Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3179

Appeal MA13-554

City of Toronto

March 31, 2015

Summary: The requester sought access to information from the City of Toronto about a Request for Proposals (RFP) for graffiti removal services. The records at issue form part of the third party appellant's winning submission in response to the RFP. The appellant objects to the city's decision to grant partial access to the records. Both the appellant and the city claim that parts of the records are exempt under sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act.* The requester's claim that section 16 (the public interest override) applies is also an issue in this case. In this order, the adjudicator finds that parts of the records that reveal the identities of the appellant's clients, detailed information about the work performed for two clients, and a portion of the appellant's training manual, are exempt under section 10(1). This order also finds that the resumes submitted with the RFP are exempt under section 14(1). In addition, this order finds that the public interest override in section 16 does not apply, and orders the city to disclose the parts of the records that are found not to be exempt.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) (definition of personal information), 4(1), 5(1), 10(1), 14(1) and 16; *Copyright Act*, R.S.C. 1985, c. C-42, s. 32.1.

Orders and Investigation Reports Considered: MO-1706, MO-3058-F, PO-3316, PO-3420, PO-2435.

Cases Considered: *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3

OVERVIEW:

[1] The requester submitted a request to the City of Toronto (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to a Request For Proposal (RFP) concerning the procurement of graffiti removal services. In particular, the requester sought access to the following information:

> . . . all emails, correspondence, evaluation reports and records as well as any and all communication records between all the individual divisions and departments involved in [an RFP identified by number]. I am also requesting a copy of all technical and pricing submission provided to the city by [identified third parties].

[2] The third party appellant (the appellant) is a graffiti removal company that was the successful bidder in the RFP process. The records at issue include training manual excerpts, resumes and references, all of which were submitted by the appellant to the city as part of the appellant's RFP submission.

[3] After notifying third parties of the request, the city issued a decision advising the appellant of the city's decision to grant partial access. The city indicated that portions of the records are exempt under sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act.* The city also provided the appellant with an index of records describing the specific pages to which the exemptions were to be applied.

[4] The appellant filed an appeal of the city's decision to grant partial access.

[5] During mediation of the appeal, the city advised the mediator that the records at issue consist of the winning submission and that no portions of this submission had been released to the requester.

[6] The mediator contacted the requester to discuss the exemptions cited in the city's decision and to clarify the records at issue. The requester indicated that he is not seeking access to the cell phone numbers severed from pages A2, A29[1] and A32, nor to the information relating to the signing officer on page A32.[2] In addition, the requester indicated that he is not seeking access to the references at pages A9, A10 and A11. The requester also indicated that he is not pursuing access to the non-responsive

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[1] I note that the city, in its index of August 11, 2014, states that page A29 is not at issue. In fact, the requester no longer seeks access to the emergency contact number, but continues to seek access to the other severed information on that page. Accordingly, page A29 remains at issue, except for the emergency contact number.

[2] Because pages A2 and A32 have been disclosed with the contact information severed, and with the information about the signing officer severed from page A32, pages A2 and A32 are no longer at issue.

information on pages A97 to A108. The information to which the requester no longer seeks access is not at issue in this appeal.

[7] The requester did indicate, however, that he wishes to pursue access to the resumes at pages A181 to A186, to which access was denied under section 14(1) of the *Act,* and to the remaining parts of the RFP submission, to which access was denied under section 10(1) of the *Act.*

[8] In turn, the mediator contacted the appellant to seek its feedback on the disclosure of the records at issue, and discuss some relevant precedents issued by this office. The appellant confirmed that the pages of the RFP submission that are not in dispute in this appeal could be released to the requester. The appellant asked for an opportunity to review the package to be disclosed to the requester, prior to its release.

[9] The city subsequently submitted the records that are not in dispute in this appeal to the appellant for its review, prior to releasing them to the requester. The city then disclosed those pages to the requester. Part of the information disclosed consists of detailed pricing information, including unit prices.

[10] The file then moved on to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act*. This office initially invited representations from the appellant and the city and sent them a Notice of Inquiry outlining the issues. Both these parties provided representations. This office then sent a Notice of Inquiry to the requester, enclosing the city's and appellant's representations, and inviting him to provide representations, which he did.

[11] In his representations, the requester raised the possible application of the public interest override found in section 16 of the *Act*. Section 16 has therefore been added as an issue in this appeal.

[12] This office then provided a copy of the requester's representations to the appellant and the city and invited their reply representations, which both of them provided.

