Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3693-I

Appeal MA17-133

City of Vaughan

November 27, 2018

Summary: The City of Vaughan (the city) received a three-part request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to all records regarding two specified studies. In response to the request, the city initially located a contract and invoices. The third party who was a party to the contract with the city was notified pursuant to section 21 of the *Act*, and the city then issued an access decision granting partial access to the records. Portions of the records were withheld on the basis of the third party information exemption at section 10(1) of the *Act*. The requester appealed that decision to this office, and the reasonableness of the city's search also became an issue. The adjudicator finds that the section 10(1) exemption does not apply to the records, and orders the city to disclose the information it withheld under that exemption. The adjudicator does not uphold the reasonableness of the city's search for certain records and orders the city to conduct a further search for those records. She delays her findings on the reasonableness of the city's search for other records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a), 10(1)(b), 10(1)(c), 17 and 21.

Orders Considered: Orders 17, P-166, P-493, P-610, PO-1753, PO-1791, PO-1932, PO-2010, PO-2435, PO-2758, PO-2806, PO-3175, PO-3638, M-250, MO-1462, MO-1914, MO-1989, MO-2141-F, MO-2616, MO-2627, MO-3058-F, MO-3258, MO-3372, and MO-3590.

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20.

OVERVIEW:

[1] The City of Vaughan (the city) received a request, under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records:

1. All records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody respecting the [specified Study A];
2. All records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody respecting [specified Study B] (2016);
3. Without limiting the generality of the forgoing, all records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody which answer/address the matters noted on the sheets attached to the enclosed Access Request Form.

[2] The city split the request for records related to Study A off from the request for records related to Study B and appears to have addressed the request for the two studies separately. It is not clear when this occurred, or if the requester was made aware of that.

[3] The city located a contract (which incorporated the winning bid by reference) related to Study A, and a number of invoices in response to the request.

[4] Before issuing its access decision, the city clarified the request with the requester and sought the views of a third party on disclosure of a portion of the record pursuant to section 21 of the *Act*. The third party did not respond. The city then issued its access decision to the requester and the affected party, granting partial access to the records. The city withheld certain information under section 10(1) (third party information) of the *Act*. The third party did not appeal the decision, and the city released the partially redacted records to the requester.

[5] The requester, now the appellant, appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office), seeking a full copy of the responsive records.

[6] During mediation, the appellant narrowed the scope of the request to certain portions of the contract and the third party refused to consent to disclosure. The city also shared information about its search with the appellant, but not to the appellant's satisfaction. As a result, the reasonableness of the city's search became an issue.

[7] Mediation did not resolve the dispute and the appeal moved to adjudication. I began my inquiry under the *Act* by sending a Notice of Inquiry that set out the facts

and issues on appeal to the city and the third party, and then asked the appellant for representations in response. The city and the appellant provided representations. However, the third party chose not to provide representations with respect to disclosure of the contract and invoices. I shared the non-confidential portions of the representations of the city with the appellant in accordance with *Practice Direction 7* of the IPC *Code of Procedure*.

[8] In preparing its initial representations, the city located an additional responsive record in relation to Study A, a specified concept plan. As a result, the city issued a revised decision granting partial access to the record, and withheld portions of it on the basis of section 10(1). I again invited the third party to provide written representations regarding this additional record. In response, the third party advised the IPC that it agreed with the city's representations about this record, and that it would provide no further comments. I determined it was not necessary for me to seek representations from the appellant in response to these representations.

[9] For the reasons that follow, I find that the mandatory third party information exemption at section 10(1) does not apply to the records at issue in this appeal, and I find the city's search for records relating to Study B to not be reasonable. I order the city to disclose the information at issue to the appellant, and to conduct a further search for records relating to Study B. I defer my findings on the reasonableness of the city's search for records relating to Study A.

RECORDS:

[10] The information at issue is contained in:

- a contract between the city and [the third party] related to Study A – at pages 27-33, 42-44, and 74 of records;
- five invoices related to the aforementioned contract– at pages 76, 78, 80, 82, and 89 of the records; and
- a specified concept plan, which was required by the aforementioned contract as a "deliverable".

ISSUES:

A. Does the mandatory exemption at section 10(1) of the *Act* apply to the information at issue?

B. Did the city conduct a reasonable search for the responsive records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) of the Act apply to the information at issue?

