Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4309

Appeal MA20-00011

City of Ottawa

December 22, 2022

Summary: The City of Ottawa (the city) received a request for access to progress and finance reports related to the city's Light Rail Transit project. After notifying a third party, the city decided to grant the requester partial access to the records, withholding information under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act.* The third party appealed the city's decision. In this order, the adjudicator finds that the information the city decided to disclose is not exempt under section 10(1), upholds the city's decision to disclose it and dismisses the appeal.

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

Order Considered: Orders P-561, MO-3628, MO-2070, MO-2151, MO-4100 and MO-4045.

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information regarding Light Rail Transit (LRT) reports. After the city clarified the request with the requester, it was articulated as follows:

> From July 1, 2018 to present (April 1, 2019) please provide:

> Progress and finance LRT reports submitted by the Transportation Services department to the Ministry of Transportation of Ontario, Infrastructure Canada, and Department of Finance Canada; progress and finance LRT reports submitted by the City Manager's office to the Ministry of Transportation of Ontario, Infrastructure Canada, and Department of Finance Canada;

[2] After notification of third parties, the city issued a decision granting partial access to the third party records.

[3] One of the third parties, the primary contractor for Phase One of the LRT project (now the appellant), appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC). The requester did not file an appeal in relation to the information the city withheld.

[4] During mediation, the appellant objected to the disclosure of any of its information, because it believes that the mandatory exemption at section 10(1) (third party information) applies. The requester maintained his interest in gaining access to that information.

[5] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*.

[6] The adjudicator originally assigned to this appeal decided to conduct an inquiry, and sought and received representations from the city, the appellant and the requester. Non-confidential copies of the parties' representations were shared with the other parties in accordance with *Practice Direction Number 7* from the IPC's *Code of Procedure*.[1]

[7] The file was then assigned to me to continue the adjudication of the appeal. I have reviewed the parties' representations, including any documents submitted in support of their positions, and concluded that I do not need further representations before rendering a decision.

[8] For the reasons that follow, I uphold the city's decision to disclose the information it decided to disclose and I order it to do so. I dismiss the appeal.

RECORDS:

[9] The records at issue consist of one monthly status report (the report) prepared

[1] Portions of the appellant's representations were withheld, including a confidential affidavit, as they met the criteria for withholding representations in Practice Direction Number 7 from the IPC's *Code of Procedure.*

by an independent certifier (IC), and appendices A and C to the report.[2] The city decided to disclose these records in part.

DISCUSSION:

[10] The sole issue in this appeal is whether the section 10(1) exemption for third party information applies to the information in the records at issue that the city decided to disclose. In particular, the appellant argues that the records are exempt under section 10(1)(a).

[11] I have reviewed all of the parties' representations and attachments, and below I summarize the portions of their representations relevant to the issue before me.

[12] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[3] where specific harms can reasonably be expected to result from its disclosure.[4]

[13] 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,
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> > (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.

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[2] There were previously two other records at issue: appendix B to the report, and an audit report. In its initial representations, the appellant confirmed that it does not object to the disclosure of these two records. The city has since disclosed the two records to the requester.

[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.

[14] For section 10(1) to apply, the party arguing against 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;

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.

Background provided in the parties' representations

[15] According to the city and the appellant, the city's LRT system, which includes the LRT line referred to as the Confederation Line, is the city's largest ongoing infrastructure project. The appellant was the primary contractor for the construction of Phase One of the project. The appellant is a consortium of companies created for the purpose of the public-private partnership project that designed and built Phase One of the LRT and that was successful in a competitive procurement bidding process. The parties' respective obligations with respect to Phase One are set out in a project agreement.

[16] As noted above, the records at issue include a monthly status report created by the independent certifier (IC), as well as two accompanying appendices. The report is one in a series of reports produced to the city for the purpose of monitoring the progress of the LRT project. The IC is a consulting firm appointed under the project agreement, and reporting to both the city and the appellant. The IC produced the report at issue further to the project agreement, which provides for the independent certification of the appellant's progress and milestones, and requires the IC to certify the fulfillment of requirements for various project events, including payment events.

