

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4289

Appeal MA21-00335

The Corporation of the City of St. Thomas

November 29, 2022

Summary: The appellant sought access to the pricing information in two municipal transit contracts between the Corporation of the City of St. Thomas (the city) and a third party transit company. The city denied access to this information, relying on the mandatory section 10(1) third party information exemption and the discretionary section 11 economic and other interests exemption.

In this order, the adjudicator does not uphold the application of the sections 10(1) and 11 exemptions and orders disclosure of the information at issue in the records.

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

Orders Considered: Order PO-2758.

OVERVIEW:

[1] The appellant sought access to the pricing information in two municipal transit contracts.

[2] Specifically, the Corporation of the City of St. Thomas (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for the:

Details of contract between the City of St. Thomas and St. Thomas transit operator [named company], i.e. monetary: wages, repairs, rent, taxes, payments, length, increase, types of default.

[3] The city located two contracts responsive to the request and notified the named company (the affected party) pursuant to the notice provisions in section 21(1) of the *Act*.

[4] The city then issued a decision granting access to both contracts, except for Schedule C to both contracts.

[5] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) and a mediator was assigned to attempt to achieve a resolution of this appeal with the parties.

[6] During the course of mediation, the city issued a clarified decision claiming the mandatory third party information exemption at section 10(1) of the *Act* to withhold Schedule C in both contracts.

[7] The city later issued a revised decision, claiming the discretionary economic or other interests exemptions at sections 11(c) and 11(d) of the *Act*, in addition to the section 10(1) claim, to withhold Schedule C in both contracts.

[8] The appellant advised that he wished to pursue access to Schedule C in both contracts at the adjudication stage of the appeal process. The appellant was advised that the adjudicator would consider whether the city was entitled to rely on the discretionary exemption in sections 11(c) and 11(d) of the *Act* due to the fact that the claim was made late in the appeal process. The appellant claimed the application of the public interest override in section 16 of the *Act*. This was also added as an issue.

[9] Further mediation was not possible and the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[10] I decided to conduct an inquiry and I sought the parties' representations, which were shared in accordance with the IPC's *Practice Direction 7*. Both the city and the affected party confirmed in their representations that they were only objecting to disclosure of the pricing information (the dollar and percentage values) in the two Schedule C's at issue.

[11] In this order, I find that the information at issue in the records is not exempt under sections 10(1), 11(c) or 11(d) and I order the city to disclose the entirety of both Schedule C's to the appellant.

RECORDS:

[12] At issue are two 2-page records, as follows:

- Schedule C to 2011 contract with the affected party.
- Schedule C to 2020 contract with the affected party.

[13] The records contain the unit costs and pricing structure for the provision of the affected party's services to the city. At issue in the two Schedule C's is the pricing information set out in dollar and percentage values in each record. The remainder of the information in these records is not at issue.

ISSUES:

- A. Does the mandatory third party exemption at section 10(1) for third party information apply to the records?
- B. Should the IPC permit the city to claim the section 11 economic and other interests discretionary exemption outside of the 35-day window for doing so?
- C. Do the discretionary economic and other interests sections 11(c) or 11(d) exemptions apply to the information at issue in the records?

DISCUSSION:

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

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

[15] 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,

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.

(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.

[16] For section 10(1) to apply, the party arguing against disclosure 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;
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

[17] The city submits that it is clear that commercial contracts, to which the records are appended, contain commercial and financial information, as they contain hourly rates, expected revenue service hours, maintenance costs and other costing information.

[18] The affected party states that the records contain revenue service rates and maintenance costs, which is commercial and financial information.

[19] The appellant did not address part 1 in his representations.

Findings re part 1

[20] The records are schedules to two contracts that contain revenue service rates and maintenance costs, which according to the city were copied from the initial proposals submitted to the city by the affected party as part of RFP processes.

[21] The IPC has described the types of information in the records, as referred to by

the city and the affected party, under section 10(1) as follows:

Commercial information is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.³ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁴

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.⁵

[22] I agree with the city and the affected party that the records contain commercial information related to the selling of services to the city by the affected party. The records outline the services that the affected party is selling to the city and contain commercial information.