[13] When the city sent its reply representations on July 18, 2014, it attached a revised access decision as Appendix A. It also provided a copy of this decision to the appellant and the requester. The appellant subsequently advised this office that it objects to the revised decision.

[14] On August 11, 2014, the city made further revisions to its access decision and sent an amended revised decision to the appellant and the requester, with a copy to this office. This office then advised all parties that it would treat the appellant's objection to the revised access decision as an appeal from the amended revised

decision of August 11, 2014, and would deal with the issues raised as part of this appeal.

[15] Subsequently, the appeal was re-assigned to me to complete the inquiry.

[16] In this order, I conclude that: the section 10(1) exemption applies to some portions of the records; the resumes are exempt under section 14(1); and the public interest override does not apply to the exempt information. The city is ordered to disclose the information that is not exempt.

RECORDS:

[17] The records remaining at issue consist of the undisclosed portions of the appellant's winning RFP submission, with the exception of the information removed from the scope of the appeal during mediation, as summarized above. The records at issue include training manual excerpts, descriptions of the appellant's services, references and resumes.

[18] My review of the records reveals that pages A171 and A172 are exact duplicates of pages A125 and A126. Similarly, page A163 is an exact duplicate of page A134, and pages A232 through A244 are exact duplicates of pages A123 through A135. No purpose would be served by including the duplicate pages in the scope of this appeal, and therefore I have removed pages A123 through A135 and page A163 from the records to be considered in this order.

[19] The appellant objects to the disclosure of any of the information that has been withheld. The city's decision of August 11, 2014 indicated that in the city's view, some of the withheld information should be disclosed.

[20] The following chart sets out the records at issue and the exemptions claimed for them, and whether access has been denied in full or in part.[3]

Page No(s)	Description	Full or Partial Denial	Exemption claimed
A5	Executive Summary	P	s. 10(1)
A6	Corporate History	P	s. 10(1)
A7-A8	Description of Services	P	s. 10(1)
A16-A27	Training manual extract	F	s. 10(1)
A28-A29	Personnel, training & contact info. (contact information on A28 is not at	P	s. 10(1)

[3] This chart reflects the information that has been withheld prior to this order. My determinations concerning the records are found in the order provisions at the end of the order.

Page No(s)	Description	Full or Partial Denial	Exemption claimed
	issue)		
A109-A120	References' Questionnaires	F	s. 10(1)
A123-A142	Training manual extract	F	s. 10(1)
A146	Description of Services	P	s. 10(1)
A147-A153	Training manual extract	F	s. 10(1)
A164	Training manual extract	F	s. 10(1)
A165	Description of Services	P	s. 10(1)
A173-A179	Client Services Information	F	s. 10(1)
A181-A186	Resumes	F	s. 14(1)
A187-A203	Training manual extract	F	s. 10(1)
A216-A231	Training manual extract	F	s. 10(1)
A245-A252	Training manual extract	F	s. 10(1)
A257-A262	Presentation Slides re Software	P	s. 10(1)

ISSUES:

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

Issue B: Do the records contain "personal information" as defined in section 2(1)?

Issue C: Does the mandatory exemption at section 14(1) (personal privacy) apply?

Issue D: Does the public interest override at section 16 of the *Act* apply?

DISCUSSION:

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

[21] 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,
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> (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.

[22] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[4] 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.[5]

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

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
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> 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.

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[4] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.).
[5] Orders PO-1805, PO-2018, PO-2184, MO-1706.

Part 1: type of information

[24] The types of information listed in section 10(1) have been discussed in prior orders:

> *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
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> (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.[6]
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> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[7]
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> *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.[8]
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> *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.[9] The fact that a record

[6] Order PO-2010.
[7] Order PO-2010.
[8] Order PO-2010.
[9] Order PO-2010.

might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]

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.[11]

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute[12]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[13]

but not to include:

- names, duties and qualifications of individual employees[14]

- an analysis of the performance of two employees on a project[15]

- an account of an alleged incident at a child care centre.[16]

[25] The city submits that the records consist of the appellant's business model, graffiti removal procedures and proprietary products, as well as training materials, and information about its customized equipment and the functionality of its systems.

[26] Accordingly, the city takes the position that the information at issue is a trade secret, or technical and/or commercial information, meeting part 1 of the test.

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[10] Order P-1621.
[11] Order PO-2010.
[12] Order P-1540.
[13] Order P-653.
[14] Order MO-2164.
[15] Order MO-1215.
[16] Order P-121.

[27] The appellant submits that the records contain trade secrets, scientific and technical information. In its representations to the city at the request stage, the appellant also argued that the records contain financial information.