[11] The city claimed the mandatory exemption at section 10(1) (third party information) of the *Act* applies to the information at issue, but for the reasons discussed below, I do not uphold the city's application of section 10(1) to the information.

[12] Since I find that the third party's winning bid was incorporated by reference into the contract, when I refer to these documents together, I will refer to them as "the contract".

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

[14] For section 10(1) to apply, the party or parties resisting disclosure must prove that each part of the following three-part test applies:

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.

[15] In this appeal, there are two parties resisting disclosure: the third party (who did not consent to the disclosure of the withheld information), and the city. As explained below, neither party has met its burden to show that the contract, invoices, and concept plan pass the three-part test qualify for the section 10 third party information exemption.

Part 1: Type of information

[16] The appellant asserts that the city has failed to show that the records contain one of the types of information listed under section 10(1) (a trade secret, or scientific, technical, commercial, financial, or labour relations information). In addition, the appellant argues that if the initial set of records disclose one of these types of

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[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

information, the third party would have provided submissions to prevent any such disclosure. In my view, this argument is directed at harms (which is part three of the section 10(1) test), not the question of whether the records contain certain types of information.

[17] Based on my review of the records, I make the following findings.

Contract and invoices

[18] I find that the contract between the city and the third party (the winning bidder) contains commercial information, which the IPC has defined as "information that relates solely to the buying, selling or exchange of merchandise or services."[3]

[19] The second set of records was characterized by the city as "financial records" related to Study B (dated in 2016). Having reviewed these records, I find that they are actually invoices that flow from the contract at issue (dated in 2014) in relation to Study A. This is clear from the dates on the invoices and the corresponding (and fully disclosed) "Contract Progress Payment Certificates." I find that the invoices contain financial information, as defined by the IPC,[4] because they relate to money and its use or distribution, and contain or refer to specific data for services.

[20] Therefore, I find that part one of the test is met for the contract and invoices because they contain financial and commercial information.

Concept plan

[21] The city and the third party (having adopted the city's representations) argue that this record contains the third party's trade secrets and its technical information.

[22] Based on my review of this record, I find that it contains technical information, as defined by the IPC:

> Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[5]

[23] In light of my finding about technical information in the concept plan, it is not necessary for me to determine whether it also contains the trade secret(s) of the affected party because the concept plan meets part one of the test.

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[3] Order P-493.
[4] Order PO-2010.
[5] Order PO-2010.

Part 2: Supplied in confidence

[24] Part two of the section 10(1) test itself has two parts: the information at issue must have been "supplied" to the institution by the third party, and the third party must have done so "in confidence" implicitly or explicitly. If either of these requirements has not been met, the section 10(1) exemption does not apply, and there no need to decide part three of the test.

[25] The requirement that the information has been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[26] 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.[7]

Contract

[27] 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.[8]

[28] The third party chose not to provide written representations about whether the contract qualifies for the third party exemption. I am, therefore, in the position of having no submissions from this party about whether this party "supplied" the contract to the city, and if so, whether that supply was made with an implicit or explicit expectation of confidence. It cannot reasonably be said that the third party has met its onus to prove that the withheld information in the contract meets part two of the test.

[29] The city did not meet its onus either. It withheld portions of the third party's winning bid, though it acknowledges that the bid was incorporated by reference into the contract. Despite this, the city submits that the bid was not "supplied," without identifying which of the two exceptions to the general rule that contracts are negotiated, not "supplied", applies. I will examine this submission in the section on exceptions.

Invoices

[30] The third party also did not establish that the information withheld in the

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8]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*),.

invoices were supplied by it to the city.

[31] What the city has withheld in the invoices under the disclosed "Hours and Fees" headings is the breakdown of those hours and fees. The IPC has held that this information is negotiated, not "supplied."[9] Pricing and personnel information is information that flows from a negotiated contract. This type of information is exactly the kind of information that is negotiated between contracting parties. That is the case even if the specific amounts charged on the invoices might have varied over time. Here, there is no evidence that they are not "derived and arise from commercial and financial terms that were mutually agreed upon in the contract that was negotiated."[10] I find, therefore, that the redacted lines on these invoices consist of terms of the contract were mutually generated by the parties rather than "supplied" by the third party for the purposes of section 10(1).

Do either of the exceptions apply to the contract?

[32] As I will explain, neither party resisting disclosure of the information withheld in the contract has persuaded me that the withheld portions of the contract were "supplied" by the third party to the city.