[23] As well, the records contain information about the prices the affected party is selling its services to the city. Therefore, the records contain financial information.

[24] Accordingly, part 1 of the test under section 10(1) has been met as the records contain commercial information and financial information.

Part 2: supplied in confidence

[25] I will now determine whether the information at issue in the records was supplied in confidence to the city.

Supplied

[26] 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.⁶

[27] 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

[28] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

⁶ Order MO-1706.

⁷ Orders PO-2020 and PO-2043.

provisions are generally treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.⁸

[29] There are two exceptions to this general rule:

1. the “inferred disclosure” exception. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.⁹
2. the “immutability” exception. This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.¹⁰

Representations re supplied

[30] For the supplied part of the test, the city states that the unique nature of the records at issue bring the records within the “inferred disclosure” exception, as disclosure would permit someone to make accurate inferences about the pricing methodologies of the affected party. It submits that such methodologies are clearly non-negotiated, internal, and confidential information that has been supplied to the city.

[31] In the alternative, it submits that certain aspects of the records at issue are hypothetical and non-negotiable and are subject to the “immutability” exception, namely, the unit costs for “Operator Owned Vehicle RSHR”; “City Owned Vehicle Additional Service RSHR”; and “Operator Owned Vehicle Additional Service RSHR”. It states that the unit costs pertaining to these aspects are not used to calculate the base contract and were included in the contract only to be used in the event the city required additional service.

[32] For the in confidence part of the test, the city states that as part of the RFP process, the city explicitly states in the RFP that:

...the information shall be treated as confidential and not be used for any purpose other than for replying to this proposal call.

[33] The city submits that:

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*).

⁹ Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

¹⁰ *Miller Transit*, cited above at para. 34.

...it would be unreasonable for the affected party to expect that information supplied pursuant to a confidential process would immediately cease to become confidential once it is incorporated into a contract. However, given that the contract itself does not contain a confidentiality provision, the expectation of confidentiality is implicit.

[34] The affected party provided a detailed affidavit from its General Manager where he states that the inferred disclosure exception applies. He states that disclosure of the revenue service rates and maintenance costs, two previously unknown variables in the affected party's overall fixed costs, can lead to the "reverse engineering" of its fixed costs which comprise the overall rates. It states that by knowing these two variables, competitors need only to estimate and input a few other variables in order to obtain the overall fixed costs. It states:

Specifically, competitors will often know a number of variables already - or can estimate these variables - such as the fixed cost of the facility and an estimation of approximately 30-35% for wages, amongst others.

Knowing the Revenue Service Rates and Maintenance Costs (which were supplied at an hourly rate), one would then only have to calculate the approximate km per day - which are the same for all competitors - to obtain the total pricing.

The price per hour taken into account with the other estimated or known variables would allow competitors to determine if the proposal aimed high or low. Therefore, competitors could use this information to undercut [the appellant] at subsequent proposals...

[35] The appellant states that his similar requests for contracts between transit contractors and contracting agencies have been found to not qualify for an exemption or has been disclosed publicly, referring to an IPC appeal involving the City of London where similar records were disclosed and Order MO-3473. He submits that insofar as similar records have been disclosed publicly and to requesters, and insofar as contracts are mutually generated and not supplied.

[36] In reply, the city states that the one order cited by the appellant, Order MO-3473, neither of the parties to the appeal in that case provided representations in connection with the section 10(1) inquiry. In the result, the adjudicator was only able to render a decision based on the information in front of them and was effectively rendering judgement in a contextual vacuum. It also states that, in any event, not all transit contracts are inherently the same and that the contract at issue in MO-3473 was materially different than the contracts at issue in the present appeal.

Findings re supplied

[37] The records are schedules to contracts for the affected party to provide transit

services to the city. At issue in this appeal are the monetary values in the records, specifically the dollar and percentage values.

[38] There is no dispute that the information at issue is contained within contracts between the city and the affected party. As explained above, the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). As further explained above, there are two exceptions: the inferred disclosure exception and the immutability exception.

[39] Both the city and the affected party rely on the inferred disclosure exception. They are concerned that disclosure of the revenue service rates and maintenance costs (which were supplied at an hourly rate) would permit someone to make accurate inferences about the pricing methodologies of the affected party.

