Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4427

Appeal MA22-00183

City of Stratford

August 23, 2023

Summary: The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of Stratford (the city) for information related to the proposed development of a glass manufacturing facility in the city. The city identified two letters of intent as responsive to the request and refused access to them under sections 10(1) (third party information) and 11 (economic and other interests). The requester appealed the decision to this office. In this order, the adjudicator finds that the letters of intent are not exempt from disclosure under the *Act* and orders them disclosed.

Statutes Considered: Municipal Freedom of Information and Protection of Privacy Act, ss. 10(1) and 11.

Orders and Investigation Reports Considered: Orders PO-4371, PO-2632, and M-654.

OVERVIEW:

[1] The City of Stratford (the city) received an access request pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information related to the proposed development of a glass manufacturing facility in the city. The city sought clarification regarding the request and the appellant revised his request to the following:

1. November 20, 2018 non-binding Letter of Intent, entered into by the City of Stratford and [named company];

2. Binding Letter of Intent, subsequently entered into by the City of Stratford and [named company];

3. Final reports and studies related to MZO request;

4. Correspondence between the Mayor and [named company];

5. Non-Disclosure agreements related to [named company].

[2] The city issued a decision denying access to the records pursuant to sections 11(a) and (e) of the *Act* (economic and other interests).

[3] The appellant appealed the city's decision to the Office of the Information and Privacy Commissioner of Ontario (IPC). During mediation, the records at issue were confirmed to be the two letters of intent described above. The city confirmed its decision to withhold the records in full.

[4] No further mediation was possible and the appeal was transferred to the adjudication stage. The adjudicator previously assigned to the appeal decided to conduct an inquiry. Given the nature of the information at issue, she added the section 10(1) exemption (third party information) to the scope of the appeal.

[5] The adjudicator sought and received representations from the city, the named company (the affected party) and the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.

[6] I was then assigned to the appeal. I reviewed the parties' representations and determined that I did not need further representations from the parties.

[7] For the reasons that follow, I find that the records at issue are not exempt from disclosure under the *Act* and order them disclosed.

RECORDS:

[8] The records at issue are two letters of intent (9 pages).

ISSUES:

Issue A: Does the mandatory exemption at section 10(1) for third party information apply to the letters of intent?

Issue B: Does the discretionary exemption at sections 11(a) and (e) for economic and other interests of the institution apply to the letters of intent?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) for third party information apply to the letters of intent?

[9] The city and affected party claim the application of sections 10(1)(a) and (c) to the withheld portions of the letters of intent.

[10] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[1] where specific harms can reasonably be expected to result from its disclosure.[2]

[11] Section 10(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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

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

Part 1: Type of information

[13] As noted above, to satisfy part one of the section 10(1) test, the city or the affected party must show that the records contain information that is a trade secret or scientific,

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[1] *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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

technical, commercial, financial or labour relations information.

Representations, analysis and finding

[14] The city submits that the records reveal detailed financial information about the affected party, as well as information about the commitments of the affected party in relation to the proposed development and city generally. The affected party submits that they provided confidential technical, financial, and commercial information to the city as part of the process leading to the letters of intent and that this information is contained in the records at issue. The appellant does not dispute that the records contain the type of information as required by part one of the section 10(1) test.

[15] Based on my review of the parties' representations and the letters of intent, I am satisfied that they contain commercial and financial information for the purpose of section 10(1). The letters of intent set out the obligations of both parties as they relate to the facility's development. The non-binding letter of intent sets out the affected party's commercial and financial commitments to the city regarding the development of the facility, and the city's commitments to assisting the affected party with the development. The binding letter of intent discusses similar issues, with more details and clarity regarding what is expected of each party.

[16] Given that I have found that the records contain commercial and financial information, I do not need to determine if they contain technical information. I find that part one of the section 10(1) test has been met.

Part 2: supplied in confidence

[17] Part two of the three-part test itself has two parts: the affected party must have "supplied" the information to the city, and must have done so "in confidence", either implicitly or explicitly. Where information was not supplied to the city by the affected party, section 10(1) does not apply, and there is no need for me to decide whether the "in confidence" element of part two of the test is met.

[18] 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.[3]

[19] 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.[4]

[20] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" for the purpose of section 10(1). Past IPC orders have, in general, treated the provisions of a contract as mutually generated, rather than "supplied" by the third party,

[3] Order PO-2010.
[4] Orders PO-2020 and PO-2043.

even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[5]

[21] There are two exceptions to this general rule, which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information that the affected party supplied to the institution. The "immutability" exception applies to information that is immutable or is not susceptible to change.[6]

Representations

The city's representations

[22] The city submits that the information in the letters of intent was supplied to them, but they did not provide further details on this in their initial representations. They submit that portions of the information they used to draft the letters was supplied to them by the affected party with a reasonable expectation of confidentiality. The city submits that the information they put into the letters was also confidential. The city states that for both the binding and non-binding letters, the information contained in the letters was supplied during negotiations about a proposed development in the city and the expectation of confidentiality was explicit, with the information communicated to the city on the basis that it would be kept confidential.