[28] The requester does not directly address the question of whether the records contain the types of information listed above. Instead, he argues that the entire contents of a submission responding to an RFP should be public.

[29] As already noted, the records for which section 10(1) is claimed are all part of the appellant's winning submission to the city in response to the RFP. They are therefore part of a submission whose sole purpose is the selling of goods and services. Accordingly, these records, in their entirety, comprise commercial information. I therefore find that part 1 of the test is met. This finding is consistent with past decisions of this office in relation to RFP submissions.[17]

[30] Having reached this conclusion, it is not necessary for me to determine whether the records also contain trade secrets, technical information, scientific information, or financial information for the purposes of part 1 of the test.

Part 2

Supplied

[31] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[18]

[32] 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.[19]

[33] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[20]

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[17] See, for example, Orders MO-3058-F, PO-3316, PO-3420.
[18] Order MO-1706.
[19] Orders PO-2020, PO-2043.
[20] 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*).

[34] It is clear that the records for which section 10(1) is claimed were all provided to the city as part of the appellant's winning submission in response to the RFP. Accordingly, I am satisfied that they were "supplied" by the appellant to the city.

[35] This conclusion is consistent with many previous orders of this office that have considered the application of section 10(1) or its provincial equivalent to RFP proposals. For example, in Order MO-1706, Adjudicator Bernard Morrow stated as follows on this point:

> …it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution…[21]

[36] Even though this was the successful bid, it is clear that the RFP submission is not a contract. For this reason, the principle affirming that, in general, the contents of a negotiated contract do not meet the "supplied" requirement does not apply here. As Assistant Commissioner Sherry Liang stated in Order MO-3058-F:

> I am aware that in some orders, adjudicators have found the contents of a winning proposal to have been "mutually generated" rather than "supplied", where the terms of the proposal were incorporated into the contract between a third party and an institution. In this appeal, it may well be that some of the terms proposed by the winning bidder were included in the town's contract with that party. But the possible subsequent incorporation of those terms does not serve to transform the proposal, in its original form, from information "supplied" to the town into a "mutually generated" contract. In the appeal before me, the appellant seeks access to the winning proposal, and that is the record at issue.

[37] I agree with this interpretation, which was applied in circumstances similar to those that are present in this case. I therefore find that the records were "supplied" to the city within the meaning of section 10(1).

[21] See also Orders PO-3058-F, PO-3316 and PO-3420.

In confidence

[38] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[22]

[39] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[23]

[40] In its representations, the appellant does not expressly address the basis for claiming that the proposal was confidential. Its covering letter accompanying its response to the RFP did not indicate that the response to the RFP is confidential. Nor were any pages of the appellant's response to the RFP marked as "confidential".

[41] However, the appellant repeatedly refers to the contents of the proposal as being confidential. In its representations to the city at the request stage, which were enclosed with its representations in this appeal, the appellant states:

> In conclusion, the proposal that we provided the City of Toronto has contained a lot of confidential information that would give away our trade secrets, technical processes, competitor advantages, and how we operate which has all contributed to the success of our company and has made us industry leaders.

[42] The city submits that in its representations at the request stage, the appellant stated that much of the information in its proposal was confidential. The city also referred to an expectation on the part of the appellant that the information would not

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[22] Order PO-2020

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

be publicly released, subject to an exception for pricing information, which the appellant expected to be disclosed as part of the RFP process.[24]

[43] The requester submits that there is insufficient evidence of an implicit expectation of confidentiality. He also states that if any of the information or documentation in the RFP was confidential, this should have been clearly stated. The requester also submits that the appellant's statement that the information is confidential is "self-serving."

[44] It would have been helpful if the confidentiality of the material submitted by the appellant in response to the RFP had been indicated on the face of the records. Nevertheless, based on the confidentiality expectations of the appellant set out above, I am satisfied that the appellant had an expectation of confidentiality for the contents of its submission, except for the pricing information.

[45] Under the circumstances, subject to one exception, I find that the appellant submitted the records to the city with an implicit expectation of confidentiality, meeting part 2 of the test.

[46] The exception relates to withheld portions of the proposal that reflect publicly available information that is posted on the appellant's own website. This information appears on pages A7 and A146 of the records. This information fails the "supplied in confidence" part of the test and is not exempt under section 10(1). Nevertheless, for the sake of completeness, I will include this information in the harms analysis under part 3 of the test, below.

Part 3: harms

[47] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not 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.[25]

[48] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[26]

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[24] The pricing information has been disclosed and is not at issue in this appeal.