[33] At the outset of this inquiry, the city and the third party were specifically asked to ensure that their respective representations explained why the bid should be considered as "supplied" to the city despite being clearly incorporated into the contract on specified pages of the contract. As parties resisting disclosure, the city and the third party had to show that one of two exceptions apply to the general rule that contracts are not "supplied": either the "inferred disclosure" or "immutability" exception.

[34] The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[11] Without direct representations from either party resisting disclosure identifying any specific, non-negotiated confidential information, I have insufficient evidence to conclude that this exception applies.

[35] The "immutability 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.[12]

[36] Not having provided representations about the contract and invoices, the third party has not established that either of the exceptions apply to the information withheld in these records.

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[9] See, for example, Orders PO-2806, MO-3258, MO-3372, and P0-3638.
[10] Order MO-3372.
[11] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[12] *Miller Transit*, above at para. 34.

[37] The city's representations on this issue were unpersuasive. The city relies on Order MO-3058-F to submit that the bid should be considered "supplied" to the city despite being a part of the contract. However, I find Order MO-3058-F to be distinguishable because it involved a request for the winning bid itself, which was not incorporated into a contract the way the bid at issue in the present appeal was.

[38] The city also submits that the "original intent" of a bid or the "types of information" within it affect whether information was "supplied," but I also reject this argument. The city submits that since the third party, hoping to become the winning bidder, supplied the study methodology, workplan and deliverables, public consultation strategy, optional workplan and consultation components, and personnel assignment and project budget to the city as part of a proposal for work on a project, this information in the contract was "supplied" by the third party to the city. However, as Order MO-3058-F itself held, "where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties, and no separate contract between the parties is created", the winning proposal is not "supplied". That is the case here.

[39] Rather than looking to "original intent" and "types of information," to demonstrate that an exception to the rule about contracts not being "supplied" applies, the city had to show that either the "inferred disclosure" or "immutability" exceptions apply. It did not, and on my review of the withheld information, I find that neither exception applies to the withheld portions of the contract. This means that those portions of the contract were not "supplied" to the city, and therefore, do not meet part two of the section 10(1) test.

<u>Do either of the exceptions apply to the invoices?</u>

[40] Similarly, neither the city nor the third party met its burden to show that the withheld portions of the invoices were "supplied" to the city by the third party.

[41] The third party did not make any representations about which exception, if any, applies to the information at issue in the invoices.

[42] The city does not specifically claim that the immutability exception applies to the invoices, but it submits that Order MO-1462 is relevant regarding "the financial figures forming the project budget and invoices." I do not accept that. Order MO-1462 found that "budgetary information" cannot be assumed to be negotiated. The context of this quote is the adjudicator's analysis of a schedule to the contract, which contained detailed cost projections of the successful bidder. That is very different from the content of the invoices that are the subject of this appeal. The adjudicator in Order MO-1462 had received submissions from the institution and the successful bidder that supported her conclusion that the source of the information in the budget was the successful bidder; I do not have such evidence before me. Therefore, Order MO-1462 does not help the city demonstrate that the immutability exception applies to the invoices, such that they qualify as having been "supplied" to it by the third party. The invoices merely reflect the negotiated terms of the contract.

[43] Accordingly, the withheld portions of the invoices do not meet part two of the section 10(1) either.

The concept plan

[44] I am not persuaded by the evidence before me, including the city's representations (adopted in writing by the third party), that the concept plan meets part two of the test.

[45] Assuming, without deciding, that the concept plan was "supplied" to the city, I do not find that this supply was "in confidence".

[46] In order to satisfy the "in confidence" component of part two of the test, 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.[13]

[47] I reject the city's argument that because the concept plan was a process document and not a final product, it was supplied with a reasonable expectation of confidentiality. The city relies on Order MO-1914 to submit that simply because an end-product or process is public, it does not mean that "all" documents involved in reaching the final recommendation should be public too. While I accept this proposition, it does not necessarily follow that because a record was a draft, it was supplied with an expectation of confidentiality. In fact, the order that the city relies on, Order MO-1914, makes the point that this question depends on the context:

> The fact that a document is a draft rather than a final version of a report is not determinative of whether the document is supplied in confidence. This will depend on all the circumstances of the case. As illustrated by the reply representations of the Town, there is an expectation that some draft reports are to be kept confidential while others are intended for release to the public.
>
> Nor is ownership of the information in a draft report conclusive evidence of whether it was supplied in confidence, although it may be a significant factor in determining this.

