

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3273-I

Appeal MA14-319

The Corporation of the City of Cambridge

December 22, 2015

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to the city's purchase and restoration of a historic building to house a new library. The city located responsive records and notified an architectural design firm who objected to the release of records. The design firm claims that the withheld information qualifies for exemption under the mandatory third party information exemption at section 10(1). The city subsequently denied the appellant access to most of the records claiming that the third party information exemption applies and the appellant appealed the city's decision to this office. The appellant also raised questions about the reasonableness of the city's search for responsive records. During the inquiry stage, the city sought to add new discretionary exemptions. In this order, I disallow the city's new discretionary exemption claims and find that the mandatory third party information exemption at section 10(1) does not apply to the records. However, I find that a small portion of the records may contain the "personal information" of identifiable individuals. As a result, the city is ordered to disclose the records to the appellant but for the portions which I have identified may contain "personal information". I also order the city to conduct a further search for records relating to the appellant's request for records regarding the proposed restaurant in the library and appraised value of the purchased property.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 10(1), 11, 15(a), 17, 18(2) and 18(3)

Orders Considered: MO-3175, PO-2384 and PO-3450

OVERVIEW:

[1] The appellant submitted a request to the Corporation of the City of Cambridge (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the city's purchase of the Old Post Office building, including records regarding the construction of a restaurant in the new library to be built at the site.

[2] The city conducted a search for responsive records and notified an architectural firm (the third party) pursuant to the notice provisions in section 21(1). The third party objected to the release of some of the records and the city decided to grant the appellant partial access to the records. The city claims that the withheld portions of the records qualify for exemption under the third party information exemption under section 10(1).

[3] The appellant appealed the city's decision to this office and a mediator was assigned to the file. During mediation, the city issued a second access decision granting the appellant partial access to another e-mail. However, the city withheld the email addresses of the recipients under the third party information exemption at section 10(1).

[4] At the end of mediation, the appellant advised that she continued to seek access to the withheld information contained in the records. The appellant also raised concerns about the reasonableness of the city's search for responsive records.

[5] This file was then transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. During the inquiry stage of the appeal, the parties exchanged representations pursuant to this office's confidentiality criteria identified in *Practice Direction Number 7*.

[6] In its representations, the third party advised that it no longer objects to the release of the email addresses at issue. As a result, the withheld information in the email, dated March 7, 2014 is no longer at issue.

[7] In this order, I find that the city did not conduct a reasonable search and order it to conduct further searches for records which respond to the appellant's questions about the proposed restaurant and appraised value of the site. I also find that the third party information exemption at section 10(1) does not apply to the records and order the city to disclose to the appellant the portions of the records which do not appear to contain the "personal information" of identifiable individuals.

RECORDS:

[8] The three records at issue in this appeal consist of:

Record No.1: Standard Form of Contract for Architect's Services, dated March 25, 2014 (20 pages)

Record No. 2: Old Post Office Building Library & Restaurant Request for Proposal for Architectural/ Consultant Services, February 2014 (51 pages)

Record No. 3: Third party's fee proposal letter to the city, dated March 12, 2014 (1 page)

Note: Pages 42 to 48 of the RFP (Record 2) contain professional profiles of the individuals the third party proposes to populate its consultant team. The profiles contain information describing the educational and work histories of individuals along with their names. In my view, the profiles found on pages 42 to 48 differ from the business information contained in the company profiles appearing on preceding pages. This information appears to constitute the "personal information" of identifiable individuals within the meaning of section 2(1) and as a result may qualify for the mandatory personal privacy exemption under section 14(1). Given the concerns the appellant raised in her representations¹, there is no indication that the appellant is interested in obtaining access to the professional profiles contained in the RFP. Accordingly, I have removed pages 42 to 48 of the RFP from the scope of this appeal.

PRELIMINARY ISSUE:

Should the city be allowed to add additional discretionary exemptions 6(1)(b) and/or 11 to the appeal?

