what penalties exist for not meeting job targets.
>
> Finally, I request the wording of any escape clause in the lease, and the quantity of any compensation to the city should [the airframe maintenance company] discontinue or close down its operations at the airport.

[2] The city identified five records as being responsive to the appellant's request. They are:

- Record 1: A services agreement between the city, the airport operator and the airframe maintenance company;
- Records 2 and 3: Amendments to Record 1;
- Record 4: An agreement between the city, the airframe maintenance company and a local development board; and
- Record 5: An agreement between the city and the airframe maintenance company.

[3] The city identified the airport operator, the airframe maintenance company and the local development board as parties whose interests could be affected by disclosure of the records, and notified these parties (the affected parties) of the request under section 21 of the *Act*. In particular, the city invited the affected parties to make submissions on whether the mandatory exemption at section 10(1) (third party information) applies to any of their information contained in the records. All three affected parties made submissions to the city.

[4] The city then notified the appellant and the affected parties of its decision, which was to grant the appellant partial access to responsive records. The city withheld portions of Record 1, and Records 4 and 5 in their entirety, on the basis of the exclusion at section 52(3) (employment or labour relations) of the *Act*. The city agreed to disclose Records 2 and 3 in full.

[5] The appellant was dissatisfied with the city's decision to withhold some of the records, and filed an appeal to the Office of the Information and Privacy Commissioner/Ontario (this office, or the IPC). None of the affected parties appealed the city's decision to disclose some parts of the records to the appellant.

[6] During the mediation stage of the appeal process, the city provided the appellant with copies of the records it had agreed to disclose. The city clarified that it relies on paragraph 3 of section 52(3) to withhold the remainder of the records.

[7] As no further mediation was possible, the appeal was transferred to the adjudication stage for a written inquiry under the *Act*. This office initially sought representations from the city and the three affected parties. In the request for representations, this office invited the city to address not only the claimed exclusion at section 52(3)3, but also any exemptions that the city would claim in the alternative if the exclusion were found not to apply. In addition, as the city had identified that the records might contain information subject to the mandatory exemption at section 10(1), all the parties were invited to address the application of section 10(1) to the information at issue in the appeal.

[8] The city and the three affected parties provided representations, which were shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Portions of the representations meeting this office's confidentiality criteria were withheld from the appellant.

[9] In its representations, the city raised, for the first time, the application of the discretionary exemptions at sections 11(c) and (d) (economic and other interests) of the *Act*, in addition to its section 52(3)3 and section 10(1) claims. The appellant was invited to respond to the representations of the city and the affected parties, which he did. In his representations, the appellant alluded to a public interest in disclosure of the requested information.

[10] In light of this, this office sought reply representations from the city and the affected parties on the application of the public interest override at section 16 of the *Act*, which overrides specified exemptions (including sections 10 and 11) where certain conditions are met.

[11] As the appellant had raised confidentiality issues around sharing his representations, this office withheld all but one paragraph of his representations in seeking reply representations from the city and the affected parties.

[12] The city and the affected parties provided reply representations as requested on

the issue of the public interest override.

[13] This office then sought further representations from the appellant on the city's reply representations. (The affected parties had objected to sharing their representations with the appellant, and these were not provided to the appellant.) The appellant provided sur-reply representations in response.

[14] The appellant's sur-reply representations were then shared, in full, with the city and the affected parties for a further response. The city and the affected parties provided further representations as requested.

[15] This appeal was then transferred to me.

[16] In this order, I uphold the city's decision in part. While I reject the claim that the records are excluded from the *Act*, I find that the exemption at section 10(1) applies to discrete portions of the records, and that the public interest override does not apply to these portions. I do not uphold the city's claim that sections 10(1) and 11(c) and (d) apply to other portions of the records. I order the city to disclose these non-exempt portions of the records to the appellant.

[17] I also defer consideration of the appellant's right of access to the name and other identifying information about an affected party who has not been notified of this appeal, pending confirmation of the appellant's interest in this information.

RECORDS:

[18] At issue in this appeal are the following portions of three contracts:

- Parts of paragraphs 8.02 and 8.03 of Record 1, a services agreement between the city, the airport operator and the airframe maintenance company;
- Record 4: An agreement between the city, the airframe maintenance company and a local development board, including schedules to the agreement, which the city has withheld in full; and
- Record 5: An agreement between the city and the airframe maintenance company, including schedules to the agreement, which the city has withheld in full.

ISSUES:

A. Does section 52(3)3 exclude the records from the *Act*?

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

C. Should the city be permitted to raise a new discretionary exemption outside the 35-day period? If so, does the discretionary exemption at section 11(c) and/or (d) apply? Did the city exercise its discretion under section 11?

D. Is there a compelling public interest in disclosure of exempt information that clearly outweighs the purpose of the applicable exemption?

DISCUSSION:

Background

[19] The city, in its non-confidential representations, provided some background on the events leading to the creation of the records at issue in this appeal.

