Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2299

Appeal MA-060159-1 and MA06-278

City of Ottawa

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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all records pertaining to two identified Requests for Proposal (RFPs). The requester subsequently revised his request, and stated he wanted the following:

> Documents pertaining to the extension and revisions to [the two RFPs] (what are the current terms).

The City located one record responsive to the request, and identified a third party whose interests may be affected by disclosure of the record (the third party). In accordance with section 21 of the *Act*, the City notified the third party and invited the third party to provide its views on the disclosure of the records. The third party provided representations identifying the portions of the record that it believed should not be disclosed.

The City then issued a decision granting the requester partial access to the record, and denying access to portions of the record on the basis of the exemption found in section 10(1) (third party information) of the *Act*. Portions of the record which the City intended to disclose included some of the portions of the record which the third party objected to disclosing, and the City also notified the third party of its decision.

When it was notified of the City's decision to disclose some portions of the record which it had objected to disclosing, the third party filed an appeal of that decision with this office, and appeal MA-060159-1 was opened.

The requester (now the appellant) also appealed the City's decision, and took the position that all of the requested information should be disclosed. As a result, appeal MA06-278 was opened.

Mediation did not resolve these appeals, and they were transferred to the inquiry stage of the process. The adjudicator previously assigned to these files initiated the inquiry process by sending out Notices of Inquiry, identifying the facts and issues in these appeals. She sent a Notice of Inquiry in appeal MA-060159-1 to the third party. With respect to appeal MA06-278, she sent a Notice of Inquiry to the City as well as to the third party.

Both the City and the third party provided representations in response to the Notice of Inquiry and, because the appeals are closely related, both parties provided one set of representations for both appeals. As a result, the previous adjudicator decided to combine these appeals. She then sent a single Notice of Inquiry to the appellant, along with copies of the non-confidential portions of the representations of the City and the third party. In addition, the adjudicator sent a complete copy of the third party's representations to the City, and the City was invited to respond to the third party's representations on why certain information ought not to be disclosed.

The City notified this office that it would not be providing further representations in these appeals. The appellant did not respond to the Notice of Inquiry.

The file was subsequently transferred to me to complete the adjudication process.

RECORD:

The record at issue in these appeals is an agreement between the City and the third party (the agreement).

Appeal MA06-278 is the appeal by the requester of the decision of the City (in consultation with the third party) to withhold portions of the agreement under section 10(1). The portions of the agreement in that appeal are:

Page 2:	Section 1.01(2), an amount withheld under the heading "Transportation Component".
Page 4-5:	Section 3, Table 1 entitled "Annual Land Application Targets" withheld extension entries after all "Targets".
Page 5:	Withheld text after "Table 1".
Page 5:	Section 3.03(5), withheld phrase after "[third party] agrees …"
Page 11-12:	Section 4.05 "Other Obligations of the City" text withheld in its entirety.
Page 12:	Withheld information in "Table 2: Fixed Rates", two entries under column one and all entries under the second column.
Page 13:	Withheld information in "Table 3: Hourly Rates", all entries under column entitled "Hourly Rate".
Schedule F:	Withheld in its entirety.
Schedule G:	Withheld in its entirety.
Schedule H:	Withheld in its entirety.
Schedule I:	Withheld in its entirety.

The portions of the agreement at issue in appeal MA-060159, which the City decided to disclose but which decision the third party appealed under section 10(1), are:

Page 2:	Section 1.05 - reference to Schedule D
Page 8:	Section 3.05 (2)
Page 11:	Section 4.01 (b)
Page 12:	Section 5.01 (1), portions of the "Table 2: Fixed Rates"
Page 13:	Section 5.01 (4), portions of this clause
Schedule D:	In its entirety

DISCUSSION:

THIRD PARTY INFORMATION

As identified above, the City denied access to the portions of the record remaining at issue on the basis of section 10(1) of the *Act*. The third party also took the position that the other portions of the record which it objected to disclosing were exempt under that section. The City and the third party provided representations in support of their position that portions of the records remaining

at issue in both of these appeals are exempt under sections 10(1)(a), (b) and (c) of the *Act*. Those sections read:

> 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, where 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184 and MO-1706].

For section 10(1) to apply, the City and 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.