[9] This office's Notice of Mediation to the city, dated August 8, 2014 set September 12, 2014 as the deadline for claiming additional discretionary exemptions. The city's representations, dated November 20, 2014 did not make submissions on the possible application of section 11 (economic and other interests). However, at the end of its representations it inserted the text of section 11 in its representations.² In response, this office contacted the city to inquiry whether the insertion was intentional. The city replied that it intended to claim that the records were also exempt under section 11. Section 11 is a discretionary exemption.

¹ Throughout her representations, the appellant raises questions about the appraised value of the property purchased by the city and the proposed restaurant to be built in the library. In fact, the appellant argued that the records the city identified as responsive do not contain information which address her main concerns.

² The city's representations, dated November 20, 2014 also mark the first time it raised the possible application of section 15(a)(Information published or available to the public) by adding the text of that section to its representations. However, I have decided not to address the issue of whether or not the city should be allowed to add section 15(a) given the appellant's submission that she is not seeking access to the records for which section 15(a) appears to be claimed.

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

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

[11] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.³

[12] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.⁴ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.⁵

[13] After my receipt of the city's representations, I sent a supplemental Notice of Inquiry to the city inviting supplemental representations regarding its late-raising of the discretionary exemption at section 11. I also asked the city to answer the following questions:

1. Whether the appellant has been prejudiced in any way by the late raising of a discretionary exemption or exemptions. If so, how? If not, why not?
2. Whether the city would be prejudiced in any way by not allowing it to apply an additional discretionary exemption or exemptions in the circumstances of this appeal. If so, how? If not, why not?
3. By allowing the city to claim an additional discretionary exemption or exemptions, would the integrity of the appeals process be compromised in any way? If so, how? If not, why not?

³ *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

⁴ Order PO-1832.

⁵ Orders PO-2113 and PO-2331.

[14] The city was also asked to provide submissions on whether the discretionary exemption at section 11 applies to the records. This would include identifying which specific subsections in section 11 apply to the records and which portions of the records the city takes the position qualify for exemption.

[15] In response, the city states that "... this project is ongoing; release of information could put the City at a disadvantage". However, the city did not identify which subsections in section 11 apply to the circumstances of this appeal. The city also did not provide submissions in support of its position that it should be allowed to raise section 11 as a new discretionary exemption.

[16] Instead, the city's supplemental representations focus on the possible application of another new discretionary exemption - section 6(1)(b)(closed meetings). The city submits that it has the ability to close its council meetings to discuss real estate issues.⁶ The city also states:

In this case the Council of the City of Cambridge did go into camera for portions of the report dealing with "acquisition/disposition of land". The closed meeting was properly authorized.

[17] However, the city's supplemental representations in support of its position that the records qualify for exemption under section 6(1)(b) did not address the preliminary issue of whether it should be allowed to raise a new discretionary exemption claim.

[18] The appellant's representations did address this issue. The appellant submits that it would be prejudiced if the city is allowed to raise new discretionary exemptions. The appellant also argues that the integrity of the appeals process would be compromised if the city is allowed to add a discretionary exemption given that the request seeks to access information about the expenditure of public funds.

[19] Though I do not agree wholly with the appellant's comments, I agree that the city should not be allowed to raise additional discretionary exemptions in this appeal outside the 35-day timeframe communicated to the city during mediation, for the following reasons:

- The city's supplemental representations failed to address the issue of whether allowing it to raise a new discretionary exemption would result in prejudice to the appellant;

⁶ Section 239(2)(c) of the *Municipal Act* provides that a meeting or part of meeting may be closed to the public if the subject matter being considered is a proposed or pending acquisition or disposition of land by the municipality or local board.

