

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3395-I

Appeal MA15-17

Town of Newmarket

December 22, 2016

Summary: The appellant submitted an access request to the Town of Newmarket for records relating to the town's decision to provide a \$2.8 million loan to a local soccer club. The town denied access to these records under sections 6(1)(b) (closed meeting) and 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that one record is exempt from disclosure under section 6(1)(b). However, he finds that the records and parts of records that contain the soccer club's financial information are not exempt from disclosure under section 10(1), and he orders the town to disclose them to the appellant. In addition, he defers consideration of some third party information pending the receipt of further information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b) and 10(1)(b) and (c).

OVERVIEW:

[1] In September 2013, Newmarket Town Council approved a \$2.8 million loan from the Town of Newmarket (the town) to the Newmarket Soccer Club (the NSC). The appellant, who represents a local taxpayers' advocacy group, submitted an access request to the town under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following records relating to that financial transaction:

[C]opies of all documents relating to the loan given to the [NSC] by [the town] from June 2013 to present. These documents should include in camera meeting reports, NSC reports and financial statements, and all

contracts and correspondence relating to the loan being transferred from [the town] to a bank or financial institution.

[2] In response, the town located records that are responsive to the appellant's access request and then issued a decision letter that provided him with access to many of these records. However, it denied access to a number of records, some in full and others in part, under the discretionary exemption in section 6(1)(b) (closed meeting) and the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[3] The appellant appealed the town's access decision to this office, which assigned a mediator to assist the parties in resolving the issues in dispute. During mediation, the town issued a supplementary decision letter that provided the appellant with access to some records which it had previously withheld under section 6(1)(b).

[4] The appellant advised the mediator that he was not seeking the personal information of other individuals that the town had severed under section 14(1) of the *Act*. Consequently, the information that the town withheld under that exemption is no longer at issue in this appeal. In addition, the mediator contacted the NSC, which is an affected party, and asked whether it would consent to the town disclosing additional information from the records that relate to the NSC. After reviewing those parts of the records, the NSC stated that it would not consent to the town disclosing additional information to the appellant.

[5] This appeal was not resolved during mediation and was moved to adjudication for an inquiry. I sought and received representations from the town, the NSC and the appellant on the issues to be resolved in this appeal.

[6] During the inquiry process, the town decided to disclose an unredacted version of the loan agreement between itself and the NSC. It notified four companies whose information appears in this record and then issued a decision letter to each of them stating that it had decided to disclose an unredacted copy to the appellant. None of those four companies appealed the town's access decision, and I asked the town to disclose the unredacted loan agreement to the appellant, except for clause 2.02(c) on page 5, which I will address in this order.

[7] In this order, I uphold the town's decision to deny access to record 4 under the discretionary exemption in section 6(1)(b) of the *Act*. However, I find that a number of records and parts of records that contain the NSC's financial information are not exempt from disclosure under section 10(1), and I order the town to disclose them to the appellant.

RECORDS:

[8] To clearly identify the records and parts of records remaining at issue in this

appeal, I have prepared the following chart, which is based on an updated index of records that the town provided with its representations and my review of the records:

Record/parts of record withheld by town	Location in records	Exemption(s) claimed
<ul style="list-style-type: none"> - Annual amounts paid by three soccer clubs to NSC to rent space - NSC's monthly payroll costs - Amounts of NSC's additional debts 	<ul style="list-style-type: none"> - Page 5 of record 3 	<ul style="list-style-type: none"> - ss. 10(1)(b) and (c) - In its representations, town expressed willingness to disclose amounts of NSC's additional debts
<ul style="list-style-type: none"> - NSC financial statements, September 30, 2012, and other financial records 	<ul style="list-style-type: none"> - Record 3 (Appendix B) - Attachment to records 42, 50, 53, 54 and 55 	<ul style="list-style-type: none"> - ss. 10(1)(b) and (c)
<ul style="list-style-type: none"> - NSC cash requirements document (20-Aug-13) 	<ul style="list-style-type: none"> - Record 3 (Appendix C) - Attachment to record 42 	<ul style="list-style-type: none"> - ss. 10(1)(b) and (c)
<ul style="list-style-type: none"> - Names of two guarantors who guaranteed loan from a private lender, amount of that guarantee and other information 	<ul style="list-style-type: none"> - Record 3 (Appendix D) - Record 47 	<ul style="list-style-type: none"> - In its representations, town expressed willingness to disclose this information
<ul style="list-style-type: none"> - Confidential Memorandum, dated September 3, 2013 	<ul style="list-style-type: none"> - Record 4 	<ul style="list-style-type: none"> - s. 6(1)(b)
<ul style="list-style-type: none"> - Clause 2.02(c) of Loan Agreement between the Corporation of the Town of Newmarket and the NSC, dated December 19, 2013 	<ul style="list-style-type: none"> - No record number - Attachment to record 48 	<ul style="list-style-type: none"> - In its representations, town expressed willingness to disclose this information
<ul style="list-style-type: none"> - Various property values of Woodbine Lands 	<ul style="list-style-type: none"> - Record 20 	<ul style="list-style-type: none"> - In its representations, town expressed willingness to disclose this information
<ul style="list-style-type: none"> - 2008 report re agreement between another town and its local soccer 	<ul style="list-style-type: none"> - Attachment to 	<ul style="list-style-type: none"> - ss. 10(1)(b) and (c)

