Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3207

Appeal MA12-406

Build Toronto Inc.

June 9, 2015

Summary: The appellant made a request to Build Toronto for access to all executed agreements and/or contracts between Build Toronto and a named company in regard to a residential development at a particular address. The appellant also advised that information related to fees, prices, costs and expenses could be withheld. Build Toronto identified three responsive records and denied access to them, in full. Build Toronto claimed the mandatory exemption in sections 10(1)(a), (b) and (c) (third party information), and the discretionary exemption in sections 11(a) (valuable government information), (c), (d), (e), (f) (economic or other interests) and (g) (proposed plans, projects or policies of an institution) of the *Act* applies to the records. During the mediation of the appeal, Build Toronto disclosed two of the three records, in part, to the appellant. In this order, the adjudicator does not uphold the exemptions in either section 10(1) or 11(1). Build Toronto is ordered to disclose the records to the appellant, with the exception of the information removed from the scope of the appeal by the appellant.

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

Orders and Investigation Reports Considered: Order 87, MO-1194, MO-1706, P-1281, PO-1763, PO-2598, PO-2632, PO-2965 and PO-3116.

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

OVERVIEW:

[1] This order disposes of the issues raised as a result of an appeal of a decision of Build Toronto under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) in response to an access request. The request was for all executed agreements and/or contracts between Build Toronto and a named company in regard to a residential development at a particular address. The requester also advised that information related to fees, prices, costs and expenses could be withheld.

[2] Build Toronto subsequently notified the named company (the affected party) of the request. After receiving submissions from the affected party, Build Toronto issued a decision to the requester denying access to three responsive records. Build Toronto claimed the mandatory exemption in sections 10(1)(a), (b) and (c) (third party information), and the discretionary exemption in sections 11(a) (valuable government information), (c), (d), (e), (f) (economic or other interests) and (g) (proposed plans, projects or policies of an institution) of the *Act*.

[3] The requester (now the appellant) appealed Build Toronto's decision to this office.

[4] During the mediation of the appeal, the affected party and Build Toronto agreed to disclose portions of two of the responsive records, and a severed copy of those two records was subsequently disclosed to the appellant. After reviewing the disclosed portions of the records, the appellant advised that he wished to pursue access to all three of the records, or portions thereof, that were withheld.

[5] The appeal was then transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The adjudicator assigned to the appeal sought and received representations from Build Toronto, the appellant and the affected party. Representations were shared in accordance with this office's *Practice Direction 7*. Portions of the representations were withheld, as they met this office's confidentiality criteria.

[6] In its representations, the appellant advised that it is not seeking access to "dates, amounts and number figures," and that to the extent that the records might contain personal information, it is not seeking access to that information. The appellant also raised the possible application of the public interest override in section 16, which was added as an issue in the appeal.

[7] In its reply representations, the affected party consented to further disclosure of two records. In particular, the affected party provided consent to disclose sections 7.1, 8.5, 9.1, 9.2 and the "Documents of Vendor" in Article 11 of the Agreement of Purchase and Sale to the appellant. In addition, the affected party stated that the identity of the

entity holding title at the property is now public, and that it was subsequently providing consent to disclose the identity of the Agent in the Agent/Nominee Agreement. As consent has been provided by the affected party to disclose the above information to the appellant, Build Toronto should disclose this information to the appellant, if it has not done so already.

[8] The appeal was then transferred to me for final disposition. I note that portions of some the representations were withheld for confidentiality reasons. However, I reviewed and took into consideration all aspects of the representations, including those portions that were withheld from the appellant. For the reasons that follow, I do not uphold Build Toronto's decision. I find that the exemptions in sections 10(1) and 11(1) of the *Act* do not apply, and I order Build Toronto to disclose the records to the appellant, with the exception of the information the appellant has removed from the scope of the appeal.

RECORDS:

[9] The records remaining at issue consist of: the withheld portions of a Partnership Agreement; the withheld portions of an Agreement of Purchase and Sale; and the complete copy of an Agent/Nominee Agreement.

ISSUES:

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

B: Does the discretionary exemption at section 11(1) apply to the records?

DISCUSSION:

Background

[10] Both Build Toronto and the affected party provided background information regarding their business relationship. Build Toronto is a creation of the City of Toronto's (the city) City Council. In May of 2010, Build Toronto officially launched as the city's independent and self-funding real estate and development corporation. The mandate of Build Toronto is to provide development services to the city to "unlock" the value of under-utilized real estate holdings with a view to enhancing the economic competitiveness of the city. The city is Build Toronto's sole shareholder.

[11] The affected party is a private company engaged in real estate development, construction and management. It competes for available development opportunities with other real estate developers in the Toronto area and negotiates with public and private landowners for lands and development projects. The affected party's entities

bid on, and were chosen in a competitive RFP process to develop and manage the lands that are the subject matter of the request through a partnership with a wholly-owned subsidiary of Build Toronto.

[12] The affected party describes the Partnership Agreement as the agreement between one of its entities and Build Toronto Holdings (Harbour) Inc. to finance and develop the lands. The Agreement of Purchase and Sale is the agreement between Harbour as vendor and the above-described partnership as purchaser, to sell the lands to the partnership. The Agent/Nominee Agreement and schedules to the Agreement of Purchase and Sale allocate responsibilities amongst the agents named in the agreements and the partnership. The affected party states that the three agreements, taken as a whole, represent its investment in the development and the financial risk, obligations and terms of its participation in the development.

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

[13] Build Toronto and the affected party are claiming the application of the exemptions in section 10(1)(a), (b) and (c), which state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

[14] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[1] Although one of the central purposes of the *Act* is to shed light on the operations of

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

government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[2]

[15] 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

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

Part 1: type of information

[16] 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:
>
> (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;[3]
>
> *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.[4] The fact that a record

[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.
[4] *Ibid*.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information;[5]
>
> *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.[6]

Representations

[17] Both Build Toronto and the affected party submit that the records contain commercial and financial information, including:

- Their respective financial contributions;
- The financial and commercial options of the parties;
- The structure of the holding interests and management of the property;
- The underlying transactional relationship between them;
- The financial level required for negotiation;
- The timing of the financial obligation of the affected party;
- How the preferred return is calculated;
- Operational details of the administration of the partnership;
- The affected party's internal organization;
- Descriptions of cheque and document signing protocols;
- The affected party's purchase option; and
- The affected party's management partnerships.

[18] Build Toronto also submits that the records contain trade secrets by virtue of the description in the records of the underlying transactional relationship between it and the affected party.

[19] The affected party also provided an appendix to its representations, in which it set out the financial information it believes is not included in the scope of the appellant's request. I also note that in its representations, the affected party claimed the application of the mandatory exemption in section 14 to signatures contained in the records at issue, stating simply that the disclosure of these signatures would be an "unreasonable invasion of privacy" to those individuals.

[20] The appellant advises that it is not seeking access to dates, amounts and number figures. It also argues that the Agent/Nominee Agreement, and the withheld portions of the Agreement of Purchase and Sale and the Partnership Agreement do not contain any commercial or financial information. In particular, with respect to the

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

Agreement of Purchase and Sale, the appellant submits that the following information, which was withheld, does not contain commercial or financial information:

- The definition of "deposit," "go firm date;" and
- Information regarding rezoning condition, OMB appeal, sales office, TPA release, termination of the TPA licence and the termination of the towing licence.

[21] In regard to the Partnership Agreement, the appellant submits that the following information, which too was withheld, does not contain commercial or financial information:

- The definition of "preferred return," "construction matters;" and
- The nominee provision and signing documents.