[48] Here, I have insufficient evidence of an objective basis for an expectation of confidentiality. This is in contrast to case that the city relies on, Order MO-1914, where the adjudicator refers to evidence from both the institution and the consultant about reasonable, objective expectations of confidentiality surrounding the draft. In the present appeal, I have not been provided with the same type of evidence regarding the concept plan. The third party would have been in the best position to explain why it would have had such an objectively reasonable expectation of confidentiality regarding the technical information (and/or trade secrets claimed by the city) in this record.

[13] Order PO-2020.

However, the third party did not provide any additional evidence beyond what the city provided. This weighs against finding that such an expectation of confidentiality existed. Based on my own review of the contract (which required the concept plan) and the concept plan, I do not find that there was an implicit or explicit expectation of confidentiality. Therefore, even if the concept plan was "supplied" to the city, there is insufficient evidence to conclude that this was done "in confidence", and the concept plan does not meet part two of the test.

[49] Although all three parts of the test must be established for the section 10(1) exemption to apply to a record and I have found that the contract, invoices, and concept plan do not meet part two of the test, I will go on to explain why these records also do not meet part three of the test.

Part 3: harms

Contract and invoices

[50] On the basis of the following, I find that there is insufficient evidence to accept the city's submission that disclosure of the withheld portions of the contract and invoices could reasonably be expected to lead to the harms set out in sections 10(1)(a), (b), and/or (c) of the *Act*.

[51] Sections 10(1)(a) to (c) say:

> 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;
> >
> > . . .

[52] The IPC has repeatedly affirmed that 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*.[14] That is important to keep in mind when assessing the evidence before me, or lack of it, regarding the contract and invoices under part three

[14] Order PO-2435.

of the section 10(1) test.

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

[53] As I will explain, I do not find sufficient evidence to accept that this type of harm is reasonably expected from the disclosure of the withheld portions of the contract and invoices.

[54] The city submits, and I accept, that the city "may not have a fulsome understanding of any future financial impacts to the [third] party's business resulting from" disclosure, and that representations from the third party should therefore be sought. As mentioned, the third party did not provide any representations about the contract and invoices. Although I do not take this to mean that the third party no longer objects to disclosure, this leaves me with a lack of evidence on the issue of harms set out in sections 10(1)(a) (or sections 10(1)(b) or (c) for that matter), from the party that was in the best position to offer it.

[55] I reject the city's submission that the reasoning in Orders MO-3058-F and MO-2141-F is relevant to whether the harms set out in section 10(1)(a) could reasonably be expected by disclosure of the withheld portions of the contract. The full context of the passage from Order MO-3058-F included in the city's submissions clearly indicates that the adjudicator in that case had evidence before her about how the withheld descriptions of services rendered, timeframes, costs, and insurance could be used to the advantage of competitors and the disadvantage of the third party. I do not have that here, with any specificity, from either party resisting disclosure of the portions of the bid that have been withheld. Therefore, Order MO-3058-F is distinguishable from this appeal.

[56] As for Order MO-2141-F, it also has no relevance in this appeal because that case dealt with exclusions and the issue of reasonable search. Regardless, the quotation associated with Order MO-2141-F in the city's submissions is unhelpful here: I cannot accept that a proposal includes a third party's "unique" information and "specific" approach to a project without representations from either party resisting disclosure about what specifically is unique to the third party about the information withheld that could prejudice the third party's competitive position. Therefore, without more than assertions that section 10(1)(a) applies to the information at issue in the contract, I find that this section does not apply and part three of the section 10(1) test has not been made out for the contract.

[57] Regarding the withheld portions of the invoices, once again, there are no representations before me from either party resisting disclosure about how the information withheld in the invoices could reasonably be expected to prejudice the third party's competitive position.