club	record 49	
- Slide presentation – NSC Special General Meeting, July 15, 2013	- Attachment to record 56	- ss. 10(1)(b) and (c)
- NSC financial document	- Attachment to record 56	- ss. 10(1)(b) and (c)

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to record 4?
- B. Does the mandatory exemption at section 10(1) apply to the records?

DISCUSSION:

CLOSED MEETING

A. Does the discretionary exemption at section 6(1)(b) apply to record 4?

[9] The town submits that record 4, which is a memorandum that staff prepared for the mayor and members of town council for a closed meeting, is exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*. The appellant’s representations do not address whether section 6(1)(b) applies to record 4.

Section 6(1)(b): the exemption

[10] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[11] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting;
2. a statute authorizes the holding of the meeting in the absence of the public; and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹

[12] Previous IPC orders have found that the first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.²

[13] With respect to part 1 of the section 6(1)(b) test, which requires an institution to show that a meeting was held, the town states that record 4 was circulated to its mayor and councillors at a Special Committee of the Whole Closed Session Meeting of September 3, 2013. It also provided me with the minutes from this meeting. Based on this evidence, I am satisfied that the town has met part 1 of the section 6(1)(b) test, because it is evident that the Special Committee of the Whole held a closed meeting.

[14] With respect to part 2 of the section 6(1)(b) test, which requires an institution to show that a statute authorized the holding of the meeting in the absence of the public, the town states that the closed meeting of the Special Committee of the Whole was held under section 239(2)(c) of the *Municipal Act* and section 12(c) of the town's Procedure By-law 2008-54, which both authorize the town to hold closed meetings to discuss a proposed or pending acquisition or disposition of land by the town. It submits that the closed meeting was held to discuss various options for the town providing financial support or possibly acquiring outright the NSC's operations.

[15] Based on the evidence provided by the town, I am satisfied that it has met part 2 of the section 6(1)(b) test. I find that the Special Committee of the Whole's closed meeting was properly held under both section 239(2)(c) of the *Municipal Act* and section 12(c) of Procedure By-law 2008-54, because the deliberations that took place included a discussion about the town possibly acquiring the NSC's assets, including its real property.

[16] With respect to the part 3 of the section 6(1)(b) test, which requires an institution to show that disclosure of the record would reveal the actual substance of the deliberations of the meeting, previous IPC orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;³ and
- "substance" generally means more than just the subject of the meeting.⁴

[17] In addition, the third part of the section 6(1)(b) test specifically requires that

¹ Orders M-64, M-102 and MO-1248.

² Order M-102.

³ Order M-184.

⁴ Orders M-703 and MO-1344.

disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.⁵

[18] The town states that record 4, which contains background information and analysis about the NSC's financial situation and potential options for the town, was provided to the Special Committee of the Whole to inform its discussions. It states that this record presents a speculative option that was considered but not decided upon. It submits, therefore, that disclosing record 4 would reveal the actual substance of deliberations that took place between members of this committee at its closed meeting.