The affected party's representations

[23] The affected party submits that the information in both letters was supplied to the city with a reasonable expectation of confidentiality, but did not provide further details.

The appellant's representations

[24] The appellant referred to IPC Order PO-4371, an appeal involving himself and the same affected party, with the Ministry of Economic Development, Job Creation and Trade (the ministry) as the respondent instead of the city. He explains that in that appeal the adjudicator found that information which formed part of the agreement between the affected party and the ministry was not supplied for the purposes of part two of the test as the information was mutually generated. He submits that this appeal is analogous and I should make the same finding that the information has not been supplied.

The city's reply representations

[25] The appellant's representations were provided to the city and affected party for a

[5] [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed. Doc. M32858 (C.A.) (*Boeing Co.*).
[6] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*.

response. In reply, the city submits that the purpose of section 10(1) is to protect the informational assets of third parties. They also outline the inferred disclosure and immutability exceptions discussed above. They conclude by stating that they continue to rely on their previous representations.

The affected party's reply representations

[26] The affected party responded to the appellant's representations by stating that in PO-4371 the record at issue was an initial Investment Framework Agreement (IFA). They submit that this type of document covers initial thinking or conceptual ideas regarding business development, with a view to facilitating discussion and negotiation between interested parties. They state that the content of this type of document can change as new or revised ideas emerge through discussion and negotiation, and that disclosure of such information is of less concern to the involved parties.

[27] They submit that, in contrast, letters of intent, whether binding or non-binding, contain specific details such as specific capital investment, site location, type of glass manufacturing facility, utility services capacity, scheduled commencement production, and the specific number of employees involved. They state that these specific details are developed with the affected party's expertise, and are not negotiable.

The appellant's sur-reply representations

[28] The appellant was provided with the city and affected party's reply representations for a response. In sur-reply, the appellant submitted that the letters off intent are negotiated contracts, and therefore cannot be withheld by the city. He states that whether information in the letters was originally supplied to the city is not relevant to the analysis and he only seeks access to the letters, not previously supplied information that is not in the letters.

Analysis and finding

[29] I have carefully reviewed the records at issue and the parties' representations, and I find that the information in the record was not supplied to the city. As outlined above, the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1), with such contracts generally being seen as mutually generated, rather than supplied.

[30] The records at issue are two letters of intent from the city to the affected party, and they are both signed by representatives of the two parties. While a letter of intent, whether binding or non-binding, does not necessarily represent a final contract, the issue before me is if the information in the records was supplied for the purpose of section 10(1), or if it was mutually generated. The non-binding letter of intent contains general commitments from the city to the affected party regarding the affected party's facility. This is offered in response to the affected party's commitments to the city regarding the facility. Similarly, the binding letting of intent outlines conditions that the affected party agreed to with more specificity and clarifies the city's commitments to the affected party.

[31] In both letters, it is clear that there was some form of negotiation between the affected party and the city, with the letters and the details within reflecting the outcome of those negotiations. Even if there were not significant negotiations leading to the letters, as discussed above, previous IPC orders have found that contractual provisions are treated as mutually generated, even where the contract is preceded by little or no negotiation. [7] As such, I find that the information in the letters was mutually generated, rather than supplied for the purpose of section 10(1).

[32] The city briefly raised the inferred disclosure and immutability exceptions, but did not provide detailed representations on how the letters fit within the exceptions. In distinguishing the present appeal from PO-4371, the affected party explained that the letters of intent contained specific information about the nature of the agreement with the city, compared with the less-concrete details in the IFA in PO-4371. They also state that the letters contain technical details that were not negotiated with the city, raising the inferred disclosure and immutability exceptions.

[33] I agree with the affected party's position that technical details about the facility would potentially mean the information in the records was supplied for the purpose section 10(1). However, I have reviewed the records in detail and neither letter of intent contains technical information of this kind. Additionally, none of the information in either letter would permit someone to make accurate inferences about underlying non-negotiated confidential information that was supplied by the affected party. Therefore, I am unable to find that either the inferred disclosure or immutability exceptions apply to the records.

[34] Based on the above, I find that the information in the records was not supplied to the city within the meaning of section 10(1) of the *Act*. As such, I do not need to consider if the information was provided to the city with a reasonable expectation of confidentiality. As all three parts of the test must be met in order for section 10(1) to apply to the record and I have found that part two of the test is not made out, I find that section 10(1) does not apply to the records at issue.

Issue B: Does the discretionary exemption at sections 11(a) and (e) for economic and other interests of the institution apply to the letters of intent?

[35] Since I have found that the records at issue are not exempt from disclosure under section 10(1), I must consider if they are exempt under sections 11(a) and (e). 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.[8]

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[7] 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*).

[8] *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.

[36] Sections 11(a) and (e) of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> …
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

Section 11(a): information with monetary value that belongs to government

[37] The purpose of this section is to permit an institution to refuse to disclose information where its disclosure would deprive the institution of its monetary value.[9]

[38] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information,
2. belongs to an institution, and
3. has monetary value or potential monetary value.