[40] In the alternative, the city submits that the unit costs for "Operator Owned Vehicle RSHR"; "City Owned Vehicle Additional Service RSHR"; and "Operator Owned Vehicle Additional Service RSHR" are subject to the immutable exception.

[41] The appellant relies on Order MO-3473, where the adjudicator found, in the absence of representations, there was no evidence to support a conclusion that the "inferred disclosure" exception or the "immutability" exception applies to any of the information at issue. In that order, at issue was the information York Region decided to disclose to the requester from an RFP submission that had become part of a contract for interpretation services between the affected party and York region. I do not find this order to be relevant to the present appeal because the adjudicator did not have before him representations on the immutability and inferred disclosure exceptions.

[42] At issue in the records are:

- the dollar values of the revenue service hours rates (dollar value per hour) for the affected party's operation of both owner operated and city owned transit vehicles;
- the total payment being paid to the affected party per contract year;
- the annual maintenance costs being paid to the affected party;
- current fuel costs per litre; and,
- the percentage increase or decrease in revenue service hours.

[43] I agree that the "inferred disclosure" or immutability exception could apply to information in a contract that reveals the underlying, non-negotiated fixed costs of a third party. However, according to the affected party, its pricing, and that of its competitors, is based on a number of components including assets (buses), maintenance, technology, wages, and many other aspects.

[44] The affected party's position is that disclosure of the information at issue would allow its competitors to reasonably "reverse engineer" the fixed costs charged to it by external companies that are providing services to the affected party. Its position is that it, along with its competitors, must determine the rates they will charge municipalities for their services based on these fixed costs and on their own internal costs.

[45] I do not agree with the city and the affected party that the information at issue in the records, as set out above, could be used through a process of reverse engineering to reveal the affected party's fixed costs. The affected party's pricing is based on a number of cost components to cover the affected party's overhead and operating costs, as well as a profit component.

[46] The affected party's cost components include the cost to the affected party to acquire and maintain buses, technology costs, and wages paid to staff and others to operate the transit service, which are inherently variable costs that can fluctuate over time.

[47] I cannot ascertain from my review of the information at issue in the records what fixed costs could reasonably be expected to be revealed by disclosure of the information at issue in the records, nor even what costs of the affected party are actually fixed.

[48] I also do not agree with the city that the immutability exception applies. This exception applies where the contract contains non-negotiable information supplied by the third party. The city's position is that the unit costs for "Operator Owned Vehicle RSHR"; "City Owned Vehicle Additional Service RSHR"; and "Operator Owned Vehicle Additional Service RSHR" are subject to the immutability exception. I do not agree with the city that these costs, which describe additional services the affected party may need to provide the city are not part of the base contracts.

[49] These costs are part of the contracts, are not underlying fixed costs but rather negotiated prices pertaining to services to be provided under the contracts. This information is not immutable, but rather is negotiated components of the contracts.

[50] Because the Schedule C's are part of the contracts between the affected party and the city, they are not supplied within the meaning of section 10(1). I have considered but rejected the argument that the immutability or the inferred disclosure exceptions apply in this case.

[51] Accordingly, part 2 of the test under section 10(1) has not been met, as the information at issue in the records was not supplied to the city and this information is not exempt under section 10(1). As I have found that part 2 of the test under section 10(1) has not been met, it is not necessary for me to consider part 3 of the test under section 10(1).

[52] I will now consider whether the city can claim the application of the section 11 discretionary exemption late.

Issue B: Should the IPC permit the city to claim the section 11 economic and other interests discretionary exemption outside of the 35-day window for doing so?

[53] The section 11 economic and other interests exemption is discretionary (the institution “may” refuse to disclose). This means that the institution can choose to withhold the information, but could also choose to disclose it. Here, the city did not claim the discretionary sections 11(c) and (d) exemptions in a timely way, and the question is whether it should still be permitted to rely on it.