[19] I have reviewed the contents of record 4 and considered the evidence provided by the town. Although the record itself does not directly propose that the town acquire the NSC's real property, it does contain information that impacted the committee's discussion about this issue at its closed meeting, including a speculative option that was apparently considered by members of the committee but not decided upon. I find, therefore, that disclosing record 4 would reveal the actual substance of deliberations that took place at the committee's closed meeting. Consequently, I am satisfied that the town has met part 3 of the section 6(1)(b) test.

[20] In short, I find that the town has satisfied all three parts of the section 6(1)(b) test with respect to record 4. Consequently, I find that section 6(1)(b) applies to this record.

Section 6(2): exception to the exemption

[21] Section 6(2) of the *Act* sets out exceptions to sections 6(1)(b). The only exception that could possibly apply to record 4 is section 6(2)(b), which reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,

...

(b) in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

...

[22] The town states that two separate options were presented to the Special Committee of the Whole and discussed in detail. However, only one of these options was subsequently adopted and voted on in an open meeting both immediately following

⁵ Orders MO-1344, MO-2389 and MO-2499-I.

the closed meeting and later in a recorded vote at a special Council meeting. The town states that the nature of the deliberations and detailed analysis of the NSC's financial position and options (such as the town acquiring the NSC's assets, including its real property) were not voted on or discussed in a public meeting. Consequently, it submits that the exception in section 6(2)(b) does not apply to record 4, because the subject matter of the deliberations was not considered in a meeting open to the public.

[23] Based on the evidence provided by the town, I am satisfied that the exception in section 6(2)(b) does not apply to record 4. Although the possible option of the town acquiring the NSC's assets, including its real property, was apparently deliberated upon at the closed meeting of the Special Committee of the Whole, the subject matter of these deliberations was not subsequently considered at a meeting open to the public. I find, therefore that the exception in section 6(2)(b) does not apply, and record 4 is exempt from disclosure under section 6(1)(b).

Exercise of discretion

[24] The section 6(1)(b) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the IPC may determine whether the institution failed to do so.

[25] In addition, the IPC may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose;
- it takes into account irrelevant considerations; or
- it fails to take into account relevant considerations.

[26] In either case IPC may send the matter back to the institution for an exercise of discretion based on proper considerations.⁶ The IPC may not, however, substitute its own discretion for that of the institution.⁷

[27] The town submits that it took relevant factors into account in withholding record 4 under section 6(1)(b) and exercised its discretion appropriately. The appellant did not submit representations on section 6(1)(b) and I do not have any evidence before me to suggest that the town exercised its discretion in bad faith or for an improper purpose or that it took into account irrelevant considerations. In addition, I note that the town exercised its discretion to disclose a number of other records to the appellant that may have qualified for exemption under section 6(1)(b).

⁶ Order MO-1573.

⁷ Section 43(2).

[28] In short, I find that the town exercised its discretion in denying access to record 4 under section 6(1)(b) and did so appropriately.

THIRD PARTY INFORMATION

B. Does the mandatory exemption at section 10(1) apply to the records?

[29] The town withheld the following records and parts of records under section 10(1) of the *Act*:

- Annual amounts paid by three soccer clubs to NSC to rent space (p. 5 of record 3)
- NSC's monthly payroll costs (p. 5 of record 3)
- Amounts of NSC's additional debts (p. 5 of record 3)
- NSC financial statements, September 30, 2012, and other financial records (appendix B to record 3 and attachment to records 42, 50, 53, 54 and 55)
- NSC cash requirements document, August 20, 2013 (appendix C to record 3 and attachment to record 42)
- Names of two loan guarantors, amount of guarantee and other information (appendix D to record 3 and record 47)
- Clause 2.02(c) of loan agreement between town and NSC
- Various property values of Woodbine Lands (record 20)
- 2008 report re agreement between another town and its local soccer club (attachment to record 49)
- Slide presentation – NSC Special General Meeting, July 15, 2013 (attachment to record 56)
- NSC financial document (attachment to record 56)

Preliminary issue: Notification of third parties

[30] The town notified the NSC about the records and parts of records at issue in this appeal and I also sought and received representations from the NSC on whether section 10(1) is applicable. However, I note that a small number of these records and parts of records contain information about third parties other than the NSC who have not been notified or given an opportunity to submit representations in this appeal, including:

- Annual amounts paid by three soccer clubs to NSC to rent space (p. 5 of record 3)
- Names of two guarantors who guaranteed loan from a private lender, amount of that guarantee and other information (appendix D to record 3 and record 47)
- 2008 report re agreement between another town and its local soccer club (attachment to record 49)

[31] In its representations, the town expressed a willingness to disclose the information relating to the two guarantors to the appellant. In my view, however, the two guarantors should first be given an opportunity to express their views about whether the information relating to them might be exempt from disclosure under the mandatory exemptions in the *Act*.

