Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4100

Appeals MA18-00893 and MA19-00086

City of Ottawa

August 30, 2021

Summary: Two journalists each made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Ottawa (the city) for access to records related to the city's Confederation Line Light Rail Transit (LRT). Each request related to information provided by the primary contractor of the LRT to the city regarding work to be completed on the LRT. After notifying the primary contractor and considering its objections to disclosure on the basis of the mandatory exemption at section 10(1) (third party information) of the *Act*, the city decided that the records did not meet section 10(1) and that they should be disclosed, in full. The primary contractor appealed the city's access decisions. On appeal, the original requesters argued that the records should be disclosed under section 16 (public interest override). In this order, the adjudicator upholds the city' s decisions, finding that the records are not exempt under section 10(1). As a result, she does not consider section 16, orders the city to disclose the records in full to the respective requesters, and dismisses the appeals.

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

Orders Considered: Orders PO-2753, PO-3834, PO-3895, MO-2070, MO-2151, MO-3628, MO-3827, MO-4007, and MO-4045.

OVERVIEW:

[1] Two journalists each made a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Ottawa (the city) for access to records related to the city's Confederation Line Light Rail Transit (LRT). Each request related to information provided by the primary contractor of the LRT to the city

regarding work to be completed on the LRT. The city notified the primary contractor about each of the requests, as a third party whose interests might be affected by disclosure of the records that the city located in response to the requests. In this order, I uphold the city's decision to disclose the records.

[2] One request was for a letter from the primary contractor to the city, outlining work scheduled for its revenue service availability date, which is the date that the primary contractor would hand over the LRT to the city for service.

[3] The other request was for:

> Memos, letters, schedules and other records possessed by the city and provided by the [third party] between [a specified date] and the date of this request with regards to the revenue-service availability and revenue service launch of the Confederation Line LRT.

[4] The city located responsive records and notified the primary contractor after receiving each request. The primary contractor objected to disclosure on the basis of the mandatory exemption at section 10(1) (third party information) of the *Act*. After reviewing the records and the primary contractor's written reasons for objecting to disclosure, the city issued an access decision granting full access to the records.

[5] The primary contractor (now the appellant) appealed each of the city's decisions to the Office of the Information and Privacy Commissioner of Ontario (the IPC) on the basis of section 10(1) of the *Act.* The IPC opened two appeal files (MA18-00893 and MA19-00086) and a mediator was appointed to explore resolution.

[6] During mediation, the appellant advised the mediator that they were not prepared to consent to the release of any information. The requesters advised the mediator that they were still interested in pursuing access to the records at issue, and raised the issue of public interest override at section 16 of the *Act*.

[7] Since mediation could not resolve the disputes, the files moved to the adjudication stage, where an adjudicator may conduct a written inquiry under the *Act*.

[8] As the adjudicator of these related appeals, I decided to conduct a joint inquiry for these appeals under the *Act* by sending a Joint Notice of Inquiry, setting out the facts and issues in the appeals. I began by seeking written representations from the appellant, as the party resisting disclosure and the party with the burden of proof to establish that section 10(1) applies. The appellant provided written representations in response, and agreed to the sharing of those representations with the other parties. I then invited the city and the original requesters to provide representations in response to the Notice of Inquiry and the appellant's representations. The city and one of the

original requesters provided written representations in response. These parties exchanged further representations before the inquiry closed.[1]

[9] For the reasons that follow, I uphold the city's access decisions, and dismiss the appeals.

RECORDS:

[10] The records at issue are the monthly updates for each month from January through August 2018 to the master schedule for Phase One of the LRT project, in relation to a certain revenue service availability date. The responsive record in Appeal MA18-00893 is the 26-page August 2018 update, and the responsive records for MA19-00086 are all of the updates from January through August. The monthly updates are between 26 and 65 pages in length. They are in the form of "Gnatt charts," which are bar graphs that the city and the appellant say are used for tracking schedules in the construction industry.