[25] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-4 and *Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 at paras. 201 to 206. See also Order PO-3157.

[26] Order PO-2435.

Representations

[49] The appellant submits:

> The disclosure of the records will significantly prejudice the competitive position of our company, our brand, and harm the businesses of 14 franchisees and licensees across North America. By releasing information pertaining to technical training for Graffiti Technicians, in-depth details of how our company functions including key performance indicators for each role that outlines what they need to do in order to be successful, in-depth descriptions of our services and how they function internally, internal presentations regarding proprietary software and how it functions for our employees administratively and in the field, the requestor is gaining access to information that falls directly under section 10(1). . . .
>
> The disclosure of the record could interfere significantly with other contracts that we currently have with other organizations across North America. This information includes the scope of work we do for these contracts, how long we have been their provider, and the size of the contract. The release of this information breaches confidentiality in technical/commercial/financial and labour relations info. There is confidential contact information for city workers that we have been given permission to give to the City of Toronto as reference information and not for public release. We do not publicly promote our relationships with Cities and Municipalities. . . . The release of this information interferes with our contractual rights with other Cities and Municipalities and could result in loss of business or contracts not only for one Franchise but for multiple franchises across our North American network.
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> . . .
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> The disclosure of the confidential information contained in the records can result in loss of business with [the appellant] and our existing clients. For example, should any references . . . be released our working relationships with high profile clients is at risk of being jeopardized. The result could be the termination of many contracts. Many of our Franchisees will feel the loss of this financially and as a result could contribute to the layoff of staff members due to less volume of work and financial loss.
>
> Furthermore, the information contained in our manual and training materials highlights how we operate as a unique company in this business. Franchisees have paid into our Franchise system to operate under [the appellant] by using these manuals that contain proprietary

> company information and step by step explanations on how we operationally function. The free release of all this can allow for our competitors to "dummy" our business using this information. Corporate training manuals are never given out for public release for these reasons. . . .

[50] The appellant also refers to, and encloses, a copy of its representations to the city at the request stage with its representations in this appeal. In those representations, the appellant stated:

> . . . our competitors gaining this knowledge would allow them to under bid on all our contracts and/or accounts which can result in loss of business.

[51] The appellant's representations to the city go on to identify "the main components of our proposal that we wish to remain confidential." These are as follows:

- experience and qualifications, including client contact information;
- Graffiti Technician training and certification process;
- internal company manuals;
- Graffiti Removal and Coating Guide from the Graffiti Technician Manual;
- information on equipment and how it works;
- assessments;
- personal safety manual;
- personal executive team resumes;
- product information;
- Handling and Safety – Removal and Painting Section and Painting Guide from the Graffiti Technician Manual; and
- slide presentation on proprietary GPS system.

[52] The rationale advanced for non-disclosure of this information is, essentially:

- the information is confidential;
- it provides information about "how we operate as a company;"
- its release would allow competitors to copy the appellant's systems, business model, training programs, and employee goals and targets;
- it would disclose trade secrets and the processes and products that would be used on different surfaces;
- disclosure could be harmful to the appellant financially and professionally;
- disclosure could result in the loss of business, contracts, and personnel, and could threaten the continued employment of staff; and
- disclosure would allow competitors to "under bid" on contracts.

[53] The city submits that:

> [t]he [appellant] states in its representations that disclosure of the information would cause substantial harm to their competitive position. It states that the release of the information would cause substantial harm to their competitive position. It states that the release of the information will allow competitors to duplicate the [appellant]'s business model, goals of the company, and how it assesses potential clients. The [appellant] further states that if their competitors gained this knowledge, it would give them an advantage when bidding on future contracts, which could reasonably lead to loss of business for the [appellant]. This financial loss could lead to unemployment for many employees employed by the [appellant].
>
> Given the above, the City supports the [appellant's] claim that the release of this information would "cause substantial harm to their competitive position" and cause "undue loss" to their company.

[54] As already noted, the representations of the appellant and the city were provided to the requester when he was invited to provide his own representations. The requester argues that the onus of proof that the exemption applies has not been met in this case. He states that evidence amounting to a speculation of possible harm is not sufficient. Referring to the appellant's argument that a competitor could duplicate aspects of the appellant's business, the requester submits that "supposing that an event could happen in the future" does not amount to proof. The requester also submits that disclosure would not interfere with copyright or patent protection.

