Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4113

Appeals MA18-00799 and MA18-00804

City of Vaughan

October 21, 2021

Summary: This order resolves two appeals: one brought by a ratepayers' group that made a request to the City of Vaughan (the city) under the *Municipal Freedom of Information Act* (the *Act*) for records relating to a certain sports facility, and the other by a third party whose interests might be affected by disclosure of the records. The requester appeals the city's decision to withhold portions of the responsive records under the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*, and the third party appeals the city's decision to disclose portions of the records and also claims sections 10(1) and 14(1). The requester also raised the public interest override at section 16 of the *Act*. In this order, the adjudicator finds that one record is exempt under section 10(1) in its entirety, and therefore, section 14(1) does not need to be considered over parts of that record; she also finds that section 16 does not apply to this record. However, the adjudicator finds that the other records at issue are not exempt under section 10(1), and orders the city to disclose them to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of "personal information"), 2(2.1), 2(2.2), 10(1), 14(1), and 16.

Order Considered: Order PO-2758

OVERVIEW:

[1] This order resolves two appeals relating to a certain sports facility in the City of Vaughan (the city). A ratepayers' group made an access request to the city under the

Municipal Freedom of Information and Protection of Privacy Act (the *Act*) for records relating to the sports facility. As the records might affect the interests of a third party, the city sought that party's views about disclosure. After considering the third party's views about disclosure, the city decided to partially disclose the responsive records. The requester appealed the city's decision to withhold portions of the records, and the third party appealed the city's decision to disclose portions of the records. Since the appeals relate to the same records, I am resolving the appeals in this one order.

[2] The request was for the following:

1. Copy of original 'Municipal Capital Facility (MCF) Agreement 1999' for [the third party] along with any Amending Agreements;

2. Copy of any Appraisals or External Consultation Reports or Financial Reviews commissioned by the City or the MCF on [the third party] lands;

3. Copy of Agreements pertaining to addition of [the third party] within the MCF arrangement including financial arrangements and ownership structure of [the third party];

4. Copy of [the third party] Financial Analysis dated Nov. 2016;

5. Summary Report (if available) of the financial performance of the current MCF, including details of the revenues and expenditures line items since inception;

6. Copy of any Legal Opinions retained by the City or the MCF regarding the proposed Amendment to the existing MCF Agreement or the Sale of Lands to [the third party];

7. An itemized list of monies spent by the City or the MCF on external reports, promotional material, consultants, engineers, appraisers, legal opinions, etc., to date relating to [name company] proposal.

[3] In response to the request, the city advised the requester that it would be notifying affected third parties about the request and seeking their views regarding disclosure, under section 21 of the *Act*.

[4] The city notified affected third parties about the request and one of them responded to the city, objecting to disclosure under the mandatory exemptions at section 10(1) (third party information) and 14(1) (personal privacy) of the *Act.* After considering the third party's submissions, the city issued an access decision, granting partial access to the responsive records. The city withheld some information in the records under sections 10(1) and 14(1) of the *Act*.

[5] The requester appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC), and appeal file MA18-00799 was opened;

the third party also appealed the city's decision to the IPC, and appeal file MA18-00804 was opened. A mediator was assigned to explore resolution.

[6] During the course of mediation, an additional responsive record was identified,[1] and the city issued a revised access decision, granting partial access to that record. Access to the withheld information was denied under section 10(1) of the *Act.* The third party asked that the additional record be added to the scope of its appeal, taking the position that section 10(1) applies to it.

[7] The requester advised the mediator that they wished to pursue access to the withheld information at the next stage of the process.

[8] Since no further mediation was possible, these appeals proceeded to adjudication, where an adjudicator may conduct a written inquiry.

[9] As the adjudicator of these appeals, I decided to conduct a joint inquiry under the *Act* and issued a joint Notice of Inquiry, setting out the facts and issues on appeal, to the city and the affected third party. I sought and received written representations from the city and the affected third party in response. After reviewing the representations and the records, I invited another party whose interests might be affected by disclosure (the affected party) to provide written representations, and received representations in response. I then sought and received written representations from the requester in response to the joint Notice of Inquiry and the other parties' representations. After further representations were exchanged, I closed the inquiry.