[20] For many years, the city's economy was dependent on the manufacturing industry. The decline of the manufacturing base in Ontario—and, particularly, the impact on the "Big 3" North American automobile producers—has severely affected the city's economy. The city's unemployment rate has ranked at or near the top for all Canadian cities in recent years.

[21] In response, city council has prioritized economic diversification as a means of job creation. This includes initiatives to develop economic opportunities and relationships with prospective employers, with the aim of attracting business to the city. The resulting agreements can include employment-related obligations. The records at issue in this appeal relate to an initiative to encourage investment and to create jobs at the city-owned airport and in the region. Specifically, they set out the result of negotiations to bring the airframe maintenance company to the city.

[22] The appellant reports that the agreement was linked, in public statements by the city's then-Mayor, to the creation of jobs in the city, and that promises of job creation were used to justify the construction of a $22-million taxpayer-financed airport hangar for use by the airframe maintenance company. The appellant explains that his interest in the records is to confirm the job creation obligations of the airframe maintenance company, and to verify that these have been met.

A. Does section 52(3)3 exclude the records from the Act?

[23] The city and the affected parties claim that the withheld portions of Record 1 and Records 4 and 5, in their entirety, are excluded from the scope of the *Act* by virtue of section 52(3)3.

[24] Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.

[25] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[26] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[1]

[27] This follows from the Divisional Court's interpretation of analogous phrases in the *Act*'s provincial counterpart, the *Freedom of Information and Protection of Privacy Act* (*FIPPA*). In *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*,[2] the court considered the meaning of the phrases "relating to" and "in respect of" as they appear in section 65(5.2) of *FIPPA*. This section states:

> This Act does not apply to a record relating to a prosecution if all proceedings in respect of the prosecution have not been completed.

[28] In allowing the ministry's application for judicial review of an order of the IPC, the court rejected the adjudicator's finding that the phrases "relating to" and "in respect of" in section 65(5.2) mean "for the purpose of, as the result of, or substantially connected to." Instead, applying the modern approach to statutory interpretation, and considering the Supreme Court of Canada's interpretation of the same phrases in other legislation, the Divisional Court in *Toronto Star* concluded that the phrases "relating to" and "in respect of" connote only some connection—and not a substantial connection—between the subjects linked by those phrases.

[29] This office has since applied the court's interpretation in *Toronto Star* to the same and analogous phrases appearing in other exclusionary sections of the *Act* and *FIPPA*.[3] The result is that for the exclusion at section 52(3)3 to apply, the city must establish that:

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[1] Order MO-2589.
[2] 2010 ONSC 991 (Div. Ct.) (*Toronto Star*).
[3] Among others, see MO-2537, MO-2589, MO-3101 and PO-3442.

1. the records were collected, prepared, maintained or used by the city or on its behalf;

2. this collection, preparation, maintenance or use was "in relation to" (or had some connection to) meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the city has an interest.

[30] The records at issue in this appeal are agreements between the city and the company (as well as some additional parties) for the provision of airframe maintenance and other services at the airport. The withheld portions of the records include references to the company's job creation obligations as part of its agreement with the city. I have no trouble finding that the city's collection, preparation, maintenance and use of these records has "some connection" to meetings, consultations, discussions or communications about matters including the creation of jobs in the city.

[31] The question is whether these matters are labour relations or employment-related matters in which the city has an interest, in satisfaction of the third part of the test.

[32] The city submits that, applying *Toronto Star*, the phrase "employment-related matters" in section 52(3)3 has a broad meaning that can include records about the company's obligations to create jobs in the region, which is a matter of interest to the city.

[33] The affected parties provided representations on this issue that were withheld from the appellant for confidentiality reasons. While I will not refer to their representations here, they support the city's submissions, and I have taken them into account in arriving at my decision.

[34] I conclude that section 52(3)3 does not apply to the records. While *Toronto Star* may counsel a broad interpretation of the term "employment-related matters" in section 52(3)3, the scope of the exclusion remains limited to those matters "in which the institution has an interest." I find no basis for the proposition that the whole phrase "employment-related matters in which an institution has an interest" ought to be read so broadly as to encompass matters outside an institution's own workforce.

[35] The Ontario Court of Appeal considered the meaning of the phrase "in which the institution has an interest" in section 65(6)3 of *FIPPA*, the provincial equivalent to section 52(3)3 of the *Act*, in *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*.[4] In that decision, among other findings, the court determined that the institution's "interest" in the labour relations or employment-related matters need not be a legal interest (while agreeing that it must be one of more than mere curiosity or concern).

[4] (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507 (*Solicitor General*).

