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Title: **Access to Information Laws – What are the Implications for Procurement?**

by

Presenter: **Priscilla Platt**

Presenter's Title: Counsel

Presenter's Office Heenan Blaikie LLP

PROCUREMENT AND ONTARIO'S ACCESS AND PRIVACY LEGISLATION

By: Priscilla Platt and Adam Kardash,[1]
Heenan Blaikie LLP

A. Introduction

[1] Under Ontario's *Freedom of Information and Protection of Privacy Act* (FIPPA) and its municipal counterpart, the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA), the interpretation of the mandatory exemption for third party information held by institutions under the legislation has impacted on the procurement process.

[2] The "third party commercially valuable information" exemption limits disclosure of the "informational assets" or the confidential information of third parties that provide information to institutions.[2] In the course of discharging their responsibilities to the public, institutions may obtain information about the activities of businesses or third parties in different contexts, including in partnering for the provision of services. Some of this information constitutes a valuable asset of the third parties, the disclosure of which could impair a firm's ability to compete effectively in the marketplace.[3] As a result, confidential third party information that "could be exploited by a competitor in the marketplace" may be protected from disclosure under this exemption.[4]

[3] The third party exemption protects the information of third parties rather than information of the institution.[5] It is a mandatory exemption - if the exemption applies to a record (or portion thereof), the head must refuse disclosure of the applicable information. If the head of an institution wishes to disclose a record that contains information to which the third party exemption *might* apply, it must, prior to disclosure, provide notice and an opportunity for the third party to make representations to the

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[1] This is an excerpt from a Chapter in Heenan Blaikie's electronic text on Ontario's access and privacy legislation available by annual subscription at www.accessprivacy.ca.

[2] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.) motion for leave to appeal dismissed, Doc. M32858 (C.A.). See also Order MO-2070 (July 24, 2006).

[3] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* 1980, vol. 2 (Toronto: Queen's Printer, 1980) ["Williams Commission Report"].

[4] Order PO-2557 (March 21, 2007).

[5] Order PO-2382 (April 14, 2005). In Order MO-2186 (April 24, 2007), the IPC noted that this exemption is not applicable to public bodies, but only to private sector businesses. As a result, a bid from a municipality to a ministry in response to an RFP is not covered by this exemption.

institution as to why information qualifies for the exemption.[6] Third party consent removes any impediment to disclosure.[7] A third party has a right to choose not to make such representations; however, the failure to make representations is not the equivalent of consent to disclosure.[8] This chapter explains how each aspect of the exemption for commercially valuable information has been interpreted in parts "A" and "B" and then, in part "C" provides key contexts in relation to tenders and contracts for the application of the exemption. Part "D" explains how the exemption for tax related information in subsection 17(2) of FIPPA has been interpreted.

[4] The exemption under FIPPA is as follows:[9]

> *17 (1) 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, where the disclosure could reasonably be expected to,*
>
> *(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;*
>
> *(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;*
>
> *(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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[6] Section 28 of FIPPA and section 21 of MFIPPA.

[7] Subsection 17(3) of FIPPA and subsection 10 (2) of MFIPPA.

[8] Order PO-1802 (July 10, 2000).

[9] Although yet to be proclaimed into force, Bill 152, the *Ministry of Government Services Consumer Protection and Service Modernization Act, 2006*, s. 16(11), would amend the *Liquor Licence Act* to provide that, despite section 17 of FIPPA and section 10 of MFIPPA, the head must disclose information required by the Registrar of Alcohol and Gaming in relation to an inquiry or investigation of an applicant for a liquor licence (*Liquor Licence Act*, R.S.O. 1990, c. L.19, s. 6.1(6)).

