Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4578

Appeal MA22-00346

County of Norfolk

October 11, 2024

Summary: An individual requested four insurance policies taken out by the County of Norfolk (the county). The county decided that the records were excluded from the scope of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) under the labour relations and employment exclusion in section 52(3) and, alternatively, exempt from disclosure under the third party information exemption in section 10(1), as well as the economic interests exemption in section 11(d). In this order, the adjudicator disagrees with the county and orders it to disclose the records to the individual.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 11(d) and 52(3).

Orders Considered: MO-2684, MO-3163, MO-3900, PO-2490, PO-3572, PO-3926 and PO-4188.

Cases Considered: *Doe v. Metropolitan Toronto (Municipality) Commissioners of Police.*

OVERVIEW:

[1] This order resolves the issues raised as a result of an appeal of an access decision made by the County of Norfolk (the county) under the *Freedom of Information and Protection of Privacy Act* (the *Act*). The access request was for all insurance policies carried by the county from 2019 to 2022 relating to liability claims.

[2] The county located four records that were responsive to the request and denied

access to them in full, claiming the discretionary exemptions in section 11(c), 11(d), (economic and other interests) and 11(g) (proposed plans, projects or policies of an institution) of the *Act*.

[3] The requester (now the appellant) appealed the county's decision to the Information and Privacy Commissioner of Ontario (the IPC).

[4] During the mediation of the appeal, the county issued a revised decision which stated that, in addition to section 11(c), 11(d), and 11(g), the records were also being withheld under the mandatory exemption in section 10(1)(a) and 10(1)(c) (third party information) of the *Act*. The county later added the labour relations and employment exclusion under section 52(3).

[5] The appeal then moved to the adjudication stage of the appeals process, and I decided to conduct an inquiry. I sought and received representations from the county, the appellant and the third party insurance company (the affected party).[1] Representations were shared among the parties.

[6] In its representations, the county clarified that it is claiming the exclusion in section 52(3), the mandatory exemption in section 10(1)(a), (b) and (c), and the discretionary exemption in section 11(d).

[7] For the reasons that follow, I find that the exclusion in section 52(3) does not apply to exclude the records from the scope of the *Act*. I also find that the exemptions in sections 10(1) and 11(d) do not apply to the records. I order the county to disclose the records in their entirety to the appellant.

RECORDS:

[8] There are 634 pages of records, consisting of Casualty Policies from 2019 to 2022.

ISSUES:

A. Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?

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

C. Does the discretionary exemption at section 11(d) for economic and other interests of the county apply to the records?

[1] The affected party submitted its representations to the county, who in turn provided them to the IPC.

DISCUSSION:

Preliminary Issue

[9] In the inquiry, the parties made representations about the relevance of section 51(1)[2] of the *Act* and the *Rules of Civil Procedure*. The parties are in litigation together. I find that it is clear from the wording of section 51(1) and prior orders[3] of the IPC that the access scheme in the *Act* does not limit a person's rights in the litigation process. Further, that an appellant may already have the records sought under the *Act* is not relevant to an appeal.

Issue A: Does the section 52(3) exclusion for records relating to labour relations or employment matters apply to the records?

[10] Section 52(3) of the *Act* excludes certain records held by an institution that relate to labour relations or employment matters. If the exclusion applies, the record is not subject to the access scheme in the *Act*, although the institution may choose to disclose it outside of the *Act*'s access scheme.[4] The purpose of this exclusion is to protect some confidential aspects of labour relations and employment-related matters.[5]

[11] Section 52(3) states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
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> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.

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[2] Section 51(1) states: "This Act does not impose any limitation on the information otherwise available by law to a party to litigation."

[3] See, for example Order MO-3900, in which Adjudicator Jessica Kowalski found that section 51(1) operates to ensure that the *Act* does not impose any limitations on information otherwise available to a litigant, and that questions of whether or not access to information should be granted under the *Act* are subject to specific exemptions and different considerations than questions of relevance in litigation. See also Orders MO-2684 and PO-2490 where the IPC found that that the Legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through the *Rules of Civil Procedure* in the discovery process in litigation, but it did not do so.

[4] Order PO-2639.

[5] *Ontario* (*Ministry of Community and Social Services*) *v. John Doe*, 2015 ONCA 107 (CanLII).

> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[12] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[13] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not stop applying at a later date.[6]

[14] The type of records excluded from the *Act* by section 52(3) are those relating to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue.[7]

[15] For the collection, preparation, maintenance or use of a record to be "in relation to" one of the three subjects mentioned in this section, there must be "some connection" between them.[8]

[16] The "some connection" standard must, however, involve a connection relevant to the scheme and purpose of the *Act*, understood in their proper context. For example, given that accountability for public expenditures is a core focus of freedom of information legislation, accounting documents that detail an institution's expenditures on legal and other services in collective bargaining negotiations do not have "some connection" to labour relations.[9]

[17] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[10]

Representations

The county's representations

[18] The county claims that section 52(3)1, 52(3)2 and 52(3)3 all apply to exclude the records from the scope of the *Act*.

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[6] *Ontario* (*Solicitor General*) *v. Ontario* (*Assistant Information and Privacy Commissioner*) (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 509.
[7] *Ontario* (*Ministry of Correctional Services*) *v. Goodis* (2008), 89 O.R. (3d) 457, [2008] O.J. No. 289 (Div. Ct.). The CanLII citation is "2008 CanLII 2603 (ON SCDC)."
[8] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).
[9] Order MO-3664, *Brockville* (*City*) *v. Information and Privacy Commissioner, Ontario*, 2020 ONSC 4413 (Div Ct.).
[10] Order PO-2157.

[19] With respect to section 52(3)1, the county submits that the insurance policies at issue set out limits for various claims against it related to the employment of a person, and that the appellant – a former county employee – is currently in active and ongoing litigation with the county related to their former employment with the county.

[20] The county submits that section 52(3)2 applies because any settlement negotiations in the litigation may be directly impacted by the information contained in the insurance policies, such as the insured limits.

[21] With respect to section 52(3)3, the county submits that the meetings, consultations, discussions and communications respecting the insurance policies in relation to employment-related litigation is a matter that it has a clear interest in as the former employer and the owner of the insurance policies.

The appellant's representations

[22] The appellant submits that none of the paragraphs in section 52(3) apply to exclude the records from the scope of the *Act*. First, the appellant submits that they and the county no longer have an employment relationship, and in any event the insurance policies do not relate to the "employment of a person," to "employment-related matters" or to "labour relations" matters. The appellant argues that the records do not deal with the terms of their employment contract or any negotiations related to it, nor to their dismissal from the county, stating the only connection to the former employment relationship are the potential coverages related to their claims as a former employee

[23] With respect to section 52(3)1 in particular, the appellant submits that the three-part test is not met. Insurance policies are obtained by municipalities for ongoing risk management purposes, wholly divorced from any single employment-related matter or dispute with an ongoing employee, or in the course of their dismissal or following termination of the employment relationship. These policies, the appellant argues, are obtained as a matter of course and not because of proceedings or anticipated proceedings regarding an employment related matter. The appellant further argues that the records were not collected, prepared, maintained or used in relation to proceedings or anticipated employment proceedings. They would have existed and continue to exist as a matter of standard municipal risk-management completely unconnected to any particular employment relationship, current or former.

[24] Regarding litigation in which an institution may be found vicariously liable for the actions of the employee, the appellant submits that the IPC has found this not to be an employment-related matter. The appellant then states:

> It stands to reason that an insurance policy responsive to negligence or other claims by a former employee cannot be considered a record relating to "employment of a person" related to proceedings or anticipated proceedings in a court.

[25] The appellant further submits that to argue that the records are excluded from the *Act* because they might be triggered by future litigation would stretch the meaning of "anticipated proceedings" beyond reason.

[26] Turning to section 52(3)2, the appellant submits that the three-part test is not met and it too does not apply to exclude the records from the scope of the *Act*. The appellant submits that their claim for wrongful dismissal against the county does not constitute employment related negotiations or anticipated negotiations. The appellant argues that the county has failed to establish a connection between the insurance policies and any specific, active or anticipated negotiation processes. The appellant further submits that the policies exist as a matter of standard municipal risk-management and that insurance coverage is irrelevant to the merits of a wrongful dismissal claim or to the negotiation of a settlement of such a claim.