[58] The city does cite several IPC orders[15] in support of its submission that the IPC

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[15] P-166, P-610, M-250, PO-1791, and PO-1932.

has "consistently applied" section 10(1) to pricing and budget information to conclude that "disclosure of such information could 'reasonably be expected to prejudice the competitive position of an affected party.'" However, there are two reasons why I reject this submission about pricing and budget information. First, I have no specific information about how the information withheld relates to the third party's "budget information." That makes this city's submission about budget information vague and speculative. Second, the city's characterization of IPC orders about pricing information does not reflect important aspects of the IPC's approach to harms and pricing information. It ignores the fact these determinations are fact-specific, and thereby does not account for IPC decisions that have ordered the disclosure of invoices, as I have cited above. The city's characterization is also inaccurate because it does not account for the IPC's long-held position that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its competitive position.[16]

[59] Therefore, I do not accept the mere assertion, essentially, that the disclosure of pricing and budget information (assuming that there is the latter) could reasonably be expected to lead to a prejudice to the third party's competitive position, as contemplated by section 10(1)(a).

<u>Section 10(1)(b) – similar information no longer supplied</u>

[60] Similarly, I am unpersuaded by the city's representations that the harms contemplated by section 10(1)(b) could reasonably be expected by disclosure of the withheld portions of the contract and invoices. The third party did not provide representations on this issue.

[61] The city argues that disclosure of the information at issue in the contract and invoices "may result in proponents being reluctant to bid on similar projects in the future". The city also submits that there is a "strong public interest in the maintenance of confidential third party commercial information," arguing that "the supply of varied proposals and bids…is crucial to continue to receive the best rates for goods and services; especially given that public money is being used to fund projects by the [c]ity."

[62] I do not accept that disclosure of the information withheld in the contract and invoices could reasonably be expected to lead to the city receiving fewer bids in the future, and thereby negatively affect the city's ability receive the best rates for goods and services using taxpayers' money. As the IPC has held about this argument, it

> ignore[s] an absolutely fundamental fact of the marketplace. That is to say, if a competitor . . . truly wishes to secure a contract with [an institution], it will do so by charging lower fees to [the institution] than its competitor, resulting in a net saving to [the institution] . . . . To argue

[16] Order PO-2435.

> that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.[17]

[63] Without sufficient evidence to suggest that the city would receive fewer bids if the information withheld in the contract and invoices were disclosed, I do not accept that that would be the case.

[64] In addition, I reject the city's argument that disclosure of the withheld information in the contract and invoices would result in harm to the "integrity of the bidding process." The city cites PO-3175 in support of this submission, but once again, from my reading of that case, the adjudicator had sufficient evidence from the parties resisting disclosure to make such a finding about the integrity of the process. I do not. There is also insufficient evidence before me to allow me to infer such a harm. As noted above, the third party who would have been in the best position to provide evidence on this issue did not provide representations.

[65] Therefore, I do not accept the submission that the harms contemplated by section 10(1)(b) apply to the contract and invoices.

<u>Section 10(1)(c) – undue loss or gain</u>

[66] The parties have similarly failed to provide me with sufficient evidence that the harms contemplated by section 10(1)(c) could reasonably be expected to occur if the withheld portions of the contract and invoices were disclosed.

[67] The city's only submission about this type of harm was that representations about it "should be made directly by the [third] party, as the [c]ity may not have a fulsome understanding of any future financial or commercial impacts to the [third] party's business resulting from the release of these records." Without representations from the third party, I have insufficient evidence before me to conclude that the harms set out in section 10(1)(c) would reasonably be expected by the information withheld in the contract and invoices. The harms are not self-evident from my review of the records.

[68] In summary, the withheld portions of the contract and invoices do not meet part three of the test, and are, therefore, not exempt under section 10(1). Without persuasive representations from the city or any evidence from the third party, I am left with insufficient evidence to find that part three of the test is met for the contract and invoices. Although the failure of the a party resisting disclosure to satisfy the standard of proof will not defeat the claim for exemption if the harms claimed can be inferred from the surrounding circumstances. I can infer no such harms from the records themselves and/or the surrounding circumstances in this appeal. I will, therefore, order the information at issue disclosed.

[17] Order PO-2758.

The concept plan

[69] On the basis of the following, I also find that there is insufficient evidence to conclude that disclosure of the withheld portions of the concept plan could reasonably be expected to lead to the harm set out in section 10(1)(a) (prejudice to competitive position), the only harm claimed by the city and the third party for this record.