- The city's supplemental representations also failed to address the question of whether or not allowing it to claim an additional discretionary exemption or exemptions would compromise the integrity of the appeals process;
- The city's supplemental representations failed to identify which portions of the records it claims qualify for exemption under the specific subsections under section 11. As a result, I have no way of determining exactly which portions of the records the city claims qualify for exemption under section 11 or what legal test to apply to determine whether the records qualify for exemption; and
- Though the city provided representations in support of its position that a report discussed in a closed council meeting qualified for exemption under section 6(1)(b) it has not identified the connection with this report and the records at issue in this appeal. The records here consist of a contract, RFP and fee proposal letter. The report the city advises was considered by council appears to address council's deliberation of the purchase of the Old Post Office Building. In any event, the city's representations failed to identify which portions of the records before me it claims qualify for exemption under section 6(1)(b).

[20] Having regard to the above, I have decided to not allow the city to raise new discretionary exemption claims under sections 6(1)(b) or 11. In my view, allowing the city to raise discretionary exemption claims in connection to section 6(1)(b) and 11 at this stage would compromise the integrity of the appeals process and prejudice the appellant. In making my decision, I took into account that the city failed to properly identify which portions of the records it claims qualify for exemption under the new exemption claims, and in the case of its section 11 claim, failed to identify which subsection applies in the circumstances of this appeal.

ISSUES:

- A. Did the city conduct a reasonable search for responsive records?
- B. Does the mandatory third party information exemption at section 10(1) apply to the records?

DISCUSSION:

Issue A: Did the city conduct a reasonable search for records?

[21] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a

reasonable search for records as required by section 17.⁷ If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[22] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records.⁸ To be responsive, a record must be "reasonably related" to the request.⁹

[23] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.¹⁰

[24] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.¹¹

[25] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.¹²

[26] A requester's lack of diligence in pursuing a request by not responding to requests from the institution for clarification may result in a finding that all steps taken by the institution to respond to the request were reasonable.¹³

Representations of the parties

[27] The appellant's request submitted under the *Act* sought access to:

Information/documents/reports pertaining to the purchase of the Old Post Office building on Water St., including, but not limited to the Agreement of Purchase/Sale; any terms and conditions; partner arrangements for a restaurant. Any subsequent reports, agreements providing insight into the arrangement among the City of Cambridge, the Library/Idea Exchange and any other tenants/partners/space occupiers. Any documents, reports or agreements outlining cost sharing, profit/loss sharing; design input and responsibilities, dispute resolution etc. Basis for cost estimates.

⁷ Orders P-85, P-221 and PO-1954-I.

⁸ Orders P-624 and PO-2559.

⁹ Order PO-2554.

¹⁰ Orders M-909, PO-2469 and PO-2592.

¹¹ Order MO-2185.

¹² Order MO-2246.

¹³ Order MO-2213.

[28] The city issued a decision letter to the appellant advising that it located 6 pages of records responsive to the request. The city granted the appellant full access to an email, dated June 11, 2014 (1 page) and partial access to an Agreement of Purchase and Sale (5 pages). The city's decision letter advises that other responsive records may be available once the "negotiations, agreements and decisions pertaining to this initiative are finalized". However, the city's decision letter did not describe the other records referenced in its access decision.

[29] The appeal form filed by the appellant raised questions about why the city had not identified the records it located by providing a list identifying "the date and nature of documents being withheld and specific basis for invoking refusal" with its decision. The appellant also took the position that "...there must be documentation of [the city's and restaurant owners'] partnership that precludes the [c]ity from seeking a restaurant service provider." The appellant also appealed the city's decision to withhold information under the third party information exemption under section 10(1).

[30] An appeal file was opened and this office sent a Request for Documentation to the city. In response, this office received copies of the Agreement of Purchase of Sale, Standard Form of Contract for Architect's Services, RFP, Fee proposal letter and an email.

[31] During mediation, the appellant advised that she was seeking access to records in relation to the city's decision to purchase the Old Post Office building along with records which explain the tender process surrounding the construction of the restaurant in the new library. The appellant also raised questions about the reasonableness of the city's search and the city advised that records relating to communications between the city, Library/Idea Exchange and/or tenants/occupiers of the Old Post Office building did not exist.