[27] Concerning section 52(3)3, the appellant submits that the three-part test is not met and as a result this section does not apply to exclude the records from the scope of the *Act*. The county has not provided evidence that the insurance policies were collected, prepared, maintained or used in relation to employment-related meetings, consultations, discussions or communications about the county's own workforce in which it has an interest. The appellant argues that section 52(3)3 does not extend to any peripheral concern the county may have due to its general role as an employer, and that it has not established that the insurance policies were substantively involved in relevant discussions about employment related matters.

The county's reply representations

[28] In reply, the county submits that the appellant's argument that they are no longer an employee of the county is irrelevant to the issue of whether section 52(3) applies to exclude the records from the scope of the *Act*. The county goes on to argue that the IPC has found in past orders that records can be excluded from the scope of the *Act* under section 52(3) (and its provincial equivalent) even where the records are about a former employee,[11] and that if the exclusion applies at the time the records was collected, prepared, maintained or used, it does not cease to apply at a later date.[12]

[29] The county further submits that the appellant has filed a wrongful dismissal claim against it, and that past IPC orders have found that records relating to wrongful dismissal claims proceedings have been found to meet part three of the test in section 52(3)1.[13] The county argues that the appellant's statement that the records are connected to potential monetary coverages for her claims as a former employee is sufficient proof that part three of the test in section 52(3)1 is met.

[30] The county goes on to submit that the appellant has misarticulated the IPC's test

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[11] See for example, Orders MO-3883, PO-2212, PO-3144, PO-3648 and PO-4130.
[12] See note 3.
[13] See for example, Orders MO-1640 and MO-2589.

under part three of section 52(3)1 with respect to litigation in which an institution may be found vicariously liable for the actions of an employee. The county submits that the proceedings referred to in section 52(3)1 are related to employment or labour relations in which the institution has an interest as an employer, such as litigation relating to terms and conditions of employment, such as disciplinary action against an employee or grievance proceedings,[14] which is the case with the proceedings between the appellant and the county.

[31] With respect to section 52(3)3, the county submits that the records were the subject of several substantive and confidential meetings, consultations, discussions or communications internally and with the affected party. The county goes on to state:

> The [r]ecords were the subject of meetings, consultations, discussions or communications concerning whether to settle with the Appellant in relation to the Proceedings (including the wrongful dismissal and other claims), strategy discussions regarding the Proceedings, etc. These are subjects in which the County has an interest in its capacity as an employer.

[32] Lastly, the county submits that the no exceptions in section 52(4) apply to the exclusion.

[33] In sur-reply, the appellant argues that the insurance policies exist independent of the litigation. The fact that the county may have referred to them to determine whether it should settle with the appellant has nothing to do with the employment of any person, including the appellant. Further, they submit that there are no "employment-related" matters in the insurance policies.

Analysis and findings

[34] For the reasons that follow, I find that the exclusion in section 52(3) does not apply and, as a result, the records are not excluded from the scope of the *Act*.

[35] The *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution "in relation to" the conditions described in sections 52(3)1, 2 and/or 3, as follows:

- Proceedings or anticipated proceedings before a court relating to the employment of a person by the county (section 52(3)1),

- Negotiations or anticipated negotiations relating to the employment of a person by the county that took place or were to take place between the county and a person (section 52(3)2), and

[14] See note 4.

- Meetings, consultations, discussions or communications about employment-related matters in which the county has an interest (section 52(3)3).

[36] In Order PO-3572, Adjudicator Jenny Ryu summarized the IPC's interpretation of the employment or labour relation exclusion.[15] She noted that the phrases "relating to" and "in respect of" in the context of a different section of the *Act* have been interpreted by the Divisional Court as meaning "some connection."[16] She further noted that the IPC has applied this judicial interpretation to the analogous phrase ("in relation to") appearing in the employment or labour relations exclusion,[17] and concluded that for the collection, preparation, maintenance or use of a record to be "in relation to" the subjects referred to in the paragraphs listed in the exclusion, it must be reasonable to conclude that there is "some connection" between them.

[37] Adjudicator Ryu further noted that the IPC has consistently taken the position that the employment or labour relations exclusions (in both the provincial and municipal *Acts*) are record-specific and fact-specific,[18] stating:

> This means that in order to qualify for an exclusion, the record is examined *as a whole*. The question of whether the exclusion applies to a whole record, based on the inclusion in the record of an excluded portion, has been addressed in previous orders. In those orders, this office has applied the record-specific and fact-specific analysis to consider whether the record, *as a whole*, qualifies for the claimed exclusion.
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> [emphasis added]

[38] For example, in Order MO-3163, Adjudicator Catherine Corban found that a training video that was generic training material disseminated to police officers was not directed at the training of a particular officer, nor did it depict a particular officer's training. As a result, she found that the video was not "about employment-related matters" and that the employment or labour relations exclusion did not apply.