Representations, analysis, and finding

[39] Neither the affected party nor the appellant provided representations on the application of section 11(a). The city submits that the non-binding letter of intent contains its detailed financial information, its obligations and, its allocation of financial expenditures. With respect to the binding letter of intent, the city submits that it contains financial information about the city and the affected party, along with information about the terms and conditions of future agreements related to the development of the facility.

[40] The city submits that the information has continuously been treated as having monetary value. They state that information related to the particular area the city intends to develop has monetary value, and that the information must be kept confidential to avoid misuse of the information by the development community. They submit both letters contain detailed financial information regarding the city's investment in a specified area, and that it is reasonable to find that this information belongs to the city. They state that the law recognizes a substantial interest in the city protecting the information from the general public. While the city submits that the information in each of the letters has

[9] Orders M-654 and PO-2226.

monetary value, they did not specify what that monetary value was.

[41] Considering the city's representations and the records at issue, I find that the records at issue are not exempt under section 11(a). As I found with part one of the section 10(1) test, I accept the city's submission that the records contain financial or commercial information. However, I am not persuaded by the city's submissions that the information in the records belongs to the city in the manner contemplated by section 11(a).

[42] The type of information "belonging" to an institution is information that has monetary value to the institution because it has spent money, skill or effort to develop it. Some examples are trade secrets, business-to-business mailing lists, customer or supplier lists, price lists, or other types of confidential business information. [10]

[43] In Order PO-2632, the adjudicator found that information produced through negotiations and included in mutually-generated agreements does not belong to an institution for the purposes of section 18(1)(a) (the provincial equivalent of section 11(a)). I make the same finding here. Considering the terms set out in the letters of intent, it is not evident to me that this information would belong to the city. In particular, I find the terms relating to the amount to be invested by the affected party or the positive economic impact of the facility would not be information that belongs to the city for the purpose of section 11(a).

[44] Even if I were to find that the information belonged to the city, the city has provided little evidence of the monetary value of the information. In Order M-654, it was found that "monetary value" requires that the information itself have an intrinsic value.

[45] The city has provided little evidence regarding what information in the letters would have an intrinsic value. Although information such as the location of the facility would possibly be valuable to property developers, the city has not explained how the disclosure of this information result in a financial loss for the city. Based on my review of the city's representations and the letters, I am unable to conclude that the information in the letters has any intrinsic monetary value to the city and I find that the letters are not exempt from disclosure under section 11(a).

Section 11(e): positions etc. to be applied to an institution's negotiations

[46] Section 11(e) is designed to protect an institution's position in negotiations. For it to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

[10] Order P-636.

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution.[11]

Representations, analysis, and finding

[47] Neither the affected party nor appellant provided representations on the application of section 11(e).

[48] The city submits that both letters contain positions, plans, procedures, criteria or instructions to be applied to negotiations carried on and to be carried on by the city. They state that the non-binding letter of intent sets out the obligations that were conditional upon approval of the proposed development, and the binding letter of intent details commitments from the city with respect to its investment in services and the development of the affected party's facility. They state that disclosure of the information would reveal the position the city took during negotiations with the affected party and confidential information related to service investments. They submit that disclosure of this information could reasonably be expected to prejudice the city's economic interests or competitive position.

[49] I do not agree that the city has established that section 11(e) applies to the two records at issue. Previous orders have defined "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme."[12] All of the terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action with an organized structure or definition.[13] The information must relate to a strategy or approach to negotiations.

[50] In the circumstances of this appeal, it is clear that any negotiations that lead to the letters of intent being formulated and signed have concluded, with the letters of intent reflecting those negotiations. Although it is possible that there will be further negotiations following the letters being signed, I find that neither letter can be characterized as a pre-determined course of action or way of proceeding. Additionally, based on my review of the records and representations, there is insufficient evidence that disclosure of the letters of intent would disclose the city's bargaining strategy, or the instructions given to individuals who negotiated with the affected party. Accordingly, I find that the first two parts of the section 11(e) test have not been met.

[51] Furthermore, I am not satisfied that, even if the letters of intent were to reveal a pre-determined course of action, their disclosure would have an adverse effect on other similar negotiations. It is clear that the affected party, being a signatory to the letters of intent, is aware of any position that the letters' disclosure would reveal. Any future

[11] Order PO-2064.
[12] Orders P-348 and PO-2536.
[13] Orders PO-2034 and PO-2598.

agreements and preceding negotiations would involve different parties, along with different considerations and circumstances from those existing during the negotiations leading to the letters of intent. As such, I find that the letters of intent do not contain any information relating to the conduct of current or future negotiations, and that any possibility of harm to the city's negotiation position following disclosure is speculative. For this reason, I find that the city has not satisfied part 3 of the section 11(e) test.

[52] Having found that parts 1, 2, and 3 of the section 11(e) test have not been met, I find that the section 11(e) test does not apply to the records at issue and they are not exempt from disclosure under the *Act*.

[53] Since neither sections 10(1) or 11 of the *Act* apply to the records at issue, they are not exempt from disclosure and I will order the city to disclose them to the appellant.

ORDER:

1. I allow the appeal.
2. I order the city to disclose to the appellant the records at issue by September 28, 2023, but not before September 22, 2023.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the appellant.

August 23, 2023

Chris Anzenberger
Adjudicator