

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3738

Appeal MA17-153

Toronto Community Housing Corporation

February 28, 2019

**Summary:** The issues in this appeal are whether the Vendor Issue Management Logs held by the Toronto Community Housing Corporation are exempt from disclosure under the discretionary exemptions in sections 11(c) and (d) (economic or other interests) or the mandatory exemption in section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the information at issue is not exempt from disclosure under sections 11(c) or (d) or section 10(1) of the *Act* and orders that the institution disclose it to the appellant.

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

### OVERVIEW:

[1] The Toronto Community Housing Corporation (TCHC) received a request under the *Municipal Freedom of Information and Privacy Act* (the *Act*) for copies of its "Vendors Issue Management Logs" during a specific timeframe.

[2] TCHC located 21 pages of responsive records comprised of logs in a chart format (the Issue Logs). TCHC says it uses the Issue Logs to track, identify and manage issues or complaints that arise in relation to work performed by its vendors. The Issue Logs contain the name of the vendor providing services, the location of the work site, a description of the issue or complaint about the vendor and the resolution by TCHC.

[3] TCHC granted the requester partial access to the Issue Logs. It withheld portions of pages 3 to 7 under the mandatory exemption in section 14(1) (personal privacy) of

the *Act*. It also withheld pages 8 to 21 in full under the discretionary exemptions in sections 11(c) and (d) (economic and other interests) of the *Act*.

[4] The requester appealed TCHC's decision to this office, becoming the appellant in this appeal. During mediation, TCHC issued a revised decision in which it also applied the section 14(1) exemption to certain portions of the pages it had withheld in full pursuant to sections 11(c) and (d). The appellant confirmed that it was not interested in the information that TCHC withheld under section 14(1) of the *Act* but was pursuing access to the information subject to TCHC's section 11 claims.

[5] Mediation did not resolve the issues in dispute and the appeal was transferred to the adjudication stage of the appeals process.

[6] The adjudicator began her inquiry by seeking the representations of TCHC. After reviewing TCHC's representations, the adjudicator decided to invite it, and six third parties whose interests may be affected by the disclosure of the information in the records, to submit representations on the possible application of the mandatory exemption in section 10(1) (third party information) of the *Act*. One of the third parties submitted representations asserting that section 10(1) applies to some of the information at issue that relates to it.

[7] The appellant was then provided with a Notice of Inquiry and complete copies of the representations of TCHC and the third party. The appellant provided representations in response and asked that they not be shared with TCHC or the third party. The appeal was then transferred to me to continue the inquiry.

[8] I have reviewed the appellant's representations and note that the majority of the matters it addresses are not responsive to the issues set out in the Notice of Inquiry and no new issues are raised that would require a response from the other parties. As such, I have decided that the appellant's representations do not need to be shared with the other parties to this inquiry and I will refer to them only generally in this order.

[9] For the reasons that follow below, I do not uphold TCHC's decision regarding sections 11(c) and 11(d) of the *Act*. I also find that section 10(1) does not apply to the information at issue and I order TCHC to disclose the information on pages 8 to 21 that is not subject to its section 14(1) claim to the appellant.

## **RECORDS:**

[10] TCHC has withheld pages 8 to 21 of the Issue Logs in full, pursuant to sections 11(c) and (d) of the *Act*. The third party claims that section 10(1) applies to information in pages 8 to 21 that relates to its business.

[11] TCHC has also applied section 14(1) to some portions of the information in pages 8 to 21 of the Issue Logs, but the appellant is not seeking access to that information.

## ISSUES:

- A. Do the discretionary exemptions at sections 11(c) or (d) of the *Act* apply to the information on pages 8 to 21 of the Issue Logs?
- B. Does the mandatory exemption at section 10(1) of the *Act* apply to the information that relates to the third party on pages 8 to 21 of the Issue Logs?

## DISCUSSION:

### **A. Do the discretionary exemptions at sections 11(c) or (d) of the *Act* apply to the withheld information?**

[12] Sections 11(c) and (d) of the *Act* state:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[13] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.<sup>1</sup>

[14] For sections 11(c) or (d) to apply, the institution must provide detailed evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>2</sup>

[15] The failure to provide detailed evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11

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<sup>1</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

<sup>2</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>3</sup>

### ***The parties' representations***

[16] TCHC says that pages 8 to 21 of the Issue Logs contain sensitive commercial information about its vendors' performance and details about the resolution of vendor issues. In summary, TCHC argues that releasing the withheld information will directly impact its commercial relationship with its vendors and could reasonably be expected to prejudice its economic interests by discouraging bidding, revealing its vendor performance management strategies and discouraging the public from making complaints about vendor performance.