[36] In arriving at this finding, the court considered the wording of the subsection as a whole:

> As already noted, s. 65 of [*FIPPA*] contains a miscellaneous list of records to which the Act does not apply. Subsection 6 deals exclusively with labour relations and employment-related matters. Subsection 7 provides certain exceptions to the exclusions set out in subsection 6. Examined in the general context of subsection 6, the words "in which the institution has an interest" appear on their face to relate simply to matters involving the institution's own workforce. Subclause 1 deals with records relating to "proceedings or anticipated proceedings . . . relating to labour relations or to the employment of a person *by the institution*" (emphasis added). Subclause 2 deals with records relating to "negotiations or anticipated negotiations relating to labour relations or to the employment of a person *by the institution* . . ." (emphasis added). Subclause 3 deals with records relating to a miscellaneous category of events "about labour relations or employment-related matters in which the institution has an interest". Having regard to the purpose for which the section was enacted, [footnote omitted] and the wording of the subsection as a whole, the words "in which the institution has an interest" in subclause 3 operate simply to restrict the categories of excluded records to those records relating to the institutions' own workforce where the focus has shifted from "employment of a person" to "employment-related matters". To import the word "legal" into the subclause when it does not appear, introduces a concept there is no indication the legislature intended.[5]

[37] Section 52(3) of the *Act*, reproduced above, contains language identical to that in paragraphs 1, 2 and 3 of section 65(6) of *FIPPA*. Specifically, while paragraphs 1 and 2 of section 52(3) exclude from the scope of the *Act* certain records relating to the "employment of a person by the institution," paragraph 3 employs the phrase "in which the institution has an interest" to modify the "employment-related matters" that are excluded from the *Act*. Based on the court's reasoning in *Solicitor General,* this office has treated the phrase "in which the institution has an interest" in the *Act* and in *FIPPA* as limiting the scope of the exclusion to employment-related matters involving the institution's own workforce.[6]

[38] The city states that the court in *Solicitor General* was called upon to determine whether the "interest" of the institution had to be a legal interest, and that it was not required to address the meaning of the term "employment-related matters." The city appears to suggest that *Toronto Star*, which post-dates *Solicitor General*, expanded the application of section 52(3)3 to include matters beyond those involving the institution's own employees. The city submits that this interpretation is consistent with the purpose of the exclusion "to promote economic prosperity": the city suggests that this purpose is served by excluding records like the ones at issue in this appeal, which concern an

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[5] *Solicitor General*, above, at para. 35.
[6] See, for example, Orders PO-2016, PO-2123 and MO-3108.

initiative to attract investment and promote employment in the region.

[39] I disagree. This reading is far too broad, and ignores the limiting language of the exclusions. There is nothing in *Toronto Star* to detract from the court's reasoning in *Solicitor General* that the meaning of the words "in which the institution has an interest" in section 65(6)3 of *FIPPA* (and, correspondingly, in section 52(3)3 of the *Act*) is informed by the language of the preceding paragraphs. The city's proposed interpretation of section 52(3)3 would expand the scope of the exclusion far beyond the types of records contemplated by sections 52(3)1 and 52(3)2, which are explicitly limited to matters in which the institution is acting as an employer, and would, in fact, make those sections redundant. An interpretation that would have this result should be avoided.

[40] This interpretation also ignores the enacting government's identification of the specific purpose of the labour relations and employment exclusions. While the promotion of economic prosperity was one of the stated purposes of the wide-ranging amending act that included, as one component, amendments to the *Act* and *FIPPA*,[7] the purpose of these particular exclusions in the *Act* and *FIPPA* is to ensure the confidentiality of labour relations information.[8] Relying on the Court of Appeal's analysis in *Solicitor General*, a later court concluded that the probable intention of section 52(3) is to protect the interests of institutions by removing public rights of access to certain records relating to institutions' relations with their own workforce.[9] It is clear from the wording of the exclusions that the Legislature intended to maintain the confidentiality of this type of information in situations where an institution is acting as an employer, and not to broadly exclude all labour relations and employment records held by an institution when its interests are not engaged in this way.

[41] I affirm that the section 52(3)3 exclusion is limited to records about labour relations or employment-related matters in which the city is acting as an employer. As the records at issue here concern the employment of individuals by an affected party, the airframe maintenance company (a non-institution), and not by the city, the exclusion cannot apply. In making this finding, I explicitly reject the argument that the city's role in enabling this employment relationship is a sufficient interest for the purposes of the exclusion.

[42] As the records are not excluded from the *Act*, I will next consider the alternative claims made by the city and the affected parties.

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

[43] In the alternative, the city and the affected parties claim that the information at issue is exempt under section 10(1) of the *Act*. The affected parties rely on sections

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[7] Bill 7, "An Act to restore balance and stability to labour relations and to promote economic prosperity and to make consequential changes to statutes concerning labour relations."
[8] Hon. David Johnson, Chair of Management Board of Cabinet, *Official Report of Debates*, October 4, 1995.
[9] *Reynolds v. Binstock*, 2006 CanLII 36624 (ON SCDC), at paras. 59-60.

10(1)(a) and (b). The city appears to rely on sections 10(1)(a), (b) and (c). These sections state:

> 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[.]

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

[45] For section 10(1) to apply, the city and/or the affected parties 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 section 10(1) will occur.