[22] In reply, Build Toronto submits that a fully owned subsidiary of Build Toronto formed a partnership, as set out in the Partnership Agreement with the affected party, to purchase a Build Toronto-owned property, and to develop, market and construct a high-rise condominium on the site. Build Toronto goes on to state that the records at issue relate to that transaction and that exchange of services, and are accordingly, commercial in nature and contain "commercial information." Also in reply, the affected party submits that the records at issue contain commercial information and are themselves a commercial arrangement. The affected party goes on to argue that commercial information, for the purpose of section 10, is not confined to dates, fees or monetary amounts as suggested by the appellant. With respect to whether the records contain financial information, the affected party argues that the Appendices in the records contain financial information, and states:

> In addition, the term "financial information" is section 10 should be interpreted to include information about partnership contributions, the amounts and calculations of contributions, methods of calculating partnership interests and partnership distributions, calculations of excess contribution required and financial penalties for default.

Analysis and findings

[23] As previously stated, the appellant advises that it is not seeking access to dates, amounts and number figures set out in the records. Accordingly, having reviewed the records, I find that portions of the records that have been withheld contain dates, amounts and number figures, which I find are not included in the scope of the request. I find that the following portions of the records containing dates, amounts and number figures are not part of the scope of the request and will not be disclosed to the appellant:

1. Agreement of Purchase and Sale;
   - 1.2 – date in definition of "closing date"
   - 2.1 - purchase price – dollar figure
   - 3.1(a), (b) and (c) - payment of purchase price – dollar figures
   - 6.1 - date regarding rezoning
   - 6.5 - date regarding OMB appeal
   - Schedule C - the amount of the consideration given

2. Partnership Agreement
   - 1.01 – anticipated capital proportions, anticipated distribution proportions and material amendment
   - 1.01 – some of the withheld portions of preferred return – dates and number figure
   - 4.03 – purchase deposit – dollar figures
   - 4.07 – pre-development expenses – dollar figure
   - 4.09(1) and (b) – dates
   - 4.10(b), (c) and (d) – dates and percentage figure
   - 5.02(m) – major decisions – dollar figures
   - 7.01(a) – the percentage amount
   - 8.02(d)(ii)(B) – the number figure
   - 8.06(a) – the number figure
   - 13.01(5) – the dates
   - 13.02(2) – the date
   - 13.02(4) – the date and percentage amount
   - 13.02(5) – the date
   - 13.03(2) – the dollar figure
   - 14.01 – the percentage amount
   - 14.02 – the dates
   - 14.03 – the date
   - 14.04 – the dates
   - 16.03(b) – the date
   - Schedule C – section 2 – the percentage amounts, dates and fees
   - Schedule C – section 3 – the dates and dollar amounts
   - Schedule C – section 4 – the dates
   - Schedule C – section 6 – the percentage amount
   - Schedule C – section 7 – the date and dollar amounts
   - Schedule D - the dollar amounts

[24] With respect to the remaining information at issue, I have reviewed the records and find that the withheld information contains commercial and financial information within the meaning of those terms in section 10(1). The commercial information that relates solely to the buying or selling of merchandise or services and the profit-making venture includes the specific terms and conditions of the business partnership between

Build Toronto and the affected party, setting out each parties' responsibilities and obligations in the development project. I find that the agreements taken as a whole contain commercial information. Examples of specific terms include construction issues, signing documents and instruments, purchase options, additional sales terms and related entities supplying goods and services to the project. The financial information in the records include terms that relate to money and its use or distribution. Examples of these terms include development financing, allocation of distributable cash and the reserve fund.

[25] However, I also find that Build Toronto has not provided sufficient evidence to demonstrate how the underlying transactional relationship between it and the affected party described in the records constitutes the type of "trade secret" contemplated by section 10(1). Past orders of this office have found that even if information in a record may reveal distinctive processes that have been used by third parties, it does not qualify as a trade secret if these processes would generally be known in the business in which the third parties are involved.

[26] I note that the affected party has raised the application of the section 14 personal privacy exemption with regard to the signatures contained in the records. In order to determine whether the personal privacy exemption applies, I must determine whether the signatures consist of personal information as defined in section 2(1) of the *Act*.

[27] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[7] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[8]

[28] In Order MO-1194, former Assistant Commissioner Tom Mitchinson discussed this office's treatment of handwriting and signatures appearing in different contexts, as follows:

> In cases **where the signature is contained on records created in a professional or official government context, it is generally not "about the individual" in a personal sense, and would not normally fall within the scope of the definition.** (See, for example, Order P-773, [1994] O.I.P.C. No. 328, which dealt with the identities of job competition interviewers, and Order P-194 where handwritten

[7] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[8] Orders P-1409, R-980015, PO-2225 and MO-2344.

> comments from trainers were found not to qualify as their personal information.) [emphasis added]
>
> In situations where identity is an issue, handwriting style has been found to qualify as personal information. (See, for example, Order P-940, [1995] O.I.P.C. No. 234, which found that even when personal identifiers of candidates in a job competition were severed, their handwriting could identify them, thereby bringing the records within the scope of the definition of personal information).
>
> Order M-585, [1995] O.I.P.C. No. 321, involved both handwritten and typewritten versions of a by-law complaint. Former Inquiry Officer John Higgins found that the typewritten version did not qualify as personal information of the author, but that there was a reasonable expectation that the identity of the author could be determined from the handwritten version, and that it qualified as the complainant's personal information.
>
> In my view, whether or not a signature or handwriting style is personal information is dependent on context and circumstances.

[29] Adjudicators Daphne Loukidelis and Bernard Morrow applied the context-driven approach of the former Assistant Commissioner in Order MO-1194 to the circumstances in Orders PO-2632 and PO-2965 respectively, finding that the signatures of corporate officers would not reveal something that is inherently personal in nature. They concluded that the signatures appearing in the records at issue were created in an official government context, that is, the signing of contracts between an institution and third parties for the provision of various services. In the circumstances of those appeals, Adjudicators Loukidelis and Morrow found that the signatures contained in the records did not fall within the definition of personal information in section 2(1) of the *Act* and that, accordingly, the signatures could not be exempt under the personal privacy exemption in the provincial equivalent of the *Act*.

[30] I agree with Adjudicators Loukidelis' and Morrow's analysis and apply it to the circumstances of this case. The signatures in the records are linked to the names of individuals who are associated with Build Toronto and the affected party in a professional, official or business capacity. These individuals are senior representatives of Build Toronto and the affected party with signing authority on behalf of them. In my view, in the circumstances of this appeal, I find that disclosure of the signatures in the records at issue would not reveal something that is inherently personal in nature. However, the application of the exemption in section 10(1) has also been claimed with respect to this information, which I will consider below.

[31] Having found that the records contain commercial and financial information, I find that the first part of the three-part test has been met.

Part 2: supplied in confidence

[32] 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.[9] 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.[10]

[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. This approach was approved by the Divisional Court in *Boeing*.[11]

[34] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[12]

[35] 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.[13]

[36] 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;

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] See note 1. See also Orders PO-2018, MO-1706 and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.) (*Canadian Medical Protective Association*).
[12] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association, ibid*.
[13] Order PO-2020.

- 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; or

- prepared for a purpose that would not entail disclosure.[14]

Representations

[37] With respect to the Agreement of Purchase and Sale, Build Toronto states that the information it withheld from the appellant is limited to specific financial and commercial terms of the sale that the parties came to through a process of negotiation. However, Build Toronto submits that the information in the records falls within the immutability and inferred disclosure exceptions to this office's findings that information in agreements between institutions covered by the *Act* and third parties has not been "supplied." In addition, Build Toronto argues that it was supplied with the records in its capacity as guarantor, and not by virtue of contract mutuality and, therefore, the records are not subject to the usual view of contracts with institutions not being "supplied" for the purpose of section 10. With respect to the "in confidence" portion of the test, Build Toronto states that the records contain explicit confidentiality obligations that are only limited if it is "required by law" to disclose them.