I will now review the record at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The City and the third party take the position that the records contain commercial and financial information for the purpose of the first part of the three-part test. The third party also argues that portions of the record contain trade secrets or technical information. These terms have been discussed in prior orders as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *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 [Order PO-2010].

Based on the representations of the parties and my review of the records, I am satisfied that the records contain "financial" and/or "commercial" information that falls within the scope of the definitions cited above. Because of this finding, it is not necessary to determine whether they also contain trade secrets and/or technical information.

Since information in the agreement qualifies as "financial" and/or "commercial", I find that the requirements of Part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the City and the third party must establish that the information was "supplied" to the City by the third party "in confidence", either implicitly or explicitly.

Representations

With respect to the portions of the record which the City objected to disclosing, the City takes the position that the exempted portions of the record were supplied to the City by the third party "… as evidenced by Schedules F, G and H". The City then states that it takes this position based on the following factors:

> … the [third party] submitted this information to the City with a reasonable, implicit expectation of confidentiality; the [third party] has represented to the City that all discussion between the City and the [third party] occurred with the express understanding that the information was confidential. The City feels that this expectation is reasonable in the circumstances. The [third party] has and continues to have a legitimate expectation that all of its proprietary commercial and financial information would remain confidential. The exempted commercial and financial information is not the type of information that is commonly known by or available to the public.

The third party also provides representations on the issue of whether the information was "supplied in confidence" by it to the City. The third party begins by identifying the requirements necessary to establish whether an expectation of confidentiality existed, and then states:

> In the present matter, the information was explicitly and/or implicitly supplied to the City in confidence, and was treated consistently in a confidential manner by [the third party]. This information is not the type of information that is commonly known by or available to the public or that [the third party] would make available to the public. It is also a type of information that cannot be discovered by observation, and is not generally known to, or readily ascertainable by other parties. [The third party] had, and continues to have, a legitimate expectation that all of its proprietary commercial and financial information, and trade secrets remain confidential.
>
> The discussions between [the third party] and the City took place outside the parameters of the RFP process. Much, if not all, of the discussions occurred with the express understanding that the information was confidential. For example,
>
> - During the discussions with the City, [the third party] was very hesitant to supply its trade secret and proprietary information

> and methods to the City and expressed its concerns on several occasions. [The third party] relied upon the express representations of [a named individual] that the use of terms such as "draft", "preliminary proposal", "without prejudice or admission" would ensure that the City would not divulge the contents of [the third party's] proposals.
>
> - [The third party] provided two (2) draft, preliminary proposals to the City on [two identified dates] (which became Schedule F of the amendment), as well as e-mail correspondence [on an identified date] (which became Schedule G of the amendment) in confidence. The third party expressly indicated that these proposals and email correspondence were confidential.
>
> - On numerous occasions, various employees of the City verbally agreed to treat all information provided by [the third party], and the terms and negotiations of any possible amendment to the Contract, as highly confidential.
>
> This information was communicated to the City with a reasonable expectation of privacy. It was communicated to the City within the context of a fiduciary relationship, not contrary to the public interest, and that relationship is one that should be fostered for the public benefit.

Later in its submissions, the third party provides detailed references to the specific information which it is opposed to disclosing, and identifies the harms which it argues will result from disclosure. The third party also provided a confidential, detailed affidavit in support of its position. I will address these specific submissions below.

Supplied

The requirement that information be "supplied" to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties (Order MO-1706).

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 (Orders PO-2020, PO-2043).

The record at issue in this appeal is an agreement entered into between the City and the third party. This office has addressed the issue of whether the contents of an agreement or contract between a third party and a government institution have been "supplied" for the purpose of section 10(1) on a number of occasions. Below is a review of a number of orders which address this issue:

Contracts/agreements

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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

In Order MO-1706, Adjudicator Bernard Morrow states:

> … [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851; motion for leave to appeal dismissed, Doc.M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be 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 affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible to change, such as the operating philosophy of a business, or a sample of its products.