[10] For the reasons that follow, I uphold the city's decision, in part. I find that one record is exempt in full under section 10(1), but the remainder of the records are not exempt under section 10(1), and will order the city to disclose them to the requester. I also find that the public interest override at section 16 does not apply to the record that is exempt under section 10(1), and dismiss the appeal.

RECORDS:

[11] In MA18-00799 (the requester's appeal), 70 pages of records are at issue, which the city wishes to withhold, in whole or in part, as follows: pages 31-76, 78, 79, 83-85, 136-149, 227-228, 364 under section 10(1), and pages 80-82 under section 14(1). The third party objects to the disclosure of these records.

[12] In MA18-00804 (the third party's appeal), the records at issue are those that the

[1] The requester advised the mediator of their belief that further records responsive to their request exist at the city. The requester identified the specific record sought and the mediator conveyed that information to the city, requesting that they conduct a further search for responsive records. The city conducted a further search for records and located further responsive records.

city wishes to disclose, in full or in part, as indicated in the city's indices, which were shared with the requester.

[13] I have numbered the records for ease of reference, below.

Record number	**Page numbers**	**Description**	**Access decision**
2	28-82	A professional accountants' report for the third party on the proposal related to the sports facility, November 2016.	Pages 31-76, 78, and 79 withheld in full or in part under section 10(1). Pages 80, 81, and 82 withheld in full under section 14(1).
3	83	Net profit and cash flow analysis for Years 1 to 16 for a specified location.	Record withheld in full under section 10(1).
4	84	Specified location and third party's actual vs. budget comparison for the fiscal year ending [specified date], 2017.	Record withheld in full under section 10(1).
5	85	Specified location and third party's actual vs. budget comparison for the fiscal year ending [specified date], 2018.	Record withheld in full under section 10(1).
6	86-379	Master agreement between the city and the third party (1999).	Pages 136-149, 227-228, and 364 withheld under section 10(1).

ISSUES:

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

B. Is there a compelling public interest in disclosure of record 2 that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

[14] By way of background, the city has a contract with the third party regarding the sports facility in question. That contract is one of the records at issue in this appeal (record 6). The sports facility operates on land owned by the city, under the terms of a 40-year land lease. The city invested about 45% of the cost of construction; the remaining balance was financed through a financial arrangement guaranteed by the city and serviced by the third party through operating revenues. The third party is a tenant, obligated to pay the city a variable rent based on 80% of available cash under certain terms, and is required to manage and operate the sports facility in accordance with the contract and covenants. The third party is also required to maintain the sports facility in a good state of repair in accordance with the contract.[2] As part of the ongoing operations of the sports facility, the third party states that it supplied the city with three of the records at issue in this appeal (records 3, 4, and 5). In 2015, the third party put forward a proposal to the city in relation to developing this facility, which the city considered and ultimately decided not to accept. The third party had professional accountants evaluate that proposal and prepare a report in relation to that proposal; that report is a record at issue in this appeal (record 2), and includes several schedules and the resume of the accountant who signed the report. In this order, I will explain why record 2 is exempt under section 10(1) of the *Act*, but not the remaining records at issue.

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

[15] The relevant parts of section 10(1) in these appeals are sections 10(1)(a), (b), and/or (c) of the *Act*, which 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[.]

[2] The details of this background come from representations and/or attachments provided by the third party and the requester.

[16] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[17] For section 10(1) to apply, the city and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[18] The city's position is that section 10(1) applies to the records at issue, but it deferred to the third party to provide representations on the harm in section 10(1). The city later provided brief reply representations in response to the requester's representations about whether headings found in the records reveal *financial information* or not, under part one of the above three-part test.

[19] The requester's position is that not all of the records at issue are subject to section 10(1), and if they are, they should nevertheless be disclosed under section 16 (public interest override) of the *Act*.

[20] For its part, the third party objects to disclosure on the basis of sections 10(1)(a), (b), and/or (c).

[21] Since section 10(1) is a mandatory exemption, I have also examined the records themselves to determine whether the exemption applies.

[22] Below, I will discuss the evidence before me regarding whether the records meet the three-part test for section 10(1).