Part 1: type of information

[46] The records are agreements between the city and the airframe maintenance company, and, in Records 1 and 4, another affected party. The withheld information in these records includes details of the parties' obligations under the agreements, which the city describes generally as including hiring requirements, training requirements, training plans and training expenses.

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[10] *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.*).
[11] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[47] I am satisfied that the records contain commercial information within the meaning of section 10(1). The records set out the particulars of the parties' agreement to exchange services for consideration. Some of the withheld information is also financial information, in the form of training program and other costs. The records also set out certain details of the nature of the employment to be offered by the airframe maintenance company, which qualify as labour relations information.

[48] I do not agree that the company's training plan constitutes a trade secret, as one affected party has claimed. The term "trade secret" has a specific meaning, and typically applies to a formula, method or technique embodied in a product, device or mechanism that meets certain additional criteria.[12] I also reject the city's claim that the records contain technical information. This term typically refers to information belonging to an organized field of knowledge under the general categories of applied sciences or mechanical arts. I see no information in the records that can be described in this way, and the city has not explained what portions of the records could qualify as technical information, or how.

[49] I will consider whether the commercial, financial and labour relations information in the records meet the next two parts of the test.

Part 2: supplied in confidence

[50] The requirement that the information be "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[13]

[51] 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.[14]

[52] The three records in this appeal are contracts. 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.[15]

[53] The city and the affected parties acknowledge the general rule regarding contracts, but they claim that the exceptions to the general rule apply.

[54] One of these is the "inferred disclosure" exception. This exception applies where disclosure of the information in a contract would permit accurate inferences to be made

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[12] Order PO-2010.
[13] Order MO-1706.
[14] Orders PO-2020 and PO-2043.
[15] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).

with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[16]

[55] The second exception is the "immutability" exception. This exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[17]

[56] The city says that all the withheld information qualifies for the exceptions to the general rule concerning contracts, but it does not explain how.

[57] The airframe maintenance company, which is a party to all three of the agreements, claims that the exceptions apply to a withheld portion of Record 1, Schedules A and B of Record 4, and Schedules A and C of Record 5.

[58] The airport operator and the local development board claim the exceptions apply to the withheld information about them in Records 1 and 4, respectively.[18]

[59] I conclude that most of the withheld information was not "supplied" within the meaning of section 10(1), and therefore cannot qualify for the third party exemption.

[60] Record 1 is an agreement between the city, the airport operator and the airframe maintenance company. The withheld portions are specific items under paragraphs 8.02 ("Service Provider Special Covenants") and 8.03 ("[Airport Operator] Special Covenants.") The withheld portion of paragraph 8.02 sets out certain hiring commitments on the part of the company, while the withheld portion of paragraph 8.03 sets out certain obligations on the part of the airport operator.

[61] A party asserting that an exception applies to information in a contract must show, on a balance of probabilities, how the information in the contract meets the exception based on its content, and not merely the fact that it originated with a third party.[19] In this case, neither the company nor the airport operator has provided evidence to show, on a balance of probabilities, that the withheld information meets either exception.

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[16] Order MO-1706, cited with approval in *Miller Transit*, above, at para. 33.
[17] *Miller Transit*, above, at para. 34.
[18] The airport operator is a wholly-owned subsidiary of the city. Based on the information before me, it appears possible that the airport operator is part of the city, or is itself an institution under the *Act*. While the third party exemption is generally understood to protect the interests of businesses or other organizations that are not institutions, this office has sometimes permitted an affected party institution to claim the third party exemption: see the discussion in Order PO-3676.
In the circumstances, and without making a finding on the airport operator's status under the *Act*, I have decided to consider its section 10(1) claim for the information relating to it in Record 1. Among other considerations, neither the city nor the airport operator raised the issue of the airport operator's entitlement to rely on section 11, and the city has itself claimed section 11 for all the withheld information in the records, including the information in Record 1.
[19] *Miller Transit*, above, at para. 32.

[62] The company asserts that it generated the job numbers and other information in paragraph 8.02 of its own initiative, and that it therefore supplied this information. On their face, these appear to be mutually generated terms of the agreement between the company and other parties, and the company does not explain why they should be treated otherwise. It also states that disclosure of a particular item in paragraph 8.03 would reveal its overhead costs, but the connection between the withheld item and the company's overhead costs is not self-evident, and the company has not explained how one can be deduced from the other.

[63] The airport operator also insists on the confidential nature of this same item in paragraph 8.03, but does not explain why this term was not susceptible to negotiation, or what other underlying, non-negotiated confidential information its disclosure would reveal, or how. It also states, generally, that the withheld information in both paragraphs could permit readers to infer other information that is strictly confidential, but what that information is, or how it could be inferred from the records, is not self-evident.

[64] In the absence of sufficient evidence to establish that either exception applies, I conclude that all this information in Record 1 was negotiated and not supplied.