Order PO-2384 dealt with a price-cost structure, and the information at issue included a document entitled "pricing sheet" [found in a schedule to the contract at issue]. The Ministry in that case submitted that the identical page in the tender submission containing bid incentives was copied into the Finalized Contract. Commenting on the contract negotiation process in the circumstances of that appeal, Adjudicator Steve Faughnan stated:

> If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained [in Order MO-1735 and MO-1706], except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no

> negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1) [the equivalent of section 10(1) of the *Act*]. Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. *A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it*. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.
>
> As set out in the section of the [finalized contract] entitled "Background", the tender bid that was submitted by the affected party is wholly incorporated into the contract by reference…
>
> Based upon the reasoning in the authorities set out earlier, and my review of the representations and records, I am satisfied that the information contained in the [finalized contract] … and extensions or renewals consist of agreed upon essential terms that I consider to be the product of a negotiation process. Therefore, in the circumstances of this appeal, I do not consider that any of the information in the agreement, including the tender that is incorporated by reference as [a schedule], or any of the information set out in the other schedules to have been "supplied" by the affected party for the purposes of this part of the test. [my emphasis]

In Order PO-2435, Assistant Commissioner Brian Beamish also addressed the issue of whether information provided by one party but incorporated into a contract was "supplied". In that order the Ministry acknowledged that the records at issue in that appeal were contracts, but explained why it believed they still qualify as "supplied". It argued: "Although the Record … consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item….. Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety."

Assistant Commissioner Brian Beamish rejected that approach to part two of the test, and stated:

> As in Order MO-1706, just because [the terms of a contract] may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).
>
> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by [the Ministry], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into [an agreement] with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by [the Ministry] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of [the Ministry] process cannot then be relied upon by the Ministry … to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of [these agreements], I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

I adopt the approach to contracts and agreements set out in the orders referenced above, and will apply that approach to the circumstances of this appeal.

Analysis and findings

The records at issue in this appeal are the undisclosed portions of an agreement entered into between the City and the third party. The undisclosed portions include various clauses, terms or portions of tables contained in the agreement, as well as five schedules attached to the agreement.

Based on the authorities discussed above, and on my review of the third party's representations and the contents of the record, I conclude that all of the information contained in the agreement consists of mutually generated, agreed-upon, essential terms that I find to be the product of a negotiation process between the City and the third party. Specifically, I make the following findings:

Prices, targets, percentages, etc.

Certain portions of the record remaining at issue contain prices, targets, or percentages which the parties have agreed to, and which in my view are mutually generated, essential terms of the contract. Some of these portions also identify how these amounts or targets are to be calculated. These portions of the contract are:

Page 2:	Section 1.01(2), [an identified amount]
Page 4-5:	Section 3, Table 1 [identified targets]
Page 5:	Withheld text after "Table 1" [an identified calculation]
Page 5:	Section 3.03(5) [an identified percentage]

In my view these terms of the contract, which set out the prices, targets, and other information which was agreed to by the parties, are the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

Hourly rates of identified positions

The withheld portion of "Table 3: Hourly Rates" on page 13 of the agreement consists of the hourly rates for identified positions. In addition to the representations set out above, the third party states as follows regarding this information:

> Hourly rates for the additional activities are strictly third-party commercial and financial information. Theses rates were not negotiated with the City and were supplied to the City.

The third party goes on to identify the ways in which disclosure of this information could lead to various possible harms.

I do not accept the third party's position that these hourly rates "were not negotiated with the City and were supplied to the City". Consistent with Assistant Commissioner Beamish's conclusions in Order PO-2435, I find that these hourly rates are the rates agreed to by the City and the third party, they form part of the agreement, and they do not represent a "fixed underlying cost". In my view these are negotiated terms of the agreement, and cannot be regarded as "supplied" by the third party.

Obligations committed to by the City

One withheld portion of the agreement identifies an obligation the City has committed to under the contract (a portion of Page 11-12: Section 4.05(1)). In my view, in accordance with the orders set out above, this portion of the agreement is also a negotiated term of the agreement, and is not "supplied" by the third party for the purpose of section 10(1).

Portions of Table 2 labelled "Fixed Rates"

The portions of the record at issue in appeal MA06-278 contained in "Table 2: Fixed Rates" are two entries under the first column, and all entries under the "price" column. This table sets out the rates to be paid by the City for the identified services. In my view these amounts are negotiated amounts agreed to by the parties to the agreement for the various services provided by the third party, and are not "supplied" by the third party to the City.