DISCUSSION:

[11] As I will explain below, I uphold the city's decisions to fully disclose the records because I do not find that the appellant has established that the records are exempt under the mandatory third party exemption at section 10(1), or that it is clear from the records themselves that section 10(1) applies. Since I find that the records are not exempt, I will not discuss the parties' positions about whether the city should disclose the records under the public interest override at section 16 of the *Act*.

[12] In these appeals, the appellant argues that section 10(1)(a) applies.[2] Section 10(1)(a) of the *Act* says:

> 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,

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[1] Shortly after I began the inquiry, IPC Order MO-3827 was issued. In that order, the IPC found that the public interest override at section 16 of the *Act* applied where a requester was seeking to understand more about delays with a manufacturer that was contracted to supply streetcars to the Toronto Transit Commission at a significant cost to ratepayers. In light of this, I provided a copy of Order MO-3827 to the parties and invited their representations in response, and the appellant, the city, and one original requester did so. However, given my findings in this order, it is not necessary to discuss section 16 of the *Act*.

[2] At the notification stage, the appellant cited section 10(1)(a) as well as section 10(1)(c), which may be seen as having overlapping harms-related concerns.

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[13] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[14] A party resisting disclosure of access to a record under section 10(1) has the onus of proving that the record meets the test for section 10(1). In the appeals resolved by this order, that party is the appellant.

[15] For section 10(1) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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

[16] The appellant's position is that the records meet all three parts of this test. The city's position is that the appellant has not demonstrated that the records meet the third part of the test. The original requester who participated in the inquiry provided representations on the public interest override, and not the three-part test for section 10(1). Below, I will summarize the arguments of the appellant and the city in relation to each part of the test.

Part 1: type of information

[17] As set out below, I find that the records meet part one of the test.

[18] Past IPC orders have defined the types of information listed in part one of the test. The three types of information raised in these appeals are:

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[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[5]

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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) as economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[8]

The parties representations

[19] The appellant describes the records as monthly schedule updates for the complex project that is Phase One of the LRT, containing detailed and specific information prepared by professional engineers and construction scheduling experts. Furthermore, the appellant submits that the records show its "learning curve" for this project, which it argues is a trade secret. As a result, the appellant submits that the records are technical information, trade secrets and commercial information within the meaning of section 10(1).

[20] The city agrees that the records contain technical and commercial information,

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

but submits that the appellant has not explained how the records disclose novel techniques, methods and processes unique to LRT construction, which would otherwise be a part of the construction project's learning curve that would constitute a trade secret.

Analysis/findings

[21] Based on my review of the records and the representations on this point, I find that the records are monthly construction schedule updates prepared by the appellant, which break down Phase One of the LRT project into hundreds of components for which the appellant had a contract with the city. The records were prepared in contemplation of the date on which the appellant would hand the LRT project to the city (the revenue service availability date). The records at issue flow from the contractual relationship between the city and the appellant for the construction of the LRT. I accept that the records were prepared by professional engineers and construction scheduling experts, given the nature of the records. For these reasons, I am satisfied that the records contain information that qualifies as technical and/or commercial information, as those terms have been defined in previous IPC orders.

[22] Since I have found that the records contain technical information and/or commercial information, they meet part one of the test. Accordingly, it is not necessary to consider whether they also constitute a "trade secret," as argued by the appellant.

Part 2: supplied in confidence

[23] The appellant and the city share the position that part two of the test applies to the records, and as set out below, I agree that it does.

[24] 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] 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]

[25] In order to satisfy the "in confidence" component of part two, a party 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]

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

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

information was

- 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]

The parties' representations

[27] The appellant submits that the records were supplied by it to a small number of city employees, in confidence, through password-protected software that could not be accessed by the public in any way. The appellant draws attention to a number of past IPC orders that considered password-protected supply as satisfying the "in confidence" portion of the test, including Order MO-3628, which involved the same LRT project as the appeals before me. In addition, the appellant states that the contract between it and the city contemplates that some records will be exempt under section 10(1). Therefore, the appellant argues that the records were supplied in confidence to the city.