Part 1: type of information

[23] The types of information listed in section 10(1) have been discussed in prior orders. In this appeal, the third party submits that the records reveal *financial information*, and arguably *commercial information* (for Record 2). These types of

---

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

information have been defined as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[7]

Record 2

[24] The third party argues that record 2 clearly contains *financial information*, as that term is defined, above. It describes record 2 as a report prepared by an accounting firm, containing financial analysis and detailed financial information. The third party argues that the numbers redacted by the city are *financial information*, and that the headings and categories of information are as well, and may be considered *commercial information* too. In addition, the third party argues that the nature of the categories themselves reveal aspects of the financial structure of the third party (as a company) and the proposed structure of the deal that was being discussed, and these categories refer to specific categories of costs and how they are addressed within the financial structure.

[25] The requester acknowledges that they have not had the benefit of reviewing the records in making their representations. Therefore, the requester states that it cannot ascertain whether record 2 contains *financial information* or *commercial information* or not. However, it disagrees with the third party's position that disclosing subtitles would still amount to disclosure of *financial information* or *commercial information*, arguing that this interpretation goes beyond the plain meaning of the words used in definitions of *financial information* and *commercial information*. The requester submits that if the city's redactions are maintained, it is doubtful that the records would maintain their character as *financial information* or *commercial information*, and that the record would likely be unintelligible and of limited use.

[26] The city submits that the subject headings and categories that it has not redacted do not qualify as *financial information*. It describes these as general titles meant only to organize the rest of the information and which do not reveal anything specific about the third party's financial interests. The city submits that these titles

---

[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.

would be common to any financial analysis report and are not unique to appellant. The city states that it has redacted the content that corresponds to these headings, as that is what the city believes to be the "true" *financial information*, not the general subject headings.

[27] Having reviewed record 2, I find that it is a report prepared by an accountant containing information that qualifies as *financial information* and/or *commercial information*, as those terms are defined in past IPC orders. The report discusses the city's contractual agreement with the third party and the third party's proposal for a new financial/commercial arrangement.

[28] Since I have found that record 2 contains *financial* and/or *commercial information*, it meets part one of the test.

Records 3, 4, and 5

[29] With respect to records 3, 4, and 5, the third party describes these records as profit, cash flow, and budget analyses. It submits that these records all clearly contain *financial information*.

[30] The requester states that it is likely that records 3, 4, and 5 contain *financial information* or *commercial information*, but without the benefit of having reviewed them, it cannot take a definitive position on this.

[31] The city's limited representations on section 10(1) did not address records 3, 4, or However, in its index of records, the city describes these records as follows:

- record 3 - [the sports facility's] Net Profit and Cash Flow Analysis for Years 1 to 16 [2000-2016]
- record 4 – [the sports facility's] & [third party's name] Actual vs. Budget Comparison for the Fiscal Year Ending [date in 2017]
- record 5 – [the sports facility's] & [third party's name] Actual vs. Budget Comparison for the 11th fiscal period ending [date in 2018].

[32] Based on my review of records 3, 4, and 5, I find that they are profit, cash flow, and budget analysis relating to the sports facility in question. Given the nature of these records, I find that they contain *financial information*, and accordingly, I find that they meet part one of the test.

Record 6

[33] The third party's overall position is that records 2-6 are all exempt under section 10(1). With respect to record 6, its representations only specially address the redacted portions of this record, stating that they relate to financial data, and clearly constitutes

financial information.

[34] The requester states that it could not definitively take a position on part one of the test for this record.

[35] Having reviewed record 6, I find that it is a contract between the city and the third party, and therefore, I find that it contains both *commercial information* and *financial information*. As a result, record 6 also meets part one of the test.

Part 2: supplied in confidence

Supplied

[36] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[8]

[37] 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.[9]

Records 2, 3, 4, and 5

[38] The third party submits that records 2, 3, 4, and 5 were supplied to the city as part of "ongoing discussions" with city staff, and that these records were generated by the third party and its consultants, and *supplied* to the city.

[39] The requester's representations do not directly address the issue of whether records 2, 3, 4, and 5 were *supplied* to the city.