[17] TCHC submits that it is under considerable pressure to maintain safe and affordable buildings with public funds and that if the withheld information was disclosed, there would be undue public scrutiny on vendors engaged with TCHC. It says that as a result, potential vendors will avoid contracting with TCHC, resulting in higher costs and jeopardizing its financial and economic interests.

[18] TCHC submits that this increased public scrutiny will impact its future negotiations with potential private sector contractors, raise its costs by narrowing the pool of potential vendors and undermine its ability to procure qualified and competent vendors. It asserts that a decrease in competitive bids will raise its costs because less qualified competitors will place higher bids in response to future procurement calls.

[19] TCHC also argues that the Issue Logs contain sensitive details about how it responds to and resolves issues brought against its vendors, including its methods of managing vendor performance and how it negotiates with vendors during the complaint resolution process. Specifically, it says that the Issue Logs detail meetings and discussions between TCHC staff, tenants and vendors, and document any necessary actions taken by or against vendors, including monetary settlements.

[20] TCHC claims that disclosing the Issue Logs will impact and undermine its ability to hold vendors accountable. Furthermore, it argues that if vendors are aware of how TCHC addresses and resolves vendor issues with the level of specificity detailed in the Issue Logs, it will allow current and potential vendors to circumvent the vendor management process, ultimately raising its costs.

[21] Finally, TCHC submits that the Issue Logs contain sensitive information raised by internal stakeholders and tenants and that if that information becomes public, it would discourage complainants from raising issues about vendor performance. It says that the

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<sup>3</sup> Order MO-2363.

allegations in the Issue Logs relate to poor workmanship, vendor conduct, incomplete jobs, injury claims by tenants, claims of compensation for damage to personal property and information provided by tenants about potential lawsuits against TCHC due to poor vendor performance.

[22] TCHC asserts that if complainants are aware that their complaints are made public they will be hesitant to raise important issues. As a result, TCHC's asserts that its ability to manage the workmanship of its vendors could reasonably be expected to be impacted and ultimately its costs would be raised.

[23] The relevant portions of the appellant's representations are that the disclosure of the Issue Logs would not impact TCHC's relationship with its vendors, that it would not be financially prejudiced by the disclosure of the Issue Logs and that complainants would not be hesitant to make complaints even if they knew that the subject matter of their complaint would be made public.

### ***Analysis and Findings***

[24] For the reasons that follow, I have concluded that sections 11(c) and (d) of the *Act* do not apply to any of the information on pages 8 to 21 of the Issue Logs. In my view, TCHC's claims that releasing the withheld information could reasonably be expected to cause the type of harms set out in sections 11(c) or (d) are vague, speculative and unsupported by the evidence in this appeal.

[25] TCHC's first claim is that potential vendors will avoid contracting with TCHC if they knew the information in the Issue Logs would be disclosed and that this could reasonably be expected to raise its costs by narrowing the pool of available vendors. I find that the information in the Issue Logs does not support these assertions. First, I note that not all of the vendors in the Issue Logs received complaints. Secondly, a number of the vendors who did receive complaints offer another version of the events.

[26] In my view, it is unlikely that vendors otherwise interested in obtaining contracts with TCHC would choose not to compete for those contracts simply because they might receive complaints about their work that could become public. As such, I do not accept that it is reasonable to expect that TCHC's pool of vendors would be narrowed, or that its costs would rise on that basis, if the Issue Logs were disclosed.

[27] I also find no basis in the evidence for TCHC's next claim, that disclosing the information in the Issue Logs could reasonably be expected to undermine its ability to hold vendors accountable to commitments to their contracts or allow them to circumvent the vendor management process, ultimately raising TCHC's costs.

[28] TCHC has not offered any concrete examples of how the information in the Issue Logs might be used by vendors for the purposes it describes. I have reviewed the Issue Logs and I am unable to identify any specific management strategies. Furthermore, while the entries in the Issue Logs document complaints or problems TCHC

encountered with its vendors, and there is information about how those matters were resolved, the information is primarily factual and I am unable to see how a vendor could use the information in the manner TCHC suggests. Without further explanation as to how specifically a vendor could reasonably be expected to use the information to undermine TCHC's economic or financial interests, I do not accept this claim.

[29] TCHC's last argument is that potential complainants will be hesitant to raise issues about vendor performance if they are aware their complaints could become public and that this could reasonably be expected to increase TCHC's costs by impacting its ability to manage its vendors. I do not accept this argument either. First, I note that TCHC has withheld the tenants' names and addresses under section 14(1) of the *Act* and the appellant is not seeking that information. As such, it is not clear from the Issue Logs who specifically made any of the complaints.

