

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4160

Appeal MA20-00090

The Corporation of the City of Cambridge

February 11, 2022

**Summary:** The requester sought access to financial information that a named charitable organization provided to the City of Cambridge (the city). The city decided to partly disclose the information to the requester. The named charitable organization appealed the decision claiming that the information qualified for exemption under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act*. In this order the adjudicator partly upholds the city's decision and finds that only certain withheld information qualifies for exemption under section 10(1) of the *Act*.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act* RSO 1990, c M.56, as amended, section 10(1).

**Order Considered:** Order MO-3756.

### OVERVIEW:

[1] The City of Cambridge (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to the financial statements of a named charitable organization provided under an agreement with the city, either before or after the execution of the agreement.

[2] The city initially issued a decision denying access to the requested information. The requester appealed the city's access decision and appeal file MA19-00638 was opened.

[3] At the mediation of appeal MA19-00638, the requester clarified that his request was for access to the following information:

- balance sheets of the named organization for the years 2018 and 2019.
- any information in the footnotes of the financial statements of the named organization that reference [a specific fund name].

[4] After inviting and receiving submissions from the named organization on disclosure of the requested information, the city issued a revised access decision. In its decision, the city granted partial access to the balance sheet for 2018 along with the explanatory financial notes #4 and #5 of the financial statements. The city advised the requester that it did not have the balance sheet for 2019. The requester did not appeal this revised access decision.

[5] The named charitable organization appealed the city's revised access decision, based on its position that the requested information qualified for exemption under the mandatory exemption at section 10(1) of the Act (third party information). The within appeal file (MA20-00090) was opened to address the named organization's appeal.

[6] As set out in the Mediator's Report, during the course of mediation, the city subsequently issued a further supplementary decision letter granting access to explanatory note #7. The requester did not appeal this decision. The named charitable organization appealed the city's supplementary decision and access to explanatory note #7 was added as an issue to be addressed in appeal MA20-00090.

[7] Mediation did not resolve this appeal and it was moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry under the *Act*.

[8] As the records at issue were now the subject of the within appeal MA20-00090, appeal file MA19-00638 was closed.

[9] Representations were exchanged between the parties in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[10] In the course of adjudication, I sent a letter to the appellant pointing out that charitable organizations provide various materials to Revenue Canada in the course of filing their T3010 Registered Charity Information Return and that a search under the appellant's name on the public Revenue Canada website indicates that there are financial materials filed for the period at issue in the appeal before me. I sought further representations from the appellant on what, if any, impact the publicly available information on the Revenue Canada website would have on the issues in this appeal.

[11] The appellant provided responding representations which were shared with the requester, who provided short representations in response. These are discussed below.

[12] In this order, I partly uphold the city's disclosure decision and find that only certain information qualifies for exemption under section 10(1) of the *Act*.

## **RECORDS:**

[13] Remaining at issue in this appeal is the named organization's 2018 balance sheet along with Explanatory Financial Notes #4, #5 and #7.

## **DISCUSSION:**

[14] The sole issue in this appeal is whether the information at issue in this appeal qualifies for exemption under section 10(1) of the *Act*.

[15] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>1</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>2</sup>

[16] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[17] For section 10(1) to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

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<sup>1</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>2</sup> Orders MO-1706, PO-1805, PO-2018 and PO-2184.

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

### **Part 1 of the section 10(1) test: type of information**

[18] The IPC has described financial information as:

*Financial information* is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>3</sup>

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

#### ***Supplied***

[19] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>4</sup>

[20] Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>5</sup>

#### ***In confidence***

[21] The party arguing against disclosure must show that both the individual supplying the information and the recipient expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.<sup>6</sup>

[22] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

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<sup>3</sup> Order PO-2010.

<sup>4</sup> Order MO-1706.

<sup>5</sup> Orders PO-2020 and PO-2043.

<sup>6</sup> Order PO-2020.

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.<sup>7</sup>

### **Part 3: harms**

#### ***Could reasonably be expected to***

[23] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the Act.<sup>8</sup>

[24] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.<sup>9</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.<sup>10</sup>

[25] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).<sup>11</sup>

#### **The appellant's representations**

[26] The appellant explains that it is incorporated as a not-for-profit organization in Ontario dedicated to protecting and providing shelter for needy animals of the Cambridge and District community.

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<sup>7</sup> Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

<sup>8</sup> Order PO-2435.

<sup>9</sup> *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

<sup>10</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52 to 54; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

<sup>11</sup> Order PO-2435.

[27] Relying on Order MO-3756<sup>12</sup>, it submits that the information at issue in this appeal falls within the definition of “financial” information, as interpreted by previous IPC Orders. The appellant states that the information at issue consists of detailed information about the financial position of the appellant and includes information about its assets, liabilities, fund balances, capital assets, and other similar items.

[28] It submits that:

In this case, the information was supplied directly from the [appellant] to the institution by virtue of a contract between the [appellant] and the city, which requires the [appellant] to make its financial statements available. [Footnote omitted] The city played no role in the creation of the financial statements. The documents were authored by the [appellant] and were supplied directly to the city.

