Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3954

Appeal MA18-421

The Corporation of the City of Barrie

September 18, 2020

Summary: The city received an access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*, for the name of the proposed developer for three adjacent lots in downtown Barrie. In its decision, the city withheld the name and email address of the proposed developer contained in a responsive record. It relied on the exemption at section 11 (economic and other interests) and charged a fee of $9.90 for the record. During mediation, the appellant advised he was appealing the fee and application of the exemption. During the inquiry, the adjudicator added as an issue the possible application of the mandatory exemption at section 10(1) (third party information) to the appeal. In this order, the adjudicator allows the appellant's appeal of the fee in part and finds that the fee of $4.90 is reasonable. She orders the withheld information disclosed as it is not exempt under sections 10(1) or 11 of the *Act*.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 11 and 45(1).

Orders Considered: Order M-273.

OVERVIEW:

[1] An architectural firm, on behalf of its client (the proposed developer), contacted the Corporation of the City of Barrie (the city) about developing three adjacent lots in downtown Barrie. A specified Ontario numbered company is the owner of these three adjacent lots.

[2] Subsequent to a General Committee meeting in March 2018, the city received an

access request, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for the following:

> The City has been contacted by [a named architectural firm] with respect to a proposed condominium development at [specified addresses].
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> In the course of that contact, [the named architectural firm] has advised the City of the name of the developer who is interested in developing the project.
>
> I anticipate that the name of the proposed developer has been recorded in records of either the Planning Department [two specified individual names] or [named architectural firm]. I seek access to at least one such record in which the name of the proposed developer is recorded.

[3] Following notification of the architectural firm as an affected party, the city issued a decision in which it withheld the name and email address of the proposed developer contained in a responsive record pursuant to the discretionary exemption at section 11 (economic and other interests) of the *Act*. (As stated above, the proposed developer is a client of the affected party.) The city also charged a fee of $9.90 for searching, preparing and photocopying the responsive record.

[4] The requester, now the appellant, appealed the city's decision to this office.

[5] During mediation, the appellant advised that he is also appealing the fee.

[6] The city maintained its reliance on section 11, citing paragraphs (c) and (d) specifically, to deny access to the withheld information.

[7] As mediation did not resolve the appeal, it was moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[8] During the inquiry, I sought and received representations from the city, the appellant and the affected party. Pursuant to section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*, copies of the city's representations (in their entirety) and the appellant's representations (in their entirety) were shared with the other parties. A non-confidential copy of the affected party's representations was also shared.[1]

[9] I also added the mandatory exemption at section 10(1) (third party information) to the scope of the appeal as it appears the responsive record may contain confidential

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[1] Some portions of the affected party's representations were withheld as they met the criteria for withholding representations found in this office's *Practice Direction Number 7: Sharing of representations.*

"informational assets" of the affected party.

[10] In this order, I find that a fee of $4.90 is reasonable and order the city to refund $5.00 to the appellant. I order the information at issue, the name and email address of the proposed developer, disclosed as it is not exempt under sections 10(1) or 11 of the *Act*.

RECORDS:

[11] The record at issue is an email chain containing the name and email address of the proposed developer.

ISSUES:

A. Should the fee be upheld?

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

C. Does the discretionary exemption at section 11 apply to the record?

DISCUSSION:

A: Should the fee be upheld?

[12] An institution must advise the requester of the applicable fee where the fee is $25 or less.

[13] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[2]

[14] This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823, as set out below.

[15] Section 45(1) requires an institution to charge fees for requests under the *Act*. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

[2] Orders P-81 and MO-1614.

> (a) the costs of every hour of manual search required to locate a record;
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> (b) the costs of preparing the record for disclosure;
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> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> (d) shipping costs; and
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> (e) any other costs incurred in responding to a request for access to a record.

[16] More specific provisions regarding fees are found in sections 6 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
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> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
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> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[17] The city submits that its fee should be upheld as it was calculated adhering to the fee provisions of the *Act*. It submits that the Office Co-ordinator of Planning and Buildings Services and the Director of Business Development received the search request memos, and these departments searched for responsive records. The city submits that the records listing of physical files were generated using a series of keywords based on the topic of the request in the physical records management

software program (RMAIS). It explains that one physical file was located using the named address in the request as the keyword. The city also submits that the search time included searching for electronic records.