[32] I will be ordering the town to disclose most of the other records sought by the appellant, including the NSC's financial statements, because they are not exempt from disclosure under section 10(1) of the *Act*. Consequently, I have decided to defer consideration of the above records and parts of records until the appellant has had an opportunity to review the other records that will be disclosed to him.

[33] If, after reviewing these records, the appellant decides that he wishes to continue to pursue access to the above records and parts of records, I will notify the third parties referred to in those records and give them an opportunity to submit representations to me on whether the information relating to them should be disclosed. These records and parts of records will then be disposed of in a final order. If the appellant chooses not to pursue access to these records and parts of records, no final order will be issued and this file will be closed.

Section 10(1): the exemption

[34] I will now consider whether the other records and parts of records are exempt from disclosure under section 10(1) of the *Act*. That exemption reads:

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; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[35] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.⁸ 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.⁹

[36] Where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.¹⁰ Third parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record.¹¹ Consequently, in the circumstances of this appeal, both the town and the NSC share the burden of proving that the records and parts of records identified above are exempt from disclosure under section 10(1).

[37] For section 10(1) to apply, the town and the NSC must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the town 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.

[38] To summarize, the records and parts of records remaining at issue are as follows:

- NSC’s monthly payroll costs (p. 5 of record 3)

⁸ *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.*).

⁹ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

¹⁰ Section 42 of the *Act*.

¹¹ Order P-203.

- Amounts of NSC's additional debts (p. 5 of record 3)
- NSC financial statements, September 30, 2012 (appendix B to record 3 and attachment to records 42, 50, 53, 54 and 55)
- NSC cash requirements document, August 20, 2013 (appendix C to record 3 and attachment to record 42)
- Clause 2.02(c) of loan agreement between town and NSC
- Various property values of Woodbine Lands (record 20)
- Slide presentation – NSC Special General Meeting, July 15, 2013 (attachment to record 56)
- NSC financial document (attachment to record 56)

Part 1: Type of information

[39] As noted above, to satisfy part 1 of the section 10(1) test, the town and the NSC must show that the records and parts of records at issue reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[40] For the reasons that follow, I find that these records and parts of records reveal "financial information." Previous IPC orders have defined that term as follows:

"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.¹²

[41] The town cites this definition and submits that all of the above records and parts of records clearly reveal the NSC's financial information. Neither the NSC's nor the appellant's representations address this issue.

[42] In my view, the NSC's financial statements clearly reveal financial information, because they set out the NSC's assets, liabilities, revenues, expenses and cash flow. In addition, the other records and parts of records include information such as the NSC's monthly payroll costs, its additional debts, its cash requirements, the property value of land owned by the NSC, and other related information. All of the information also meets the definition of "financial information."

[43] In short, I find that the records and parts of records at issue reveal financial information. Part 1 of the section 10(1) test has therefore been met.

¹² Order PO-2010.

Part 2: Supplied in confidence

[44] To satisfy part 2 of the section 10(1) test, the town and the NSC must show that the financial information in the records and parts of records at issue was supplied to the town in confidence, either implicitly or explicitly. Both the "supplied" and "in confidence" components of this test must be met.

[45] 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.¹³

[46] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁴

[47] For the reasons that follow, I find that the NSC supplied the financial information in the records and parts of records at issue to the town with an implicit expectation of confidentiality, except for Clause 2.02(c) of the loan agreement between the town and the NSC, which does not meet the "supplied" test.

[48] The town submits that the NSC supplied its financial statements and the financial information in the other records and parts of records directly to the town with an implicit understanding of confidentiality. Neither the NSC's nor the appellant's representations directly address this issue, although the NSC submits that disclosing these records and parts of records "would go far beyond providing transparency on the dealings between the town and the [NSC]," which is indicative of a belief that it supplied its financial information to the town with an implicit expectation of confidentiality.