[40] I am satisfied that records 2, 3, 4, and 5 were *supplied* to the city. Having reviewed record 2, I am satisfied that it was *supplied* to the city, given its nature as a report prepared by professional accountants at the request of the third party, regarding a commercial proposal made by the third party to the city. With respect to records 3, 4, and 5, I accept the third party's statement that these profit, cash flow, and budget analyses were created by the third party with its consultants and *supplied* to the city, as part of the ongoing operation of the sports facility.

Record 6

[41] As mentioned, record 6 is a contract. 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

[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.

that originated from a single party.[10]

[42] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[11] 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]

[43] The third party describes record 6 as an agreement negotiated between itself and the city. Its representations only specifically address the pages withheld by the city, though it appears to take the position that record 6 overall is exempt under section 10(1).

[44] The third party states that the portions of record 6 that the city redacted all contain financial information related to the construction and operation of the sports facility, and projected financial information relating to that. The third party submits that this information falls within the *immutability exception* to the general rule that information contained in contracts is not considered *supplied*. In particular, the third party argues that the information is not subject to change through negotiation, as it represents fixed constructions costs (in the case of pages 137- 149) and financial projections (in the case of pages 136, 227-228 and 364). The third party argues that the financial *projections* should be considered in the same category as financial *statements*, as projections are not negotiated, but rather are generated by the third party and *supplied* to the city.

[45] The requester does not dispute the nature of record 6, that it is an agreement setting out the obligations of the city and the third party in relation to the sports facility.

[46] The city's limited representations (on reply) do not address whether any of the city's redactions to record 6, or the further redactions that the third party also seeks, meet either the *immutability exception* or the *inferred disclosure exception*.

[47] Having reviewed record 6, including the information that the city seeks to withhold in it, I am not satisfied that either the city or the third party have discharged their burden of proof to establish that record 6 was *supplied* (meeting one of the two exceptions), and not negotiated.

---

[10] 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*).
[11] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[12] *Miller Transit*, above at para. 34.

[48] Without representations from the city on the information that it has redacted, I would be left to speculate as to why those portions of the contract between the city and third party meet either of the exceptions to the general rule that contracts are negotiated, not *supplied*.

[49] Likewise, the third party's representations on this point are vague and unpersuasive. Asserting that the information in record 6 falls within *immutability exception* does not establish that it does. Based on my review of the pages flagged by the third party in its representations, I am not persuaded that I have sufficient evidence to accept that these portions of the contract contain "informational assets" of the third party that are not subject to change. Pages 136 and 137-149 are found in the portion of the contract containing the project's master budget and cash flow, which are aspects of the contract that the city can be presumed to have agreed to. More specifically:

- On page 136, the city redacted the dollar amounts (but not the general categories) relating to the third party's contribution to the cash flow; it did not redact the table on the same page showing the city's financial contributions to the project. However, since the information about the third party's side reflects terms of its commercial agreement with the city under the contract, in my view, this information reflects information that was negotiated and agreed to by the city. I am not persuaded that this is the type of information that qualifies as immutable, belonging to the third party and not subject to change.

- On pages 137-149, the city has similarly redacted any dollar amounts appearing in the various cost breakdowns found in these pages of the contract. However, I find that these amounts reflect costs of the project that the city agreed to, regardless of which contractual party was paying. Based on my review of these pages and the brief representations of the third party on this point, I am not persuaded that the costs listed and redacted on these pages are "fixed costs" of the third party (reflecting, for example, how much certain materials or services will cost them). I am unable to conclude that they represent "informational assets" of the third party, based on the evidence before me. Therefore, I find that these pages do not qualify for the immutability exception.

[50] With respect to pages 227, 228, and 364, they are ten-year financial projections (for a time period that has now passed, given the date of the contract). The third party argues that the financial projections should be considered in the same category as financial statements, submitting that they are not negotiated, but rather are generated by the third party and *supplied* to the city. I am prepared to accept that pages 227, 228, and 364 were *supplied* to the city because they were prepared by the third party and, by their nature, as projections, were likely not subject to negotiation with the city. Therefore, I will go on to consider whether the supply of these pages was done in confidence.

In confidence

[51] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[13]

[52] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[14]

Record 2

[53] The third party submits that it supplied record 2 to the city during the course of confidential discussions when the city was considering the proposal by the third party to expand the sports facility and establish a community centre. Therefore, the third party submits that record 2 was expressly supplied in confidence.