> *(2)A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.*
>
> *(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.*

[5] The exemption under MFIPPA is as follows:

> *10(1) 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, where the disclosure could reasonably be expected to,*
>
> *(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;*
>
> *(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;*
>
> *(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.*
>
> *(2)A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.*

1. Direction for Interpretation of this Exemption

[6] On May 29, 2007, the IPC issued its 2006 Annual Report. Among other things, the Report emphasized the need for a transparent purchasing system. The News Release accompanying the Report stated that institutions are urged to "post the winning bid for every contract awarded by a provincial government organization to a website, accessible to the public. Further, to ensure that the entire process is transparent, the unsuccessful bids should be posted alongside the successful bid." The

Report itself refers the reader to British Columbia and New York State websites for examples of public procurement processes and recommends that all bids be disclosed "for public comparison".[10]

[7] Last year, the IPC's 2005 Annual Report highlights the interpretation of this exemption as a key recommendation to institutions governed by the legislation. The Report states the following:

> *[a]ny government office planning on hiring a consultant, contractor, etc., should make it clear to that future agent that the default position is that the financial and all other pertinent information related to the contract will be made available to the public, except in rare cases where there are very unusual reasons not to do so.*
>
> *The need for public accountability in the expenditure of public funds is a very important reason why information about such contracts needs to be kept in the public view. All government organizations should make this clear—up front—when seeking outside help. [at 24]*

[8] Following the release of the Annual Report, in Order PO-2485, the IPC reiterated this point as follows:

> *...while the [exemption] seeks to protect the informational assets of businesses, the details of contracts between the government and those who partner with it in providing public services will usually be available for public scrutiny. Only in rare cases, where a third party or an institution denying disclosure can provide 'detailed and convincing' evidence to support the harms outlined in subsection [1 of the exemption], will disclosure not be ordered.*[11]

[9] Section 17 of FIPPA and section 10 of MFIPPA contain substantially the same language therefore, virtually the same information qualifies for the exemption under both Acts.[12]

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[10] At page 21.

[11] Order PO-2485 (July 19, 2006).

[12] However, Subsection 17(2) of FIPPA provides an exemption for information obtained on a tax return or gathered for the purpose of collecting a tax. This provision addresses unique circumstances that arise in respect of certain FIPPA institutions; there is no MFIPPA equivalent.

B. The Test for the Exemption

[10] The third party exemption contains a number of elements and each one must be satisfied in order for information to be exempt from disclosure pursuant to an access to information request.

[11] Specifically, in order to qualify for this exemption the information must be:

1. of a special kind, namely a trade secret or scientific, technical, commercial, financial or labour relations information;
2. supplied by an entity to the institution;
3. in confidence, by virtue of the explicit or implicit way it was supplied; and
4. the disclosure "could reasonably be expected to" cause the harm described in subsections (a) to (d).

1. Is the information of a special kind?

[12] The record must reveal information that is a trade secret, or is scientific, technical, commercial, financial in nature, or is labour relations information. The IPC has stated that where the record simply refers to another record that reveals such information it will not qualify for exemption,[13] and where the record contains some information that does not qualify as one of the types listed, this information can be severed from the exempt information and disclosed.[14]

a) Trade secret information

[13] The IPC has indicated this trade secret information includes, but is not limited to, a formula, pattern, compilation, programme, method, technique or process or information contained or embodied in a product, device or mechanism which:

1. is, or may be, used in a trade or business,
2. is not generally known in that trade or business,
3. has economic value from not being generally known, and
4. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[15]

[14] In PO-2557, the IPC held that standard water monitoring and testing methods were not "trade secrets".

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[13] Order PO-2436 (December 19, 2005).
[14] Pursuant to Subsection 10(1) of FIPPA and subsection 4(1) of MFIPPA.
[15] Order M-29 (July 30, 1992).