[49] Based on my review of the records, it is evident that the NSC provided its financial statements and other financial information to the town for the purposes of providing town council with a transparent view of its financial situation. Consequently, I find that the financial information in the records and parts of records at issue was "supplied" to the town by the NSC.

[50] With respect to the "in confidence" component of part 2 of the section 10(1) test, there is no evidence before me to suggest that the NSC supplied this financial information with an explicit expectation of confidentiality. However, based on the NSC's representations, I am satisfied that it supplied this information to the town with an implicit expectation of confidentiality.

¹³ Orders PO-2020 and PO-2043.

¹⁴ Order PO-2020.

[51] In short, I find that the financial information in the records and parts of records at issue was supplied to the town in confidence, implicitly. Part 2 of the section 10(1) test has therefore been met.

[52] The only exception to this finding is clause 2.02(c) of the loan agreement between the town and the NSC. The IPC has found in previous orders that 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.¹⁵

[53] In my view, clause 2.02(c) of the loan agreement cannot qualify as having been "supplied" by the NSC because it was mutually generated between the parties.

[54] 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.¹⁶ The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

[55] There is no evidence before me to suggest that either of these exceptions applies to clause 2.02(c) of the loan agreement. Given that the information in this clause does not meet the "supplied" component of part 2 of the section 10(1) test, it cannot qualify for exemption under section 10(1) and must be disclosed to the appellant.

Part 3: Harms

[56] To satisfy part 3 of the section 10(1) test, the town and the NSC must show that the prospect of disclosing the NSC's financial information in the records and parts of records will 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.

[57] The parties resisting disclosure must provide detailed and convincing evidence about the potential for harm. They must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the

¹⁵This 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*).

¹⁶ Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

type of issue and seriousness of the consequences.¹⁷

[58] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁸

[59] The town submits that the harms specified in sections 10(1)(b) and (c) could reasonably be expected to occur if the NSC's financial information in the records and parts of records at issue is disclosed. The NSC does not specify which of the harms in paragraph (a), (b), (c) and/or (d) of section 10(1) it is relying upon to oppose disclosure of its financial information.

Section 10(1)(b): Similar information no longer supplied

[60] I will start by examining whether disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(b). Under that provision, an institution must refuse to disclose information if doing so could reasonably be expected to 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.

[61] For the reasons that follow, I find that the town has not provided the detailed and convincing evidence required to show that disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(b).

[62] The town submits that if the IPC orders disclosure of the NSC's financial statements and other records, the town could no longer request such records from "those with whom [it] is contracting." It submits that this would seriously impair its ability to conduct business, as contemplated by section 10(1)(b). Neither the NSC's nor the appellant's representations address this issue.

[63] In my view, the town's assertions are not credible. With respect to the financial information at issue in this appeal, it is certainly in the public interest that similar information continue to be supplied to the town by all of its business partners and contractors. However, the notion that disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to result in these other private businesses no longer supplying similar information to the town is both speculative and dubious.

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

¹⁸ Order PO-2435.

[64] Private businesses seek to establish contractual relationships with the town to make money for themselves or, in this particular case, to seek a taxpayer-backed loan. The town holds significant power in such relationships because in a competitive business environment, it can decline to do business or grant a loan to a private entity that refuses to be transparent about its financial situation. Consequently, I find that if the NSC's financial information in the records and parts of records at issue is disclosed, it is not reasonable to expect that other businesses would refuse to supply similar financial information to the town.

[65] In short, I find that the town has failed to provide the detailed and convincing evidence required to show that disclosing NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(b). Consequently, I find that those records and parts of records are not exempt from disclosure under section 10(1)(b).

Section 10(1)(c): Undue loss or gain

[66] The town submits that disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(c). Under that provision, an institution must refuse to disclose information if doing so could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency." The NSC does not specifically cite section 10(1)(c) in its representations but appears to be relying on this provision to support its objection to the disclosure of its financial information.

[67] For the reasons that follow, I find that the town and the NSC have not provided the detailed and convincing evidence required to show that disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(c).