[54] In my view, the context that the third party describes is important. The proposal that is discussed in record 2 was not made to the city in response to a request from the city for proposals, but rather, it was a proposal for redevelopment made by the third party to the city. It is, therefore, reasonable to accept that the supply of record 2 would have been in confidence. Furthermore, while the city ultimately decided not to accept the third party's proposal, the possibility that it might not accept the proposal lends credence to the third party's evidence that record 2 was supplied in confidence as well. In the circumstances, I accept the third party's representations and affidavit evidence that record 2 was supplied *in confidence* to the city. As a result, I will go on to consider whether record 2 meets part three of the test later on in this order.

Records 3, 4, and 5

[55] With respect to the *in confidence* portion of part two of the test, the third party submits that each of records 3, 4, and 5 contains a header at the top of every page that

[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

states "For Discussion Purposes Only – Strictly CONFIDENTIAL (not intended for distribution)". The affidavit provided by the third party also states that records 3, 4, and 5 were expressly provided on a confidential basis. Therefore, the third party submits that these records have clearly been supplied to the city *in confidence*. I note that the affidavit describes these records as ones that "will reveal the business model and costing that [the third party used to successfully bid to enter into the Agreement with the City and will also reveal information about the ongoing revenues and expenses of the ongoing operations."

[56] Based on information that the requester says she received outside of this request, she submits that records 3, 4, and 5 relate to ongoing obligations of both city and the third party pursuant to the contract, namely budgeting and forecasts relating to ice time purchased by the city, and the portion of that cost that is subsidized by taxpayers. The requester submits that despite any markings on the records regarding confidentiality, these records should be disclosed to the extent that they relate to matters within the scope of the third party's existing contract with the city.

[57] In response to the requester's submissions, the third party notes that the requester "already appears to have some knowledge of the contents of the records," and offers speculation about whether that was proper, and what the real reason for the request is. However, what is relevant here is that the third party appears to agree with the requester's characterization of the records, in general terms.

[58] Based on my review of records 3, 4, and 5, I find that record 3 does not contain confidential markings as records 4 and 5 do. Since such marking were the reason put forward by the third party that record 3 was supplied in confidence, and since I have no evidence from the city with respect to expectations of confidentiality about this record, I find that there is insufficient evidence to accept that record 3 was supplied in confidence. As it fails part two of the test, it will be ordered disclosed.

[59] With respect to records 4 and 5, based on the representations of the third party and my review of these records, which are clearly marked as confidential, I find that records 4 and 5 were supplied to the city with an express expectation of confidence. As these records meet parts one and two of the test, I will consider whether they also meet part three of the test for section 10(1) later on in this order.

Pages 227, 228, and 364 of record 6

[60] Since I accepted that pages 227, 228, and 364 were *supplied* to the city by the third party, I will now consider whether there is sufficient evidence that this supply was made *in confidence*.

[61] The third party states that record 6 is an agreement between itself and the city, which expressly addresses the question of disclosure and confidentiality at a certain section of the contract, which says:

> Each of the parties hereto acknowledges that the contents of this Agreement may be disclosed and may become a matter of public record and further acknowledges and agrees that Applicable Law may require disclosure of information provided by any party hereto to any other party or parties hereto pursuant to or in connection with this Agreement. Except as may be required by Applicable Law, all such information shall be kept confidential by the parties and shall only be made available to such of a party's employees and consultants as required to have access to the same in order for the recipient party to adequately use such information for the purposes for which it was furnished. [Emphasis added.]

[62] The third party acknowledges that, based on the above, the contract does reference the potential for disclosure under "Applicable Law," and that this law would include *MFIPPA*. However, the third party submits that section 10(1) of the *Act* provides for an exemption disclosure "where the tests are met" and that "[o]ne of the tests is that information be supplied in confidence," and the above confidentiality clause "makes clear that information related to, and provided under, the Agreement 'shall be kept confidential.'" I find this reasoning to be unpersuasive, and that it appears to be based on a misreading of the confidentiality clause itself. The confidentiality clause indicates that unless *MFIPPA* requires disclosure ("Except as may be required by Applicable Law"), the contents of the agreement shall remain confidential. If a record does not meet all three parts of the test of section 10(1), and no other exemption under *MFIPPA* applies to it, *MFIPPA* requires that it be disclosed.