[38] The affected party submits that the Agreement of Purchase and Sale, Partnership Agreement and Agent/Nominee Agreement do not involve Build Toronto in a direct capacity. The affected party goes on to submit that Build Toronto is a signatory to the Agreement of Purchase and Sale, but only in its capacity as the vendor's guarantor, and not as the vendor or purchaser. Similarly, the affected party argues, Build Toronto is not a signatory to the Partnership Agreement or the Agent/Nominee Agreement. The affected party submits that from its perspective, information about its own entities in these agreements represents mutuality with the signatories and not Build Toronto, because the information was supplied to Build Toronto in its capacity as parent or guarantor of the contracting entity with whom the affected party has contracted. The affected party goes on to state:

> The [records] do not represent contracts mutually generated with [Build Toronto]. Although [Build Toronto] may have exercised internal control of Build Toronto Holdings (Harbour) Inc. and has control of Harbour records, the signatories, mutuality and exchanges generating the contractual terms with [the affected party] was not with [Build Toronto], but with Harbour.

[14] Orders PO-2043, PO-2371 and PO-2497.

[39] Consequently, the affected party concludes that given the circumstances described above, the contractual terms should be regarded as having been "supplied" to Build Toronto, and not subject to the usual view of contracts with institutions as not having been "supplied."

[40] Further, the affected party submits that much of the information in the records reveals information about its financial and commercial obligations, options, internal structure and risks, which falls under the immutability and inferred disclosure exceptions. The affected party also submits that the information at issue was supplied in confidence to Build Toronto and that all three agreements contain explicit confidentiality obligations.

[41] The appellant disagrees with the arguments made by both Build Toronto and the affected party that the information at issue was supplied in confidence. With respect to the Agreement of Purchase and Sale, the appellant submits that Build Toronto is a signatory to it and is, therefore, a party to it. As a result, the appellant argues, Build Toronto was not "supplied" with the information in the Agreement of Purchase and Sale because it was negotiated by the parties, even if there was little or no negotiation on the part of Build Toronto.

[42] Regarding the Partnership Agreement and the Agent/Nominee Agreement, the appellant states that Build Toronto Harbour is a wholly-owned subsidiary of Build Toronto and is, therefore, deemed to be a part of the City of Toronto[15] and is also an institution under the *Act*.[16] The appellant further argues that the city cannot forego its statutory duty under the *Act* by simply delegating its power through a chain of subsidiary corporations, which is its authority to appoint the officers of Build Toronto Harbour. The appellant goes on to argue that Build Toronto, as the sole shareholder of Build Toronto Harbour, has full control over the management and business operations of Build Toronto Harbour. As such, Build Toronto has the power to appoint Build Toronto Harbour's directors, and these directors in turn appoint the officers of Build Toronto Harbour under the delegated authority of the city. In other words, the appellant states, the Board of Directors of Build Toronto Harbour is required to consist of a sub-set of the Board members of Build Toronto, which is appointed and removed by city Council.[17] The appellant goes on to submit that Build Toronto and the affected party have suggested that Build Toronto may have been the incorrect institution to make a request to in respect of the Partnership Agreement and the Agent/Nominee Agreement. The appellant argues that if the subsidiary was the correct institution to request the agreements from, Build Toronto should have transferred the request to the subsidiary under section 18(3) of the *Act*, but it did not.

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[15] Relying on section 20 of *Ontario Regulation 599/06* of the *Municipal Act, 2001*.
[16] Relying on sections 2(1) and 2(3) of the *Act*.
[17] Relying on section 2.7(c) of Build Toronto's Shareholder Direction.

[43] Therefore, these agreements, the appellant submits, were not "supplied" within the meaning of section 10(1) because they consist of the result of negotiations between Build Toronto, acting through Build Toronto Holdings (Harbour) Inc. and the affected party.

[44] The appellant also disagrees with the arguments of Build Toronto and the affected party that information in the records falls within the immutability or inferred disclosure exceptions. With respect to the immutability exception, the appellant states that Build Toronto and the affected party:

> . . . [H]ave not provided any evidence that the terms sought to be disclosed are "immutable." The contractual terms in the Agreements at issue do not contain the operating philosophy of [the affected party] or samples of its products or services. Instead, these contractual terms contain the obligations of [the affected party, Build Toronto and Build Toronto Harbour] under the Agreements, which were negotiated by the parties are therefore "clearly susceptible to change." Further, [Build Toronto] submits on page 4 of their representations that several of the terms in the Agreements contain "non-standard" and "negotiated terms", which, by their very definition, are susceptible to change and therefore not subject to the "immutability" exception within the meaning of MO-2287 . . .

[45] The appellant also submits that the "inferred disclosure" exception does not apply because no inferences can be made with respect to any non-negotiated confidential information contained in the records. It argues that neither Build Toronto nor the affected party have satisfied the burden of proof on this issue, as they have not identified any portions of the agreements which contain information supplied to Build Toronto or that would reveal information that was supplied, if disclosed.

[46] Lastly, the appellant submits that the information in the records was not supplied "in confidence" because there could not have been any reasonable expectation of confidentiality between the parties at the time the information was provided. The appellant also submits that despite the fact that the agreements contain confidentiality provisions, these same provisions provide for the disclosure of information as required by law, meaning that these provisions contemplate disclosure required by the *Act*.

[47] In reply, Build Toronto submits that the commercial information at issue was derived from the affected party's successful RFP. The terms created by the affected party in the RFP were a departure from its usual terms because it took Build Toronto's mandate and objectives into account. Build Toronto goes on to state that it relied on the affected party to generate the terms of the commercial relationship on the basis of its successful RFP. Accordingly, it argues, the commercial information falls under the immutability, as well as the inferred disclosure exceptions.

[48] Also in reply, the affected party submits that it solely developed the Agent/Nominee Agreement, and it was not negotiated or susceptible to negotiations by either Build Toronto or its entities. With respect to the Agreement of Purchase and Sale and the Partnership Agreement, the affected party submits that disclosure of the information at issue would permit inferences to be drawn about its financial position, reserves, risk, outlay arising from the project, capital structure, financial commitments, operating finances and internal organization. This information, the affected party argues, consists of immutable information "supplied" within the meaning of section 10 by it to Build Toronto.

[49] The affected party also reiterates its argument that the information was supplied to Build Toronto because the Agreement of Purchase and Sale and the Partnership Agreement were not negotiated with Build Toronto, which is the institution in this request. The affected party goes on to argue that to the extent a Build Toronto subsidiary such as the one in this case is also a government institution under the *Act*, it is a separate institution from Build Toronto.

Analysis and findings

[50] As previously stated, Build Toronto and the affected party argue that Build Toronto is a signatory to the Purchase and Sale Agreement, but only in its capacity as the vendor's guarantor. Similarly, the affected party argues that Build Toronto is not a signatory to the Partnership Agreement or the Agent/Nominee Agreement, but rather that its subsidiary, Build Toronto Holdings (Harbour) Inc., is. Essentially, the argument is that the "mutuality and exchanges" generating the contractual terms in the records were carried out by the affected party and Build Toronto's subsidiary. As a result, they argue that the negotiations were not conducted with Build Toronto and the affected party. Instead, Build Toronto and the affected party maintain that rather than being a party to negotiations, Build Toronto was simply supplied with the records.