[18] In response, the appellant submits that he appealed the city's fee based on a matter of principle, as the amount is *de minims*. He submits that if it was not necessary for the city to have conducted any search due to the city's policy of not disclosing the name of potential developer(s) until such time as they choose to reveal themselves and/or there is a formal application or process subject to public notification.

Analysis and findings

[19] The city's fee is calculated as follows:

Search

Department	**Costs provided by staff**	**Actual fees charged**
Business Development	30 minutes	5 minutes
Planning & Building Services	50 minutes	0 minutes
Legal Services	10 minutes	10 minutes
Total time:		**15 minutes**

15 minutes @ 0.50 (15 ÷ 7.5 = $0.50 per minute)

Total search cost: $7.50

Preparation

Severing - 2 minutes per page = 2 x 2 x 0.50 = $2.00
Photocopying – 1 page @ $0.20 = 2 x $0.20 = $0.40

Total preparation cost: $2.40

Total cost: $9.90

[20] In determining whether to uphold a fee, my responsibility under section 45(3) of the *Act* is to ensure that the fee is reasonable. The burden of establishing the reasonableness of the fee rests with the city. To discharge this burden, the city must provide me with detailed information as to how the fee has been calculated in accordance with the provisions of the *Act*, and produce sufficient evidence to support its claim.

[21] With respect to search, the city determined that it would charge 15 minutes. The city's decision to ask the following two departments - business development and planning and building services - to search for responsive records is reasonable. Due to the nature of the request, it is reasonable that responsive records would potentially exist in these two departments. I note that a bulk of the search time is for the search conducted of the legal services department. However, the city has not provided an explanation about why legal services was involved in the search. I note that the *Act* does not allow an institution to charge for time it spent deciding whether a particular exemption applies.[3] In the absence of submissions on how and why legal services was involved, I am unable to find that the search time spent by legal services is reasonable. As such, I will deduct 10 minutes from the total search time charged, which results in 5 minutes remaining with a new search cost of $2.50.

[22] With respect to preparation, I find that the city's photocopying charge and severing charge are reasonable. The city is permitted to charge for photocopying at a rate of $0.20 per page. The city allows four minutes to sever two pages. This office has accepted that it takes two minutes to sever a page that requires multiple severances.[4] Accordingly, I uphold the city's preparation fee.

[23] In summary, I find that the fee for search of $2.50 and the fee for preparation of $2.40 is reasonable. Accordingly, I will order the city to reimburse the appellant $5.00 as he has paid $9.90 for the responsive record.

B: Does the mandatory exemption at section 10(1) apply to the record?

[24] 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;

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[3] Order P-4.
[4] Orders MO-1169, PO-1721,PO-1834 and PO-1990.

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (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.

[25] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[27] To satisfy the first part of the section 10(1) test, the city and/or affected party must show that the record reveals information that is a trade secret or scientific, technical, commercial, financial, or labour relations information.

[28] Past orders of this office have defined commercial information 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.[7] The fact that a record

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[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[7] Order PO-2010.

> might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]

[29] Adopting the definition set out above and from my review of the record, I am satisfied that the record contains information that qualifies as commercial information. I agree with the city where it submits that the record contains commercial information as it considers the name of the proposed developer to be commercial information in a business context. It submits that the proposed developer is engaged in commercial activities and is identifiable to other players in the business field. I agree with the city that it is impossible to provide the name of the proposed developer without also releasing commercial information about its possible development. Although the affected party and the appellant provided representations, their representations did not address this issue.

[30] Accordingly, I find that the first part of the section 10(1) test is met. I will now consider the second part of the test.

Part 2: supplied in confidence

Supplied

[31] 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.[9]

[32] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[10]

In confidence

[33] 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.[11]

[34] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case are considered, including whether the information was

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[8] Order P-1621.
[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[12]

[35] The city submits that the affected party supplied the withheld information to it. It also submits that the affected party has treated the name and email address of the proposed developer confidentially. The city points out that there is a non-disclosure agreement (NDA) between the affected party and its client (the proposed developer). The city finally submits that the affected party has an expectation of confidentiality as demonstrated by its refusal to consent to the disclosure of the withheld information, based on providing it to the city in confidence.

[36] In addition, the city submits it has consistently treated the identity of the developer in a manner that indicates a concern for confidentiality. It submits:

> "…all communications between the [affected party] and the [city] regarding the investment investigation were submitted with the understanding that the identity of their client would remain confidential until such time as the client agreed to the disclosure of their identity."