[55] The requester's other arguments relate to whether the appellant has the proper qualifications, whether the city did due diligence in awarding the contract, and whether the appellant uses hazardous chemicals. All of these arguments relate to the public interest in disclosure rather than the application of section 10(1). The public interest is addressed under section 16 (the "public interest override"), below.

[56] The appellant replied to the requester's representations, and in doing so, addressed the comments made by the requester that relate to the public interest override. The city's reply representations on section 10(1) essentially repeat its earlier position. The city responds in detail to the requester's arguments relating to the public interest override, which I will discuss under a separate heading, below.

Analysis

[57] This exemption only applies if disclosure could reasonably be expected to result in one of the harms identified in sections 10(1)(a) through (d). In this case, the

arguments refer to competitive harm/harm to negotiating position [section 10(1)(a)] and undue loss or gain [section 10(1)(c)].

[58] In Order PO-2435, Acting Commissioner Brian Beamish rejected the application of section 17(1) of the provincial *Freedom of Information and Protection of Privacy Act* ("*FIPPA*"), which is the equivalent of section 10(1) of the *Act*, on the basis that the parties resisting disclosure had not provided sufficiently compelling evidence to meet the "could reasonably be expected to" threshold. He stated:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the Act identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." . . .In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:
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> > . . . *a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms.* Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. . . . In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.
>
> The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this

> case, the information sought relates directly to government expenditure of taxpayer money. . . .
>
> The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). [Emphasis added.]

[59] The Notice of Inquiry sent to the appellant in this case referred to Order PO-2435 and stated:

> Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.

[60] Nevertheless, the appellant appears to believe that the harms that could result from disclosure are self-evident. In its representations to this office, the appellant states:

> Just listing off [the categories of information found in the records] already indicates why this information should be withheld based on the sensitivity of it and the damaging effects it could have on our company if released. . . .

[61] However, the appellant did attempt to explain that various information in the records could cause harm if it were disclosed. The appellant makes general references to disclosure revealing "how we operate as a company," and to competitors copying various aspects of the appellant's systems, business model, and its training programs and employee goals and targets. The appellant makes broad claims about financial and professional harm, as well as loss of business, contracts and personnel. The city makes similar statements. The problem with these submissions, from an evidentiary standpoint, is that they fail to provide a convincing explanation of *how* disclosing some of the information in the records could reasonably be expected to produce the harms mentioned in sections 17(1)(a) or (c).

[62] Having said that, I am prepared to find that a "risk of harm that is well beyond the merely possible or speculative" is established with respect to the disclosure of two categories of information. This conclusion arises from my review of the records in the context of the appellant's representations, and taking into account the fact that this office has upheld this exemption for similar information in previous decisions. I am also mindful of the difficulty of establishing a reasonable expectation of future harm, and the mandatory nature of the section 10(1) exemption. I agree with the following observations of Adjudicator Loukidelis in Order PO-2987:

> As past orders of this office have acknowledged, the disclosure of information relating to a procurement process must be approached

> thoughtfully, with consideration of the tests developed by this office, as well as an appreciation of the commercial realties of a procurement process and the nature of the industry in which the procurement occurs (Order MO-1888). In each case, the quality and cogency of the evidence presented, including the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them must be considered. . . . (see Order MO-2496-I).

[63] The first category that satisfies the harms test (part 3 of the section 10 test) is information that would identify other clients of the appellant, and other particulars of the appellant's relations with those clients. This category also includes the associated contact information of the appellant's clients' employees, as well as references provided by the appellant's clients. As outlined above, the appellant argues that disclosure of this information could reasonably be expected to be injurious to those relationships.[27] I accept that this could reasonably be expected to significantly injure its competitive position and significantly interfere with future negotiations as contemplated in section 10(1)(a). I also note that this type of information has been found to be exempt in previous decisions of this office.[28] Detailed information about services performed by the appellant on behalf of several of its clients also meets part 3 of the test for these same reasons.[29]

[64] The second category of information that satisfies the harms test consists of detailed instructions in the Training Manual on how to remove different types of graffiti from a variety of surfaces, which are, as the appellant notes, "step by step explanations" of how this work is to be done. These instructions are the fruit of the appellant's accumlated expertise in this area and are part of the Graffiti Removal and Coating Guide from the Graffiti Technician Manual[30] referred to by the appellant in its representations to the City at the request stage, as noted above. I make the same finding concerning detailed descriptions of the appellant's products, and detailed instructions for their use.[31] I accept that disclosure of this information could resonably be expected to significantly injure its competitive position, as contemplated in section 10(1)(a). Similar to the first category, this type of information has previously been found to be exempt.[32]