[17] In its decision, the city severed some of the information in the records, including information related to delays in the construction schedule and the cost impact of variations. As noted above, the requester did not file an appeal in relation to this information. It is therefore not at issue in this appeal.[5] The appellant takes issue with the disclosure of any of the information contained in the report and Appendix A and C on the basis that it should be exempt under section 10(1). The issue before me is whether the information that the city decided to disclose is exempt under section 10(1).

[5] In his representations, the requester asks that I assess whether the information the city severed is exempt under section 10(1) of the *Act* and whether those severances are in the public interest. As the requester did not appeal the city's severances, the requester's access to this information is not before me.

Part 1 of the section 10(1) test: type of information

[18] The IPC has described the types of information protected under section 10(1) as follows:

> ***Trade secret*** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:
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> (a) is, or may be used in a trade or business;
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> (b) is not generally known in that trade or business;
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> (c) has economic value from not being generally known; and
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> (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[6]
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> ***Technical information*** is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.[7]
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> ***Commercial information*** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.[8] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[9]
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> ***Financial information*** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[10]

Representations, analysis and findings

[19] The appellant submits that the records constitute technical information and trade secrets within the meaning of section 10(1) of the *Act*. It states that the report and appendices at issue contain a comprehensive overview of monthly project progress, as

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

well as detailed technical information relating to project scheduling and contractual variances. The appellant argues that the IPC has consistently found that project and construction schedules constitute technical or trade secret information.

[20] The city agrees that the records contain technical information, but not information that amounts to trade secrets. The requester does not address this issue in his representations.

Technical information

[21] The appellant submits that the records are technical information as they were authored by experts in their respective fields. The city agrees with the appellant's submission. In the appellant's non-confidential affidavit, the IC's project director with respect to Phase One affirms that the report was authored by a professional engineer employed by the IC. The project director also notes that the Project Agreement describes the IC's role as providing expert certification services.

[22] I agree with the appellant and the city and find that the records contain technical information. Based on my review of the records and the parties' representations, I find that the records contain information prepared by an engineer, that describes the construction, operation or maintenance of a structure, process, equipment or thing.

Trade secret

[23] The appellant also submits that the records at issue contain information that qualifies as a trade secret, as it amounts to a learning curve. The appellant describes a learning curve as "its acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the LRT Project." In particular, it asserts that the records detail the solutions to challenges it encountered with respect to construction, design, manufacturing, and project testing. It argues that its competitors do not have access to this information, which, in its view, it developed through its own investment of time and effort.

[24] The city disagrees with the appellant's position that the information at issue qualifies as a trade secret. It submits that the appellant has not explained how this information amounts to a learning curve, comprised of techniques, methods and processes unique to the LRT construction.

[25] The appellant cites certain IPC orders in support of its argument,[11] which the city argues are distinguishable on the facts of the present appeal. I agree. The records at issue in these orders were either not found to qualify as trade secrets,[12] or were more

[11] Orders P-561, MO-2070, MO-2249-I and MO-2274.
[12] See Order MO-2274.

detailed and/or contained information of a different nature.[13]

[26] For instance, the appellant cites Order P-561, in which former Assistant Commissioner Irwin Glasberg found that certain records related to the construction of the SkyDome formed part of a learning curve amounting to a trade secret under section 10(1). At issue in Order P-561 were five groups of records that included information such as: the results of quality control testing of components of the roof structure, drawings and sketches describing certain repair work, and inspection reports documenting the completion of elements of the structure.

[27] I find that the records at issue differ considerably from the groups of records described in Order P-561. Based on my reading of the appellant's representations, I understand it to be arguing that the report at issue in the present matter is similar to the inspection reports described in Order P-561. I note that while both may document the completion of aspects of a large-scale construction project, this alone does not establish that the information at issue in the present matter qualifies as a trade secret. As noted above, the inspection reports in Order P-561 were among several other groups of records, many of which featured substantively different types of information, and which together, were found to form a body of knowledge amounting to a trade secret.

[28] The appellant describes the report as a detailed overview of all aspects of the project, including its challenges and responses with respect to matters of construction, design, manufacturing and contract variance. The appellant describes Appendix A as a highly detailed, master project schedule, tracking changes to construction timelines, and Appendix C as a comprehensive list of all contractual variances to date.