I have carefully reviewed this table to determine whether any portions of it fit within the situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply (the "inferred disclosure" and "immutability" exceptions referred to above). I considered the information in this table in particular because, in entries under the column entitled "Price", some of the entries include not only the total amount to be paid by the City, but also a base amount and an additional percentage, from which the listed total amount is calculated.

Although the parties have not provided specific representations on the "inferred disclosure" and "immutability" exceptions, based on the discussion set out in order PO-2384 (above), if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" for the purpose of section 10(1). Accordingly, I carefully considered whether the base amount in the "Price" column could be considered an "immutable" amount. However, on my review of the contract, including a reference to one of these amounts in Schedule F, which suggest that the "base amount" is not a fixed cost but a calculated estimate, and in the absence of any other specific evidence on this issue from the parties, I find that none of the information under this column fits within the exceptions.

Schedules F, G and H

Schedule F, G and H were withheld in their entirety. In addition to the representations of the City and the third party set out above, the third party also states:

> Schedule F is [the third party's] business proposal to the City's request to provide an alternative option to [an identified matter]. It was provided to the City before the [agreement] was signed.
>
> It outlines various business options and strategies offered by [the third party] to the City. It encompasses [various options, requirements and references to other contractual situations].
>
> It also states prices and various projected savings, as calculated by [the third party] on the basis of various business proposals and parameters.
>
> It is basically a tip sheet of how [the third party] proposed to do business with the City, with many options to respond to City concerns. Disclosure of this

> information would amount to give competitor a "how-to" compete [the third party] and its business method and approach.
>
> The information in Schedule F, table 1 is [the third party's] own calculations and information submitted to the City. They form the core of the proposal regarding [various costs and projections].
>
> These records constitute business financial information that was provided to City in confidence, on a confidential base.

The third party also refers to Schedules G and H as "complement[s] to [the third party's] proposal described in schedule F", and states that the reasoning concerning Schedule F applies to these two schedules as well.

In addition, with respect to Schedule H, the third party states that the rates and costs of services were proposed by it to the City. It also states:

> The disclosure of the information would provide competitors with [the third party's] pricing structure, allowing them to adjust their bidding structure accordingly. They would thereby gain a significant competitive advantage at the time of the renewal of the Contract ….

Finding

I have carefully examined Schedules F, G and H. These three schedules are referred to by the third party as its "proposal" (Schedule F) and two "complement[s]" to its proposal (Schedules G and H). On my review of these documents, they do appear to be a confidential proposal and two related records, provided by the third party to the City. I accept that at the time these records were provided to the City (which appears to have been during the time that the agreement was being negotiated), these records may well have been "supplied" to the City in confidence for the purpose of section 10(1). However, the parties subsequently chose to incorporate these records into the agreement entered into between them. The agreement clearly refers to these three schedules as forming part of the agreement, and as containing certain terms of the agreement.

In my view, by incorporating these documents in to the agreement, and by having them form part of the agreement, these documents can no longer be considered to have been "supplied" by the third party. Rather, these documents constitute the agreed, negotiated terms of the agreement.

Again, I have also carefully reviewed these records to determine whether any portions of them fit within the situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply (the "inferred disclosure" and "immutability" exceptions). On my careful review of these records, I find that the exceptions do not apply to any of the information contained in them. These three schedules, which form part of the agreement, do contain some "background" information as to why these records were provided, and the basis upon which some of the information in them is provided. I consider this information to be in the nature of the type of information found in a "preamble" to a contract, which essentially sets the

framework for why the clauses in the contract were negotiated. I do not consider these portions of the schedules to fit within the "inferred disclosure" and "immutability" exceptions.