[37] The city also cites section 6 of the International Economic Development's *Code of Conduct* and the Economic Developers Association of Canada's *Code of Conduct* for the principle that there is a duty to keep in confidence the affairs of any client, college or organization and not to disclose confidential information obtained in the course of professional activities.

[38] Finally, the city submits that the withheld information was and is kept in a secure location at all times (the Business Development Office and Planning Department), and it has not been disclosed nor is it available from other sources to which the public has access.

[39] The affected party submits that, as it is an architectural firm, it is not able to disclose any confidential information about its client, the proposed developer. It also submits that its client must first seek approval from the proposed hotel brand that it is planning to introduce to the site, as it does not yet have the hotel brand's approval. The

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

affected party finally submits that it has entered into a NDA with its client and it is aware that its client has entered into a similar agreement with the hotel brand. It states:

> Our concern is that, disclosing the developer at this time, could potentially disclose the Hotel Brand, and therefore violate ours and our clients [NDA], putting the whole project in jeopardy.

[40] In the circumstances, I am satisfied that the withheld information was "supplied" by the affected party to the city. I am also satisfied that the affected party had a reasonable expectation that the information it supplied would be kept confidential. I note that the affected party and city agree that there was a reasonable expectation of confidentiality. Accordingly, I find that the second part of the section 10(1) test is met.

Part 3: harms

[41] To satisfy the third part of the test, the city and/or the affected party must provide evidence about the potential for harm resulting from disclosure. 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.[13]

[42] The failure of a party resisting disclosure to provide such 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*.[14]

[43] Although the affected party submits that disclosure of the proposed developer's name could reasonably be expected to result in it suffering harms, the affected party does not specify which of the harms (if any) articulated under section 10(1)(a) to (d) it is relying upon.[15] It simply submits that disclosure of the proposed developer's name could potentially disclose the hotel brand, and, therefore, violate it and its client's non-disclosure agreements and put the entire project in jeopardy. It does not explain (nor provide any evidence) how the project is put in jeopardy due to the identity of the hotel brand being made public.

[44] Given that the site owner has already purchased the lots in question, and given

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[14] Order PO-2435.
[15] I note that the city submits that section 10(a) to (c) applies to the withheld information.

the relationship between the affected party and the site owner and from my review of the information at issue, I am skeptical that the disclosure of the proposed developer's name could reasonably be expected to stop the development from occurring.

[45] I acknowledge that there is a NDA between the affected party and its client. There also may be a NDA between the affected party's client and the hotel brand. However, it is a well-established principle that one may not contract out of the provisions of the *Act*.[16] As stated in Order PO-2497 by Adjudicator Daphne Loukidelis, neither the access regime nor the oversight role of this office established by the *Act* can be qualified, neutralized or contracted out of by a NDA.

[46] Moreover, I find that the affected party's representations fall short of the sort of detailed evidence that is required to establish part three of the test. Instead, its representations amount to speculation of possible harms. From my review of the record, I further find that the harm in its disclosure is not inferable on its face. Accordingly, I find that the affected party has not established that any of the harms could reasonably be expected to result from disclosure of the withheld information.

[47] As all parts of the three-part test must be met for section 10(1) to apply, I find that the proposed developer's name and email address are not exempt under section 10(1). I will now go on to consider the application of section 11.

C: Does the discretionary exemption at section 11 apply to the record?

[48] The city relies on sections 11(c) and (d), which state:

> A head may refuse to disclose a record that contains,
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> > (c) information where the 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;

[49] 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*. [17]

[50] The purpose of section 11(c) is to protect the ability of institutions to earn

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[16] See Orders PO-2497 and PO-2520.
[17] Toronto: Queen's Printer, 1980.

money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[18]

[51] For sections 11(c) and (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.[19]

[52] 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 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[20]

[53] Section 11(c) is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[21]

Representations

[54] The city submits that disclosure of the withheld information could reasonably be expected to prejudice its economic interests. It submits that disclosure of the proposed developer's name (and the email address) could disclose the hotel brand, and, as such, make the hotel brand available to other municipalities to approach and negotiate a more attractive arrangement. The city submits that this would result in the loss of revenues and economic development opportunities for it. It also submits that the economic impacts to the city could be substantial if the development was not to proceed.