[65] I make the same finding for most parts of Records 4 and 5. Record 4 is an agreement between the city, the airframe maintenance company and a local development board. Record 5 is an agreement between the city and the airframe maintenance company. These agreements and schedules to the agreements elaborate on the parties' obligations in respect of certain employment commitments made by the company, and include information about hiring and training requirements, among other things.

[66] The local development board states that disclosure of Record 4 would reveal the core of its operations and how it works with partners in the community, which it says is integral to its way of doing business. It is not evident how general terms setting out the board's obligations under the agreement could qualify as confidential informational assets supplied by the board, and the board has not provided an explanation.

[67] The company does not suggest that any information in the body of Record 4 was supplied by it.

[68] I conclude that none of the information in the body of Record 4 was "supplied" for the purposes of section 10(1).

[69] Record 4 also includes Schedules A and B. Schedule A contains a training plan prepared by the company, which includes a detailed outline of various components of the proposed training, and training costs. The company describes Schedule A as a description of its capabilities and significant expenses with respect to its business operations. I accept that the details of the proposed training, including costs, were supplied by the company to the city. I note that the training plan is specific to the particular industry in which the company operates. I accept that the plan was

developed by the company based on its specialized expertise in this industry, and that the nature of the training to be provided by the company was not subject to negotiation. Although Schedule A forms part of the agreement in Record 4, it contains confidential informational assets of the company that are immutable.

[70] Schedule B reproduces and summarizes the financial information in Schedule A. Schedule B also sets out cumulative totals and other information that is not contained in Schedule A. The specific line items and amounts that are reproduced from Schedule A comprise supplied information for the reasons given above. However, other information appearing in Schedule B, which is not reproduced from Schedule A, is not supplied information. Specifically, the cumulative totals, and a particular commitment made by one of the parties to the agreement in light of these totals, is not supplied information. Also not supplied is a note in the schedule about additional obligations of the company under the agreement. All these components of Schedule B are negotiated terms of the agreement between the parties, and do not contain or reveal underlying non-negotiated confidential information of any one party to the agreement.

[71] Record 5 is similar to Record 4. The company submits that Schedules A and C to Record 5 were supplied by it to the city.

[72] The body of Record 5 sets out obligations of the two parties to the agreement, the company and the city, in light of certain employment commitments made by the company. As in Record 4, I find that none of the information in the body of Record 5 was "supplied" for the purposes of section 10(1). However, the record contains some brief references to an affected party that has not been notified of the appeal. I refer to this party as the "Schedule D party," below.

[73] Schedule A to Record 5 sets out the company's training plan and proposal, including estimated training costs and training milestones. For the same reasons given above, I accept that the training plan, including costs, comprise immutable information that was supplied by the company to the city.

[74] Schedule B to Record 5 sets out details of a particular commitment made by the city. The company does not claim that this is supplied information, and I find that it is not. The information in this schedule is similar to the information in Schedule B to Record 4 that I found, above, is not supplied information.

[75] Schedule C to Record 5 sets out certain obligations of the company in the event specific circumstances arise. I cannot describe this schedule in more detail without revealing its contents. The terms in Schedule C reflect the bargain struck between the company and the city. The company does not appear to be claiming that this portion of the agreement was supplied by it, and I find that it was not. However, Schedule C contains references to the third party mentioned above, who has not been notified of this appeal. This party is also a party to the agreement in Schedule D, which I discuss below.

[76] Schedule C-1 to Record 5 sets out certain operating projections, while Schedule

C-2 contains a listing of company assets. I am satisfied that both these schedules contain immutable information that was supplied by the company to the city.

[77] Schedule D to Record 5 is an agreement between the city and the Schedule D party. This schedule sets out certain obligations of the Schedule D party as a consequence of the agreement reached between the city and airframe maintenance company. Schedule D reflects the agreement of the Schedule D party and the city to these terms. Other than a few references to certain assets described in Schedule C-2, which is supplied information (consistent with my finding above), the terms of Schedule D are not supplied but rather mutually generated by the parties to that agreement. This information is not subject to the third party exemption.

[78] I recognize, however, that the Schedule D party has not been notified of this appeal, and ought to have to an opportunity to make representations on the potential disclosure of the information to the appellant. I also observe that it is not clear from the circumstances whether this information is of interest to the appellant. I will therefore defer consideration of the appellant's right of access to information about the Schedule D party in various portions of Record 5 pending confirmation of the appellant's interest in this information.

[79] In summary, I find that Schedule A and discrete portions of Schedule B to Record 4, and Schedules A, C-1, C-2, and discrete portions of Schedule D to Record 5 were "supplied" for the purposes of section 10(1).

[80] I am also satisfied that this information was supplied with an objectively reasonable expectation of confidentiality, in satisfaction of the "in confidence" component of part two of the test for exemption. This is based on the content of the information itself, which I have accepted comprises confidential informational assets of the company, and the context in which the company provided this information to the city.