[68] The town states that it supports the NSC's representations regarding disclosure of its financial information in the records and parts of records at issue. It states that the NSC has advised it that such disclosure would reveal the substance of the NSC's negotiations with its creditors, and this could impact the NSC's ongoing relationship with its suppliers. The town further states that it considers this to be a reasonable expectation of harm to the NSC's financial situation and submits, therefore, that section 10(1)(c) applies to the information in the records and parts of records at issue.

[69] In its representations, the NSC makes the following arguments:

The information requested in this appeal has references to other businesses (Suppliers), who in their dealings with [the] NSC had requested or [had] expectations of confidentiality. [The NSC] had made confidential arrangements regarding outstanding debt/accounts payable matters (repayment terms, timeframe, amounts, etc.). This of course was

disclosed to the town to ensure they had all the information that they required to make their decision on whether to provide the [NSC] with a loan.

It is our opinion that should that information become public, it could potentially have an effect on these Suppliers and their current business relationships.

For example:

- Current customers might learn from this information being divulged, that they don't have to pay their bills on the due date and can negotiate "extended" terms after the fact.
- Competing businesses might use this information to exploit liquidity/debt holdings of these companies when competing/bidding for contracts.

I am sure that there are probably a lot more reasons why these Suppliers would take issue with this information being divulged.

[70] The appellant submits that the NSC's claim that disclosing its financial information may be awkward for its vendors and business associates is "moot." He attached a copy of land registry documents which lists the NSC's creditors and various encumbrances such as constructions liens that they registered against the NSC's real property. He submits that because this information is already in the public domain, there is no "issue with privacy" relating to the disclosure of the NSC's financial information.

[71] In reply, the town submits that the NSC has asserted that disclosing details of its payments to its vendors and business associates could cause "undue loss" to the NSC. It submits that this information is not restricted only to those creditors who took out security against the NSC's real property, through the *Construction Lien Act* or otherwise.

[72] As noted above, the records and parts of records remaining at issue are as follows:

- NSC's monthly payroll costs (p. 5 of record 3)
- Amounts of NSC's additional debts (p. 5 of record 3)
- NSC financial statements, September 30, 2012, and other financial records (appendix B to record 3 and attachment to records 42, 50, 53, 54 and 55)
- NSC cash requirements document, August 20, 2013 (appendix C to record 3 and attachment to record 42)

- Various property values of Woodbine Lands (record 20)
- Slide presentation – NSC Special General Meeting, July 15, 2013 (attachment to record 56)
- NSC financial document (attachment to record 56)

[73] In assessing whether disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to lead to the harm specified in section 10(1)(c), I have considered both the evidence provided by the parties and the contents of the records and parts of records at issue.

[74] The town and the NSC are required to show that disclosing the NSC's financial information in records and parts of records at issue could reasonably be expected to "result in undue loss or gain to any person, group, committee or financial institution or agency." At the outset, I note that the representations of the town and the NSC are contradictory. The town claims that the NSC's position is that disclosing details of its payments to its vendors and business associates could reasonably be expected to result in "undue loss" to the NSC. However, the NSC's representations focus almost entirely on alleging that disclosing these records and parts of records could reasonably be expected to have an adverse impact on its suppliers, not itself.

[75] The scope of section 10(1)(c) is certainly broad enough to cover both the NSC itself and its suppliers, because it contemplates undue loss to any "person" or "group." In my view, however, there are three flaws in the evidence adduced by the town and the NSC.

[76] First, in terms of substance, the records and parts of records at issue consist almost entirely of the financial information of the NSC, not its suppliers. Although there are some sparse references to both the private and public entities who provided loans to the NSC, I agree with the appellant that the identities of these entities are already in the public domain. The town claims that this information is not restricted only to those creditors who took out security against the NSC's real property, through the *Construction Lien Act*, but it does not elaborate on or pinpoint in detail where such creditors are identified in the records and parts of records at issue.

[77] Second, as noted above, the parties resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative. However, the NSC's evidence of the risk of harm to its suppliers is largely speculative. It asserts, for example, that disclosing the records and parts of records at issue "could potentially" have an effect on its suppliers and their current business relationships. In addition, it speculates that a supplier's current customers "might learn" from the information being disclosed that they do not have to pay their bills on the due date. In my view, this type of speculative evidence falls short of the detailed and convincing required to show that disclosing the NSC's financial information in the records and parts of records at issue

could reasonably be expected to lead to the harm specified in section 10(1)(c).