[39] In Order PO-3926, Adjudicator Justine Wai found that provincial equivalent of the employment or labour relations exclusion did not apply to an agreement between the institution and a third party for the provision of information technology related services. She found that the record itself did not have a sufficient connection to labour relations or employment-related matters.

[40] In Order PO-4188, Adjudicator Steven Faughnan found that reports presented to

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[15] Order PO-3572 deals with the provincial equivalent of section 52(3).
[16] *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.) (*Toronto Star*) in which the Divisional Court considered the exclusion at section 65(5.2) of the *Act*. Section 65(5.2) provides that the *Act* does not apply to a record "relating to" a prosecution if all proceedings "in respect of" the prosecution have not been completed.
[17] See Orders MO-2537, MO-2589 and MO-3088, which apply the interpretation in *Toronto Star*.
[18] For example, see Orders M-797, MO-3163, P-1575, PO-2531, PO-2632 and PO-3456-I.

the Board of Directors of the Deposit Insurance Corporation of Ontario by its CEO were not excluded from the scope of the provincial *Act* under its equivalent of the employment or labour relations exclusion because, while the records at issue addressed many matters involving the corporation's operations, employment-related matters comprised only a small part of these records.

[41] The orders referred to above demonstrate that the IPC has found that records, as a whole, are not excluded from the scope of the *Act* simply because some information in them was or may be used by an institution for an excluded employment or labour relations purpose as set out in section 52(3).[19] I agree with and adopt the approach taken in these orders to the records at issue in this appeal and find that the records are not, as a whole, excluded from the scope of the *Act*.

[42] The county's position is that the records are excluded in their entirety because they were used or will be used for the purposes set out in section 52(3). The records are four insurance policies taken out by the county, consisting of 634 pages covering a wide range of circumstances that are covered by the insurance policies. According to the county, the subject matter of the litigation between the county and the appellant is wrongful dismissal, which is a circumstance addressed in the insurance policies. However, the topic of wrongful dismissal litigation in the records represents a very small portion of the circumstances covered by the insurance policies. The policies do not relate specifically to wrongful dismissal litigation, nor the appellant in particular. They deal with many different types of liability that the county may face. In other words, only a small portion of the records relate to the purposes set out in section 52(3). As a result, I find that there is not "some connection" between the subject matter of section 52(3) and the records as a whole, and that they are not, therefore, excluded from the scope of the *Act* under section 52(3).

[43] Having found that the records are not excluded from the scope of the *Act*, I will go on to consider the exemptions claimed by the county to them.

Issue B: Does the mandatory exemption at section 10(1) for third party information apply to the records?

[44] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[20] where specific harms can reasonably be expected to result from its disclosure.[21]

[45] The county is claiming the application of sections 10(1)(a), (b) and (c) to the records in whole. These sections state:

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[19] This was Adjudicator Ryu's finding in Order PO-3572.
[20] *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.*).
[21] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> 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

[46] 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) and/or (c) of section 10(1) will occur.

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

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

> ***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.[22]
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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

[22] Order PO-2010.

> commercial or non-profit organizations, large or small.[23] The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.[24]
>
> ***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.[25]

[48] The county submits that the records contain commercial, technical and financial information including the full policy terms, conditions, limits and underwriter technical details. The affected party submits that the records contain unique and strategic technical and commercial information created by it.

[49] The appellant submits that section 10(1) does not apply to the records. With respect to the first part of the three-part test, the appellant's position is that the records do not contain technical, financial or commercial information. With respect to commercial information in particular, the appellant submits that insurance policies themselves do not represent information that relates to buying, selling or the exchange of merchandise or services.

[50] Based on my review of the parties' representations and the records themselves, I find that they detail the amount of insurance coverage that the county has obtained, which qualifies as financial information within the meaning of the *Act*. I further find that they qualify as commercial information because they are the agreements the county has entered into with the insurance company for the provision of insurance coverage. As a result, I find that part 1 of the three-part test is met. Because the test is met on this basis, it is not necessary for me to determine whether the records also contain technical information.[26] I will now go on to determine if part 2 of the three-part test is met.