[81] The parties also refer to various confidentiality provisions in the agreements as evidence of their shared expectation of confidentiality. Contractual terms setting out confidentiality obligations may support a finding that parties held an objectively reasonable expectation of confidentiality, although they are not determinative.[20] They do not, however, override any rights of access under the *Act*. This is in answer to claims made by the company and the affected parties that they entered into negotiations with the city based on express assurances that the records would remain confidential. The company also directs my attention to specific clauses in the records that purport to shield portions of the records from disclosure, or that make the fulfillment of an agreed-upon term contingent on the non-disclosure of that term. I confirm for the parties' benefit that these clauses in the agreements do not limit the rights of access under the *Act*. The principle that parties may not contract out of the provisions of access-to-

[20] See, for example, Orders MO-2465, PO-2569 and PO-3176.

information legislation has been upheld by the courts,[21] and consistently applied by this office.[22]

[82] In any event, I have found that discrete portions of Records 4 and 5 were supplied to the city in confidence. I will now consider whether they meet part three of the three-part test for exemption.

Part 3: harms

[83] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[23]

[84] In applying section 10(1) to government contracts, 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).[24]

[85] The city states that disclosure of the withheld information will harm the airframe maintenance company's competitive position in the market, by revealing its negotiating strengths and weaknesses and affecting its ability to compete with other operators in the business. The city states that disclosure will also significantly interfere with contractual and other negotiations between the city and the company.

[86] For its part, the company submits that disclosure would interfere significantly with its ability to negotiate similar arrangements with other potential partners, and alert its customers to its costs of doing business, including what portions of its costs are variable and what portions are fixed. The company argues that this information could be used by its competitors to compete with the company, or by potential partners as leverage in negotiations with the company. This includes negotiations with the company's employees, who are generally not aware of the company's financial obligations, overhead costs, and what it pays its other employees.

[87] The company particularly seeks to shield Schedules A and B of Record 4 and Schedule A of Record 5 from disclosure, as it says this would provide competitors with a blueprint to the company's business operations. The company reports that this particular industry operates on a worldwide scale and on razor-thin margins, and that

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[21] Among others, see *St Joseph Corp. v. Canada (Public Works and Government Services)*, 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services)*, 2003 FCT 254 (CanLII); *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner),* 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] S.C.C.A. No. 563.
[22] See, for example, Orders PO-2520, PO-2917, PO-3009-F, PO-3327 and MO-2833.
[23] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[24] Order PO-2435.

disclosure would harm not only the company, but also its various affiliates. The company also suggests that disclosure of the records would dissuade other prospective business partners from entering into similar agreements with municipal corporations, which would have a negative effect on attempts to encourage economic development.

[88] I am satisfied that the potential harms of disclosure have been made out for some discrete portions of Records 4 and 5 that I found, above, were supplied to the city in confidence. Specifically, I accept that section 10(1) applies to the company's detailed training plans, including costs, in Schedule A (and the portions of this plan reproduced in Schedule B) to Record 4, and in Schedule A to Record 5. Section 10(1) also applies to the company's asset list in Schedule C-2 and the references to specific assets appearing in Schedule D to Record 5. This information is not publicly known and I agree that its disclosure would provide the company's competitors and counterparties to future negotiations with details of its business operations and fixed expenses that could put the company at a competitive disadvantage. This is the harm contemplated by section 10(1)(a).

[89] I do not accept that disclosure of the company's operating projections in Schedule C-1 to Record 5 could reasonably be expected to give rise to any of the harms in section 10(1). This schedule sets out projections for operations at a particular facility in 2014. The company has not explained what potential harms could be expected to arise from disclosing dated projections for a specific project, and none is self-evident from the circumstances. For this particular item, there is insufficient evidence to establish that section 10(1) applies.

[90] I therefore conclude that section 10(1)(a) applies to Schedule A and a portion of Schedule B to Record 4, and Schedules A, C-2 and portions of Schedule D to Record 5.

[91] Because of this finding, it is unnecessary for me to consider the claim made by some affected parties that certain information in Schedule A to Records 4 and 5 is also exempt under the personal privacy exemption at section 14.

[92] I reject the parties' section 10(1) claims for other portions of the records. It is not necessary for me to address the harms arguments made for those portions of the records that I found, above, were not supplied in confidence. I will note, however, that these arguments are typically general in nature, and for the most part do not relate specific items in the records to any particular claimed harms.

[93] One exception is a particular term in paragraph 8.03 of Record 1. The airport operator claims that disclosure of this item would interfere significantly with its ability to negotiate similar arrangements with other parties, because those parties would be aware of its willingness to accept such a term. The company also referred to this specific item, arguing that its disclosure would reveal the company's overhead costs and permit outside parties to negotiate lower fees as a result. I found, above, that this item does not constitute supplied information, because none of the parties satisfied me that the inferred disclosure or immutability exception applies. In particular, the company did not explain how disclosure of this item would reveal underlying non-negotiated

confidential or fixed information like the company's overhead costs. The parties failed to establish that this information is a negotiated term of the agreement between them. I reiterate that, as a result, the third party exemption at section 10(1) cannot apply to this item.