[65] In my view, the information in the second category that I have just described differs in a significant way from the remaining pages of the training manual, which set out more general information, much of which is common knowledge or based on

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[27] This infomation appears on parts of pages A5 and A6, and the references are found at pages A109 through A120.
[28] Orders MO-2070, PO-3277
[29] Page A5 (part) and pages A173 through A179.
[30] Pages A123 through A135.
[31] This information appears on parts of pages A142, A149 and A153; pages A187 through A203; page A227 (part); pages A228 through A231; pages A246 (part) and A248 (part); and pages A249 and A250.
[32] Order MO-2892.

common sense. I am not satisfied that disclosure of this information gives rise to a "risk of harm that is well beyond the merely possible or speculative." Also, assuming (without making a finding) that the manual is subject to copyright, I note that although disclosure of copyrighted material under the *Act* is not a breach of the *Copyright Act*,[33] section 32.1(2) of that statute indicates that copyright continues to attach to records that are subject to such disclosure.[34] For all these reasons, I find that the remaining pages of the training manual do not meet part 3 of the test.

[66] I am also not satisfied that part 3 of the test is met for the remainder of the information in the records. In my view, as regards that information, the submissions of the appellant and the city do not rise beyond the level of generalized assertions of harm, and as such, they fail to demonstrate "a risk of harm that is well beyond the merely possible or speculative" as required under this exemption. Nor is there any additional information in the records that, in and of itself, demonstrates such a risk.

[67] While this analysis is sufficient to dispose of the matter, I would nevertheless like to comment on several further matters under section 10(1).

[68] As identified under part 2, above, some of the information claimed to be exempt under section 10(1) essentially duplicates information that is available on the appellant's website about one of its publicly available programs[35]. In *Merck Frosst* (cited above), the Supreme Court of Canada notes that "it is very hard to show that harm can reasonably be expected to result from disclosure of publicly available information."[36] In this case, no evidence or explanation is provided to show how disclosure of this publicly available information could reasonably be expected to cause harm. The same analysis applies to a general description of another program that is offered to the public.[37]

[69] My analysis of the remaining portions of the training manual, above, in support of my conclusion that they do not meet part 3 of the test, applies with equal force to a general list of training topics that has been severed elsewhere.[38]

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[33] R.C.C. 1985, c. C-42. See also Order MO-2016.

[34] Section 32.1 of the *Copyright Act* states in part:

32.1 (1) It is not an infringement of copyright for any person

(a) to disclose, pursuant to the Access to Information Act, a record within the meaning of that Act, or to disclose, pursuant to any like Act of the legislature of a province, like material; . . .

(2) Nothing in paragraph (1)(a) or (b) authorizes a person to whom a record or information is disclosed to do anything that, by this Act, only the owner of the copyright in the record, personal information or like information, as the case may be, has a right to do.

[35] Found on pages A7 and A146.

[36] *Merck Frosst* (cited above) at para. 208.

[37] Found on page A8.

[38] This information appears on pages A28 and 29.

[70] As well, the appellant makes a broad submission that disclosure could lead to "our competitors gaining this knowledge which would allow them to under bid on all our contracts and/or accounts." Given that the pricing component of the RFP has already been disclosed, I am at a loss to understand how the disclosure of the remaining information could reasonably be expected to produce this particular result. No further explanation is provided to justify this claim, which therefore does not rise to "a risk of harm that is well beyond the merely possible or speculative."

[71] Referring to slides that provide an overview of its proprietary GPS software (pages A257 through A262), the appellant argues that disclosure "would allow for competition to use [the appellant's] systems to operate, which could result in financial loss and loss of contracts." Given that the software is proprietary, and therefore not in the possession of the appellant's competitors, it is difficult to imagine how disclosure of these general descriptions of its use could reasonably be expected to lead to the appellant's competitors using its "system to operate." I find that part 3 of the test is not met in relation to these pages.

[72] Accordingly, except for the information described in the first and second categories outlined above, I find that the appellant and the city have not demonstrated "a risk of harm that is well beyond the merely possible or speculative" as required under this exemption. As a consequence, they have not established that disclosure of the records could reasonably be expected to produce the harms in section 10(1)(a) or (c) of the *Act*. They have therefore not met part 3 of the test, and as all three parts must be met, I find that section 10(1) does not apply.

[73] On the other hand, the information in the two categories described above as meeting part 3 of the test has also met parts 1 and 2, and this information is therefore exempt under section 10(1)(a).