[15] Examples of information determined by the IPC to be trade secret information include:

- research revealing details of the composition of a vaccine and construction of a bait;[16]
- information relating to the hardware and software required for a new voting system that had been developed by a third party, as well as some of the information relating to the set up and implementation procedures of the system;[17]
- a drive clean testing system;[18] and
- an insurance rating algorithm.[19]

b) Scientific information

[16] The IPC has held that "scientific information" is information belonging to an organized field of knowledge in the natural, biological or social sciences or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of specific hypotheses or conclusions and be undertaken by an expert in the field.[20]

[17] Examples of information determined by the IPC to be scientific information include:

- records contained in correspondence with the Drug Programs Branch relating to the reimbursement of a drug under the Special Drugs Program, as they contained information describing the chemical make-up of the drug;[21]
- information resulting from the compilation and analysis of raw data;[22] and
- records regarding the testing of certain substances to disinfect drinking water.[23]

c) Technical information

[18] The IPC has held that "technical information" is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. The IPC has stated that this includes, but is not limited to, information in a precise fashion

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[16] Order PO-2305 (August 11, 2004).
[17] Order MO-2070 (July 24, 2006).
[18] Order PO-1753 (February 9, 2000).
[19] Orders P-463 (May 26, 1993) and P-1526 (February 3, 1998).
[20] Orders P-463 (May 26, 1993), PO-2020 (June 5, 2002) and PO-2399 (June 9, 2005).
[21] Order PO-2528 (November 22, 2006).
[22] Order M-1108 (June 3, 1998).
[23] Order PO-2557 (March 21, 2007).

prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[24]

[19] Examples of information determined by the IPC to be technical information include:

- an electrical layout drawing;[25]
- the observations of a professional geologist such as a description of rock type;[26]
- monitoring and testing procedures and test results;[27]
- detailed information about the programming of software and hardware required for the functioning of election equipment required for a new voting system, and descriptions of the method and process required to install that equipment;[28]
- copy of a site plan for a specific property which consists of drawings prepared by a licensed surveyor and relate to construction proposed to be undertaken on a building;[29]
- technical specifications for the construction of a building;[30]
- Software Licensing and Maintenance Agreements;[31]
- structural plans containing details of a construction design of structures and including information such as load conditions;[32] and
- records of the testing of methods and measurements to disinfect drinking water.[33]

d) Commercial information

[20] The IPC has limited its interpretation of "commercial information" to information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making and non-profit organizations and has equal application to both large and small enterprises.[34] Notably, the IPC has indicated that the fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information,[35]

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[24] Orders P-454 (May 7, 1993), PO-2010 (June 5, 2002) and PO-2478 (June 20, 2006).
[25] Order PO-2427 (November 9, 2005).
[26] Order PO-2399 (June 9, 2005).
[27] Order MO-2004 (December 9, 2005).
[28] Order MO-2070 (July 24, 2006).
[29] Order MO-2081 (August 23, 2006).
[30] Order MO-2115 (November 7, 2006).
[31] Order MO-2121 (November 16, 2006).
[32] Order MO-1957 (August 30, 2005).
[33] Order PO-2557 (March 21, 2007).
[34] Orders P-493 (July 9, 1993), P-1508 (December 29, 1997), PO-2010 (April 23, 2002) and MO-2106 (October 23, 2006).
[35] Order PO-1621 (October 7, 1998).

but this would clearly be a factor to consider.[36] In *Ontario First Nations Limited Partnership v. Information and Privacy Commissioner,*[37] the Divisional Court agreed with the IPC that the financial auditing information at issue was in relation to the administration of the Casino Rama Revenue Agreement and was not itself "commercial" information. The Court stated that it agreed with the IPC that the "commercial source of the funds did not transform the essential nature of the financial auditing information into commercial information."[38] Interestingly, the IPC has found that the scoring of competing contractors in a bid constitutes commercial information "because of its relation to the process designed by the institution for the selection of bidders who will provide commercial goods or services to that institution".[39]

[21] Examples of information found by the IPC to be commercial information include:

- tenders;[40]
- product information;[41]
- information relating to the commercial viability of a business;[42]
- marketing strategies;[43]
- information relating to a business or proposed business activities, plans and strategies;[44]
- information relating to the sale of merchandise and services by a third party to an institution;[45]
- information about a third party's client;[46]
- software licensing and Maintenance Agreements;[47]
- roles and names of individuals found in the 'staffing' section of an agreement between an institution and a company;[48]
- information related to proposed compensation of staff contained in a Letter of Agreement between a Ministry, the Ontario Women's Directorate, and another organization