[32] Also during mediation, the city issued a second decision letter granting the appellant partial access to the second email, dated March 7, 2014. The city also provided this office with a copy of this email.

[33] At the end of mediation, the appellant confirmed that she believed that additional responsive records should exist.

[34] During the inquiry stage of the appeal, the city was asked to provide an affidavit summarizing the steps taken in response to the request in support of its position that it conducted a reasonable search. The city did not provide an affidavit but made the following arguments in support of its position that it conducted a reasonable search for responsive records:

- Many records relating to the city's purchase of the Old Post Office building are posted on the city's website;

- In addition, the city has hosted an open house to the public in July 2014 to discuss issues relating to its purchase and development of the site;
- A search for responsive records was conducted in the city's Electronic Records Management System and Documentum database, which includes physical and various electronic records. In addition a search was conducted in the city's Archives database; and
- The city also coordinated the search for responsive records in different departments at the city. Attached to its representations are two emails the city sent to two city staff members.

[35] With respect to any records that address the construction of a restaurant in the new library, the city submits that:

Restaurant negotiations are done at the Library level and are currently ongoing and can't be completed until the final design of the building, which is still on going as well, according to staff working on the project here at the City. Therefore at some point in time these records will be public, but currently things are still being worked on.

[36] The city also submits that the restaurant is an initiative taken by the library and thus any records relating to the restaurant project "would be accessible through the Library." The city also argues that there is "... no responsibility under the [Act] to create records that do not exist in the City's possession or belonging to another organization."

[37] The appellant's representations state:

...the City has chosen to misinterpret my FOI request to include information related to the ongoing design of the building while ignoring what I am really asking. In fact my information request is, and always has been about the process that led to an agreement of purchase above market value and anchored by a defacto agreement with the seller to run a restaurant in the newly purchased building. The City wanted to save an historic building from further degradation and ruin. It could have exercised it's mandate under Property Standards and forced the owner to protect the building. Or it could have made a decision to purchase the building and put out tenders for historical remedial work and RFPs to repurpose the building. Instead it chose to buy the building with no public input, no transparency or accountability, and pay above market value and commit to an agreement with the seller to run a licensed restaurant in conjunction with a youth oriented library facility that apparently doesn't have a documented plan. It is these documents, letters, working papers, thought processes that I am seeking.

[38] The appellant goes on to state that price the library paid for the Old Post Office

building was "above the appraised value". The appellant questions why a copy of the appraisal report was not identified as a record responsive to her request.

[39] In response, the city submits that the request did not seek access to documentation pertaining to its "thought processes". The city also states that it "is not in custody or control of documents that provide the right to run a restaurant in the Old Post Office/Library". Finally, the city submits that the library is a separate entity from the city and the appellant should contact the library directly to obtain access to any documentation regarding the restaurant.

Decision and analysis

[40] I have carefully reviewed the submissions of the parties and find that there are a number of deficiencies in the manner the city processed the request and conducted its search.

[41] First, I am not satisfied that the city has provided sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate the responsive records within its custody or control. Though the city asserts that it conducted a search for responsive records in its electronic and paper records, it did not provide details of the searches it carried out including, by whom they were conducted, what places were searched, who was contacted in the course of the search and what were the results of the searches. For example, the city provided copies of two emails its Freedom of Information office sent to two individuals, however it is not clear what types of record holdings these individuals have access to or in which department of the city they are employed.

[42] Given the lack of detailed information provided by the city, I find that it has failed to demonstrate that it conducted a reasonable search for responsive records. However, taking into consideration that the appellant has claimed that additional architectural services or design related records should exist, I will not order the city to conduct a further search for these types of records.