[29] Based on my review of the records and the parties' representations, I accept the city's submission that the records do not contain the detailed type of information that would constitute a trade secret. As the city states, the report is largely summary in nature, and contains the IC's general observations about the status of completion in relation to different aspects of the project and contractual requirements. With respect to Appendix A and C, I note that they contain lengthy, itemized lists of different aspects of the construction schedule and contractual variances. I also note that each entry provides a brief overview. For instance, contractual variances are usually described in a phrase.

[30] The appellant has not established how this information represents "an acquired body of knowledge, experience and skill" relating to the development of unique techniques, methods and processes, as was the case in Order P-561. Nor has it established that this information "confers proprietary rights on its owners,"[14] or how proprietary information may be gleaned or inferred from the records.

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[13] See Orders P-561, MO-2070 and MO-2249-I.
[14] Order P-561.

[31] Based on the evidence before me, I find that the records at issue do not amount to a trade secret under section 10(1) of the *Act*.

[32] I have, however, found that the records contain technical information. I will therefore next address whether that information was supplied to the city in confidence.

Part 2: supplied in confidence

Supplied in confidence

[33] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[15]

[34] 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.[16]

[35] The party arguing against disclosure must show that both the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. This expectation must have an objective basis.[17]

[36] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information:

- was communicated to the institution on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the third party in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[18]

Representations, analysis and findings

[37] The appellant and the city agree that the records at issue were supplied to the city in confidence.

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[15] Order MO-1706.
[16] Orders PO-2020 and PO-2043.
[17] Order PO-2020.
[18] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[38] The appellant submits that the IC generated the report based on information it provided to the IC. It notes that the IC then supplied the report to the city and to the appellant.

[39] The appellant and the city cite the following factors in support of the position that the records were supplied in confidence:

- The report was provided to the city through password-protected software, and only a small number of city staff were permitted access. They cite previous IPC orders that recognized this as a factor in support of the expectation of confidentiality.[19]
- The word "confidential" appears in the footer of the pages of the report.
- The Project Agreement includes a confidentiality clause.

[40] In his representations, the requester does not address whether the records were supplied in confidence.

[41] Based on my review of the records and the parties' representations, I am satisfied that the report, and its appendices, were supplied in confidence to the city. While the appellant did not directly supply the report to the city, I find that disclosure of the report would permit the accurate inference of the appellant's information that was supplied to the IC for the purposes of drafting the report. I am also prepared to find that the report was supplied in confidence. In making this finding, I considered that the records were sent via password-protected software. As the parties point out, this is in line with previous IPC orders, including several more recent orders.[20] I also took into account the fact that the report is explicitly marked confidential, and the clause in the Project Agreement that provides for the confidentiality of documents including those created by the IC under the agreement.

[42] I will next address whether disclosure of the disputed information could reasonably be expected to result in any of the harms contemplated by section 10(1).

Part 3: harms

Could reasonably be expected to

[43] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred

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[19] See Order MO-4007 (at para 31) and Order MO-3628 at (para 44), which also addressed records related to the city's LRT project.

[20] The following orders also involved the city, the appellant, and records related to the city's LRT project, submitted through the same password-protected software: MO-4045 (at para 32), Order MO-4086 (at para 40) and Order MO-4087 (at para 37).

from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act.*[21]

[44] Parties resisting disclosure must show that the risk of harm is real and not just a possibility.[22] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[23]

[45] In applying section 10(1) to government contracts, the need for accountability in how public funds are spent is an important reason behind the need for detailed evidence to support the harms outlined in section 10(1).[24]

[46] The appellant and the city disagree with regard to whether disclosure of the records can reasonably be expected to harm the appellant.

Appellant's initial representations

[47] The appellant takes the position that the disclosure of the records at issue will harm its competitive position, referencing the wording of section 10(1)(a).[25]

[48] Reiterating its argument in relation to part one, the appellant submits that the report and appendices at issue demonstrate its learning curve, its "acquired body of knowledge and skill relating to the LRT project" which it maintains is a trade secret under section 10(1). It argues that the records provide a comprehensive template of its unique approach to a large and complex project, including its responses to the challenges it encountered. The appellant submits that if disclosed, this information would give its competitors a window into proprietary processes and techniques it developed through its own investment of time and resources, and grant them a "head start" that it was not afforded. The appellant adds that disclosure could also reasonably be expected to prejudice its competitive position for future phases of the LRT.