[94] As I found that the majority of the records do not qualify for exemption under section 10(1), I will consider another alternative claim made by the city for this same information.

C. Should the city be permitted to raise a new discretionary exemption outside the 35-day period? If so, does the discretionary exemption at section 11(c) and/or (d) apply? Did the city exercise its discretion under section 11?

Late raising of discretionary exemption

[95] In its representations, the city claimed, for the first time, the application of the discretionary exemptions at sections 11(c) and (d) to all the withheld information in the records.

[96] The IPC's *Code of Procedure* (the *Code*), which provides basic procedural guidelines for parties involved in appeals before this office, addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 of the *Code* states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[97] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[25]

[98] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator will also balance the relative prejudice to the institution and to the appellant.[26] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions

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[25] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

[26] Order PO-1832.

can be raised after the 35-day period.[27]

[99] In this case, I find no prejudice to the appellant in allowing the city's section 11 claims. Although the city raised the discretionary exemption for the first time at the inquiry stage, it did so in response to the adjudicator's request, in his Notice of Inquiry to the city, that the city provide representations on any exemption claims on which it would rely in the alternative to its exclusion claim. The city complied by making representations on the application of section 10(1) (a mandatory exemption) and the discretionary exemption at section 11 to the same information that it sought to withhold under section 52(3). No additional information in the records was withheld from the appellant as a result of the city's new exemption claims.

[100] There was also no additional delay as a result of permitting the city to raise the discretionary exemption in the course of this inquiry. Had the appeal proceeded on the sole issue of the city's exclusion claim, a finding that the records are not excluded would have resulted in an order for the city to issue a decision on access under the *Act*. The city would then have had the opportunity to claim exemptions in support of a decision to withhold access. If the appellant had continued to seek access to the records, the city's exemption claims would have been addressed in a fresh appeal.

[101] Addressing these issues in the course of the present appeal rather than in a fresh appeal has not compromised the integrity of the appeal process. During this inquiry, the appellant had an opportunity to respond to the city's new exemption claims, and he did so. In any event, given my findings below, there is ultimately no prejudice to the appellant in permitting the city to make its section 11 claims. I will address these next.

Does the discretionary exemption at sections 11(c) and/or (d) apply?

[102] The city submits that sections 11(c) and (d) apply to the records. These sections state:

> 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[.]

[103] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected

[27] Orders PO-2113 and PO-2331.

under the *Act*.[28]

[104] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[29]

[105] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[30]

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

[107] The city submits that this case is analogous to the circumstances in Order PO-2569. In that order, the adjudicator accepted that letters and other documents setting out details of the government of Ontario's proposal to host a private company's aircraft assembly plant qualified for exemption under the equivalent sections of the *Act*'s provincial counterpart. The city quotes extensively from that decision, and particularly from the adjudicator's findings that disclosure of the specific information at issue in that case would demonstrate "how far Ontario is prepared to go in order to attract business to Ontario," and undermine its ability to negotiate competitive financial contribution packages with other industry players. The adjudicator also accepted the parties' evidence that Ontario must compete with other jurisdictions in attracting investments, and that disclosure would provide competitors with insight into Ontario's business strategy. From all this, the adjudicator concluded that disclosure of the records could reasonably be expected to weaken the province's negotiating position, prejudicing its economic and financial interests.

[108] The city submits that "it is not unreasonable in the circumstances of this case to substitute" the parties in this appeal for the parties in Order PO-2569. It states that the reasons of the adjudicator in that order mirror the city's position regarding release of the records at issue.

[109] These statements fall far short of establishing a risk of harm that is "well beyond" the merely possible or speculative. It is not enough for the city to assert that

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[28] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[29] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, above, at paras. 52-4.
[30] Order MO-2363.
[31] Orders MO-2363 and PO-2758.

this appeal should be resolved in the same manner as another case. I understand the city to be arguing that the potential harms of disclosure of the records in this appeal are the same as those discussed in Order PO-2569, but this is not evident to me.

[110] The records at issue in this appeal are agreements between the city and other parties that set out, among other things, certain obligations and commitments of the city as part of the bargain struck between them. The city reports its concern that disclosure of the records would have a negative effect on its ability to negotiate with and entice other parties to come to the city, and it refers again to the unemployment statistics of the region and its efforts to improve the local economy and provide jobs. While this may explain the city's interest in pursuing these types of agreements with private companies, these arguments do not connect the contents of the records with the claimed harms of disclosure. For example, the city has not explained why disclosure of the records, including the particular commitments it made, would deter other private companies from entering into negotiations with it to bring investments to the city. Disclosure of these commitments might be expected to have the opposite effect of encouraging private companies to seek partnerships with the city.