[43] I also note that throughout its representations, the city takes the position that a substantial portion of responsive records are publicly available and that the appellant should refer to the city's website to obtain information about its purchase of the Old Post Office Building. However, the city's access decisions did not specify which portions of the appellant's request it was denying on the basis of section 15(a).¹⁴ In fact, neither the city's original or revised decision letters refer to section 15(a). As a result, it appears that the appellant was not aware that the city denied access to some of the responsive records on the basis that they are publicly available until after she filed an appeal with this office. In addition, it is still not clear which portions of the request the city claims

¹⁴ Section 15(a) states: A head may refuse to disclose a record if the record or the information contained in the record has been published or is currently available to the public

are exempt under section 15(a). In my view, this confusion could have been avoided had the city issued a decision letter and Index of Records in accordance to *IPC Practices Number 1 – Drafting a Letter Refusing Access to a Record*.¹⁵

[44] I find, the city’s decision letter failed to provide the requester with a sound understanding of the type of records that were identified during the request stage, including design/architectural records and records the city takes the position are publicly available. However, based on the appellant’s submissions it appears that the appellant is not interested in pursuing access to these records. Accordingly, I will not order the city to issue an access decision or Index of Records to identify these records.

[45] However, it appears that the appellant continues to seek access to any records which would respond to her questions about the proposed restaurant in the library and appraised value of the site. Accordingly, I will order the city to conduct a further search for these records in its record holdings. The city will also be required to send representations on the results of its new search to me. In addition, the city will be ordered to issue an access decision to the appellant regarding access to any additional records located as a result of its further search. The city’s new access decision should be in accordance with the requirements of the *Act* and identify which portions of the records it claims are exempt pursuant to specific exemptions.

[46] If the city determines that it does not have custody or control of records which respond to the appellant’s request for information about the proposed restaurant in the library and appraised value of the site, the city must discharge its obligations under the *Act*, including sections 18(2) and (3).

[47] Sections 18(2) and (3) require the city to forward the request to the library within 15 days of receiving the request if it determines that it does not have custody and control of the records or in the alternative, if it determines that the library has a greater interest in the records. In making its decision as to whether sections 18(2) and (3) apply in the circumstance of this appeal, the city should consider whether the proposed restaurant or appraised value of the site was discussed at council or public meetings, and if so, what impact these discussions would have on the city’s position that it does not have custody or control of records which respond to this portion of the appellant’s request.

Summary

[48] The city is ordered to conduct a further search of its electronic and paper record holdings for records about the proposed restaurant in the new library and appraised value of the site. The city is also ordered to:

- send representations on the results of its new search to me;

¹⁵ *IPC Practices Number 1, Revised February 2013*

- issue an access decision to the appellant regarding access to any additional records located as a result of its further search; and
- if the city takes the position that it does not have custody or control of records which respond to the appellant's request for records about the proposed restaurant and appraised value of the site, the city must issue an access decision in accordance with the *Act*, including sections 18(2) and (3).

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

[49] The city and the third party take the position that the withheld records qualify for the third party information exemption under section 10(1)(a). This section states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization

[50] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹⁶ Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.¹⁷

[51] 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.

¹⁶ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

¹⁷ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[52] The third party takes the position that the records contain its proprietary information. In support of its position, the third party submits that:

[Record 1] is the executed contract for architectural and engineering services for the Old Post Office Building. The information which is recorded in the document includes our fee amount, our hourly rates, a breakdown of our fees on a stage by stage basis, and a detailed scope of services.

...

[Record 2] is our submission to the Request for Proposal which was issued by the City. It includes text on our Understanding of the Project Requirements, our Work Plan, descriptions of related previous project experience, our subconsultant team members, and our fee proposal.

...

[Record 3] is a letter written by ourselves to set out our fees and services related to the design of the restaurant in the Old Post Office [Emphasis in the original]

[53] Having regard to the third party's description of the records it appears that the third party takes the position that the records contain commercial and/or financial information.