[51] There is no dispute amongst the parties that Build Toronto is an institution under the *Act*. Further, the affected party suggests that the subsidiary of Build Toronto may also be an institution under the *Act*. Build Toronto and the affected party argue that I should treat Build Toronto and its wholly-owned subsidiary as separate entities for the purposes of the second part of the test in section 10(1). In particular, they ask that I accept that the subsidiary was the negotiating party and Build Toronto was merely the recipient of the records as supplied to it. I do not accept this argument. As acknowledged by the parties, Build Toronto is an institution under the *Act*. The fact that Build Toronto incorporated a wholly-owned subsidiary to enter into negotiations with the affected party to form a partnership to develop the project does not mean that Build Toronto is somehow at arm's length from the process for the purposes of section 10(1) of the *Act*. I agree with the appellant that the approach Build Toronto is taking in this regard is that by delegating its negotiating and signing power to a subsidiary, it is

attempting to circumvent its evidentiary burden under part two of the three part test in section 10(1) of the *Act*. Therefore, for the purposes of meeting this evidentiary burden in this appeal, I am going to treat Build Toronto and its subsidiary as one entity.

[52] In the circumstances of this appeal, I find that the records at issue, which are the Agreement of Purchase and Sale, the Partnership Agreement and the Agent/Nominee Agreement, are the product of negotiations between Build Toronto and the affected party. The affected party even acknowledges in its representations that mutuality and exchanges took place generating contractual terms. 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).

[53] Even if information in the three agreements reflects information that originated from the affected party, I find that it has not been supplied within the meaning of that term in section 10(1).[18] With one portion of the Partnership Agreement excepted, the agreements are not subject to either the immutability or inferred disclosure exceptions. Rather, it is information about how the affected party and Build Toronto will fulfill the contracts, setting out each of their contractual obligations. I find that all of this information was or could have been subject to negotiation.

[54] In Order MO-1706, Adjudicator Bernard Morrow dealt with the issue of whether the information contained in a contract was "supplied" for the purpose of section 10(1). In doing so, he stated:

> … the 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 (see Order P-1545).[19]

[55] Consequently, I find that agreed-upon essential terms of a contract are generally considered to be the product of a negotiation process and are not "supplied," even if the "negotiation" amounts to acceptance of the terms proposed by a third party.[20] Even assuming that the information in the three agreements was provided by the affected party to Build Toronto, the acceptance of the terms of the agreements by Build Toronto amounts to negotiation of the agreements.

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[18] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.).

[19] Order MO-1706. This approach was approved in *Boeing*.

[20] Orders PO-2384 and PO-2497.

[56] Further, I am not satisfied that Build Toronto and the affected party have established how the three agreements are distinguishable from contracts, or the other circumstances in which both this office and the Courts have found that the content of a negotiated contract is not supplied.[21]

[57] Therefore, I find that the information in the three agreements does not meet the second part of the test under section 10(1), as it was not "supplied" for the purposes of section 10(1).

[58] However, as I previously stated, I find that there is a portion of one record where the "inferred disclosure" exception applies. Portions of Schedule C of the Partnership Agreement set out information that would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to Build Toronto. In particular, these portions of the schedule set out a description of management partnerships of the affected party. I find that these portions refer to the underlying and fixed structure of the affected party that is not subject to change by Build Toronto. Consequently, I find that these portions of Schedule C of the Partnership Agreement were "supplied" to Build Toronto by the affected party. Conversely, I find that the remaining portions of this schedule consist of the terms of some of the specific services that will be provided in the context of the development project that is the subject matter of the request. I find that this information was not "supplied" for the purposes of section 10(1) because it was subject to negotiation between Build Toronto and the affected party. As stated above, the acceptance of the terms of the agreements by Build Toronto amounts to negotiation of the agreements.

[59] Consequently, I am satisfied that the limited information[22] that I have found to have been supplied by the affected party to Build Toronto was done with a reasonably held expectation of confidentiality. Therefore, I find that this remaining information was "supplied in confidence" by the affected party to Build Toronto for the purposes of section 10(1), thus meeting the second part of the test.

[60] Build Toronto has also claimed the application of the exemption in section 11 to the information that I have not found to have been "supplied" which I will consider later in this order.

Part 3: harms

[61] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

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[21] *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario*, 2013 ONSC 6776 (CanLII).

[22] Portions of Schedule C to the Partnership Agreement.

Evidence amounting to speculation of possible harm is not sufficient.[23] 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 other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[24] 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 10(1).[25] 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*.[26]

Representations

[62] Build Toronto submits that disclosure of the information at issue would prejudice it and the affected party's competitive positions and interfere significantly with their future contractual or other negotiations, causing the harm contemplated in section 10(1)(a). In addition, Build Toronto argues that the harms caused to the affected party would also result in the harms contemplated in section 10(1)(c). In particular, Build Toronto submits that the disclosure of commercial intelligence would result in an undue gain to the affected party's competitors, at the expense of the affected party. Build Toronto also argues that it is likely that it will have fewer bidders for similar private-public partnership opportunities in the future if it cannot guarantee the confidentiality of sensitive and valuable commercial and financial information of its potential partners. The inevitable result, Build Toronto states, is a less competitive bidding process and the attendant losses of profit to the City of Toronto.

[63] With respect to section 10(1)(b), Build Toronto submits that disclosure of the records could cause potential partners to expect and require Build Toronto to be satisfied with less information when assessing competitive bids and drafting the necessary partnership agreements, due to a loss of confidence in Build Toronto as a development partner who can be entrusted with sensitive financial information. Build Toronto goes on to argue that hesitation from potential future partners would translate into fewer bidders on future projects, resulting in lower bids and lower returns. Build Toronto also submits that some private entities will not work with it if they are forced to disclose information that will jeopardize their competitive advantages. Build Toronto states that it was intended to be a relatively small operation focusing on expertise rather than resources; it does not want to "tackle" large complex development projects

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[23] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[24] Order PO-2020.
[25] Order PO-2435.
[26] *Ibid*.

without the resources of a joint venture partner from the private sector[27] in order to create value for its shareholder, the City of Toronto. Build Toronto states:

> Any impact on [its] ability to enter into public-private partnerships, given that these are a cornerstone of its business plan, will jeopardize future dividends to the City's fiscal detriment.

[64] The affected party submits that the current test for determining whether the commercial injury and/or the competitive prejudice criteria are met in a claim for the third party exemption is whether disclosure of the information would cause "a reasonable expectation of probable harm." The affected party relies on the Supreme Court of Canada's decision in *Merck Frosst Canada Ltd. v. Canada (Health)*.[28] The affected party further submits that in *Merck*, the Supreme Court of Canada also held that a third party need not show on a balance of probabilities that the harm will come to pass, or is more likely than not to occur should the information be disclosed, and that a requirement that competitive harm be "immediate" and "clear" is too onerous. At the same time, the affected party argues, the *Merck* decision also states that the harm must be more than simply possible and that exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. The affected party argues that competitors could use its information in future negotiations with other municipalities, causing a reasonable expectation of harm as contemplated in *Merck*.

[65] In particular, the affected party submits that disclosure of the information at issue could cause the harms contemplated in sections 10(1)(a) and (c) by:

- enabling competitors to enhance their own bids in future RFP processes;
- permitting other municipalities looking for land development opportunities in the GTA and neighbouring areas to use the information to extract similar commitments from the affected party;
- allowing competitors to better gauge the proposals that the affected party is likely to make and then submit proposals incorporating aspects of the affected party's deal structure or terms intended to undercut it;
- adversely affecting the affected party's ability to effectively negotiate with potential future partners, who will likely insist upon terms that are at least as beneficial to them as the terms which favour Toronto Build Harbour in the deal that is the subject matter of the request; and

[27] As set out in Build Toronto's Annual Report, 2011 at p. 15.
[28] 2012 SCC 3 (*Merck*).