[70] Again, section 10(1)(a) says:

> 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,
>
> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

[71] For the harms at section 10(1)(a) to be made out, the parties resisting disclosure must establish that the prospect of disclosure of the record gives rise to a reasonable expectation that the harms will result. When this language of "could reasonably be expected to" is used in the *Act*, evidence well beyond or considerably above a mere possibility of harm must be provided to meet the standard of proof.[18]

[72] The third party's representations relating to the concept plan were limited to the following: *"I concur with the submissions and comments provided by the City of Vaughan. I will have no further comments."*

[73] For its part, the city submits that disclosing the information withheld in the concept plan would harm the third party's competitive position by *"making public their unique and specific methodology for completing the [concept plan]; thus, allowing potential competitors to incorporate the same methodology into future planning reports, resulting in an unfair advantage."*

[74] However, the city does not explain what is unique and specific to the third party within the withheld information that could reasonably be expected to result in an unfair advantage to the third party's competitors. Therefore, I distinguish the circumstances of this appeal from those in a case that the city relies on in support of its position, Order PO-1753, because the analysis in that case shows that the adjudicator had sufficient evidence about what information was proprietary to the third party and why it fell within the exemption. In this appeal, I have a 29-page long concept plan and nothing beyond the submissions laid out above (in the previous two paragraphs) from the third party and the city. The city's submission is a speculative assertion, unsupported as it is by a sufficient or clear explanation as to what is "unique and specific" to the third party

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[18] *Ontario (Community Safety and Correctional Services) v Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Merck Frosst Canada Ltd. v Canada (Health)*, 2012 SCC 3 (CanLII) paras. 197 and 199.

about the information withheld within the 29 pages. I am also unable to infer the harm contemplated by section 10(1)(a) from my own review of the concept plan. Therefore, I do not accept that revealing the withheld contents could reasonably be expected to harm the third party by significantly prejudicing its competitive position, as contemplated by section 10(1)(a).

[75] As no other type of harm was claimed or is evident to me regarding disclosure of the withheld portions of the concept plan, I find that the concept plan has failed the third part of the section 10(1) test, as it did the first two parts. I will, therefore, order it disclosed.

Issue B: Did the city conduct a reasonable search for responsive records?

[76] For the reasons that follow, I find that the city has not provided sufficient evidence for me to uphold its search as reasonable.

[77] The appellant submits that additional records exist beyond those identified by the institution, so I must decide whether the city has conducted a reasonable search for records as required by section 17.[19] Examining this question, it is important to keep in mind that the request was for records relating to both Studies A and B, the appellant clarified that it was for both studies upon the city's request, but the search memos only covered Study B (likely because the city had split the request in two, by study) – and yet only records located relate to Study A.

[78] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[20]

[79] The *Act* does not require an institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.[21] To be responsive, a record must be "reasonably related" to the request.[22]

[80] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[23]

The appellant's position

[81] The appellant's request clearly included records relating to Study B, and after receiving the city's affidavits and no records relating to Study B, the appellant

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[19] Orders P-85, P-221 and PO-1954-I.
[20] Order MO-2246.
[21] Orders P-624 and PO-2559.
[22] Order PO-2554.
[23] Order MO-2185.

submitted[24] that the city's search for records relating to Study B was not reasonable. I agree.

[82] It is undisputed that the original request was for records relating to both Studies A and B. The city confirmed that both studies were being pursued when it approached the appellant for clarification.

[83] The city split the request in two requests, one for each study, "[i]n response to such a voluminous request." The search memos issued by the city only mention Study B.

[84] And yet, the records located and at issue in this appeal only relate to Study A, not Study B.

[85] Given these search results, and having reviewed the city's affidavits, I agree with the appellant's submission that the city's search is not reasonable. I find that city's representations do not establish why this result occurred. I also find that these search results are inconsistent with, and do raise reasonable questions about, the basis for the city's representations that it had to split the request into two files (one for each study) for being "voluminous."

[86] Therefore, I find that the appellant's position that the city has failed or refused to provide the specified records in relation to Study B to be a reasonable basis for concluding that such records exist.

[87] The appellant's representations regarding the city's search relate to Study B records and I find no mention of the Study A records. Given the fact that the city split the appellant's request on the basis of the two studies, it is unclear to me whether the appellant is still seeking additional Study A records, and if so, whether that is now being handled as a separate request. Accordingly, I reserve my finding on the city's search for Study A records pending clarification from the parties about the status of the request for Study A records.

The city's position

[88] In addition to the reasonable basis provided by the appellant for concluding that additional records exist, as I will explain, I find that the city's representations were not clear (or were silent) on a number of matters that also prevent me from finding that the city's search was reasonable.