[54] In its representations, the city submits that the records contain "sensitive business information" that constitute a "trade secret". The city also submits that the withheld information contains information that is "scientific or technical in nature". In support of its position, the city provided confidential submissions on this issue.

[55] The appellant's representations do not specifically address this issue.

Based on the third party's description of the records, along with the content of the records themselves, I am satisfied that they contain commercial and/or financial information.¹⁸ The records address the contractual relationship between the city and the third party, including the price the city is to pay the third party for design services.

¹⁸ This type of information have been defined in prior orders as follows:

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or

[56] Accordingly, I find that the first part of the three-part test has been met.

Part 2: supplied in confidence

Supplied

[57] The requirement that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.¹⁹

[58] 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.²⁰

[59] 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.²¹

[60] 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 third party to the institution.²² The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.²³

Representations of the parties

[61] The representations of the parties do not specifically address whether the withheld information meets the “supplied” test in section 10(1). However, the third

potential monetary value does not necessarily mean that the record itself contains commercial information [Order P-1621].

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

¹⁹ Order MO-1706.

²⁰ Orders PO-2020 and PO-2043.

²¹This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*),.

²² Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²³ *Miller Transit*, above at para. 34.

party's submissions suggest that the records contain information it provided the city. In particular, the third party submits that disclosure of:

- the executed contract would reveal information about its pricing strategy and methodology, including its proposed fee amount, hourly rates, stage-by-stage breakdown and scope of their services (Record 1/executed contract);
- its RFP submission would reveal information about its approach to library design which has taken approximately 7 years to develop, including their work methodology, graphic style, teaming strategy and pricing information (Record 2/bid submission); and
- its fee proposal letter would reveal pricing information regarding its proposal to design a restaurant in the new library (Record 3/fee proposal letter).

[62] The city and the appellant do not appear to dispute the third party's evidence that the information at issue was prepared by it and submitted to the city.

Decision and analysis

[63] The records at issue in this appeal consist of an executed contract, the third party's bid submission and a fee proposal letter.

[64] As noted above, there is a long line of decisions from this office which find that 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). In addition, this office's approach to the application of section 10(1) to negotiated agreements has been repeatedly upheld by the courts. Recently in Order MO-3175, Adjudicator Catherine Corban summarized this office's approach, as follows:

... it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party [See Orders PO-2384, PO-2497 (upheld in CMPA) and PO-3157]. In Order MO-1706, Adjudicator Bernard Morrow stated:

...[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the 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.

Also ... the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements and specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[65] Having regard to the above noted decisions from this office, I adopt this office's approach to section 10(1) which has been repeatedly upheld by the Divisional Court, and find that the executed contract (Record 1) is a product of the negotiation process between the city and the third party

[66] However, I note that there is also a line of decisions from this office which makes a distinction between the type of information potential service providers provide to governments when they submit a bid as part of a procurement process as opposed to information forming part of the agreed upon contractual terms.²⁴ Adjudicator Daphne Loukidelis summarized this distinction in Order PO-3450, as follows:

Section 17(1) [provincial equivalent of section 10(1)] protects sensitive business information in a contract only where it is demonstrably the same confidential "informational asset" originally supplied by a third party, and not where the evidence points to that same information representing the negotiated intention of the parties.

[67] Accordingly, an argument could be made that the third party's bid submission and fee proposal letter (Records 2 and 3) should not be treated as products of the negotiation process between the city and third party.

[68] However, I also note that the executed contract between the city and the third party specifies that the third party's bid submission and fee proposal letter form part of the contractual terms between the parties. The contract between the parties is a Standard Form of Contract for Architect's Services prepared by the Ontario Association of Architects (Form OAA 600-2013). The parties made amendments to the standard form contract and customized other sections. The agreed upon amendments are accompanied by the parties initials. The last page of the contract has a section entitled "Other Terms of Contract". In this section, the parties agree that the other terms of contract are set out in a number of other documents and letters, including the third party's bid submission and the fee proposal letter (Records 2 and 3).