[28] The city states that it is its understanding that some of the records would have been included in correspondence that the city received from the appellant. The city agrees that only a limited number of city staff would have had access to the information and that the records were implicitly provided in confidence. It states that the contractual agreement between the city and appellant does not require that documents be labeled confidential if they are to be treated as being confidential by the receiving party.

Analysis/findings

[29] Based on the representations of the appellant and the city, I am satisfied that the records were supplied to the city by the appellant, and that this was done with an expectation of confidentiality. As I indicated in Order MO-4007 regarding the same LRT project, I accept that the supply of records through the password-protected software from the same appellant to the city reflects an expectation that the appellant was supplying the records to the city in confidence. As a result, I find that the records meet part two of the test. To be clear, I come to this conclusion without relying on the confidentiality provision in the contract between the city and the appellant, which the appellant and the city referenced in their representations. The principle that parties may

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

not contract out of the provisions of access-to-information legislation has been upheld by the courts,[13] and consistently applied by the IPC.[14]

Part 3: harms

[30] The appeals before me arise out of a dispute between the appellant and the city regarding whether the records meet part three of the test. The appellant's position is that disclosure can reasonably be expected to result in harm to its competitive position, under section 10(1)(a) (competitive position) of the *Act*. For the reasons set out below, I find that the appellant has not established that the records meet part three of the test, and that from my review of the records themselves, I find that the records do not. Therefore, I will order the city to disclose the records in full to the respective original requesters, and I will not consider whether the public interest override applies.

[31] As the party resisting disclosure, the appellant had the burden of proving a risk of harm from disclosure of the records that is well beyond the merely possible or speculative. However, it did not need to prove that disclosure will in fact result in such harm.[15] In the Notice of Inquiry sent to the appellant, it was advised that parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties are advised in the Notice of Inquiry that they 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*.[17]

[32] In these appeals, the appellant submits that disclosure of the records will prejudice its competitive position. The city submits that the appellant has not sufficiently established that disclosure will do so, and furthermore, submits that the records are not unlike scheduling records commonly used in the construction industry. I will discuss the parties' positions in further detail, below.

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[13] Among others, see *St. Joseph Corp. v. Canada* (*Public Works and Government Services*), 2002 FCT 274 (CanLII); *Brookfield Lepage Johnson Controls Facility Management Services v. Canada* (*Minister of Public Works and Government Services*), 2003 FCT 254 (CanLII); *Ontario* (*Ministry of Transportation*) *v. Ontario* (*Information and Privacy Commissioner*), 2004 CanLII 11768 (ON SCDC), affirmed 2005 CanLII 34228 (ON CA), application to Supreme Court of Canada for leave to appeal dismissed [2005] SCCA No. 563.

[14] Among others, see Orders PO-2917, PO-3009-F, PO-3327 and MO-2833.

[15] *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616, *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23.

[16] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), cited above.

[17] Order PO-2435.

The parties' representations

The appellant's initial representations

[33] In describing the records at issue, the appellant states that the level of detail in each monthly update contains itemized work running between 25-65 pages per update, listing the work required to complete the entire LRT project. It describes the categories included in the records, and states that milestones are also listed. It argues that "[t]hese hundreds of unique components for this massive project distinguish it from other construction projects." The appellant argues that the records show its "learning curve" for this project, which was a first of its kind in Ottawa, and that disclosing such information would negatively affect its competitive position by allowing knowledgeable competitors to infer the steps taken and solutions involved in resolving problems in this project. The appellant relies on IPC Orders MO-3628 (which involved the same LRT project), MO-2151, MO-2070, and PO-2753 to argue that the IPC has consistently found that section 10(1) applies to construction schedules. The appellant also notes that its competitive position could be negatively affected in the competition for Phase Three of the LRT project.