Part 2: supplied in confidence

[51] 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.[27]

[52] 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.[28]

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[23] Order PO-2010.
[24] Order P-1621.
[25] Order PO-2010.
[26] I note that it is clear on my review of the records that they do not contain technical information.
[27] Order MO-1706.
[28] Orders PO-2020 and PO-2043.

[53] The contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[29]

[54] There are two exceptions to this general rule:

1. **the "inferred disclosure" exception**. This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non- negotiated confidential information supplied to the institution by a third party.[30]

2. **the "immutability" exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.[31]

[55] The county submits that the records were supplied in confidence to it by the affected party. The county goes on to argue that the information in the records was supplied to it and its legal counsel by the affected party in the course of the wrongful dismissal claim brought by the appellant against the county.

[56] The affected party submits that records were supplied to the county in confidence. The affected party further submits that the terms and conditions in the records explicitly state that the information contained in them is confidential, and that only certain individuals at the county would have access to these records. The affected party goes on to argue that it is well understood in the insurance industry that all policy wordings are not to be disseminated widely, due to the strategic technical and commercial information contained in the policies.

[57] The appellant submits that the policies are not supplied, but were negotiated contracts, even where the contract was preceded by little or no negotiation. The appellant also argues that if the records were supplied, they were not done so in confidence. General insurance coverage insuring municipal operations is publicly known information as part of the annual budget process, as well as prospective insurers' own publicly available information. While the precise wording and coverage is not generally published, the county itself has published a great deal of information about its program of insurance on the public record.

[58] In reply, the county submits that while certain general insurance coverage is

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[29] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[30] Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.
[31] *Miller Transit*, cited above at para. 34.

publicly available, the contents of the various policies is not.

[59] I find that the second part of the three-part test is not met because the records were not "supplied" to the county by the affected party within the meaning of the language in section 10(1). As a result, I find that the exemption in section 10(1) does not apply to the records and they are not exempt from disclosure.

[60] As previously stated, the contents of a contract between an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties.[32]

[61] The general position of the county and the affected party is that the information in the records was supplied in confidence to the county by the affected party. The appellant's position is that the policies are negotiated contracts, even where they were preceded by little or no negotiation. Neither the county nor the affected party's representations address whether or not the insurance policies qualify as contracts entered into between them. In addition, the county and the affected party have not referred me to where in the records there may be information that would fall within the exceptions to the general rule that contracts are not considered to be supplied, namely the inferred disclosure and immutability exceptions. Instead, both the county and the affected party have taken an overly broad approach to the application of section 10(1), stating that all of the information in the records was supplied for the purposes of part two of the three-part test.

[62] The records are four insurance policies that are the final result of the county paying premiums to the affected party – the insurance company – to provide insurance coverage to the county for a wide range of circumstances as further specified in those records. I find that these records are contracts, that is, the final product of any negotiations that took place between the county and the affected party to come to mutually agreed upon insurance terms.

[63] Section 42 of the *Act* requires that where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution. I find that the county (and the affected party) have not provided sufficient evidence to support a finding that the records qualify as having been "supplied in confidence" to the county by the affected party, nor is it evident on my review of the records which information could fall with inferred disclosure and immutability exceptions.

[64] I also disagree with the argument advanced by the county that part-two of the

[32] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

test applies because the insurance policies were provided to it and its legal counsel in the course of the wrongful dismissal claim brought by the appellant against the county. I find that the county already had these mutually agreed upon insurance policies in place, and that the county's provision of a copy of the policies to its legal counsel does not qualify as having been "supplied" by the affected party to the county or by extension to its legal counsel for the purposes of part two of the test.

[65] For these reasons, I find that the records were not "supplied" by the affected party to the county, that part two of the three-part test is not met. Having found that part two of the test is not met, it is not necessary for me to consider part three of the test. As a result, the records are not exempt from disclosure under section 10(1).

Issue C: Does the discretionary exemption at section 11(d) for economic and other interests of the county apply to the records?