[89] The city's representations indicate that upon receipt of the request, the city:

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[24] The appellant also noted defects in two of the city's affidavits in support of its position that the city's search was not reasonable. Although I agree that the defects identified by the appellant are present in those two affidavits, I find that the substance of the contents of the affidavits are more relevant to the issue of reasonable search in these circumstances.

- "[r]eferring to Order 17 . . . decided not to respond directly to the appellant's questions related to the request, rather only to the request for records which might assist in answering the questions posed by the appellant;"

- split the request into two parts with two file numbers (which I will call File Number 1 and File Number 2);

- sought clarification from the appellant on several points before sending out search memos to potential responsive departments;

- informed the appellant that any requested records which were presented to Committee of the Whole or Council were available to the public on the city's website;

- sent search memos to six named departments after receiving clarification about the request from the appellant;

- conducted searches in the respective departments and forwarded responsive records, if any, to the Access and Privacy Officer, who reviewed the records and decided to ask the third party for comment;

- released portions of the responsive records after the third party did not respond to the city within the timeframe set out in the *Act*, withholding portions of the records on the basis of section 10(1);

- provided the appellant with a link to the city's website containing additional information and records related to Study A during the mediation of this appeal;

- forwarded a copy of additional information to the mediator, including a search memo that refers to Files Numbers 1 and 2; and

- located the concept plan during the inquiry stage of this appeal.

[90] From the evidence before me, it is not clear that the appellant was made aware of the city's decision to split its request. This lack of clarity gives the appearance that the city unilaterally changed the scope of the request, and by doing so, did not conduct a reasonable search. I am, however, deferring my findings on the reasonableness of the search for Study A records pending clarification of this issue.

[91] However, even if the appellant was made aware of the split, there are other unexplained gaps in the city's representations about its search for records responsive to Study .

Time period searched

[92] The city had asked the appellant for clarification about the time period covered by the request, and the appellant provided the three-year period of interest. However, the city asked all employees except one to search within that specified three-year

period, and did not explain the narrower timeline stated in the affidavit for that employee. I find that this unexplained narrowed timeline undermines the reasonableness of the city's search. That is especially concerning in this context where there is a discrepancy between what was searched (records relating to Study B) and what was found (only records relating to Study A).

Types of records requested

[93] The second and third parts of the original request relate to Study B, and specific records or types of records are being pursued, but it is not clear from the city's affidavits that the multi-faceted nature of the request was presented to all the relevant employees who were asked to search for records.

[94] The second part of the request asked for "[a]ll records, including but not limited to, notes, emails, reports, letters, facsimiles, documents and voice mail messages, prepared, held, sent or received in the City's custody respecting [specified Study B] (2016)." Based on my review of the city's affidavits, I find that they do not support a finding that the city employees searched for the records that the appellant is seeking through this part of the request.

[95] The third part included an attachment with more details about the records sought in relation to Study B, which the appellant reproduced again in their representations. None of the employees appear to have been provided with the detailed portion of the request in the attachment referenced in the third part of the request. This attachment contains questions, but I have insufficient evidence to uphold the city's treatment of those questions. The city's position with respect to this attachment was that it contained questions and that, citing Order 17, the city was not required to answer questions. The city does submit that it decided to respond "only to the request for records which might assist in answering the questions posed by the city." This approach is actually in keeping with prior IPC orders, as summarized in Order MO-3590:

> Taken together, Orders 17, MO-2096, MO-2285, and MO-2957 establish that a 'right to information' does not require an institution to provide an answer to a specific question; rather, the institution must consider what records in its possession might contain information that would partly or fully answer the questions asked in a request.[25]

[96] However, because I am unable to discern from the city's affidavits which questions it chose to search for responsive records for, and which it did not, I have insufficient evidence to uphold the city's response to the third part of the request as it relates to Study B.

Search terms used

[97] What I have been referring to as "Study B" in this order has another, much

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[25] Order MO-3590, para. 28.

longer name, which was identified in all the search memos referenced in the city's affidavits. Especially given the lack of any records being located in relation to Study B, it would have been reasonable for the city to clearly specify whether the searches conducted involved any short forms or other names that were in use for Study B, if any. It is possible that responsive records could have been located if the search terms other than the exact long name of Study B were used. If other search terms were used, it is not clear from the affidavits.