[34] In support of its position, the appellant provided an affidavit from its project director for the LRT project. The project director's affidavit states the following, in part:

> Disclosure of the Records will negatively prejudice [the appellant's] competitive position, including by:
>
> > a. allowing competitors to copy [the appellant's] processes and techniques with respect to Phase One of the LRT;
> >
> > b. allowing competitors to track changes to the timeline of the hundreds of individual work elements of the LRT project, and thereby to infer the unique challenges experienced by [the appellant] in constructing Phase One of the LRT, as well as the solutions to those challenges;
> >
> > c. allowing competitors to benefit from [the appellant's] accrued body of knowledge and experience, whose development required significant investment of time and resources by [the appellant]; and
> >
> > d. allowing competitors a "head start" that [the appellant] was not afforded.

[35] In addition, the affidavit also set out the history of its communications with the city about the two requests, and attaches supporting documentation of those communications.

The city's response

[36] The city argues that the appellant has not addressed the specific records at issue

in its representations. The city acknowledges that the records provide a breakdown of different components of the construction project, but it states that the appellant did not detail how the records disclose the structure of solutions. In addition, the city argues that the scope of work for each component is broad and that the appellant has not detailed how the records disclose proprietary information that is subject to section 10(1) of the *Act*. While the city acknowledges that co-ordinating the listed tasks and outlining them in the schedules may have involved a significant amount of resources, the city argues that it is "unclear as to how anyone could reverse engineer any trade secrets, technical, or commercial information," or "discover any processes or techniques that are proprietary to the [appellant]."

[37] In the city's view, the records at issue in these appeals are similar to the information in the records at issue in Order PO-3834. The city states that similar to the affected party in that appeal, the appellant in the present appeals has not addressed specific records when making its harms argument, and that, in effect, "the harms claimed are broad unsupported assertions."

[38] The city distinguishes the records at issue from those in Order PO-3895, which related to a renovation of St. Michael's Hospital in Toronto, on the basis that the records at issue in the present appeals do not appear to contain a significant amount of information, again reiterating that the appellant has not detailed how the records disclose the structure of solutions.

[39] In addition, the city explained (albeit in its representations about the public interest override), that a significant amount of information relating to the subject matter of the request was made public. This occurred through disclosure by the city, tangible evidence that work needed to be completed in the form of active construction sites at various locations, dissemination of information about delays by the media and other mediums (such as a specified website that is not associated with the city). In the city's view, there is a small gap between the information at issue and the information that has been publicized.

The appellant's reply representations

[40] In reply to the city's representations, the appellant reiterates points it made in its initial representations, describing the records and its general position overall.

[41] The appellant also states that the city did not consider the appellant's affidavit evidence.

[42] The appellant also states that the city failed to address any of the IPC cases referenced in its representations, including Orders MO-2151, MO-2070, and PO-2753, again arguing that that these orders show a "consistent" approach by the IPC towards project schedules (that they are exempt under section 10(1) of the *Act*). The appellant also disagrees with the city's view that the records are not similar to those found exempt in Order PO-3895.

[43] In addition, the appellant states that the city's position disregards the fact that the LRT is the first project of its kind in Ottawa, making it novel in and of itself. As a result, it argues that issues and challenges arising during its construction "are novel by sheer virtue of the fact that no LRT has previously been constructed in Ottawa's unique milieu of geological and climatic conditions." The appellant states that many of the issues that resulted in changing timelines arose because of this novelty. It argues that the records are a "roadmap for a first-of-its kind project, and one which will serve as the template for future expansions of the LRT system." It states that the records, as monthly schedule updates (including changes to specific technical components of the schedule) provided to the city, were provided to the city for the specific purpose of allowing the city to track the changes of the LRT project from one month to another. The appellant also flags that the original requester who participated in the inquiry acknowledged that this project is novel (in his representations about the public interest override).

[44] The appellant also submits that it has provided a specific and detailed explanation of the harms that can reasonably be expected to result from disclosure of the records, and that its representations are supported by affidavit evidence that was not contradicted by any party.