[63] In my view, there is insufficient evidence before me to establish that the information at issue on pages 227, 228, and 364 of record 6 was supplied *in confidence*. The third party's representations on the issue of the *in confidence* component of part two of the test do not specifically address these pages in their representations about harms, though the third party specifically addressed these pages elsewhere in its representations. The reference to the confidentiality clause in its contract with the city does not sufficiently establish that the information on these pages was supplied to the city *in confidence.* Accordingly, I find that pages 227, 228, and 364 do not meet part two of the test, and they will be ordered disclosed because all three parts of the test for section 10(1) must be met for them to be withheld under that exemption.

[64] Since I found that records 2, 4, and 5 meet part two of the test, I will now go on to consider whether they also meet part three.

Part 3: harms

[65] For the reasons that follow, I find that record 2 meets part three of the test in its entirety, but that there is insufficient evidence to establish that records 4 and 5 do.

[66] Parties resisting disclosure must establish a risk of harm from disclosure of the

record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[15]

[67] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act.*[17]

[68] 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 evidence to support the harms outlined in section 10(1).[18]

Record 2

[69] The third party states that record 2 is a report that was provided to the city in the context of a proposal to expand the existing sports facilities and to provide a range of public services and benefits.

[70] The third party submits, and I find, that although the city ultimately decided not to pursue this proposal, there is a public interest in the private sector bringing forward proposals to the government with the potential benefit to both the broader public and private sector. The affidavit provided by the third party indicates that the information provided to the city in the context of the meetings about the proposal that is the subject of record 2 were expressly without prejudice and confidential. In the circumstances, I accept the third party's argument that disclosure of record 2 is a disincentive to other private entities bringing proposals to government if confidential information will later be released publicly.

[71] In addition, the third party argues that disclosure of the information in record 2 will reveal aspects of its financial structure and how aspects of the sports facility are valued and addressed, which is confidential financial information. For these reasons, the third party submits, and I find, that disclosure of record 2 would result in similar information supporting potential public-private partnerships no longer being supplied.

[72] As a result, I find that record 2 meets part three of the test, in full, under section 10(1)(b) and is exempt from disclosure. In making this finding, I do not uphold the

---

[15] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[16] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[17] Order PO-2435.
[18] Order PO-2435.

city's decision to disclose small portions of this record, such as headings and subheadings. For the reasons I have already set out, I am satisfied that record as a whole is exempt from disclosure under section 10(1)(b).[19]

Records 4 and 5

Sections 10(1)(a) and 10(1)(c)

[73] Although I will only be addressing records 4 and 5 under part three of the test, I note that the third party's representations regarding part three of the test covered records 3-6. That is the case despite the different nature of these records - records 4 and 5 are one-page budget comparisons for 2017 and 2018 respectively, and record 6 is a contract (originally signed in 1999) consisting of hundreds of pages. The third party submits that sections 10(1)(a) and 10(1)(c) apply, as follows:

> The information contained in these records constitutes the underlying business model that [the third party] has used to structure the management of the [the sports facility]. If this information is released, it would prejudice [the third party's] competitive position as it would reveal costs and other sensitive financial information of rates and fees charged and costs incurred. [The third party's] competitors in the sports facility sector would have detailed information on all aspects of its operations, and this will impact [the third party's] ability to bid competitively on future contracts. Its competitors would have access to [the third party's] business model and would adjust bids accordingly. [The third party] would not have that information in relation to its competitors' operations and would have its competitive position harmed accordingly. The test in section 10(1)(a) is therefore met.
>
> [The third party] would suffer undue losses if the information is disclosed as it would harm its ability to gain future contracts given the harm to its competitive position, meeting the test in section 10(1)(c).

[74] In addition, the third party submits the following about records 3-5, specifically:

> Further, [the third party] would no longer provide the detailed information contained in Records 3-5 to the City if it is made public. Given the nature of the public private partnership [the third party] has with the City, it is in the public interest for as much detailed information as possible to be provided to the City. The test in section 10(1)(b) is therefore met.