I have also carefully examined the table which forms part of Schedule F, as well as various references to amounts set out in some portions of the schedules (particularly Schedule F). As identified above, if a third party has certain fixed costs that determine a floor for a financial term in the contract, the information setting out the fixed or "overhead" cost may be found to be "supplied" for the purpose of section 10(1). Accordingly, I carefully considered whether the various amounts referred to in the schedules (including identified "base amounts" and other references to various costs) identified any such "fixed" costs. However, on my review of this information, including a reference to an amount in Schedule F which suggests that the "base amounts" are not fixed costs but calculated estimates, and in the absence of any other specific evidence on this issue from the parties, I find that none of the information fits within the exceptions. In addition, although there is a reference to certain identified costs in Schedule F, and the proposed methods of resolving issues surrounding those costs, by incorporating Schedule F and its terms into the contract, the parties have negotiated these amounts and issues. In my view, the exceptions identified above do not apply to the information in Schedules F, G and H, and I find that they were not "supplied" by the third party for the purpose of section 10(1).

Schedule I

Schedule I was withheld in its entirety; however, the third party has not provided any representations on this schedule and chose not to comment on whether section 10(1) applies to it. On my review of this schedule, which forms part of the agreement, I find that it was not supplied to the City by the third party for the purpose of section 10(1).

Schedule D and the portions of the Agreement referring to that schedule (Appeal MA-060159-1)

The portions of the agreement at issue in Appeal MA-060159, which the City decided to disclose but which decision the third party appealed under section 10(1), are:

Page 2: Section 1.05 - reference to Schedule D
Page 8: Section 3.05 (2)
Page 11: Section 4.01 (b)
Page 12: Section 5.01 (1), portions of the "Table 2: Fixed Rates"
Page 13: Section 5.01 (4), portions of this clause
Schedule D: In its entirety

The third party takes the position that this information is "guarded very closely" as "much of it is the result of years of business-sensitive development and has substantial commercial value." The third party submits that the release of the information in Schedule D in the competitive field in which it is involved would provide the third party's competitors with "important commercial information and intelligence which are not otherwise available", and that disclosure "would provide a ready-made guide for competitors to copy." The third party also provides additional references to the harms which it believes will occur if the information is disclosed, and refers to

this information in the confidential portions of its representations and in the confidential affidavit provided by it along with its representations.

In its confidential representations and affidavit, the third party describes Schedule D in some detail, identifies how the information in it was prepared, distinguishes it from information in other parts of the agreement, and provides additional information in support of its position that the information ought not to be disclosed.

I have carefully reviewed Schedule D and the references to it in the agreement, as well as the representations of the third party (including the confidential representations, which I cannot refer to in detail). I do not accept that Schedule D and the references to it can be viewed as anything other than agreed-upon terms in what appears to be a detailed and carefully negotiated agreement between the City and the third party. Although the third party's representations do not specifically refer to the "inferred disclosure" or "immutability" exceptions, the third party's representations suggest that this information is in the nature of information that is "immutable"; however, I do not accept that characterization of this information. In my view, Schedule D does not contain that type of information; rather, it identifies the approach the third party will take to fulfilling the terms of the agreement with the City regarding a particular aspect of the agreement. On my careful review of Schedule D, I am not satisfied that it, or the references to it in the agreement, fall into the "inferred disclosure" or "immutability" exceptions.

Therefore, in the circumstances of this appeal, I do not consider that information to have been "supplied" by the third party for the purposes of part 2 of the section 10(1) test.

In summary, I find that that the City and the third party have failed to meet the requirements of part 2 of the section 10(1) test, as the information contained in the portions of the agreement remaining at issue was not supplied to the City. As all three parts of the three-part test set out in section 10(1) must be met, I find that the records do not qualify for exemption under section 10(1).

As a final matter, the third party provided representations identifying the harms that it believes will result from the disclosure of the records (namely, harms to its competitive position, or interference with contractual or other negotiations). In Order MO-1393, Adjudicator Sherry Liang examined whether a lease agreement qualified for exemption under section 10(1), and found that the lease agreement was not "supplied" for the purpose of the second part of the three part test in that section. She then wrote:

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected

> party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

I agree with these comments made by Adjudicator Liang. As noted above, all three parts of the test under this exemption must be established. Having found that the information in the withheld portions of the record was not supplied to the City, I find that section 10(1) does not apply to it.

ORDER:

1. I order the City to disclose the records at issue to the appellant by sending him a copy by **June 2, 2008** but not before **May 26, 2008**.

2. In order to verify compliance with provision 1, I reserve the right to require the City to provide me with a copy of the records which were disclosed to the appellant.

Original signed by: April 28, 2008
Frank DeVries
Adjudicator