[29] The appellant submits that the facts of this appeal are analogous to those under consideration in Order MO-3756, where the adjudicator found that financial statements of a third party had been provided to the Region of Peel by virtue of a contract between the third party and the region.<sup>13</sup>

[30] The appellant submits that:

... it is clear that the records were provided “in confidence” to the city. First, the [appellant] had a reasonable expectation that its internal financial documents would be held in confidence by the city as they are documents created without the input of a public body such as the city. Second, the records have been consistently treated as confidential by the [appellant]. Third, neither the records nor the information in the records have been disclosed or available from sources to which the public has access. Fourth, the records were prepared for a purpose that does not entail disclosure. Namely, the records were prepared by the [appellant] for its members under the legislative requirements for not-for-profit corporations.

Notably, the records were not created for the city. Nor were the records supplied to the city for the purposes of disclosure. The records were supplied to the city to meet the [appellant’s] contractual obligations under the services agreement between the [appellant] and the city, but they are not appended to, nor do they form part of that agreement. The information was provided solely to fulfill the agreement's requirements as between the parties, and therefore are supplied with an implicit and reasonable expectation of confidentiality.

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<sup>12</sup> The appellant references paragraph 15 of Order MO-3756 in support of its position.

<sup>13</sup> The appellant references paragraph 21 of Order MO-3756 in support of this submission.

[31] The appellant also submits that there is a reasonable expectation of harm to its competitive position if the records are disclosed. It states that it is a private organization that is not publicly traded and therefore, its financial statements and footnotes are not publicly available. The appellant takes the position that these documents and the information contained within them are considered to be its "informational assets" that, if disclosed, would result in the release of sensitive competitive information that would cause harm to the appellant's operations as a private charity.

[32] It adds that:

The [appellant] is an organization that is dedicated to protecting and providing shelter to needy animals in its community. While the [appellant] does not "compete" with other animal shelters for its services like a for-profit company operating in other industries might, the [appellant] is in competition with all types of other non-profit and charitable organizations for donations from individuals.

A large portion of the [appellant's] operations is supported through the fundraising activities of the organization. In this sense, the [appellant] is in "competition" with other organizations that are supported through fundraising activities. Disclosure of the [appellant's] financial statements offers these competitors insight into the [appellant's] financial position. This may allow competitors to discern what types of fundraising activities are successful or unsuccessful, in turn leading to these competing charities and non-profits enhancing their own fundraising activities. This includes any explanatory information provided by the footnotes to the financial statements. Thus, there is a reasonable inference that disclosure of the financial records could result in a gain to competitors at the expense of the [appellant].

[33] The appellant submits that a similar rationale was adopted by adjudicator in Order MO-3756.<sup>14</sup>

[34] With respect to the question I posed in the course of adjudication the appellant submits that the publicly available information on the Revenue Canada website has minimal impact on the issues in this appeal. The appellant submits that:

While similar information regarding the organization is filed with the Canada Revenue Agency, as part of the [appellant's] reporting obligations as a charitable organization, the vast majority of the information at issue is not contained in the publicly available information.

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<sup>14</sup> The appellant references paragraph 43 of Order MO-3756, as well as Orders P-1179 and P-1260 in support of this submission.

Further, the terminology and formatting of the record varies from the publicly available information, highlighting the [appellant's] financial and commercial practices.

... In this case, the record is comprised of the [appellant's] precise financial information, the majority of which is not publicly available. Therefore, the [appellant's] claim of harms from disclosure remains unaffected.

[35] The appellant provided a highlighted version of the record showing the information that it asserted was not available on Canada Revenue Agency's website or in the public portion of the appellant's tax filings.

### **The city's representations**

[36] While conceding that the information at issue qualifies as financial information, the city takes the position that the circumstances of this appeal, section 10(1) does not apply to the information that the city is prepared to disclose.

[37] Relying on section 12 of its agreement with the appellant whereby the appellant acknowledges that the city is a Municipal corporation that operates with openness and transparency and is subject to *MFIPPA*, and may be required to disclose the contents of the agreement and cannot guarantee its confidentiality, and supplying its financial statements to the city was required under the agreement, the city submits that the appellant did not supply the information to the city in confidence.

[38] The city submits that disclosing the information would not significantly prejudice the competitive position of the appellant, interfere with contractual negotiations, nor give rise to any reasonable expectation of harm. The city adds that:

Based on the level of detail contained within the Financial Statement for 2018 and that only year end balances with no further specific details on how these were achieved were identified for release, the city is of the opinion that determining undue loss or gain would be difficult to measure.

[39] The city submits that it operates with a view to accountability, openness and transparency to enhance public trust which is only achieved through the city adopting measures ensuring, to the best of its ability, that all activities and services are undertaken utilizing a process that is open and accessible to its stakeholders.

[40] It submits that members of the public expect details on how decisions are made and by not making information open and available may promote feelings of mistrust, dishonestly and poor integrity.



### **The original requester's representations**

[41] The original requester agrees with the city's position and explains the circumstances of a donation he made to the appellant, which he understood would be dedicated for a specific purpose, that he says did not come to pass.