[75] Having considered these arguments, and records 4 and 5 themselves, I am not

[19] The third party, the affected party, and city submitted that certain information relating to the author of the report is exempt under section 14(1). As I have found the report exempt under section 10(1), I will not be considering the application of section 14(1).

satisfied that the third party has established that sections 10(1)(a), (b), or (c) apply to records 4 and 5. I find the third party's arguments about sections 10(1)(a) and 10(1)(c) to be speculative and vague, and not sufficiently tied to the contents of records 4 and 5. The city's index of records described these records as "the [sports facility's] and [third party's] Actual vs. Budget Comparison for the Fiscal Year Ending [date in 2017 and 2018, respectively], and that is what they are." There is insufficient evidence before me to accept that the third party's underlying business model can be discerned from these records.

[76] Furthermore, the fact that the third party, who won a contract with the city, may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them, as contemplated by sections 10(1)(a) and 10(1)(c).[20]

[77] In the circumstances, I am unable to infer the harms contemplated by sections 10(1)(a) and 10(1)(c) from the records themselves or the representations of the third party.

Section 10(1)(b)

[78] With respect to section 10(1)(b), I found the third party's representations to be similarly unpersuasive and vague. The third party refers to its contractual relationship with the city in asserting that section 10(1)(b) applies, citing the nature of this relationship as a reason for having as much information provided to the city as possible. However, if I accept (as I did under part two of the test) that the information in records 4 and 5 had to be submitted to the city in performance of the contract, it is difficult to accept that records similar to records 4 and 5 would no longer be supplied to the city. If these records were put to the city voluntarily, though, the third party's argument would still be difficult to accept as evidence that section 10(1)(b) applies because it would be reasonable to expect that the third party would want to maintain its contractual relationship with the city going forward. In that sense, the "commercial reality" of doing business with a government entity is relevant here. In Order PO-2758, the adjudicator recognized certain facts relevant to contracts involving government bodies:

> … [the institution] has significant power in determining which companies to do business with. [The institution] offers an environment in which a large body of individuals require access to [the specified services related to the contract].
>
> Even more importantly, [the institution's] arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with [an institution], it will do so by charging lower fees to [the institution] than its competitor,

[20] *Ibid*.

> resulting in a net saving to [the institution] … To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. In my view, this is a totally different situation than in Order PO-1745, where there was an obvious danger that customers would move to a casino where the slot machines had a lower 'hold percentage.' For all these reasons, I find that [the provincial equivalent of section 11 (c)] does not apply.

[79] I agree with this reasoning, and adapt and adopt it here.

[80] For these reasons, I find that the third party has not established that the considerations of section 10(1)(b) apply to records 4 and 5, and I cannot infer that they do from my review of the records themselves.

[81] Given my findings that records 3, 4, 5, and 6 do not meet the three-part test and will be ordered disclosed, it is not necessary to discuss the parties' views about whether section 16 (public interest override) applies to these records. However, I will be considering whether record 2 may be disclosed under section 16, under Issue B in this order.

Issue B: Is there a compelling public interest in disclosure of record 2 that clearly outweighs the purpose of the section 10(1) exemption?

[82] For the reasons that follow, I find that section 16 does not apply to record 2.

[83] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 9.1, 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.

[84] 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.

[85] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[21]

[21] Order P-244.

Compelling public interest

[86] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[22] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record 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.[23]

[87] A public interest does not exist where the interests being advanced are essentially private in nature.[24] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25]

[88] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[26]

[89] Any public interest in non-disclosure that may exist also must be considered.[27] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[28]

[90] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation[29]
- the integrity of the criminal justice system has been called into question[30]
- public safety issues relating to the operation of nuclear facilities have been raised[31]
- disclosure would shed light on the safe operation of petrochemical facilities[32] or the province's ability to prepare for a nuclear emergency[33]

---

[22] Orders P-984 and PO-2607.
[23] Orders P-984 and PO-2556.
[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Order P-984.
[27] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[28] Orders PO-2072-F, PO-2098-R and PO-3197.
[29] 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.).
[30] Order PO-1779.
[31] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

- the records contain information about contributions to municipal election campaigns.[34]

[91] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations[35]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations[36]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding[37]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter[38]
- the records do not respond to the applicable public interest raised by appellant.[39]

The appellant's position

[92] The requester asserts that section 16 applies to the records at issue, even if section 10(1) applies to them.