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[36] Order PO-1818 (September 22, 2000).
[37] 2006 CanLII 9606 (Div. Ct.).
[38] *Ibid.*, at para. 9. In the result, since the information at issue was not about the operations of the Casino, the exemption did not apply.
[39] Po-1993, PO-1957, MO-1462 and MO-2197 (May 31, 2007).
[40] Order PO-2453 (February 28, 2006) and PO-2575 (May 11, 2007) since it relates to exchange for services.
[41] Order P-269 (February 6, 1992).
[42] Order PO-2377 (March 11, 2005).
[43] Order PO-2178 (September 17, 2003).
[44] Order P-1629 (November 6, 1998).
[45] Order MO-2070 (July 24, 2006).
[46] *Ibid.*
[47] Order MO-2121 (November 16, 2006).
[48] Order PO-2529 (November 30, 2006).

relating to the naming, development and execution of a public education/awareness campaign on violence against women;[49]
- correspondence with the Drug Programs Branch in relation to the reimbursement of a drug under the Special Drugs Program;[50]
- an agreement under which a City agreed to rent parking spaces to a third party;[51]
- a cost quotation for the provision of biosolids (the product that results from the treatment of wastewater) management services to a City, as it related solely to the selling of services;[52]
- a Bid Evaluation form that contained information relating to the proposed terms of a commercial relationship between the institution and various third parties;[53]
- price lists, supplier and customer lists;[54] and
- statistical tonnage production from a gravel pit belonging to the affected party.[55]

e) Financial information

[22] While the IPC has interpreted the phrase "financial information" to generally be information relating to money and its use or distribution, it has noted that it should also contain or refer to specific data.[56]

[23] Examples of information found by the IPC to be financial information include:

- financial statements;[57]
- accounting methods, pricing practices, profit and loss data, overhead and operating expenses;[58]
- budget estimates, actual expenditures;[59]
- proposed costs for the various components of a new voting system, for the delivery and installation of the system, and for training;[60]

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[49] Order PO-2527 (November 21, 2006).
[50] Order PO-2528 (November 22, 2006).
[51] Order PO-2117 (November 10, 2006).
[52] Order MO-2155 (November 7, 2006).
[53] Order MO-2072 (July 27, 2006). See also Order MO-2103-I (October 19, 2006).
[54] Order MO-1237, MO-2197 (May 31, 2007).
[55] Order PO-2594 (July 11, 2007).
[56] Order P-47 (April 3, 1989) reiterated in PO-2010 (April 23, 2002).
[57] Order PO-2328 (September 30, 2004).
[58] Order P-47 (April 3, 1989) reiterated in PO-2496 (August 17, 2006). See also Order MO-2115 (November 7, 2006).
[59] Order PO-1875 (February 28, 2005).

- information contained in a Bid Evaluation form which included information about third parties' pricing practices (including per diem rates for various staff categories and profit margin percentages);[61]
- a Prescribed Lottery Scheme Site Holder Facilities Agreement;[62]
- proposed amounts of investments, sales revenue, research and development spending, and job creation and employment costs;[63] and
- documentation relating to property taxes owing by an individual, contained in correspondence, memoranda, handwritten notes, receipts, affidavits, and a property tax ledger.[64]

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2. Was the Information "Supplied"?