[98] It is also not clear why the searches conducted by the Manager of Infrastructure Delivery, the Manager of Transportation Planning, and the Transportation Engineer were limited to a search for "any staff reports" related to Study B in a specified time period, as opposed to any other types of records, given the types of records listed in the request. The fact that the appellant identified the engineering, finance, and clerk's departments as departments that might have staff reports other than the Development Planning Department does not mean that the city should have only asked those departments to search for staff reports. By doing so, the employees could have failed to locate any of the other types of records mentioned in the request regarding Study B. And on the issue of who was searching for "staff reports," it is not clear why the city did not approach the finance and clerk's departments for "staff reports," though the appellant specifically identified those departments at the clarification stage.

Locations searched

[99] The city's affidavits also do not sufficiently address the following about the locations searched:

- where the Director of Development Planning searched;
- where the Director of Policy Planning and Environmental Sustainability searched;
- whether any electronic search was conducted other than the "JD Edwards" search by the Senior Manager of Corporate Financial Planning & Analysis, and if not, why not;
- whether the Managers of Infrastructure Delivery and Transportation Planning searched paper records, and if not, why not;
- whether there were engineering departments other than "Transportation" would have had responsive records, and if not, why not; and
- why the Transportation Engineer's search was limited to project file folders and his Outlook email box.

[100] These deficiencies regarding search locations also undermine the reasonableness of the city's search.

Claim of publicly available records

The city submits that when it asked for clarification, it also notified the appellant that "any requested records which were presented to Committee of the Whole or Council are available to members of the public via the [c]ity's website." Without identifying which records those would be, I find that to be an unreasonable response to the appellant's request. This is especially the case because in its decision letter, the city did not identify any responsive records that it was refusing to disclose on the basis of section 15(a) of the *Act*.[26]

Failure to address the retention policy

[101] The city's affidavits are silent on the issue of the city's retention policy, though the city was asked to address that issue in the Notice of Inquiry sent to it. In my view, this information would have been relevant to include, especially given the lack of records located in relation to Study B (dated fairly recently, in 2016).

Conclusion about reasonable search

[102] The city could not explain why the appellant asked for Study B and confirmed that Study B was being sought, but only received records in relation to Study A out of searches directing employees to search for Study B. Together, with the many unclear aspects of the searches described, I find that I have insufficient evidence to uphold the reasonableness of the city's search for records relating to Study B.

ORDER:

1. I allow this appeal on the issue of the section 10(1) exemption, and order the city to fully disclose to the appellant the records at issue no later than **January 7, 2019** but no earlier than **January 1, 2019**.

2. I do not uphold the city's search for responsive records relating to Study B. Accordingly,

    a. I order the city to conduct further searches for responsive records in relation to Study B. The searches should be conducted by an experienced individual or individuals employed by the city who would be reasonably knowledgeable in the subject matter of the request for the three-year period identified by the appellant at the clarification stage. This would include any employees in the city's IT department.

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[26] Section 15(a) states:

> A head may refuse to disclose a record if,
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> > the record or the information contained in the record has been published or is currently available to the public;

b. I order the city to use all search terms that could be applicable for Study B, not just the official name of the study.

c. I further order the city to provide me with an affidavit sworn by any employee or employees who have direct knowledge of the search, including the following information:

- the questions in relation to which it conducted searches
- the name(s) and position(s) of the individual(s) who conducted the search;
- the steps taken in conducting the search, and if a type of search that would normally be expected (such as a paper or electronic search) is not conducted, an explanation as to why that is;
- the results of the search; and
- if no records are located, an explanation for why no records are located.

3. I order the city to provide representations and affidavits to this office in compliance with provision 2 of this order, within 30 days of this order. This information may be shared with the appellant, unless there is an overriding confidentiality concern.

4. If the city locates further records responsive to the request as a result of the search, I order the city to provide the appellant with an access decision in accordance with the requirements of the *Act*, treating the date of this order as the date of the request for the purposes of the procedural requirements of the access decision. The access decision should be clear about which questions the city is responding. In order to verify compliance with this order, I reserve the right to require a copy of this revised decision.

5. My findings on the reasonableness of the city's search for records related to Study A are deferred pending receipt of further information from the parties, which I will be writing to the parties about separately.

6. I remain seized of this appeal in order to deal with any issues arising from provisions 2 and 3 of this order.

7. I reserve the right to require the city to provide this office with a copy of the records it discloses to the appellant as a result of order provision 1.

Original Signed by:	November 27, 2018
Marian Sami Adjudicator	