[45] Furthermore, the appellant states that by tracking the monthly evolution of the project schedule, including the progress of specific line items against originally projected dates, a competitor can easily infer specific challenges encountered by the appellant "at a fairly micro level." The appellant asserts that this information, especially the length of the delay, would allow its experienced and knowledgeable competitors "to infer the amount of resources and the methods employed to overcome specific challenges." The appellant states that this information is:

> vastly more technically detailed than the information that is otherwise generally available, and its disclosure could reasonably be expected to allow [the appellant's] competitors a window in processes and techniques whose development required significant investment from [the appellant] in terms of time and resources. It would negate any competitive advantages that [the appellant] could derive from its development of these proprietary techniques and processes, and allow its competitors a "head start" that [the appellant] was not afforded.

[46] With respect to the city's views about the extent of information already made public regarding Phase One delays, the appellant submits that the information at issue is far more detailed than what was made public.

The city's sur-reply representations

[47] In response to the appellant's reply representations, the city reiterates its previously expressed position.

[48] It also notes that the appellant acknowledges, in citing previous IPC orders, that

those orders are persuasive but not binding on me in these appeals. The city explains that its decisions in response to requests under the *Act* are made on a case-by-case basis because the context and the content of the records necessarily varies from request to request. It states that its decision that the records in these appeals were not subject to the mandatory exemption at section 10(1) of the *Act* reflect a perspective on the content and potential use of the records that is different than that of the appellant. The city also states that it defers to my decision-making authority under the *Act* to order documents or portions of documents be withheld upon review of the records along with representations of the parties in these appeals.

[49] With respect to Orders MO-2151, MO-2070, and PO-2753, the city states that these orders refer to work scheduling in the context of proposals that were submitted to institutions as part of a procurement process - whereas the records at issue in these appeals were created during the performance of a contract. The city submits that context here, including the purpose and time for that which the records were created, may be more similar to the monthly progress reports on the assembly of streetcars for the City of Toronto, which were one of the types of records at issue in Order MO-3827.

[50] The city also submits that the use of a Gantt chart to monitor the progress of projects, including using bars and colour codes to outline when work on major activities will occur in the future, is commonplace in the construction industry. The city contrasts this with the appellant's characterization of the records as a "highly detailed and itemized schedule," with examples of categories of work such as "installation of electrical work for a station or individual building." The city's view is that this and other activity names listed in the records are in fact broad categories of work for very large components of the overall project.

[51] The city states that it is "sceptical" of the appellant's submission that it is reasonable to conclude that a competitor could infer specific challenges at a "fairly micro level" or infer the amount of resources and methods employed to overcome challenges associated with those components from observing the delays in completing the listed activities. The city notes the records contain no information about resources other than the time-frames, nor do the records appear to contain any information about methods or techniques.

[52] With respect to the appellant's claim that the disclosure would allow its competitors a head start that the appellant was not afforded, the city states that its determination was that the actual information in the records was summary in nature and did not constitute commercially valuable information. The city acknowledges that the appellant is experiencing the unique and expected business circumstance of building and maintaining the LRT in the City of Ottawa with its climate conditions, and that it is the first time anyone has built and maintained an electricity powered LRT in the city. However, the city submits that the records represent a summary of a work progress and do not contain or otherwise allow for the inference of informational assets, such as a proprietary method to overcome a challenge of construction over a unique geological formation.

[53] The city also submits that private-public-partnerships that are formed for the second phase of the city's LRT system will benefit from lessons learned from completed transportation infrastructure projects in Ottawa and in other jurisdictions. It submits that non-proprietary information about progress with construction will continue to be available to the city and will be available to other parties in later phases of LRT construction.

The appellant's supplementary representations

[54] In response to the city's sur-reply representations, the appellant reiterated that its harms-related evidence is uncontradicted, and that the city did not properly address the affidavit of its project leader. It states that the city has not asked to cross-examine the project leader and has not provided any countervailing evidence. Therefore, in the appellant's view, the affidavit is uncontradicted and the only evidence before the IPC in these appeals speaking to the harms that the appellant states will result from disclosure of the records. The appellant submits that the city's submissions are unsubstantiated and that, to the extent that they contradict the appellant's affidavit evidence, the IPC should prefer and/or give greater weight to the affidavit.