[30] In any event, I do not accept that it is reasonable to expect that tenants would be hesitant to make complaints about vendors if they knew vendors could identify them as the complainant. I note that it is clear from the Issue Logs that TCHC raised the issues brought forward by tenants with the vendors. As such, the vendors would already be aware which tenant had made a complaint. In my view, it is reasonable to expect that a tenant making a complaint about a vendor would be aware that TCHC would then raise that issue with the vendor and that the vendor would know that the tenant made a complaint. As such, I do not accept TCHC's argument that disclosing the information could reasonably be expected to increase its costs by discouraging complaints and impeding its ability to manage the workmanship of its vendors.

[31] As noted above, an institution's failure to provide detailed evidence will not necessarily defeat its claim for an exemption under section 11(c) or (d) of the *Act* where harm can be inferred from the surrounding circumstances. However, in this case, I am unable to make any inferences about any financial or economic harm that could be reasonably expected to occur from the surrounding circumstances. As such, I find that neither section 11(c) nor (d) apply to the withheld information and subject to my findings with regard to the application of section 10(1), TCHC must disclose pages 8-21 of the Issue Logs to the appellant, except for the information it withheld pursuant to section 14(1) of the *Act*.

**B. Does the mandatory exemption at section 10(1) of the *Act* apply to the withheld information?**

[32] Section 10(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

(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.

[33] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>4</sup> 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.<sup>5</sup>

[34] For section 10(1) to apply, the party resisting disclosure 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.

[35] In this inquiry, it is the third party who is resisting disclosure. Both the third party and the appellant provided representations in regard to the application of section 10(1) of the *Act*. TCHC did not make any representations on this issue.

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<sup>4</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, 2005 CanLII 24249 (ON SCDC), [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (Boeing Co.).

<sup>5</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

***Part 1: type of information***

[36] The third party submits that there is commercially sensitive information about its company in the Issue Logs. Previous orders have defined “commercial information” as information relating solely to the buying, selling or exchange of merchandise or services.<sup>6</sup>

[37] Based on my review of the Issue Logs, I find that the information at issue relates to services the third party provided to TCHC in exchange for payment and that this qualifies as commercial information. As such, I find that the third party has met the first part of the section 10(1) test.

***Part 2: supplied in confidence***

[38] Part two of the three-part test itself has two parts: the information at issue must have been “supplied” to the institution, and must have been supplied “in confidence,” either implicitly or explicitly.

[39] As set out in the Notice of Inquiry that was provided to the third party when it was invited to make representations in this inquiry, information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where the disclosure of the information would reveal or permit the drawing of accurate inferences with respect to information that was supplied.<sup>7</sup>

[40] If the information was not supplied to the institution, section 10(1) will not apply and there will be no need for me to decide whether the “in confidence” element of part two of the test is met.

[41] The third party’s representations do not specify whether the information at issue in this inquiry was supplied to TCHC and I have determined that it was not. I have reviewed the Issue Logs and note that they were created by TCHC and are primarily comprised of copies of communications about various issues relating to its vendors and the steps it took, or planned to take, to resolve those issues.

[42] I note that there is information “about” the third party in the Issue Logs. However, the third party does not assert that it, or any other party, supplied that information to TCHC. Based on my review of the Issue Logs it is my view that the information that relates to the third party originated with TCHC and was, therefore, not supplied.

[43] Furthermore, there is nothing in the content of the Issue Logs that suggests the

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<sup>6</sup> Order PO-2010.

<sup>7</sup> Orders PO-2020 and PO-2043.



disclosing the information in the Issue Logs that relates to the third party would reveal or permit the drawing of accurate inferences with respect to information that was supplied.

[44] I therefore conclude that third party has not established that the information at issue was supplied and has failed to meet the first requirement of part two of the section 10(1) test. As such it is not necessary for me to consider whether it was supplied in confidence.

[45] Since the third party must meet all three parts of the test to establish that section 10(1) of the *Act* applies, I also do not need to consider Part 3 of the test (whether the disclosure could reasonably be expected to result in any of the harms set out in that section).

[46] As such, I find that the information at issue is not exempt from disclosure pursuant to section 10(1) of the *Act* and TCHC must disclose it to the appellant, with the exception of the information that it has severed pursuant to the mandatory personal privacy exemption in section 14(1).

**ORDER:**

1. I do not uphold TCHC's decision under sections 11(c) or (d) of the *Act*.
2. I find that the third party has not established that section 10(1) of the *Act* applies.
3. I order TCHC to provide the appellant a copy of pages 8 to 21 of the Issue Logs, excluding the information subject to TCHC's section 14(1) claim, by **April 4, 2019** but not before **April 1, 2019**.
4. In order to verify compliance with this order, I reserve the right to require TCHC to provide me with a copy of the records disclosed to the appellant.

Assigned by \_\_\_\_\_  
Meganne Cameron  
Adjudicator

February 28, 2019 \_\_\_\_\_