[24] According to the IPC, in order for the third party exemption to apply, the information must be "supplied" to an institution by the third party. Information is "supplied" when it is given to the institution by the third party, rather than when it is produced independently by the institution or is the product of negotiation between the institution and the third party. Notably, this requirement is not present in the French versions of either Acts. Since each element of the test must be satisfied, commercially valuable information, for example, may meet all the parts of the test in that it may be confidential information the disclosure of which may result in the enumerated harms, and yet not be exempt under this provision. The emphasis put on the need to establish that the information was "supplied" and the interpretation given to the word "supplied" has made the exemption very difficult to apply. According to the IPC, 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.[65] The manner in which the information flows from the third party to the institution, for example electronically as opposed to paper documents, is not determinative of whether information is "supplied."[66]

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[60] Order MO-2070 (July 24, 2006).
[61] Order MO-2072 (July 27, 2006).
[62] Order PO-2526 (November 17, 2006).
[63] Order P-1629 (November 6, 1998).
[64] Order MO-2125 (November 27, 2006).
[65] Orders P-203 (November 5, 1990) and PO-2020 (June 5, 2002).
[66] Order P-531 (September 3, 1993).

[25] Information that is produced independently by the institution, such as information in the reports of institutional inspectors, would not qualify as being supplied, since the institution collected or obtained the information itself as opposed to a third party independently providing it. This is different from the situation where information is provided to the institution in accordance with reporting requirements, in which case the information qualifies as "supplied".[67]

[26] Information which is the product of "negotiation" between a third party and an institution will also not normally qualify as information that is "supplied" to an institution.[68] This is because negotiated information is mutually generated or the product of agreement between the institution and a third party rather than having been provided to the institution.[69] By way of example, a contract is a negotiated agreement that is therefore not considered by the IPC to be "supplied". However, where disclosure of the information in a contract would permit an accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied to an institution, an exception to this general rule applies.[70]

[27] Whether information is "immutable" (i.e. not susceptible to change) is a factor the IPC will consider in determining whether information has been "supplied" to an institution within the meaning of subsection 17(1) of FIPPA and subsection 10(1) of MFIPPA.[71] In Order PO-2371, the IPC stated that "the intention of [subsection 17(1) of FIPPA and subsection 10(1) of MFIPPA is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed."[72]

[28] The IPC has found information is "supplied" where:

- it was submitted under the requirements of a statute or pursuant to reporting requirements;[73]
- it was submitted in response to a request for proposals;[74]

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[67] Order PO-1983 (December 24, 2001).
[68] Orders P-36 (December 28, 1998), PO-2496 (August 17, 2006) and MO-2117 (November 10, 2006).
[69] Orders PO-2018 (May 30, 2002), MO-1706 (October 31, 2003) and PO-2496 (August 17, 2006).
[70] See Orders PO-2435 (November 21, 2006), PO-2527 (November 21, 2006) and PO-2529 (November 30, 2007), where this was referred to as the "inferred disclosure" exception.
[71] Orders PO-2371 (February 22, 2005), PO-2384 (April 19, 2005) and MO-2070 (July 24, 2006).
[72] Order PO-2371 (February 22, 2005).
[73] Order PO- 2328 (September 30, 2004).
[74] Orders MO-1706 (October 31, 2003), MO-1889 (December 22, 2004), MO-2072 (July 27, 2006) and MO-2164 (February 22, 2007).

- test results were provided by a third party researcher and chemical company to the institution;[75] and
- pit and quarry licensees were required by statute to submit annual reports of tonnage to the Ministry.[76]

[29] In addition, in Order MO-2179, the IPC found that certain information contained in an appendix to a contract was "supplied".[77] The information included references to proposed and projected diversion rates, data in a Table, the identity of the proposed insurer and the limits on liability insurance held by the third party. Similarly, in MO-2193, provisions for building a Fire Hall, Bid Bond documents and the project organization chart were considered "supplied".[78] However, in Order PO-2435, the IPC made it clear that accepted proposals submitted by potential vendors, including *per diem* rates, are negotiated because the government either accepts or rejects the proposal.[79] The IPC has indicated that acceptance of a proposal is a form of negotiation.