[69] In my view, the contractual term which incorporates the bid submission and fee proposal letter as "other terms of contract" converted the procurement documents into agreed upon essential terms of the contract between the parties. In Order PO-2384, Adjudicator Stephen Faughnan found that a pricing sheet which was originally

²⁴ Orders MO-1450 and MO-1705.

submitted with a bid and subsequently attached as a schedule to an executed contract is "wholly incorporated into the contract by reference". In that order, Adjudicator Faughnan stated:

A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[70] I agree and adopt Adjudicator Faughnan's reasoning for the purposes of this appeal and find that the procurement documents at issue in this appeal (Records 2 and 3) should be treated as products of the negotiation process in the same manner as the executed contract (Record 1).

[71] Finally, I considered whether either the "inferred disclosure" and "immutability" exceptions apply to the circumstances of this appeal. The parties resisting disclosure did not provide specific representations on whether the "inferred" disclosure exception applies. Accordingly, there is no evidence before me suggesting that disclosure of the records would reveal, or permit the drawing of accurate inferences to be made with respect to underlying non-negotiated confidential information the appellant provided the city.²⁵

[72] The "immutability" exception applies to information that is immutable or is not susceptible of change. Examples are financial statements, underlying fixed costs and product samples or designs.²⁶ In my view, the records do not contain this type of information; nor did the city's and third party's representations address this issue. In fact, the third party's submissions in support of its position that disclosure of the information at issue could reasonably be expected to result in financial loss is premised on the assumption that the price information submitted in bids can be changed to undercut future bids.

[73] Accordingly, I find that the information at issue in this appeal does not fit the "inferred disclosure" or "immutability" exceptions.

[74] In summary, I find that the executed contract and procurement documents referenced as part of the contract reflect the end result of the city's and the third party's negotiations. Accordingly, this information was not "supplied" to the city for the purposes of section 10(1) and does not meet the second part of the three-part test for the third party information exemption under section 10(1). As all three parts of the

²⁵ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

²⁶ *Miller Transit*, above at para. 34.

section 10(1) test must be met, it is not necessary for me to also review the confidentiality requirement of the second part or the harms contemplated in the third part.

[75] As section 10(1) does not apply, I order the city to disclose the portions of the records which do not potentially contain the "personal information" of identifiable individuals. I have highlighted this information in the copy of the RFP (Record 2) sent to the city to avoid any inadvertent disclosures.

ORDER:

1. I order the city to disclose the withheld information in the records which I found did not qualify for exemption under section 10(1) to the appellant by **January 29, 2016** but not before **January 22, 2016**. For the sake of clarity, in the copy of Record 2 enclosed with the city's order, I have highlighted the portions of the record (pages 42 and 48) which may contain "personal information" and **should not** be disclosed to the appellant.
2. I order the city to conduct a new search for records responsive to the appellant's request for records relating to the proposed restaurant in the library and appraised value of the site. The city is to send representations on the results of its new search to me by **January 15, 2016**, and to provide an affidavit outlining the following:
 - a. the names and positions of the individuals who conducted the searches;
 - b. information about the types of files searched, the nature and location of the search, and the steps taken in conducting the search; and
 - c. the results of the search.

The city's representations may be shared with the appellant, unless there is an overriding confidentiality concern. The procedure for submitting and sharing representations is set out in this office's *Practice Direction Number 7*. The city should indicate whether it consents to the sharing of its representations with the appellant.

3. I order the city to issue an **access** decision to the appellant regarding access to any additional records located as a result of the search ordered in provision 2, in accordance with the *Act*, treating the date of this order as the date of the request.
4. I remain seized of this appeal in order to deal with any other outstanding issues arising from this interim order. In order to verify compliance with order

provisions 2 and 3, I reserve the right to require a copy of the records disclosed by the city to be provided to me.

Original Signed by: _____
Jennifer James
Adjudicator

_____ December 22, 2015