- permitting competitors to enhance future bids through knowledge of the affected party's management partnerships.

[66] With respect to section 10(1)(b), the affected party argues that this exemption applies because disclosure of the information at issue, despite contractual confidentiality obligations, would generate uncertainty amongst parties with whom Build Toronto enters into contracts.

[67] The appellant disagrees with the affected party's argument that the test articulated by the Supreme Court of Canada in *Merck* represents the current test for determining whether commercial injury or competitive prejudice has occurred. Instead, the appellant relies on Order PO-3116 in which the adjudicator found that the *Merck* decision did not necessitate a departure from the requirement of this office to provide "detailed and convincing" evidence to establish a reasonable expectation of harm. The appellant argues that disclosure of the records cannot reasonably be expected to cause the harms contemplated in sections 10(1)(a) or (c) for the following reasons:

- the information at issue, the appellant states, does not consist of terms of a proposal, but rather the general terms negotiated under three agreements. Even if the affected party was subject to a more competitive bidding process due to the disclosure of the information, this alone would not significantly prejudice their competitive position or result in undue loss to it[29];

- the fact that the commercial terms in the agreements may be revealed to competitors does not automatically allow them to use similar terms in future bids. Commercial terms must be negotiated between the parties in relation to each party's positions and interests as well as the circumstances surrounding the transaction. A competitor would not be able to unilaterally "use" a similar term in the agreements to form a contract with another party;

- the agreements do not contain any proprietary information that could be used in future negotiations and is almost three years old. The agreements are, therefore, significantly outdated and unlikely to compromise the affected party's or Build Toronto's competitive position;

- Build Toronto and the affected party have not made any representations concerning the degree of competition in its business, who its competitors are, or specifically how the information could be used by competitors to significantly affect their operations.

[29] See Order PO-2435.

[68] With respect to the application of section 10(1)(b), the appellant disagrees with Build Toronto and the affected party that, should the records be disclosed, potential partners would hesitate in entering into a partnership with Build Toronto, translating into fewer bids and driving the price of the property down. The appellant submits that both Build Toronto and the affected party would have known about the disclosure provisions in the *Act* and that disclosure of their agreements was likely. Similarly, the appellant submits, potential partners who wish to enter into similar agreements with Build Toronto likely already know about the disclosure provisions under the *Act* and will supply the information required to enter into these agreements. In addition, potential partners would be exposed to the same risk of disclosure under the *Act* regardless of whether they negotiate with Build Toronto or any other public partner that is subject to the *Act*.

[69] Further, the appellant submits that Build Toronto, by its own admission in its Corporate Brochure, states that it has some of the best development sites in the city. Therefore, the appellant argues, it would be highly unlikely that potential partners would hesitate to provide information or enter into agreements with Build Toronto only to leave these high-value sites open to their competitors. Even if they were, the appellant submits, the purchase price of Build Toronto's development sites would not necessarily go down, and there is no evidence to support that assertion.

[70] In reply, Build Toronto submits that it has provided detailed and convincing evidence, which closely tracks that accepted by this office in Order PO-3116, which was cited by the appellant. In particular, Build Toronto reiterates its original representations and also sets out further harms as follows:

- Other developers will have a snapshot of the manner in which the affected party is contractually required to operate the development, marketing and construction of the property;

- Competing developers will be able to use the information in the records to their advantage and to better compete with the affected party on future RFP's;

- By combining Build Toronto's publicly available financial statements and annual reports with the terms setting out the allocation of cash in the Partnership Agreement, a competitor would be able to deduce the range of compensation that the affected party receives;

- The affected party would have to make concessions to future development partners if its expenditure and financial exposure to the development were disclosed; and

- Competitors would know with precision the expenditure and financial exposure to development that the affected party was willing to accept and would likely be willing to accept again. With this information, competitors could undercut the affected party in future bids.

[71] Also in reply, the affected party submits that, with respect to the evidence of harm required, the decision in *Merck* binds this office in that I must assess the reasonable expectation of probable harm in line with the Supreme Court of Canada's *dicta* that showing harm is not a "heavy burden", and that a requirement that competitive harm be "immediate" and "clear" is too onerous.[30] The affected party also submits that this office's requirement of "detailed and convincing" evidence of injury sets a standard for quality of evidence that is similar to that found to result in too high a threshold for the burden of proof in *Merck*.

[72] The affected party also argues that competitors will make specific use of the information at issue to undercut or better its terms. This will cause the affected party to have to trim margins, sustain more risk or make greater financial outlay to win bids in competition with other developers. There is significant interest, the affected party states, by competitor developers in knowing how it secured this development project, precisely because they wish to beat it and win the next Build Toronto or other development bid invitation.

[73] Similarly, the affected party submits, disclosure is likely to cause its future financial partners to demand better terms than they would otherwise, given the concessions it made in the Agreement of Purchase and Sale and the Partnership Agreement. This is likely to constrain the affected party's ability to obtain improved terms than in the current agreements. The affected party goes on to argue that the likelihood of this injury taking place has been heightened well beyond a reasonable expectation of probable harm, for the reasons set out in the representations that were withheld for confidentiality reasons.[31]

Analysis and findings

[74] First, with respect to the burden of proof when claiming this exemption, the affected party relies upon the Supreme Court of Canada's decision in *Merck*.[32] In Order PO-3116, I considered the relevance of the *Merck* decision to this office's requirement that the evidence of harm in section 17(1)[33] be "detailed and convincing." In doing so, I stated:

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[30] See note 22 at para. 205.
[31] Meeting the confidentiality criteria set out in this office's *Practice Direction 7*.
[32] See note 22.
[33] The provincial equivalent of section 10(1) of the *Act*.

> In *Merck*, the Supreme Court of Canada engaged in a thorough examination of the elements of the third party information exemption in the *ATIA.* It may be that there are aspects of this decision that will inform this office's application of section 17(1). With respect to the particular argument made by the appellant here, I do not find anything in *Merck* which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof. As the Ontario Court of Appeal stated in the *WCB* decision, the phrase "detailed and convincing" is about the quality of the evidence required to satisfy the onus of establishing a reasonable expectation of harm:
>
> > . . . the use of the words "detailed and convincing" do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.[34]

[75] Therefore, I find that there is nothing in the *Merck* decision which necessitates a departure from the requirement that a party provide "detailed and convincing" evidence of harm in order to satisfy its burden of proof under section 10(1) of the *Act*.

[76] The remaining information at issue consists of the portions of Schedule C of the Partnership Agreement that set out a general description of the type of services provided by the affected party's management partnerships. I note that some of the information in the records describing these partnerships is publicly-available on the affected party's website. I find that none of the harms contemplated in section 10(1)(a), (b) or (c) apply to exempt this information from disclosure, particularly given the fact that any specific financial data described in these portions has already been removed from the scope of the request.

[77] In my view, the information at issue is instead of a general nature. It describes, in general terms, the type of services provided by the affected party's management partnerships. In my view, this information does not provide insight into the commercial methodology of the affected party with regard to this particular project, with the result that disclosure of the information could significantly prejudice its competitive position or provide an undue gain to competitors, as contemplated in section 10(1)(a) and (c). I

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[34] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.) (*WCB*).

make this finding in light of the fact that some of the information at issue is publicly available.

[78] With respect to the application of section 10(1)(b), in my view, a partnership to develop a residential property of this magnitude with Build Toronto is potentially profitable. To meet the threshold of this exemption requires detailed and convincing evidence to demonstrate that future bidders could reasonably be expected to either withdraw from, or not participate in, the bidding process for such contractual arrangements. I find that Build Toronto's and the affected party's representations on the possible application of section 10(1)(b) are general and highly speculative and do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board).*[35] In particular, I find that Build Toronto's representations appear to focus on potential harm caused to it by disclosure of the records. Section 10(1) is designed to protect the interests of third parties and not those of an institution.