[55] The appellant also disputes the city's characterization of the nature of the records, and repeats its own previously expressed characterization of the records. It views the city's position that the activity names listed as being "broad categories of work for very large components of the overall project" as inaccurate, and submits that records are highly detailed and itemized. While the appellant agrees that the use of Gantt charts to monitor the progress of construction projects is common in the industry, it states that its objection to disclosure is not on the basis of the format of the monthly schedules, but their contents.

[56] With respect to the city's scepticism that a competitor could use the monthly schedule updates to infer specific challenges that the appellant encountered, the appellant states that this scepticism is unsubstantiated and originates from the city's "fundamental mischaracterization" of the records and "flawed analysis overall." The appellant reiterates its previous submissions that the records are highly detailed and itemized monthly schedule updates that would allow its experienced and knowledgeable competitors to infer the amount of resources and the methods employed to overcome specific challenges, on a precise and micro level.

[57] Regarding the city's submission that the records may be more similar to the records at issue in Order MO-3827 (which dealt with streetcars that were delayed in the City of Toronto) as opposed to those in Orders MO-2151, MO-2070 and PO-2753, the appellant states that this is unsubstantiated and a mischaracterization of the records. Furthermore, the appellant states that because Order MO-3827 only describes the records but does not attach them to the decision, the city's statement is "mere supposition, at best, and should not be given any weight." (However, I must note that IPC orders do not attach the records at issue to them.) The appellant agrees that the work schedules in Orders MO-2151, MO-2070 and PO-2753 were submitted to institutions in the context of a procurement process but argues that these decisions

show that the IPC "has consistently held that the disclosure of third party project or construction schedules would cause harm within the meaning of" the mandatory exemption at section 10(1) of the *Act*. The appellant submits that distinguishing those three orders on the basis of context does not take into account the basis or logic of the IPC's rulings in those appeals. In addition, the appellant submits that the city failed to address the appellant's submission that the records at issue are much more similar to the detailed construction schedules at issue in Order PO-3895, in which the IPC found (as the city acknowledged in its reply representations) that the records in question qualified for exemption under section 10(1).

[58] The appellant then reiterates its previous submissions about the records being vastly more technically detailed than the information that is otherwise generally available. It again submits that disclosure could reasonably be expected to allow its competitors to infer specific challenges encountered and the methods used to overcome these challenges, negating any competitive advantages that the appellant could derive from its development of these "proprietary techniques and processes," and allowing its competitors a "head start" that it was not afforded.

[59] I provided the city with an opportunity to comment on the appellant's supplementary representations, and the city stated that it would rely on its earlier representations without anything further.

Analysis/findings

[60] For the reasons that follow, I find that the records do not meet part three of the test.

[61] Section 10(1) prohibits disclosure of a record "*if the disclosure could reasonably be expected to*" before listing four categories of harm under paragraphs (a) to (d). The Supreme Court of Canada has held that wherever the "could reasonably be expected to" language is used in access to information statutes, evidence well beyond or considerably above a mere possibility of harm must be provided to meet the standard of proof.[18] The obligation to provide this evidence belongs to the party claiming the exemption (the appellant in these appeals), not the party or parties seeking, or agreeable to, disclosure of records (the original requesters and the city in these appeals). Therefore, I do not accept the appellant's view that the city's views expressed through its representations required substantiation. The appellant's view that its affidavit is uncontradicted by the city and stands as the *sole* evidence before the IPC with respect to the harms-related part of the test is also inaccurate. This view appears to suggest that the city has a burden of proof in these appeals (which it does not),

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[18] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Merck Frosst Canada Ltd. v. Canada* (*Health*), 2012 SCC 3 (CanLII) paras. 197 and 199.

despite being a party that does not resist disclosure; it also ignores the fact that adjudicators are to look at the records themselves as evidence to determine whether the mandatory exemption applies.