[66] The county claims that section 11(d) applies to the records. The purpose of section 11 is to protect certain economic and other interests of institutions. It also recognizes that an institution's own commercially valuable information should be protected to the same extent as that of non-governmental organizations.[33]

[67] Section 11(d) states:

> A head may refuse to disclose a record that contains,
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[68] An institution resisting disclosure of a record on the basis of sections 11(d) cannot simply assert that the harms mentioned in those sections are obvious based on the record. It must provide detailed evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, the institution should not assume that the harms are self-evident and can be proven simply by repeating the description of harms in the *Act.*[34]

[69] The institution must show that the risk of harm is real and not just a possibility.[35] However, it does 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.[36]

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[33] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[34] Orders MO-2363 and PO-2435.
[35] *Merck Frosst Canada Ltd.* v. *Canada* (*Health*), [2012] 1 S.C.R. 23.
[36] *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.

[70] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[37]

Representations

[71] The county submits that section 11(d) applies to the records in whole or part[38] because the "exact insurance provisions and limits" is information that could be used to "significantly negate" the county's negotiating ability in settling any insurance claims, and could reasonably be expected to increase litigation settlement amounts. The county also argues that there is significant risk to its financial interests, as it is in the midst of an RFP for insurance coverage for the current year.

[72] The appellant submits that the county has failed to provide detailed evidence how the disclosure of the records could reasonably be expected to impact or injure its financial interests, and that the county's argument is inaccurate and irrelevant because settlement negotiations between plaintiffs and the county, as defendant, are not dictated or impacted by insurance policy limits for financed defendants. The appellant further submits that the access request in no way impacted, nor would it have, the county's ability to obtain insurance coverage, noting that the RFP the county has referred to in its representations has concluded with the county awarding a three-year insurance contract to a third-party insurance company during the inquiry of this appeal.[39]

Analysis and findings

[73] For the reasons that follow, I find that the records are not exempt from disclosure under section 11(d). The county's position is that the records are exempt for two reasons. First, because their disclosure could be expected to impair the county's negotiating ability in settling any insurance claims, which could then reasonably be expected to increase litigation settlement amounts and, second, that there is significant risk to its financial interests, as it is in the midst of an RFP for insurance coverage for the current year.

[74] I disagree with both arguments. First, I find that the county has broadly applied the exemption to all of the records. Although in its reply representations the county references the records being exempt in whole or in part under section 11(d), it provides no information or evidence as to which specific portions of the records are exempt. Instead, it has taken the approach that over 600 pages of records are exempt on the basis that their disclosure could reasonably be expected to impair the county's negotiating

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[37] Orders MO-2363 and PO-2758.
[38] The county's reference to the records being exempt under section 11(d) "in part" was not raised in its first representations, but rather in its reply representations.
[39] The appellant provided copies of a Council-In-Committee Meeting backgrounder and minutes, dated November 15, 2023, both publicly available, the subject of which is the 2024 Insurance Program Renewal. These minutes pre-date the county's reply representations and the appellant's sur-reply representations.

ability in settling insurance claims, thus increasing settlement amounts with potential claimants. I find that the county has not provided the required detailed evidence how the disclosure of all of the records could reasonably be expected to impact or injure its financial interests, simply because a potential litigant may be aware of its insurance coverage for specific liability issues. I find this argument to be speculative. In addition, following my careful review of the insurance policies themselves, I find that the type of harm described by the county is not evident on the face of the records themselves. While I find the records describe the monetary limits on insurance coverage and set out the conditions under which coverage will not be provided, I am unable to discern how disclosure of this information could reasonably be expected to be injurious to the county's financial interests.

[75] Second, regarding the RFP for insurance coverage, I find that this argument is not relevant because the appellant has provided evidence that the county's council carried a resolution to execute an insurance coverage contract for a three-year period, with an option in favour of the county to extend the agreement for two additional one year terms. This information is publicly available.[40] Furthermore, the fact that disclosure of contractual arrangements such as the insurance polices may subject insurance companies doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[41]

[76] As a result, I find that the exemption in section 11(d) does not apply and the records are not exempt from disclosure.

ORDER:

1. I do not uphold the county's access decision. I find that the records are not excluded from the scope of the *Act* under section 52(3), nor are they exempt from disclosure under sections 10(1) and 11(d).

2. I order the county to disclose the records, in whole to the appellant by **[November 20, 2024**] but not before [**November 15, 2024**].

3. I reserve the right to require the county to provide a copy to the IPC of the records it discloses to the appeal.

Original Signed by: October 11, 2024
Cathy Hamilton
Adjudicator

[40] *Ibid.*
[41] Orders MO-2363 and PO-2758.