[54] The IPC’s *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before the IPC. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

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

[55] The purpose of the 35-day rule is to provide an opportunity for institutions to raise a new discretionary exemption without compromising the integrity of the appeal process. Where an institution is aware of the 35-day rule, disallowing a discretionary exemption claimed outside the 35-day period is not a denial of natural justice.¹¹

[56] In deciding whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the requester.¹² The specific circumstances of the appeal must be considered in making this decision.¹³

[57] The parties were asked to consider and respond to the following:

1. Whether the requester is prejudiced in any way by allowing the late raising of a discretionary exemption or exemptions. If so, how? If not, why not? Please explain.

¹¹ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

¹² Order PO-1832.

¹³ Orders PO-2113 and PO-2331.

2. Whether the institution is prejudiced in any way by not allowing it to apply an additional discretionary exemption in the circumstances of this appeal. If so, how? If not, why not? Please explain.
3. By allowing the institution to claim an additional discretionary exemption, is the integrity of the appeals process compromised in any way? If so, how? If not, why not? Please explain.

Representations

[58] The city blames the late raising of the section 11 discretion exemption on staffing issues due to staff working from home during the pandemic or being away.

[59] The city submits that the appellant is not prejudiced by allowing the raising of the section 11, as this exemption was raised by the city in advance of the mediation which and well in advance of the adjudication Notice of Inquiry. Accordingly, it states that the appellant has had sufficient time to consider the issues and to prepare representations and to effectively seek a mediated settlement of the appeal. Furthermore, it states that the late raising of the section 11 exemption did not contribute to a delay in processing the appeal. It states:

By contrast, not allowing the city to apply the section 11 exemption would significantly prejudice it in the circumstances of this appeal. Namely, doing so would prevent the city from relying on one of the actual legal bases for its decision to deny access to the record merely because of an administrative oversight. Clearly, denying the city an opportunity to make submissions regarding the legal basis of its objection would be prejudicial...

[60] The affected party and the appellant did not provide representations on the late raising of the section 11 discretionary exemption, nor did they provide representations on the application of this exemption.

Findings

[61] I agree with the city that the late raising of the section 11 claim for the information at issue in the records, which are same portions of the two records that it has claimed section 10(1) will not, in the circumstances of this appeal, prejudice the appellant. This will not delay the processing of this appeal. The appellant was able to fully participate in both the mediation and adjudication stages of this appeal as the appellant was aware of the section 11 exemption claim prior to a mediated resolution of the appeal was attempted and prior to providing representations at adjudication.

[62] Accordingly, I will allow the city to raise the section 11 discretionary exemption.

Issue C: Do the discretionary economic and other interests sections 11(c) or 11(d) exemptions apply to the information at issue in the records?

[63] The purpose of section 11 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.¹⁴

[64] The city relies on sections 11(c) and (d), which read:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

[65] An institution resisting disclosure of a record on the basis of sections 11 (c) or (d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It 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, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act*.¹⁵

[66] The institution must show that the risk of harm is real and not just a possibility.¹⁶ However, it does 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.¹⁷

[67] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.¹⁸

¹⁴ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

¹⁵ Orders MO-2363 and PO-2435.

¹⁶ *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹⁷ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

¹⁸ Orders MO-2363 and PO-2758.

Representations

[68] As set out above, only the city provided representations on section 11.

[69] In its representations, the city recognizes that, as set out in the Notice of Inquiry, the IPC has found that although disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process, this does not prejudice the institution's economic interests, competitive position or financial interests under section 11.¹⁹

[70] However, the city submits that this is not the case in this appeal, as disclosure would lead to a significantly less competitive bidding process. It states that the confidentiality of the RFP process is precisely what attracts a wide variety of companies to participate in it – thus ensuring its competitiveness. It submits that with fewer participants in the process, it will lead to less competitive (i.e. more expensive and/or lower quality) bids over time. It states:

Indeed, given that adjudicators have determined that disclosure of similar information prejudices the companies participating in an RFP process,^[20] it would be expected that companies would be hesitant to participate in a such a process. Moreover, the disclosure of this information will damage the existing business relationship between the city and the affected party. It would be reasonable for the affected party to resent that the confidential information that it submitted pursuant to a confidential process has now become a matter of public record.

It is certainly reasonable to expect that this could affect the city's reputation within the transit community and with respect to other RFPs moving forward. Moreover, it is reasonable to expect that the affected party may not be willing to participate in this next RFP, thus removing a quality participant from the process. The process relies on trust between business partners, which will have been irreparably broken by disclosure of the records at issue...