[93] In support of her position, the requester reiterates the general principle noted above, that in order to find a "compelling" public interest the requesting party must show that the record is of vital importance in showing the operations of government and will provide the public with information needed to make informed political decisions. The requester asserts that it has shown this public interest from its representations on the application of section 10(1).

[94] The requester also specifically flags record 6 as a "vitally important document," submitting that the public has a right to know whether the third party, as operator of the sports facility and tenant of the city, "is properly carrying out its obligations and adhering to the terms of its contractual obligations."

[95] With respect to record 2, the requester made some submissions under part two of the test for section 10(1) that touch on a public interest in disclosure:

---

[32] Order P-1175.
[33] Order P-901.
[34] *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.
[35] Orders P-123/124, P-391 and M-539.
[36] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[37] Orders M-249 and M-317.
[38] Order P-613.
[39] Orders MO-1994 and PO-2607.

> Considering the proposal, being in the nature of public private partnership, taxpayers have an interest generally in the subject matter of such proposal save and except perhaps for certain information which is deemed commercially sensitive to the Third Party.

The third party's position

[96] The third party argues that the test for section 16 is "clearly not met" with respect to record 2.

[97] The third party submits that the record relates to a proposal made by it to the city which was not accepted, as the requester acknowledges, so the record does not relate to the "operations of government," but rather, to a proposal that did not result in a contract with the city. The third party argues that, therefore, disclosure of record 2 would only shed light on the third party's business model.

[98] In addition, the third party points to past IPC orders[40] that have held that a compelling interest has not been found where there is already a significant amount of public information already disclosed that is adequate to address any public interest considerations. The third party argues that a great deal of information is already available regarding the proposal that is discussed in record 2. In support of this submission, it relies on its affidavit evidence and an attached specified city staff report regarding the proposal, containing detailed information about the proposal.

[99] Furthermore, the third party argues that since the city has decided not to proceed with the proposal, the requirement that there be a "compelling" public interest has not been met.

[100] The third party's affidavit evidence includes the following, with respect to future public-private partnership proposals:

> If this information is made public, I will not want to come to any public agency with a proposal in the form of a public private partnership that would provide public benefits as well as a profitable business model for [the third party]. While there does need to be transparency when dealing with a public agency, the business model and financial information related to a private entity should not be made public as part of that transparency.

Analysis/findings

[101] Having considered the parties' representations, the third party's affidavit evidence, and record 2 itself, I find that there is no compelling public interest in the disclosure of record 2.

---

[40] Orders P-123/124, P-391 and M-539.

[102] I find that the public interest identified by the requester relates to transparency and decision-making regarding the sports facility, and especially the nature of the contractual obligations as between the city and the third party, given the requester's comments about the importance of record 6.

[103] Furthermore, I find that the requester has not sufficiently established that there is a compelling public interest in the disclosure of record 2, and appears to be more interested in the disclosure of the contract (record 6), which is already being disclosed through this order, as a result of my findings under section 10(1). I find that the fact that the third party was proposing a partnership with the city is insufficient to establish a compelling public interest in the disclosure of record 2.

[104] In addition, I find the city's decision not to accept the proposal weighs against finding that any public interest that may exist in disclosure of record 2 is "compelling."

[105] I am also satisfied that there is a public interest in *non*-disclosure of record 2. From the third party's argument and affidavit evidence, I accept that disclosure of record 2 would reasonably be expected to deter future proposals being made by private companies, which may benefit the public at large.

[106] For these reasons, I find that there is no compelling public interest in the disclosure of record 2, which I have found to be exempt under section 10(1).

[107] Given my finding that there is no compelling public interest in the disclosure of record 2, it is not necessary to discuss the part of the test for section 16 dealing with the purpose of the exemption at section 10(1).

ORDER:

1. I uphold the city's decision, in part. I order the city to withhold record 2, in its entirety.

2. I do not uphold the city's decision to withhold portions of records 3-6, and I order the city to disclose these records to the requester, in full, no later than **November 25, 2021**, but no earlier than **November 20, 2021**.

3. 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 pursuant to order provision 2.

Original signed by: October 21, 2021

Marian Sami
Adjudicator