[62] It is equally important to emphasize that what the party with the onus of proof must establish is that the particular records at issue in an appeal are subject to the exemption claimed, as the city repeatedly submitted. In my view, this is important to remember, and particularly, where the parties disagree (as they do here) about which records previously before the IPC are most similar to the records at issue. The reasoning in previous IPC orders may be persuasive but it is not binding on adjudicators considering different records later on. Each appeal is decided on its own merits, taking into consideration the level of relevant detail presented by the party with the onus of proof in support of its position, and examining the actual record at issue. Having reviewed the orders cited by the appellant and the city, I am not persuaded that engaging in a discussion of whether the records before me are similar to records in other appeals is particularly helpful here. It appears to me from reading those orders that the adjudicators had very detailed evidence before them from the parties resisting disclosure.[19] In my view, having reviewed the appellant's representations and affidavit, that is not the case here.

[63] The appellant and the city agree, and I find, that the records at issue in these appeals are monthly scheduling updates in view of the revenue service date, breaking up the remainder of the LRT construction project into hundreds of tasks, and include timelines. I accept that the appellant provided this information to the city to allow the city to track the changes in Phase One of the LRT project, month over month, and that this project was novel to Ottawa.

[64] However, having considered the records and the parties' representations and the appellant's affidavit evidence, I am not persuaded that the appellant has established that the records meet part three of the test. Apart from asserting that four types of harms would reasonably be expected to occur as a result of disclosure, I find that the affidavit evidence does not contain sufficient supporting details. In contrast to this, the affidavit includes extensive details and supporting attachments reflecting the correspondence exchanged with the city after the requests were made, but the fact of these exchanges does not establish that section 10(1) applies. Neither the appellant's representations nor its affidavit evidence sufficiently demonstrate that the information is proprietary to the appellant, or that it would allow "inferences" about detailed, unique solutions. The appellant did not point to any examples of where such solutions could be found in the records; this weighs against accepting that such detailed solutions can be

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[19] In any event, as the city submits, and as Adjudicator Kowalski found in Order MO-4045 (an appeal involving the same appellant, city, and LRT project), past IPC orders where the records at issue were provided to an institution in the course of a procurement process can be distinguished from the records at issue here, as these records relate to performance of a contract already awarded by the city.

found, directly or by inference. I find that the claims made by the appellant are not sufficiently supported by the evidence it provided (or the face of the records themselves).

[65] The appellant agrees that the format of these schedules is not proprietary and is commonly used in the construction industry, but argues that the contents of the records relating to this project make the information exempt, essentially because there had been no project like that in Ottawa. The appellant claims that its learning curve can be appreciated and exploited by its competitors, similarly, without reference to more specific evidence allowing me to understand how. I am not persuaded that the novelty of the project sufficiently establishes that the records contain information that is proprietary to the appellant as the principal contractor of that project. I find that the appellant's evidence, including its affidavit evidence, amounts to general assertions and speculation about how these monthly scheduling updates could be used by its competitors.

[66] Since section 10(1) is a mandatory exemption, I have also considered whether I can conclude from the records themselves that the records meet part three of the test in the circumstances, and I cannot. Considering the nature and contents of the records, the stated purpose for which they were provided to the city, and the common use of such tracking charts in the construction industry (as acknowledged by the appellant), I am not satisfied that the records meet part three of the test for section 10(1) of the *Act*.

[67] Given my findings about part three, and since all three parts of the test must be met for the exemption to apply, I find that the records are not exempt from disclosure under section 10(1) of the *Act*. As a result, it is not necessary to address the parties' arguments about whether the records should be disclosed under the public interest override at section 16 of the *Act*.

[68] For these reasons, these appeals are dismissed.

ORDER:

1. I uphold the city's access decisions, and dismiss the appeals.

2. I order the city to disclose the records to the respective original requesters, in full, no later than **October 4, 2021**, but no earlier than **September 29, 2021**.

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 records disclosed pursuant to order provision 2.

Original Signed by: August 30, 2021

Marian Sami
Adjudicator