PERSONAL INFORMATION

Issue B: Do the records contain "personal information" as defined in section 2(1)?

[74] The city and the appellant both rely on the personal privacy exemption in section 14(1) to deny access to the resumes at pages A181-A186. In order to determine whether section 14(1) of the *Act* may apply, it is necessary to decide whether the records contain "personal information." That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,

> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
>
> (c) any identifying number, symbol or other particular assigned to the individual,
>
> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[75] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information[39].

[76] Sections 2(2), (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2) Personal information does not include information about an individual who has been dead for more than thirty years.

[39] Order 11.

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

Representations and Analysis

[77] The appellant submits that pages A181-A186 are the confidential and personal resumes of members of its staff. The city submits that these pages contain employment and educational history of individual, identifiable employees. On this basis, both the appellant and the city submit that these pages qualify as "personal information". The requester relies on the generally established rule that "information associated with an individual in a professional, official or business capacity will not be considered to be 'about' the individual."

[78] Many past orders of this office have concluded that the contents of an individual's resume are personal information.[40] This is the case because they essentially consist of information about a person's education and employment history, which qualifies as personal information under paragraph (b) of the definition.

[79] Information of this nature does not fall under the "general rule" cited by the requester, which refers more generally to an individual's work product and other information of that nature. The Legislature has specifically included education and employment history as examples of personal information, and the rule cited by the appellant therefore does not apply to that type of information.

[80] In its reply representations, the city takes the position that information that "identifies or describes individuals in their current business capacity" does not qualify as personal information.

[81] Section 2(2.1) of the *Act* provides that "personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity." This information appears in some parts of pages A181-A186. However, I agree with the following comments made by Assistant Commissioner Liang in Order PO-3058-F:

[40] See, for example, Orders MO-2070, MO-2856, MO-3058-F and PO-3277.

> Certain information in these pages does not qualify as personal information . . . in that they consist of the names and titles of employees of the affected party, which is addressed by section 2(2.1) of the Act. However, I find that severing the records for the purpose of disclosing this information would result in the disclosure of meaningless pieces of information and I will not deal with it separately.

[82] I agree with this assessment and will apply it in this appeal to the names, titles and contact information of the appellant's employees where it is found in their resumes. I find that the remaining information in the resumes is personal information.

PERSONAL PRIVACY

Issue C: Does the mandatory exemption at section 14(1) (personal privacy) apply?

[83] Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

[84] If the information fits within any paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14.

[85] In the circumstances, it appears that the only exception that could apply is paragraph (f). Under section 14(1)(f), if disclosure would not be an unjustified invasion of personal privacy, it is not exempt from disclosure.

[86] The factors and presumptions in sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f).

[87] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.)].

Representations and Analysis

[88] The appellant submits that the presumptions in sections 14(3)(c), (d), (f) and (g) apply to the personal information in the resumes. The city submits that section 14(3)(d) applies. The requester submits that the city and the appellant have not met the burden of proof to establish the application of the exemption.

[89] Many previous orders of this office have concluded that information in resumes falls under the presumed unjustified invasion of privacy in section 14(3)(d).[41] This section states:

> A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,
>
> (d) relates to employment or educational history;

[90] I have reviewed the resumes and I am satisfied that the personal information they contain consists of information about the employment and educational history of the individuals concerned.

[91] As already noted, where a presumption in section 14(3) applies, as in this case, the information can only be disclosed if section 14(4), or the public interest override in section 16, applies.

[92] I have reviewed the provisions of section 14(4) and find that none of them apply. The resumes[42] are therefore exempt under section 14(1). I will consider whether the public interest override in section 16 applies under Issue D, below.

PUBLIC INTEREST OVERRIDE

Issue D: Does the public interest override at section 16 of the *Act* apply?

[93] Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and **14** does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [Emphases added.]

[94] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[95] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the

[41] See Orders M-1084, MO-1257, MO-2070, MO-3058-F and PO-3277.
[42] Pages A181 through A186.

records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[43]

[96] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[44] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[45]

[97] A public interest does not exist where the interests being advanced are essentially private in nature.[46] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[47]

[98] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[48]

Representations

[99] The requester submits:

> Disclosure of the information requested is desirable for the purpose of subjecting the activities of the institution to public scrutiny. . . .
>
> The public has the right to know whether a company contracted to carry out work for the [city] indeed has the credentials and experience it has claimed to have in a RRFP [sic]. In order for a member of the public to satisfy him/herself of such credentials and experience, the public must first be give the details of the credentials and experience claimed in the RRFP [sic], in order to verify or discount such information.
>
> The public has a right to know the processes involved in work that is contracted for by the [city]. For example, there may be certain chemicals being used by the Appellant, which a member of the public may find to be hazardous to his or her health or safety. To further illustrate, I would suggest that a member of the public should have the right to know what

[43] Order P-244.
[44] Orders P-984 and PO-2607.
[45] Orders P-984 and PO-2556.
[46] Orders P-12, P-347 and P-1439.
[47] Order MO-1564.
[48] Order P-984.