Further, the city is tasked with contracting third parties that not only offer their services at a low price, but which can also provide services of a high quality. By making the unit prices of the successful bidder public, it only encourages a "race to the bottom" in terms of prices (amongst those companies that are still willing to participate). The confidentiality of the process ensures that companies are offering quality services at a price that is sustainable to them, which ultimately benefits the economic interests of the city.

¹⁹ Orders MO-2363 and PO-2758.

²⁰ The city relies on Order MO-3246, an order on the application of section 10(1) to bid documents, not an order with respect to the application of section 11 to contract information.

While it may appear beneficial in the short term to have companies aggressively offer the lowest prices in order to secure a bid, it would only encourage the quality of the services to suffer as a result which would in turn create economic stagnation within the community. Ultimately, the city has a long term economic and financial interest in deploying transportation infrastructure that is sustainable, of a high quality, and reasonably priced. Publicly exposing the confidential proprietary information of its transportation partners can reasonably be expected to interfere with these interests

Findings

[71] Although the wording of sections 11(c) and (d) differ, namely “prejudice the economic interests” (or its competitive position) and “be injurious to the financial interests,” the context of an institution’s claim to both of them has often resulted in their possible application being considered together in orders of this office.²¹ In this appeal, I am satisfied that it is appropriate to address the possible application of sections 11(c) and (d) together in this order.

[72] Both exemptions consider the consequences of the disclosure of information.

[73] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.²² Section 11(d) requires an institution to establish that disclosure of the information in the record reasonably be expected to be injurious to its financial interests.

[74] To reiterate, to establish section 11(c) or 11(d), the city was required to provide detailed evidence about the potential for harm. A risk of harm well beyond the merely possible or speculative must be demonstrated, although the city was not required to prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²³

[75] As set out above, the IPC has found that the fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution’s economic

²¹ Orders MO-3482-I, PO-2598 and PO-2987.

²² Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

²³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra*.

interests, competitive position or financial interests.²⁴

[76] The city's position is that less bidders will want to bid on future city contracts if the pricing information at issue in the records is disclosed. It submits that, as a result, less competitive bidding process will result in higher prices being charged to the city or lower quality bids.

[77] I find that the city has not explained, with reference to the information at issue in the records and section 11(c), how it competes for business with other public or private sector entities nor how disclosure of the information could reasonably be expected to prejudice its economic interests or competitive position. I find that the city's submission is a submission about a possible risk of general harms about a less competitive bidding process and it has not detailed evidence about the risk of harm if the information at issue, the prices it has been charged by the affected party for transit services, is disclosed.

[78] In Order PO-2758, in finding that the provincial equivalent²⁵ of section 11(c) did not apply, 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, 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...

[79] I agree with and find that the above reasoning applies to this appeal. I find the city's submission that disclosure of the commercial and financial information in the records could harm its economic or financial interests and competitive position to be speculation. I am satisfied that if a new or renewing transit operator wishes to secure a contract with the city, it will do so by charging lower fees, resulting in net savings to the city and could not reasonably be expected to prejudice the city's economic interests or competitive position.

[80] Therefore, I find that disclosure of the information at issue in the records could not reasonably be expected to prejudice the city's economic interests or competitive

²⁴ Orders MO-2363 and PO-2758.

²⁵ *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31.

position and section 11(c) does not apply. I also find that section 11(d) does not apply as disclosure of the pricing information at issue in the records could not reasonably be expected to be injurious to the financial interests of the city.

Conclusion

[81] As I have found that both sections 10(1) and 11 do not apply to exempt the information at issue in the records, and no other mandatory exemptions apply and no other discretionary exemptions have been claimed, I will order the information at issue in the records disclosed.

[82] As I have ordered the information at issue in the records disclosed, there is no need for me to consider whether the public interest override in section 16 applies to this information.

ORDER:

I order the city to disclose the entirety of both Schedule C's to the appellant **by January 9, 2023 but not before January 4, 2023.**

Original Signed By: _____

Diane Smith
Adjudicator

November 29, 2022