[49] The appellant submits that the IPC has consistently held that the disclosure of third-party project or construction schedules would cause harm within the meaning of section 10(1). The appellant relies on several orders to support its position.[26] In particular, it notes that the harms at issue in this case are substantially similar to those

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[21] Orders MO-2363 and PO-2435.
[22] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[23] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.
[24] Order PO-2435.
[25] I note that the appellant also refers to section 10(1)(c) in correspondence to the city prior to filing its appeal, although it does not explicitly address this subsection in its representations.
[26] Orders MO-2151, MO-2070 and P-561

found in Order MO-3628, which addressed non-conformance reports related to Phase One of the LRT project, and their attachments.

[50] The appellant submitted a non-confidential affidavit outlining its position, along with its representations. Communications between the appellant and the city are attached to this affidavit as exhibits.

City's representations

[51] The city takes the position that the appellant has not provided detailed evidence of harm, as required under part three of the test, and that the information at issue does not constitute an informational asset meant for exemption under section 10(1).

[52] The city submits that the report is one in a series of monthly progress updates for project funders at different levels of government. As noted above, the city submits that the report is largely summary in nature, and contains general observations about the status of completion of different aspects of the project and contractual requirements. The city adds that the appendices feature similarly general information. The city submits that disclosure of the information contained in the report and appendices would not reasonably be expected to lead to the harms contemplated by section 10(1). In particular, it argues that their disclosure would not reveal the appellant's unique approaches, or solutions to the challenges it encountered during the project.

[53] The city distinguishes the records at issue from the LRT non-conformance reports in Order MO-3628, noting that the latter addressed deficiencies in construction, and included substantive technical information with respect to remedying those deficiencies. With regards to Orders MO-2151 and MO-2070, it submits that these dealt with information contained in proposals that were submitted to municipalities as part of a procurement process, as opposed to the records at issue which were created during the performance of a contract.

[54] The city acknowledges that organizing the project tasks along a time continuum (as was done in Appendix A) may have involved a significant amount of resources. However, it notes that the scope of work for each task was broad and submits that "it remains unclear how a competitor could. . .reverse engineer any trade-secrets, technical, or commercial information including [the] discovery of any processes or techniques."

[55] The city maintains that the records at issue represent a snapshot, or a summary of a work progress. It submits that they do not contain, or otherwise allow for the inference of, commercially valuable information.

[56] The requester relies on the city's representations.

Appellant's reply

[57] In its reply, the appellant submits that the city has no basis for distinguishing Orders MO-2151 and MO-2070, which it says upheld the exemption of works schedules. In the appellant's view, these orders are applicable in the circumstances regardless of the fact that they addressed proposals submitted in the context of procurement processes. The appellant submits that in these cases, the IPC found that disclosure of the records would allow competitors to copy the templates, methods, and techniques of the affected parties. It submits that the fact that the records were submitted as part of a procurement process had no bearing on the analyses.

[58] The appellant notes that the city's submissions are not supported by any sworn evidence, and asserts that the "sole evidence before the [IPC] in this appeal speaking to the harms caused by disclosure is the uncontradicted [confidential and non-confidential] affidavits" that it submitted. It submits that the IPC should prefer or give greater weight to its affidavits, over the city's unsworn submissions.

Analysis and findings

[59] For the reasons set out below, I find that the appellant has not made out part three of the test.

[60] As noted above, in order for me to find that the exemption at section 10(1) applies, the appellant must establish that the specified harms could reasonably be expected to occur in the event of disclosure. To do so, it must provide sufficient evidence about the potential for harm.

[61] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*,[27] the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*,[28] and found that it requires a reasonable expectation of probable harm.[29] The Court observed that "the reasonable expectation of probable harm formulation...should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

[62] In order to meet that standard, the Court explained that:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual

[27] 2014 SCC 31 (CanLII).
[28] The law enforcement exemptions in sections 14(1)(e) and 14(1)(l) of the *Act.*
[29] See paragraphs 53-54.