[79] Consequently, I find that the applicable portions of Schedule C of the Partnership Agreement are not exempt from disclosure under section 10(1)(a), (b) or (c). Build Toronto has also claimed the application of the exemption in section 11 to this information, which I will consider below.

Issue B: Does the discretionary exemption at section 11 apply to the records?

[80] Build Toronto is claiming the application of the discretionary exemption in sections 11(a), (c), (d), (e), (f) and (g), which state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[35] See note 12.

> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

[81] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*[36] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[82] For sections 11(c), (d) or (g) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[37]

[83] 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 11.[38] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[39]

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[36] Vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report).
[37] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[38] Orders MO-1947 and MO-2363.
[39] Order MO-2363.

[84] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[40]

Section 11(a): information that belongs to government

[85] For section 11(a) to apply, Build Toronto must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;

2. belongs to an institution; and

3. has monetary value or potential monetary value.

[86] The types of information listed in section 11(a) have been discussed in prior orders and are set out, in part:

> *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.[41]
>
> *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.[42] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[43]

[87] The term "belongs to" refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

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[40] Orders MO-2363 and PO-2758.
[41] *Ibid*.
[42] *Ibid*.
[43] Order P-1621.

[88] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,[44] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.[45]

[89] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.[46] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section.[47] In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption.[48]

Representations

[90] Build Toronto and the appellant submit that the type of information at issue in the records is the same as described in their respective representations on the mandatory exemption in section 10(1).[49]

[91] With respect to the second part of the test, Build Toronto submits that the financial and commercial details and processes/procedures in the records were developed through the skill and effort of Build Toronto and the affected party and, therefore, "belongs" to them within the meaning of section 11(a). In particular, Build Toronto argues that it engages in a great deal of market analysis[50] prior to a bid process before taking a property to market. It then engages in a two-round bid process, requiring a significant amount of time and resources to analyze the bids, including the records at issue.

[92] With respect to whether the information at issue has monetary value, Build Toronto argues that the information has intrinsic value to it. It argues that the cost of the procurement process includes legal fees, hundreds of hours of executive time and

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[44] Order P-636.
[45] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.
[46] Orders M-654 and PO-2226.
[47] Orders P-1281 and PO-2166.
[48] Order PO-2724.
[49] Commercial and financial information.
[50] Including valuations, appraisals and due diligence.

other external consultants, which costs hundreds of thousands of dollars invested to put the partnership together.

[93] The appellant submits that the information at issue does not "belong" to Build Toronto because it consists of agreements with commercial terms that were negotiated by Build Toronto and the affected party. The appellant goes on to argue that the term "belongs to" refers to ownership by an institution, and is more than the right simply to use, possess or dispose of information, or control access to the record in which the information is contained. For information to belong to an institution, it argues, it must have some proprietary interest in it either in a traditional intellectual property sense, such as copyright, trademark, patent or industrial design, or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.[51] The appellant submits that Build Toronto does not have a proprietary interest in the records like one would have in the ownership of a patent or trademark. In addition, the appellant argues that another party who wished to enter into a similar agreement would not simply misappropriate the terms in the records for its own use. Instead, other parties would negotiate commercial terms based on their interests, just like Build Toronto and the affected party did.

[94] With respect to whether the records at issue have "monetary value," the appellant submits that the fact that there has been a cost to the institution, as well as time and resources expended to create the record does not mean that it has intrinsic monetary value for purposes of section 11(a).[52] In addition, the appellant submits that the fact that the information has been kept confidential does not, on its own, establish this exemption.

Analysis and findings

[95] For the reasons set out in my previous discussion of section 10(1), I find that the records at issue contain commercial and financial information. Section 11(1)(a) requires that the information at issue have actual or potential monetary value, as distinguished from information the disclosure of which would cause a reasonable expectation of harm. In my view, Build Toronto's section 11(1)(a) claim fails because the information in question does not "belong" to it in the sense that this term is used in the *Act*. Further, I find that Build Toronto has not demonstrated that the information has "monetary value" in the sense described in previous orders of this office.

[96] With reference to the meaning of the phrase "belongs to", former Assistant Commissioner Mitchinson stated in Order P-1281:

> . . . In my view, the fact that a government body has authority to collect and use information, and can, as a practical matter, control physical

[51] Relying on Order P-636.
[52] Relying on Order PO-2066.

> access to information, does not necessarily mean that this information "belongs to" the government within the meaning of section 18(1)(a) [the provincial equivalent of section 11(1)(a)]. While the government may own the physical paper, computer disk or other record on which information is stored, the Act is specifically designed to create a right of public access to this information unless a specific exemption applies. The public has a right to use any information obtained from the government under the Act, within the limits of the law, such as laws relating to libel and slander, passing off and copyright, as discussed below.
>
> If the Ministry's reasoning applied, all information held by the government would "belong to" it and, presumably, the rights to use information belonging to government could be restricted for this reason alone . . .

[97] The approach taken by former Assistant Commissioner Mitchinson was applied in Order PO-1763[53] by former Senior Adjudicator David Goodis, in which he determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, former Senior Adjudicator Goodis found that the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[98] In addition, in Order PO-2632, Adjudicator Daphne Loukidelis found that records that consisted of mutually-generated agreements which were the product of negotiations did not constitute the intellectual property of and, therefore, did not "belong to" the institution in the sense contemplated by this exemption.

[99] I adopt the approach taken by both former Senior Adjudicator Goodis and Adjudicator Loukidelis for the purpose of section 11(1)(a). I have not been provided with sufficient evidence to establish that the information at issue, which was produced through negotiation and contains mutually-generated terms, constitutes the intellectual property of Build Toronto or is a trade secret of Build Toronto. With respect to the portions of Schedule C of the Partnership Agreement that I found were "supplied" for the purposes of section 10(1), I find that any proprietary interest in that information rests with the affected party, and not with Build Toronto.

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[53] Upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.).

[100] In view of my finding that this specific information does not meet part 2 of the test, and because all three parts must be met, I find that it is not exempt from disclosure under section 11(1)(a).

Sections 11(c) and (d): prejudice to economic interests and injury to financial interests

[101] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[54]

[102] These exemptions are arguably broader than section 11(a) in that they do not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position,[55] or cause injury to its financial interests. As previously stated, to meet this test, Build Toronto must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm".

Representations

[103] Build Toronto states that it partnership with the affected party is its first major partnership since its creation. Its corporate direction, it advises, is oriented towards public-private partnerships such as the one with the affected party, and it plans to enter into many more such partnerships in the years to come. If the financial details in the records are disclosed, Build Toronto argues, future potential partners would learn what it was willing to accept and would, therefore, have an unfair advantage in developing their proposals. Build Toronto goes on to argue that this unfair advantage would hamper its ability to generate shareholder income.

[104] With respect to section 11(d) in particular, Build Toronto submits that the disclosure of the information at issue would compromise its business relationship with the affected party, as well as other similar private entities in the future. Build Toronto states that it does not have the resources or expertise to, for example, market its properties, and that it relies on the affected party to utilize its "tremendous marketing machine." Build Toronto argues that the construction of the property, and the sale of condominiums and commercial space therein, depends on the effectiveness of the

[54] Orders P-1190 and MO-2233.
[55] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

partnership. It goes on to argue that if the information is disclosed, competitors will be able to benefit from the specifics of the relationship between Build Toronto and the affected party and subsequently use that information to enhance their own condominium undertakings. As a result, Build Toronto submits, its financial interests would be injured.