[111] It may be that revealing the specific promises the city made in these agreements could impair the city's ability to offer different or less attractive terms to potential partners in future negotiations. If this is the city's argument, it has not made this clear. Throughout its submissions, the city has emphasized the importance to its economy of pursuing job creation and economic diversification initiatives like the one described in the records in this appeal. The city indicates that not pursuing such agreements would be detrimental to its financial and competitive interests. The city does not indicate that in pursuing these agreements, it is seeking the best deal for itself; the city says, in fact, that the reason for its relationship with the airframe maintenance company is to foster economic development and to create jobs. In this case, concerns about disclosing the city's bottom line and weakening its negotiating position, which was one of the main concerns of the institution in Order PO-2569, are not present in the same way.

[112] The city's more general argument appears to be that private companies may not want to contract with the city if there is a risk of disclosure of third party information, and that companies' reluctance to do so would ultimately hurt the city. I addressed the arguments about potential harms to third parties in my consideration of the third party exemption, above. I find any claims about the ultimate prejudice to the city's own economic and other interests based on potential harms to third party interests to be speculative and not supported by the evidence. The city's reliance on Order PO-2569 does not help. In that order, the adjudicator accepted the evidence before her about the competitive nature of the industry for which the records were prepared, including the presence of domestic and international players against which the institution had to compete, and, in those circumstances, accepted that disclosure could harm the institution's ability to prepare and submit future bids in that industry. The city has not provided comparable evidence in this appeal, and the claimed harms of disclosure are not self-evident in these circumstances.

[113] In all, given the absence of evidence to show otherwise, I conclude that sections 11(c) and (d) do not apply to the records.

C. Is there a compelling public interest in disclosure of exempt information that clearly outweighs the purpose of the applicable exemption?

[114] Above, I found that section 10(1)(a) applies to discrete portions of the records setting out the airframe maintenance company's training plans and expenses, and company assets. I found that the remainder of the information in the records, including specific details of the company's job creation obligations and other commitments made by parties under their agreements, do not qualify for exemption under sections 10(1) or 11 of the *Act*. As a result, all that information will be ordered disclosed to the appellant.

[115] Throughout the appeal, the appellant has asserted a public interest in disclosure of the job creation numbers and other commitments made by the parties to the agreement. He explains that his interest is in holding the city to account for the job creation promises used to justify taxpayer expenditures in bringing the company to the city. The appellant alludes to the public interest override at section 16 of the *Act*, which states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[116] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[117] I am satisfied that the information to be disclosed as a result of this order will satisfy the interest identified by the appellant. I have considered whether there is a compelling public interest in disclosure of the remainder of the information, and I conclude there is not.

[118] In considering whether there is a "public interest" in disclosure of information, the first question to ask is whether there is a relationship between the information and the *Act*'s central purpose of shedding light on the operations of government.[32] Previous orders have stated that in order to find a compelling public interest in disclosure, the information must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[33] The word "compelling" has been defined in previous orders as "rousing strong interest or attention."[34] A compelling public interest has been found to exist where, for example, records related to the economic impact of Quebec's

[32] Orders P-984 and PO-2607.
[33] Orders P-984 and PO-2556.
[34] Order P-984.

separation,[35] the integrity of the criminal justice system;[36] and the province's ability to prepare for a nuclear emergency.[37]

[119] I do not find comparable the limited information that will be withheld from the appellant as a result of this order. There is no obvious connection between this information and the purpose of promoting transparency in government activities. Specifically, there is no suggestion that disclosure of the withheld information about the company's training methods and assets is necessary to evaluate the benefits of the agreement struck between the city and the company. On the other hand, the purpose of exempting information of this kind is to allow third parties that engage in relationships with government to provide confidential information without fear of exploitation of that information in the marketplace. In this case, I am not satisfied that there is a compelling public interest in disclosure, or that any interest that might exist would clearly outweigh the purpose of the third party exemption in these circumstances.

[120] I conclude that the public interest override does not apply to the limited information I found exempt under section 10(1)(a).

ORDER:

I uphold the city's decision in part. In particular:

1. I do not uphold the city's decision under section 52(3).

2. I uphold the city's section 10(1) exemption claim for discrete portions of Records 4 and 5.

3. I find that section 16 does not apply to these portions of the records.

4. I do not uphold the city's section 10(1) and 11 exemption claims for the remainder of the records.

   I order the city to disclose the non-exempt portions of the records to the appellant by **May 4, 2018** but not before **April 30, 2018.**

   To assist the city, I enclose with this order a copy of the records, with the **exempt portions highlighted in yellow**.

   In this copy of the records, I have also **highlighted in green the name and other identifying information of the Schedule D party**.

[35] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).
[36] Order PO-1779.
[37] Order P-901.

The city is to disclose all but the highlighted portions of the records to the appellant by the date set out above.

5. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

6. I remain seized of this appeal in order to deal with any outstanding issues, including notification relating to the Schedule D party, if necessary.

Original signed by	March 28, 2018

Jenny Ryu
Adjudicator