[42] With respect to the question I posed at adjudication, the original requester submitted that the appellant has not demonstrated any significant harm to their operations by disclosing to him alone what happened to his charitable donation.

### **The appellant's reply to the city's representations**

[43] The appellant disagrees with the city's interpretation of the agreement regarding disclosure of the Financial Statements. It submits that the clause of the agreement referenced by the city specifically refers to "this agreement" and other clauses restrict the scope of the "agreement" to the contract between the city and the appellant, and not to other documents or records that may be provided under the agreement.

[44] The appellant submits that this distinguishes the present situation from others that the IPC has previously considered where certain records that contained business financial information were incorporated into an agreement between an institution and a third-party as schedules to the agreement.<sup>15</sup> It submits that in this case, while the agreement does refer to the appellant's financial statements, it does not incorporate them into the agreement such that records would no longer be considered to be "supplied" to the city.

[45] The appellant adds that section 12 of the agreement should not be read to require disclosure. It submits that simply because a document may state that it is subject to *MFIPPA* does not mean that the record must be disclosed under that legislation and the same analysis of potential exemptions and procedural requirements under *MFIPPA* are required to be followed regardless of the references to the legislation in the agreement. It also submits that section 12 of the agreement refers to the city's obligations, not the appellant's. It submits that it is a separate private organization that is not subject to the *Act* in the same way as the city is, and that *MFIPPA* "does not impose goals of openness and transparency onto private organizations."

[46] Finally, the appellant submits that the city has provided no basis for its position on disclosure other than unsubstantiated allegations that are insufficient to refute the established line of IPC decisions that have accepted harm may result from disclosure of financial statements.

[47] The appellant then proceeds to explain its position regarding the requester's donation.

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<sup>15</sup> The appellant references Order MO-2299 in this regard.

## **Analysis and finding**

[48] I begin by stating that my determinations in this matter are guided by the *Act* and the applicable circumstances. Addressing the circumstances of the requester's donation is not part of that task.

[49] I accept that the information at issue qualifies as financial information under section 10(1) of the *Act*. Accordingly, the first part of the section 10(1) test has been satisfied.

[50] I also accept that the information at issue, although mandated by a provision of a commercial agreement, and some of which is included in the appellant's charitable tax filings, was provided by the appellant to the city with a reasonably held expectation of confidentiality. In that regard, I agree with the appellant that abiding by section 12 of the agreement does not result in the appellant consenting to the disclosure of the information at issue in this appeal.<sup>16</sup> Simply stating that the city may be required to disclose the contents of the agreement and cannot guarantee its confidentiality does not mean that the *Act* does not apply. Furthermore, the existence of information on the appellant's charitable tax filings does not impact the appellant's reasonable expectation of confidentiality with respect to the supplying the information to the city, I therefore find that the second part of the section 10(1) test has been met.

[51] Section 10(1)(a) seeks to protect information that could be exploited in the marketplace.<sup>17</sup> The information at issue consists of detailed information about the financial position of the appellant and includes information about its assets, liabilities, fund balances, capital assets, and other similar items. I agree with the appellant that these are its informational assets. I note that it disclosed this information to the city to satisfy its contractual obligations under the agreement. I also note that they are not appended to nor do they form a part of that agreement. I therefore find that it is reasonable to expect that the appellant would suffer harm from the disclosure of the information at issue, that does not appear in the appellant's charitable tax filings. The appellant provided a highlighted version of the record showing the information that it asserted was not available on Canada Revenue Agency's website or in the public portion of the appellant's tax filings. In my view, it is reasonable to expect that, except for the information that also appears in the appellant's charitable tax filings, its competitors would gain an advantage over the appellant if the information at issue were disclosed. In that regard, I accept that the appellant competes with all types of other non-profit and charitable organizations for donations from individuals. Except regarding the information that appears on its charitable tax filings, the appellant's competitors would be able to use the other information to make accurate inferences regarding its financial position, which normally would be kept confidential. Accordingly, I find that the third part of the section 10(1) test has been met with respect to the information at issue that

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<sup>16</sup> See in this regard Order MO-2591.

<sup>17</sup> Orders MO-1706, PO-1805, PO-2018 and PO-2184.

does not appear on the appellant's charitable tax filings. I therefore find that this information qualifies for exemption under section 10(1) of the *Act*.

[52] I do not draw the same conclusion with respect to the information in the record that also appears in the appellant's charitable tax filings, as indicated by the appellant. I have highlighted this information in yellow on a copy of the record that I have provided to the city along with this order. In my view disclosing that information could not reasonably be expected to cause the section 10(1) harms alleged. Accordingly, I shall order the city to disclose that information to the requester.

**ORDER:**

1. I order the city to disclose to the requester only the information that I have highlighted in yellow on a copy of the record by disclosing it to him by March 18, 2022 but not before March 13, 2022.
2. In order to ensure compliance with paragraph 1, I reserve the right to require the city to send me a copy of the record as disclosed to the requester.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

February 11, 2022 \_\_\_\_\_