[105] The appellant submits that neither section 11(c) nor (d) apply to exempt the records from disclosure. In particular, the appellant relies on Order MO-1915 and states:

> Similar to the Board in MO-1915, BT[56] is not competing for business with potential purchasers but instead it is the potential purchasers who are competing for access to BT's high-value development sites. BT admits that it controls some of the best development sites in Toronto. Disclosure of these Agreements would allow potential purchasers to structure their contractual terms more favourable to BT in order to gain access to these lucrative development sites, which would have the effect of *improving* BT's competitive position as opposed to harming it. Further, the increased competition between potential purchasers trying to gain favourable access to favourable development sites would have the effect of *improving* the financial interests of BT, not injuring it.
>
> Further, BT has failed to provide any "detailed or convincing" evidence of any harm that has occurred to will likely occur in the future. Rather, it has only provided conjecture. Stating that a harm will result does not make it so, and does not amount to detailed and convincing evidence.

Analysis and findings

[106] I have considered the arguments advanced by Build Toronto and the appellant and have carefully reviewed the records. In my view, Build Toronto has not provided sufficiently detailed and convincing evidence of prejudice to its economic interests or competitive position and injury to its financial interests as contemplated in section 11(1)(c) or (d), nor does this appeal present circumstances in which harm can reasonably be inferred. One of Build Toronto's concerns is the disclosure of the detailed financial information in the records. However, as previously stated, the detailed financial information contained in the records was removed from the scope of the request by the appellant and is, therefore, no longer at issue.

[107] I agree with the appellant that Build Toronto continues to determine what companies it will do business with. Build Toronto has access to a number of desirable commercial and/or residential properties in the city, which would be of interest to

[56] The appellant's representations refer to Build Toronto as "BT."

developers. In addition, a fact of the marketplace is that if a competitor (or renewing party) truly wishes to secure a contract and partnership with Build Toronto, it will do so by offering a lower market share to Build Toronto than its competitor, resulting in a net saving to Build Toronto. Similarly, in circumstances where Build Toronto is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for Build Toronto.

[108] For all these reasons, I find that sections 11(1)(c) and (d) do not apply to exempt the information at issue from disclosure.

Section 11(e): positions, plans, procedures, criteria or instructions

[109] In order for section 11(e) to apply, Build Toronto must show that:

1. the record contains positions, plans, procedures, criteria or instructions;

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations;

3. the negotiations are being carried on currently, or will be carried on in the future; and

4. the negotiations are being conducted by or on behalf of an institution.[57]

[110] Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation.[58] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding.[59] The term "plans" is used in sections 11(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme."[60]

Representations

[111] Build Toronto submits that its negotiations with the affected party, a private corporation, would qualify for this exemption. It states that the Partnership Agreement sets out processes, plans and procedures that cover a number of eventualities,

[57] Order PO-2064.
[58] Orders PO-2064 and PO-2536.
[59] Orders PO-2034 and PO-2598.
[60] Orders P-348 and PO-2536.

including further negotiations between the parties. Details in the Partnership Agreement, Build Toronto states:

> . . . would be used to guide the parties in the event of negotiations necessary to resolve the usual issues which arise in a business partnership. They set out pre-determined courses of action to establish, with as much certainty as possible, how the parties can and should act in these situations.[61]

[112] The appellant argues that Build Toronto has not established that the records contain plans or methods as to fall within the meaning of section 11(e), and even if they did contain plans, are not intended to be applied to current negotiations on or behalf of Build Toronto as an institution, because the agreements have already been negotiated and are fully executed.[62] The appellant argues that parts 2, 3 and 4 of the test in section 11(e) have not been met for the same reason.

Analysis and findings

[113] In the circumstances of this appeal, it is clear that the negotiations which led to the Agreement of Purchase and Sale, Partnership Agreement and Agent/Nominee Agreement have concluded and that the records are in fact final agreements. As such, I am satisfied that they cannot be characterized as a pre-determined course of action or way of proceeding. In addition, in my view, disclosure of these agreements, or portions thereof, cannot be said to disclose Build Toronto's bargaining strategy or the instructions given to those individuals who carried out the negotiations. As with most negotiated agreements, the records at issue represent agreements, the culmination of the negotiation between Build Toronto (by its wholly-owned subsidiary) and the affected party. I am satisfied that the records do not contain positions, plans, procedures, criteria or instructions for the purposes of section 11(1)(e). Therefore, I find that the first two parts of the test under section 11(1)(e) have not been met.

[114] Even if I were to accept that the records at issue, particularly the Partnership Agreement, contain a pre-determined course of action or way of proceeding, I do not find that parts 3 and 4 of the section 11(1)(e) test are met. Although I acknowledge that Build Toronto may enter into similar agreements with other developers in the future, I do not accept that disclosure of these records would reveal positions, plans or procedures intended to be applied by Build Toronto in the negotiation of those future agreements.

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[61] Order PO-2034.
[62] Relying on Order P-581.

[115] In Order PO-2598, Adjudicator Catherine Corban relied on and quoted Order 87, in which former Commissioner Sidney B. Linden reviewed the application of section 18(1)(e) (the provincial equivalent of section 11(1)(e)) to completed negotiations and stated that:

> Turning to the exemption claim under subsection 18(1)(e), this subsection refers to "positions, plans, procedures, criteria or instructions *to be applied* to any negotiations carried on or to be carried on by or on behalf of an institution or the Government of Ontario" (emphasis added). In my view, the exemption is not available to prevent the release of these types of records in situations where they *have been applied* to negotiations between the government and third parties (emphasis added). Furthermore, to interpret the phrase "or to be carried on by or on behalf of an institution of the Government of Ontario" to mean any possible future negotiations including those that have not been presently commenced or even contemplated, is in my view, too wide. My conclusion is therefore that in the circumstances of this appeal, negotiations between the institution and Toyota have been completed and any positions, plans, procedures, criteria or instructions applied to these negotiations are no longer exempt from disclosure under subsection 18(1)(e).

[116] Following the reasoning applied by former Commissioner Linden in Order 87 and Adjudicator Corban in Order PO-2598, if the records, particularly the Partnership Agreement, reveal a pre-determined course of action, it has already been applied to those negotiations as the records represent final agreements. However, Build Toronto states in its representations that the Partnership Agreement sets out processes, plans and procedures that cover a number of eventualities, including further negotiations between the parties. The difficulty with this argument is that if these processes, plans and procedures are to be used in future negotiations between Build Toronto and the affected party on this project, the affected party is already aware of what these processes, plans and procedures are, as it is a signatory to the records, including the Partnership Agreement.

[117] I am also not satisfied that disclosure of the records, even if they reveal a pre-determined course of action, could have an adverse effect on other similar negotiations. Any future agreements, and any preceding negotiations, may not only involve different parties but also would entail different considerations and circumstances from those existing at the time of the negotiation of the records at issue in this appeal. Accordingly, I find that Build Toronto has not satisfied parts 3 and 4 of the test under section 11(1)(e). In any event, I have concluded that Build Toronto has failed to demonstrate that the records contain "positions, plans, procedures, criteria or instructions," and that therefore, parts 1 and 2 of the test under section 11(1)(e) have also not been met. As all parts of the test in section 11(1)(e) must be met for the

exemption to apply, I find that section 11(1)(e) does not apply to exempt the records at issue from disclosure.