[30] The IPC has found information is not "supplied" where:

- as noted above, it is the product of negotiation such as a record originating out of a mediated settlement;[80]
- the fact that information was collected by a third party and subsequently provided to another party who then provided it to the institution does not necessarily mean that the information was not supplied.[81] However, survey results prepared by a research company were not supplied since the research company took the information provided by the third party and prepared research results which were then supplied to the institution.[82]
- employees of an institution conduct inspections of third parties, collect information and create reports, this has been found to apply to an audit of the operations of a restaurant,[83] a

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[75] PO-2557 (March 21, 2007).
[76] PO-2594 (July 11, 2007) and see also P-725 and P-925. The Ministry had policies in place that stipulated that such information was supplied confidentially.
[77] MO-2179 (March 29, 2007).
[78] MO-2193 (May 11, 2007).
[79] Orders PO-2435 (December 16, 2005) and PO-2522 (November 8, 2006). See also Order MO-2078 (August 25, 2006).
[80] Order PO-2405 (June 30, 2005).
[81] Order PO-2222 (December 23, 2003).
[82] Order MO-1690 (September 24, 2003).
[83] Order MO-1893 (December 24, 2004).

property inspection,[84] an environmental inspection,[85] an organizational audit[86] and a school inspection;[87]

- documents discussing the status of a project since they contained information arising out of the ministry's involvement in a project and reflected information either generated by the institution or mutually agreed to between the institution and the parties;[88] and
- information generated through the subjective evaluation of a bid by an evaluation team.[89]

[31] For more information on whether information is supplied or negotiated please see the section relating to contracts specifically (below under C. 'Key Contexts' (ii) 'Contracts')

[32] Where information is not "supplied" by the third party to the institution, it may still qualify for exemption where its disclosure would reveal or permit the drawing of accurate inferences with respect to information actually supplied by a third party. This applies when, for example, an employee of an institution includes information in an email which would be considered supplied information. Although it is not provided by the third party, its disclosure would reveal the underlying supplied information. Negotiated information will still be considered supplied if its disclosure would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the third party to the institution.[90] Similarly, if information is "immutable" it will also qualify as supplied to the institution.

3. Was the information supplied "in Confidence"?

[33] To qualify for the third party exemption the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality at the time the information was provided. This expectation must have an objective basis[91] and it may arise implicitly or explicitly.[92] Simply asserting that the information is confidential is not sufficient,[93] nor is providing generalized statements of possible harm.[94]

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[84] Order PO-122 (November 24, 1989).
[85] Order MO-1701 (October 28, 2003).
[86] Order PO-2206 (November 18, 2003).
[87] Order PO-1614 (September 25, 1998).
[88] Order PO-2344 (November 15, 2004).
[89] Orders PO-1993, MO-1237, MO-1462 and MO-2197 (May 31, 2007).
[90] Order MO-1706 (October 31, 2003) and PO-2575 (May 11, 2007).
[91] Orders M-169 (August 5, 1993) and PO-2020 (June 5, 2002).
[92] Order M-169 (August 5, 1993).
[93] Order PO-2274 (April 30, 2004).
[94] Order MO-2115 (November 7, 2006).

[34] The consideration of whether the expectation was reasonable involves the examination of various factors, such as, whether the information was (i) communicated to the institution on the basis that it was confidential, (ii) treated by the supplier in a manner that indicates concern for protection from disclosure, (iii) not otherwise or available from sources to which the public has access, and (iv) prepared for a purpose that would not entail disclosure.[95] A brief discussion of each of these factors is set out below.

a) Communicated to the institution on the basis that it was confidential

[35] Where a record is provided to the institution with a confidential marking, while not determinative, it will be considered very strong evidence of an explicit expectation of confidentiality. Notably, information has been found not to have been supplied in confidence despite being marked confidential, while other information has been found to have been supplied in confidence despite the absence of such an indication.[96] A confidential marking is also not absolute, as assurances of confidentiality are subject to overriding legislative rights, including a right of access under the Act.[97] A bald assertion of implied confidence is not sufficient in the absence of corroborating evidence of a reasonable expectation of confidentiality.[98] Legal accounts provided by counsel retained by an institution, to the institution, including the full aggregate amounts of the invoice, were accepted by the IPC to be supplied in confidence.[99]