> and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences."

[63] I agree with and adopt this principle for the purposes of this appeal.

[64] I will first address the appellant's contention that the city's submissions are unsubstantiated and that I should therefore prefer the appellant's sworn evidence. As a tribunal, the IPC is not bound by the traditional rules of evidence. It is open to adjudicators to rely on unsworn evidence, hearsay evidence, and opinions.[30] Furthermore, as the party resisting disclosure, the burden of proof falls on the appellant and not the city. In Order MO-4100, which also involved the appellant, the city, and LRT records related to Phase One, Adjudicator Marian Sami addressed similar representations from the appellant. In my view, the following analysis is applicable in this appeal:

> 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), 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.[31]

[65] I also do not accept that the city was required to provide sworn evidence to substantiate its views, nor that the appellant's affidavits are uncontradicted and the only evidence before me with respect to part three of the section 10(1) test.

[66] Section 10(1)(a) seeks to protect information that could be exploited in the marketplace.[32] As noted above, the appellant takes the position that the disclosure of the records at issue could reasonably be expected to harm its competitive position.

[67] I have reviewed the records at issue and the parties' representations, and find that the appellant has not provided sufficient, detailed evidence demonstrating how disclosure could reasonably be expected to lead to the harms contemplated under section 10(1)(a). I agree with the city that the records are largely summary in nature, a snapshot of the project's progress. The report provides an overview of a two-month period and includes high-level information about such matters as: the status of completion of different project components, the progress towards certification and milestone achievements, delay events, testing and commissioning activities. Appendix A is a construction schedule comprised of itemized charts depicting the status of various

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[30] *Cooper v. Canada (Human Rights Commission),* [1996] 3 SCR 854 at p. 894.
[31] Order MO-4100 at para 61.
[32] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

aspects of the project, including variations in timelines. Appendix C consists of a table enumerating the variances to the project agreement to date, and features brief descriptions of these variances. As the city notes, it has withheld the dollar amounts for each variation in Appendix C under section 10(1). I make no finding with respect to that information.

[68] In my view, the disputed information in the records consists of a project update meant for briefing purposes. It is unclear how a competitor might make use of this information, either on its face or by inference, to gain unearned advantages over the appellant. The appellant does not specify what information, if disclosed, could reasonably be expected to bring about the harms section 10(1) is meant to protect against. It does not explain what unique methods or processes are likely to be discovered in the event of disclosure. The appellant maintains that the records provide a comprehensive template to its unique approach, including solutions to challenges relating to construction, design, and contract variance. However, neither the appellant's representations nor the records themselves support this. The appellant has not explained how the information in the records might amount to informational assets, either individually or together.

[69] The appellant relies again on its argument that the records meet the definition of a trade secret, and demonstrate its acquired body of knowledge and skill in relation to the LRT project. I rejected this argument under part one, and also do not accept it as evidence of a reasonably expectation of harms under part three.

[70] The appellant cites a number of orders in support of its argument that the IPC has consistently held that the disclosure of third-party project or construction schedules would cause harm within the meaning of section 10(1)(a). The appellant and the city disagree with regard to the relevance of these orders.

[71] The appellant submits that project schedules at issue in Orders MO-2070 and MO- 2151 were found to be exempt under section 10(1). In my view, the circumstances in those orders are not analogous to those before me. In Order MO-4100, involving the same parties and similar records, the appellant also raised Orders MO-2070 and MO-2151 in support of its submissions under part three. I find Adjudicator Sami's comments in response to these submissions are relevant here:

> 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. In my view, having reviewed the appellant's representations and affidavit, that is not the case here.

[72] I agree with and adopt this reasoning. I note that project schedules were *among* the records found exempt in Orders MO-2070 and MO-2151, and that the adjudicators in these matters based their findings on a level of substance and detail that is not present in the records at issue.