[55] In addition, the city submits that disclosure would impact its reputation:

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[18] Orders P-1190 and MO-2233.
[19] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[20] Order MO-2363.
[21] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

> The release of this information would be considered in direct violation of standard business procedures and the industries' confidence in the city's ability to protect their interests would be lost.
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> There would be no desire for businesses to invest funds at the investigative stage where the potential release of their identity may result in the loss of their initial investigation investment and/or property purchase.

[56] Finally, the city submits that the affected party has made it clear that it is very concerned about the potential disclosure and its impact on the relationship with their client and possible project. The city also submits that the affected party has made it very clear that the developer's decision to locate in the city was something that is optional at this time and did not necessarily have to happen. It finally submits that the affected party has indicated that it would not recommend the city to any of their fellow colleagues or industry contacts should the name of the proposed developer be disclosed.

[57] With respect to section 11(d), the city submits that disclosure could reasonably be expected to injure its financial interests. It submits that the harms include but are not limited to the following:

- The risk of losing the investment opportunity (development fees, tax revenues, direct employment, spin-off economic benefits which would include increased business for existing suppliers in the community and associated employment or the attraction of other businesses);
- The financial risk of potential litigation associated with the affected party seeking reparations for third-party breaches of their non-disclosure contract and business loss from any of the items noted above in risks to the municipality;
- The settling of public expectations which undue influence/pressure is placed on the municipality and can publicly damage the reputation of the municipality should the development not come to fruition;
- The reputation of the municipality for future site selection/developer opportunities will be severely tarnished as the trust factor for companies to look at Barrie's risks exposure and thus their competitive market position;
- Other municipalities (globally) may look to 'scoop' the business from the municipality resulting in lost financial revenues and economic benefits.

[58] The city also submits that disclosure could result in negative fiscal impacts.[22] It submits that the total hotel revenues for 2017 was equal to $30.5 million amongst 13 hotels in the city. The city also submits that this does not include the newly added 4% accommodation tax of which the city receives 50% and Tourism Barrie receives the other 50%. It submits that this is estimated to be approximately $94,011 per hotel per year.

[59] Finally, the city submits that if the affected party violated its NDA with its client due to the disclosure then it will likely seek to obtain compensation for any awarded penalties as part of the NDA. It also submits that punitive actions for breaching NDAs range from expectation damages, restitution damages, recovery damages and disgorgement.

[60] In response, the appellant submits that the city's statement "if the hotel brand is revealed, it puts the entire development project at jeopardy" is a general statement with no particulars as to any factors which would justify it. The appellant also points out that the site has already been selected.

[61] In addition, the appellant submits that the city is not a party to the NDA. He points out that even if the city were, it cannot contract out of its obligations under the *Act*. As such, he submits that disclosure by the city, pursuant to an order, would not result in a breach of the NDA by the affected party. Moreover, the appellant submits that "despite the (misleading) efforts to portray the architect, the site owner and the developer as being completely separate entities and therefore protecting their own interests with a NDA, in fact they are all related and the NDAs appear to be a sham."

Analysis and findings

[62] In this appeal, the city submits that the exemptions in sections 11(c) and (d) of the *Act* apply to the name of the proposed developer and email address. The purpose of section 11 is to protect certain economic interests of institutions.

[63] For sections 11 (c) and/or (d) to apply, the city must demonstrate that disclosure of the proposed developer's name and email address "could reasonably be expected to" lead to the specified result. To meet this test, the city must provide detailed evidence to establish a "reasonable expectation of harm".

[64] I have carefully reviewed the city's representations and I am not persuaded that the city has satisfied the requirements of sections 11(c) and (d), for the following reasons.

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[22] The city has defined fiscal impacts as the tax revenues that result from the spending and income related to the activities.

[65] The city argues that disclosure of the proposed developer's name could reasonably be expected to prejudice its economic interests and/or injure its financial interests. It submits that such disclosure would reveal the hotel brand, and, as such, other municipalities would approach the hotel brand and lure it away with a more attractive arrangement. I do not agree. The city is speculating that publicly disclosing the identity of the hotel brand would cause other municipalities to approach and lure it away. The city has not provided any evidence to support this argument.