[36] For example:

- a "notice provision" identifies that the Acts apply to information submitted to the institution. Where a notice provision provides that if a third party wishes that the institution attempt to preserve confidentiality, that information should be clearly marked and designated as confidential, the onus is on the third party to identify the portions of the record that contain information that they wish to remain in confidence. Parties do not have a reasonably held expectation of confidentiality of information submitted that is not designated as confidential where this notice is present;[100]
- where each page of a proposal was marked "Business Confidential – Do not Distribute to any Third Party," the IPC

[95] Order P-561 (October 22, 1993).
[96] Order PO-2283 (May 18, 2004).
[97] Order MO-1847 (October 6, 2004).
[98] Order MO-2182 (April 17, 2007).
[99] Order MO-2208 (June 29, 2007).
[100] Orders PO-2453 (February 28, 2006), MO-2078 (August 25, 2006) and MO-2080 (August 25, 2006).

found the information in the proposal to have been supplied in confidence; [101]

- where a standard confidentiality clause was used on a fax cover sheet, this was not adequate evidence to show an explicit expectation of confidentiality;[102]
- a confidentiality clause which was binding on the third party and not the institution was nonetheless evidence supporting that the information was intended to be treated as sensitive and confidential;[103]
- where a record was not explicitly marked confidential or proprietary, the IPC concluded that as the record contained details about the third party's methods and techniques that had been developed over time, including information that would qualify as technical information, the information was supplied implicitly in confidence.[104]

b) Treated by the supplier in a manner that indicates concern for protection from disclosure

[37] Where information is treated in a confidential manner by its supplier, such treatment will serve to establish that information was communicated with an implicit expectation of confidentiality.[105] It is also very helpful for the institution to provide submissions on how it generally treats the information in question, and any notifications it might have given to the affected party in this regard. Clearly, where an institution wishes to make its policies on confidentiality clear to third parties, it ought to include these policies in a notice provision rather than relying on the implicit expectations of the parties.[106] However, the IPC noted in Order PO-2558 that it must be satisfied that there is an expectation of confidentiality *objectively*.[107] Therefore, it held that there is a "diminished expectation of

[101] Order MO-2088 (September 26, 2006).
[102] Orders PO-2180 (September 23, 2003) and MO-1814 (July 16, 2004).
[103] Order PO-1875 (February 28, 2001).
[104] Order MO-2070 (July 24, 2006).
[105] In a comparable context in the federal *Access to Information Act*, the Federal Court of Appeal has ruled in *Canada (Minister of Health) v. Merck Frosst Canada and Co.*, 2005 FCA 215 (CanLII) that "once the information is within the public domain, it is no longer confidential, even if it differs in form." [at para. 2] The Federal Court of Appeal has also ruled, in *Rubin v. Canada (Minister of Health)*, 2003 FCA 37 (CanLII), that where an institution claims that a third party has kept information confidential, the institution is obliged to provide evidence that "there has not been public disclosure of information sought to be kept confidential." [at para. 4]
[106] Orders PO-2453 (February 28, 2006) and MO-2048 (April 27, 2006).
[107] Order PO-2558 (March 23, 2007).

confidentiality" in relation to information provided to an institution in the context of environmental regulation.[108]

[38] The IPC has issued several orders where it considered this issue, including the following:

- The IPC found an institution to have indicated a concern for the protection from disclosure where employees had access to the information on a need-to-know basis only, speeches and publications were screened to ensure that they do not reveal this information, visitors were required to sign in and out and be escorted at all times, and third parties who received this information were required to sign confidentiality agreements;[109]
- where a third party took specific steps to ensure that its methods remained out of the hands of its competitors, this established its intention that the information be treated in a confidential manner;[110]
- where an institution submits that it has a practice of keeping records confidential, this supports a finding of a reasonable expectation of confidentiality;[111]
- an institution's policy statements regarding its practice of keeping records confidential is also considered a relevant factor;[112]
- where an institution only shared the information with those employees who needed to know, this was proof of the expectation on the part of both the institution and the third party that the record was confidential;[113]
- where Bombardier had sought public funding from other jurisdictions including Ontario through its Request for Proposals to locate an assembly plant for its new aircraft, and its information was available to those other jurisdictions, did not mean that the information was not provided in confidence.[114]