[73] In Order MO-2070, Adjudicator Catherine Corban based her finding on the "considerable detail [she was provided] about the affected party's methods and techniques for both the implementation and the functioning of their product," which she found were "developed over a great deal of time and trial and error." In Order MO-2151, Adjudicator Frank Devries based his decision in part on the "unique information contained in small portions of [a] proposal," which in his view "disclose[d] a particular approach to the project taken by the affected party." The appellant argues that the records contain the level of detail, and the type of information that would reveal unique approaches it acquired through its own investment of time and effort. As noted above, I do not accept this on the basis of the evidence before me, nor am I convinced by the comparisons to Orders MO-2070 and MO-2151.[33]

[74] The appellant also relies on Order MO-3628, another order involving the city, the appellant and records relating to Phase One of the LRT project. In that order, Adjudicator Cathy Hamilton found that disclosure of the non-conformance reports and attachments at issue could reasonably be expected to bring about the harms contemplated in section 10(1)(a). I do not accept the appellant's submission that the harms at issue here are substantially similar to the ones refered to in Order MO-3628.

[75] The records at issue in Order MO-3628 contained detailed information regarding surveying techniques and specific mixes of concrete developed by the appellant, as well as methods for dealing with the water table. The reports described non-conformance events, their cause, the proposed treatment or action plan, and the subsequent response. The attachments were made up of technical reports and drawings, and photographs. Adjudicator Hamilton found that a competitor could incorporate this technical information into its own construction practices, which she found could be used to compete against the appellant in future LRT projects.

[76] I find Order MO-3628 distinguishable on the facts. The set of records before Adjudicator Hamilton reflected the appellant's unique approach to construction challenges, and included varying levels of technical detail and substance that she found could be valuable to competitors. Again, the records at issue in this appeal amount to a

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[33] In Order MO-4045, involving the city, the appellant, and similar LRT records, Adjudicator Jessica Kowalski distinguished these orders on the basis that the information at issue in each was contained in proposals submitted as part of procurement processes, while the records before her were created during the performance of a contract already awarded.

progress update, and in my view, do not contain this level of detail.

[77] I find that Order MO-4045 provides a more apt comparison. Among the records at issue in Order MO-4045 were five monthly status reports relating to Phase One of the LRT project, prepared for the appellant by the same independent certifier and provided to the city. The parties provided representations similar to the ones submitted in the present appeal. In that order, Adjudicator Jessica Kowalski found that the appellant had not made out the third part of the test in relation to any of the records at issue, including the monthly status reports:

> I have reviewed the portions of the records at issue and find that they are not as detailed or prone to exploitation by competitors as the appellant asserts. I accept the city's position and find that the records provide a snapshot of the project's progress over a six-month period and contain information that is more summary in nature, as opposed to detailed information about the particulars of the work undertaken to complete the project's constituent components…
>
> [t]he appellant has not provided me with sufficient basis on which to conclude that the information in the records at issue could be used or adopted by a competitor into its own construction practices. The appellant has not elaborated on what specific information in the records could reasonably be expected to help a competitor infer construction or testing processes, techniques or methodologies developed and acquired over the course of the project that it could later use, and those methodologies do not appear to be described with any detail in the records themselves.
>
> … The records itemize components of the project but do not contain the high level of detail the appellant submits, such as detailed information about design approaches for specific project components, or details regarding the appellant's methodology or detailed information regarding key activities.[34]

[78] I agree with Adjudicator Kowalski's approach and analysis and adopt it here. I find that the records before me also do not contain the level of detail that the appellant submits they do. The information at issue is a summary of project progress during a limited time frame. In my view, it does not reveal unique approaches, solutions to challenges, nor information that may be considered proprietary.

[79] For the reasons above, I find that part three of the test has not been met, and order the city to disclose the portions of the records at issue in this appeal.

[80] In light of my finding, it is not necessary to determine whether the public interest override at section 16 of the *Act* is applicable.

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[34] Order MO-4045 at paras 50, 54 and 55.

ORDER:

1. I order the city to disclose the records to the requester in accordance with its access decision by **January 30, 2022** but not before **January 23, 2022**.

2. In order to verify compliance with order provision 1, I reserve the right to require the city to provide me with a copy of its access decision as well as any records disclosed with it.

Original signed by: December 22, 2022

Hannah Wizman-Cartier
Adjudicator