Section 11(f): plans relating to the management of personnel

[118] In order for section 11(f) to apply, Build Toronto must show that:

1. the record contains a plan or plans; and

2. the plan or plans relate to:

   (i) the management of personnel; or
   (ii) the administration of an institution; and

3. the plan or plans have not yet been put into operation or made public.[63]

Representations

[119] Build Toronto submits that there is information in the records that would be used to guide it and the affected party in the management of the personnel involved in the development of the project. The records, it states, contain mechanisms for decision-making in a number of situations, and these plans have not yet been put into operation or made public given that this is Build Toronto's first public-private partnership of this nature. Build Toronto goes on to submit that the "complex and serious" decisions with significant financial implications and the plans, will have a bearing on its future partnerships. To disclose these plans/processes, it argues, would likely impact future negotiations and partnerships and likely not to its benefit. Build Toronto also set out in the confidential portions of its representations which portions of the records it considers to contain plans relating to the management of personnel or the administration of an institution.

[120] The appellant submits that Build Toronto has not shown any detailed and convincing evidence of plans in the form of a detailed method for accomplishing a particular objective in relation to the management of its personnel. The appellant also argues that if the records contain "plans" within the meaning of section 11(f), they have already been put into operation or made public and, therefore, do not meet part 3 of the test in section 11(f). The appellant relies on Order PO-2635, in which this office held that the provincial equivalent of section 11(f) is meant to guard against the premature disclosure of plans, leading to unfairness. The appellant goes on to argue that the records at issue would not lead to the premature disclosure of government plans or policies because the agreements were entered into almost three years ago,

[63] Orders PO-2071 and PO-2536.

and construction has already begun on the project with the full knowledge of the public. Further, the appellant submits that Build Toronto's arguments are overly broad and vague, and it has not provided any specific evidence of any plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public.

Analysis and findings

[121] There are three parts to the test that must be met for the application of section 11(1)(f). As previously stated, the records at issue are final agreements between Build Toronto (through its wholly-owned subsidiary) and the affected party. I find that the records do not set out a "plan of action" or a "thing to be done" or a "design or a scheme" as those terms are used in part one of the test for the application of section 11(1)(f). Therefore, I find that the first part of the three-part test has not been met. Even if I were to accept that the records at issue contain a "plan of action" or a "thing to be done" or a "design or scheme," I do not find that parts 2 and 3 of the section 11(1)(f) test are met.

[122] Part two of the test requires that the plan or plans relate to either the management of personnel or the administration of an institution. While portions of the records set out the structure of the partnership between Build Toronto and the affected party at a high level, they do not include a plan for the management of the personnel of either Build Toronto or the affected party. Similarly, while the records may contain contractual terms relating to the administration of the partnership between Build Toronto and the affected party with respect to this particular development project, the information in the records does not set out plans that relate to the administration of Build Toronto as an institution. Therefore, I find that the second part of the three-part test has not been met.

[123] The third part of the three-part test requires that the plan or plans have not yet been put into operation or made public. While Build Toronto's position is that the information at issue has not been made public, I find that any plans that may be contained in the records have been put in operation, given that the project is underway and that the records are almost four years old. Therefore, I find that the third part of the test has not been met. As all three parts of the test must be satisfied before section 11(1)(f) applies, I find that the records at issue are not exempt under section 11(1)(f).

Section 11(g): proposed plans, policies or projects

[124] In order for section 11(g) to apply, Build Toronto must show that:

1. the record contains information including proposed plans, policies or projects of an institution; and

2. disclosure of the record could reasonably be expected to result in:

(i) premature disclosure of a pending policy decision; or
(ii) undue financial benefit or loss to a person.[64]

[125] For this section to apply, there must exist a policy decision that the institution has already made.[65]

Representations

[126] Build Toronto states that it plans to engage in many public-private partnerships of the type it has developed with the affected party, and that the details of this partnership are contained in the records. It goes on to submit that the disclosure of the details of the partnership is certain to be viewed negatively in two ways, stating that:

- its confidence in the protection of its confidential information would be shaken, and business relationships never benefit from the loss of confidence in a partner; and

- where there are differences favouring a party, there would be a breakdown in the partnership which puts the market value of the project at risk.

[127] It then goes on to argue that its current partnership with the affected party has been so successful that it expects to use its terms and policies in future deals, with site-specific amendments. The disclosure of these specific plans and policies would prematurely publicize its approach to public-private partnerships to its long-term detriment. With respect to the requirement that there is a policy decision that the institution has already made, Build Toronto refers to portions of its representations that were withheld for confidentiality reasons that point to certain contractual terms contained in the records.

[128] The appellant submits that the intent of section 11(g) is to allow an institution to avoid the premature release of a policy decision where that disclosure could reasonably be expected to harm its economic interests. For this section to apply, the appellant argues, there must exist a policy decision that the institution has already made. The appellant states that in this instance, the agreements have already been negotiated and are fully executed and, therefore, do not contain any proposed plans, policies or

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[64] Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).
[65] Order P-726.

projects. It goes on to state that if this office fails to order the disclosure of the records because Build Toronto intends to use similar contractual terms in the future, it would effectively freeze the disclosure of public contracts in the province, as many public institutions recycle contractual terms where permitted. In addition, the appellant argues that although Build Toronto may wish to use the same terms in future agreements, the terms will be dictated by the negotiating power of both parties and not unilaterally.

[129] In addition, the appellant submits that Build Toronto has not provided evidence to show that disclosure of the records would reveal any pending policy decision, the disclosure of which could reasonably be expected to harm its economic interests. Lastly, the appellant states:

> Further, BT has not provided any evidence whatsoever to show any type of financial benefit or loss to a person. . .
>
> Further, the disclosure of the Agreements would not prematurely publicize BT's approach to public-private partnerships to its long-term detriment. Disclosure of these Agreements will likely cause potential competitors to grant more favourable terms to BT in future agreements and compete for BT's prime development sites thereby improving the competitive position of BT as well as its financial interests. Further, disclosure of these Agreements cannot be said to be premature, as the Agreements are nearly 3 years old with full knowledge of the public.

Analysis and findings

[130] There are two parts to the test that must be met for the exemption in section 11(1)(g) to apply. First, the records must contain information including proposed plans, policies or projects of an institution. For the reasons set in my analysis of section 11(1)(f), I find that the records do not contain proposed "plans" as that term is contemplated in section 11(1). On my review of the records, I also find that the records do not contain proposed policies. The records, which contain contractual terms, could be said to contain information about a project. However, for the purposes of this part of the test in section 11(1)(g), a "proposed project" means a planned undertaking that has not already been completed. In my view, the planned undertaking in the circumstances of this appeal was the formation of the partnership between Build Toronto (through its wholly-owned subsidiary) and the affected party to develop a particular property. Build Toronto also acknowledges in its representations respecting this exemption that the records reveal details of the partnership. Further, I find that the records reflect the terms that Build Toronto and the affected party negotiated to form the partnership and to purchase and develop the property together. This partnership has been in place for almost four years and, therefore, cannot be said to be a planned undertaking or a proposed project for the purposes of section 11(1)(g).

The fact that the construction of the property is ongoing is irrelevant. Consequently, I find that the first part of the two-part test has not been met and the records are not exempt from disclosure under section 11(1)(g).

[131] In sum, I do not uphold the application of either the mandatory exemption in section 10(1) or the discretionary exemption in section 11. As I have not upheld the exemptions claimed, it is not necessary for me to consider Build Toronto's exercise of discretion or the possible application of the public interest override raised by the appellant. I order Build Toronto to disclose the records to the appellant, with the exception of the financial data that the appellant removed from the scope of the request.

ORDER:

1. I order Build Toronto to disclose all of the records to the appellant by **July 15, 2015** but not before **July 10, 2015**. I have highlighted the portions of the Agreement of Purchase and Sale and the Partnership Agreement that are not part of the scope of the request. The highlighted portions are not to be disclosed.

2. I reserve the right to require Build Toronto to provide this office with copies of the records I have ordered disclosed.

Original signed by: June 9, 2015
Cathy Hamilton
Adjudicator