> chemicals are being used by the Appellant to remove graffiti in or around a public swimming pool. If such information is not released to the public, the public is harmed by not having sufficient information available to make an informed decision as to whether or not to use a city-owned pool.
>
> The public has the right to the release of the information required in order to confirm whether the City of Toronto complied with its due diligence obligations in granting the contract to the Appellant. An informed member of the public, being a taxpayer, should be entitled to the release of information sufficient to confirm that taxpayers' funds are being handled in a responsible manner and that city contracts are being awarded on merit.
>
> I am concerned that the Appellant may have misrepresented their qualifications, equipment and ability to service the tender. The information is required in order to confirm or alleviate my concerns in this regard.
>
> I am concerned that the chemicals being used by the Appellant fail to meet the threshold for environmental compliance. The information requested is required in order to confirm or alleviate my concerns in this regard.

[100] The city submits that the information in the records does not fall within any of the types of information for which there exists a public interest in disclosure, and that there is no evidence that disclosure will further inform the public of the activities of the city or affect the public's ability to make informed choices.

[101] The city refers to its RFP document, in which the city reserves the right to disqualify any proponent who has given inaccurate, incomplete, false or misleading information. The city also submits that it has checks and balances in place to ensure that all RFP submissions meet the prescribed requirements.

[102] The city submits that no public interest, compelling or otherwise, exists in the disclosure of the records, and that the purpose of the exemptions outweighs any interest in disclosure, and that the requester's interest, in this case, is of a private nature.

[103] The appellant also disputes the application of the public interest override.

Analysis

[104] If there were evidence to suggest that the city had awarded a contract to an unqualified bidder, or that a contracted service provider of the city is conducting its

business in a way that endangers the public, that might well rise to the level of a compelling public interest, in the sense that it would "rouse strong interest or attention." No such evidence has been provided by the requester. I have also reviewed the exempt portions of the records to determine whether they reveal anything that might support that requester's allegations, and I found nothing of that nature. In my view, a compelling public interest cannot be established on the basis of allegations that are unsupported by evidence.

[105] The appellant's position also suggests that all RFPs should be subject to second guessing by the public, regardless of whether there is any evidentiary basis to question the awarding of the contract. I disagree.

[106] With respect to the requester's environmental concerns, I note that the city would be obligated to make information revealing a grave environmental, health or safety hazard public under section 5(1) of the *Act*, which states:

> Despite any other provision of this Act, a head shall, as soon as practicable, disclose any record to the public or to persons affected if the head has reasonable and probable grounds to believe that it is in the public interest to do so and that the record reveals a grave environmental, health or safety hazard to the public.

[107] Accordingly, I find that a compelling public interest in the disclosure of the records and portions of records I have found to be exempt under sections 14(1) and 10(1) has not been established, and the first requirement under section 16 has therefore not been established. Under the circumstances, therefore, it is not necessary to weigh the public interest against the purposes of the exemptions. I find that section 16 does not apply.

ORDER:

1. I find that the parts of pages A5, A6, A142, A149, A153, A227, A246 and A248 that are highlighted on the copies of those pages provided to the city with this order, and pages A109 through A120, A123 through A135, A173 through A179, A187 through A203, A228 through A231, A249 and A250 in their entirety, are exempt under section 10(1)(a) of the *Act*.

2. I find that the resumes at pages A181-A186 are exempt in their entirety under section 14(1) of the *Act*.

3. I find that section 16 of the *Act* does not apply.

4. I order the city to disclose the parts of pages A5, A6, A29[49], A142, A149, A153, A227, A246 and A248 that are not highlighted on the copies of those pages provided to the city with this order, and pages A7, A8, A16 through A28, A136 through A141, A146 through A148, A150 through A152, A164, A165, A216 through A226, A245 and A247, A251, A252, and A257 through A262, to the requester by **May 6, 2015**, but not before **April 30, 2015**.

Original signed by: March 31, 2015
John Higgins
Adjudicator

[49] The withheld portion of page A29 is a contact telephone number to which the requester does not seek access.