[66] Moreover, it is unlikely that another municipality would be able to lure the hotel brand away. The appellant points out the following from his corporate searches:[23]

> … [a named individual] is the principal of [the affected party], the architects for the proposed condominium/hotel. He is listed as an officer and secretary of [the specified Ontario numbered company], the owner [of the site]. The president of Ontario 2476703 Inc. is [another named individual]… It would therefore appear that despite the (misleading) efforts to portray the architect, the site owner and the developer as being completely separate entities and therefore protecting their own interests with an NDA, in fact they are all related and the NDAs appears to be a sham.

[67] The affected party's representations imply that its client, the proposed developer, works closely with a specific hotel brand (which is why it argues that disclosure of the proposed developer's name would reveal the identity of the hotel brand). Consequently, I accept the appellant's argument that it is unlikely that, if disclosure occurred, the proposed developer will not continue with its plan to build a condominium/hotel in downtown Barrie or that the hotel brand could be lured away. As this proposed developer is affiliated with the site owner and works with one specific hotel brand, it is unlikely that the hotel brand will be lured away.

[68] I acknowledge the city's reliance on the affidavit of its director of business development, which states, in part:

> …
>
> Specifically, the risk of releasing information that identifies the developer has detrimentally impacted the relationship between the City and the proposed developer of the property leading to potentially reputational harm within the developers' network of influence as well as putting the project in jeopardy.

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[23] Copies of the results from his corporate searches were attached with the appellant's representations, which were shared with the city and the affected party.

> I have had communications with the project architect, who are representing the proposed developer. They have expressed significant concern with non-compliance with the non-disclosure requirements with the release of the developer name and that they 'do not have to do this project in Barrie'. They have also indicated that they have never had this experience in any other municipality they have dealt with and that this risk is significant and that they would not recommend Barrie to any of their fellow colleagues or industry contacts should this information be released.

[69] It is evident that the city believes the affidavit establishes a reasonable expectation of harm. The city's affidavit is evidence that the affected party has threatened to not proceed with the project if its client's identity is disclosed. However, I give this affidavit little weight as I do not believe the threat is substantial or realistic. In my view, it is highly unlikely that the proposed developer will not develop the three adjacent lots given that the site owner, which is affiliated with the affected party, has already purchased them.

[70] I also note that the affidavit mentions the issue of non-compliance with the NDA. To be clear, the city is not a party to any of these NDAs. My understanding is that the affected party has a NDA with its client, the proposed developer, and that there is a NDA between the proposed developer and the hotel brand. I also understand that the city respects that there is an existing NDA between the affected party and the proposed developer.

[71] In any event, the city argues that there is a financial risk, if disclosure occurred, as the affected party may seek reparations for third party breaches of their NDAs. In other words, the city is concerned that it would be sued either by the affected party or the proposed developer if it disclosed the name and email address of the latter.

[72] In Order M-273, Adjudicator Holly Big Canoe faced a similar argument by the institution. The institution argued that the employment agreement contained a confidentiality clause, and, therefore, it was bound not to disclose the addendum to the requester. She states:

> … In my view, the belief by an institution that it may be sued if the records are released is not sufficient grounds for exemption under s. 11(c) or (d). Section 49(2) of the *Act* provides that "No action or other proceeding lies against a head…for damages resulting from the disclosure or non-disclosure in good faith of a record or any part of a record under this *Act*…"

[73] I agree with and adopt the above reasoning for the purpose of this analysis. As such, I do not accept that disclosure of the proposed developer's name and email address is a violation of the NDAs between the affected party and its client, nor do I accept that any potential violation of the NDAs from such disclosure establishes the harms set out in sections 11(c) and/or (d).

[74] In sum, I find that the city's representations fall short of the sort of detailed evidence that is required to establish a reasonable expectation of harm to its economic interests or injury to its financial interests. Accordingly, I find that the proposed developer's name and email address do not qualify for exemption under sections 11(c) and 11(d) of the *Act*.

ORDER:

1. I order the city to disclose the name of the proposed developer and email address to the appellant by **October 26, 2020** but not before **October 19, 2020**.

2. I also order the city to reimburse the appellant $5.00 as a result of my findings on the fee issue.

3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the record as disclosed to the appellant.

4. The timelines noted in order provision 1 may be extended if the city is unable to comply in light of the current COVID-19 situation, and I remain seized to consider any resulting extension request.

Original Signed By
Lan An
Adjudicator

September 18, 2020