[78] Finally, it is not sufficient for the town and NSC to merely show that disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to result in "loss" to the NSC or its suppliers. They must establish that the loss that could reasonably be expected to result, whether financial or otherwise, would be "undue." The term "undue" is defined in the *Concise Oxford Dictionary* (3rd Ed.) as "1. excessive, disproportionate. 2. Not suitable. 3. Not owed."¹⁹

[79] Neither the town's nor the NSC's representations explain why disclosing the NSC's financial information in the records and parts of records at issue could reasonably be expected to result in loss to the NSC or its suppliers that is excessive, disproportionate, not suitable or not owed. I find, therefore, that the town and the NSC have not provided the evidence required to meet the harm threshold specified in section 10(1)(c).

[80] In short, I find the NSC's financial information in the record and parts of records at issue is not exempt from disclosure under section 10(1)(c).

Summary

[81] I find that the town and the NSC have failed to establish that the prospect of disclosing the NSC's financial information in the records and parts of records at issue will give rise to a reasonable expectation that the harms specified in paragraphs (b) and (c) of section 10(1) will occur. Consequently, I will order that these records and parts of records be disclosed to the appellant because they are not exempt from disclosure under those provisions.

[82] It is important to note that disclosing this information is consistent with the public accountability and transparency principles underlying the *Act*. The courts have consistently found that access-to-information legislation must be interpreted within the context of its purpose which is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process and to hold politicians and bureaucrats accountable to the citizenry. In addition, they have held that the exemptions in such legislation, such as the third party information exemption in section 10(1), are to be construed narrowly.²⁰

[83] The town disclosed a substantial number of records to the appellant both prior to and during this appeal. However, the town's decision to provide the NSC with a \$2.8

¹⁹ Order P-1614.

²⁰ See *Miller Transit Limited* above in footnote 15 at para. 45, *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)* (2004), [2004 CanLII 15009 \(ON SCDC\)](#), 181 O.A.C. 251 (C.A.), at para. 66, citing *Dagg v. Canada (Minister of Finance)*, [1997 CanLII 358 \(SCC\)](#), [1997] 2 S.C.R. 403 at paras. 61-63.

million taxpayer-backed loan was largely based on its review of the NSC's financial statements and other similar records. In my view, the town's decision to refuse disclosure of such records means that the public has been provided with an incomplete picture of the town's decision-making process with respect to the loan. Disclosing the NSC's financial information in the records and parts of records at issue will significantly enhance the public's capacity to determine whether the town's decision to provide the NSC with a taxpayer-backed loan was sound, and to hold the town's politicians and bureaucrats accountable.

ORDER:

1. The appeal is allowed in part.
2. I uphold the town's decision to deny access to record 4.
3. I order the town to disclose the following records and parts of records to the appellant by **February 2, 2017** but not before **January 27, 2017**:
 - NSC's monthly payroll costs (p. 5 of record 3)
 - Amounts of NSC's additional debts (p. 5 of record 3)
 - NSC financial statements, September 30, 2012, and other financial records (appendix B to record 3 and attachment to records 42, 50, 53, 54 and 55)
 - NSC cash requirements document, August 20, 2013 (appendix C to record 3 and attachment to record 42)
 - Unredacted version of loan agreement between town and NSC, dated December 19, 2013
 - Various property values of Woodbine Lands (record 20)
 - Slide presentation – NSC Special General Meeting, July 15, 2013 (attachment to record 56)
 - NSC financial document (attachment to record 56)
4. In the interests of clarity, I am providing the town with a copy of the records and parts of records that I have ordered be disclosed to the appellant under order provision 3.
5. If the appellant wishes to continue pursuing access to the following records and parts of records, he should notify me in writing on or before **February 16, 2017**.

- Annual amounts paid by three soccer clubs to NSC to rent space (p. 5 of record 3)
- Names of two guarantors who guaranteed loan from a private lender, amount of that guarantee and other information (appendix D to record 3 and record 47)
- 2008 report re agreement between another town and its local soccer club (attachment to record 49)

6. I remain seized of this appeal to address any compliance issues and the outcome of order provision 4.

Original Signed by: _____
Colin Bhattacharjee
Adjudicator

December 22, 2016 _____