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[108] Order PO-2558 adopted Order MO-2004 in this respect.
[109] Order P-246 (November 1, 1991).
[110] Order M-1157 (November 2, 1998).
[111] Order PO-2294 (June 14, 2004).
[112] Order PO-2436 (December 19, 2005).
[113] Order MO-1750 (February 6, 2004).
[114] Order PO-2569 (April 26, 2007).

c) Not otherwise disclosed or available from sources to which the public has access

[39] Where the information is publicly available, a third party will not have a reasonable expectation of confidentiality.[115] However, the extent of public availability may be considered. For example, where tests had been given to students enrolled in a course, this was not considered public disclosure which would negate the confidentiality of the tests involved.[116] However, where the information was available to the public through a title search, the IPC has held that such information was not supplied in confidence.[117]

d) Prepared for a purpose that would not entail disclosure

[40] Some communications give rise to an implicit expectation of confidentiality by virtue of the circumstances for which they are prepared. For example, it is implicit in commercial relations that the negotiation of terms between a vendor and purchaser regarding the sale of land are intended by the parties to be confidential.[118] However, the IPC has held that customer invoices provided by a bidder to an institution provides evidence of a transaction as between a business and its customers which may be used for other purposes by either party, including applications for reimbursement of the expense through an insurance company, and are therefore *not* confidential.[119]

e) Other considerations

[41] Many other factors have been weighed in determining whether a reasonable expectation of confidentiality existed at the time the information was provided to the institution.

[42] For example:

- the mere possibility that the Acts could compel disclosure is insufficient to neutralize a reasonable expectation of confidentiality;[120] and
- the fact that a document is a draft rather than a final version is not determinative of whether the document was supplied in confidence.[121]

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[115] Order MO-1769 (March 23, 2004).
[116] Order PO-1860 (January 26, 2001).
[117] Order PO-2526 (November 17, 2006).
[118] Order PO-1887-I (March 27, 2001).
[119] Order MO-2197 (May 31, 2007).
[120] Order PO-1688 (June 16, 1999).
[121] Order MO-1914 (April 1, 2005).

[43] In addition, there may be situations where the nature of the information contained in the records at issue may give rise to a finding that the records have been supplied in confidence. For instance, in Order MO-2070, the IPC stated that in compiling customer lists, client lists, and user lists, companies expend a great deal of work in seeking out and soliciting new clients, and that these lists are normally kept confidential. In the circumstances of that decision, the IPC held that client lists were supplied implicitly in confidence to the institution.[122] In the same decision, the IPC commented that a certified cheque is a common method of payment, which generally does not carry any expectations of confidentiality. In Order PO-2557, the IPC found that certain test results and studies compiled by a third party researcher and a chemical company were implicitly provided to the ministry in confidence given that research data is commonly expected to be confidential until the results are published.[123]

[44] The IPC has found that information was NOT supplied explicitly or implicitly "in confidence" where:

- a contract provides that subject to FIPPA, confidentiality shall be at the discretion of the institution;[124]
- it is supplied under circumstances of mounting public concern and a need for expedient solutions to a crisis;[125]
- an amount can be readily calculated from publicly available information;[126]
- information is reasonably ascertainable in publicly available records;[127]
- a party argued that it did not know or understand that the Act might apply. Further evidence that the party expressed concern to the institution about the confidentiality of the information or efforts to confirm an expectation of confidentiality were required.[128] However, in a previous order, where a third party had not understood or known about the Act and the consequences of providing information, and the institution did not advise the party of the possibility that its records could be subject to disclosure, it was reasonable for the third party to expect that its records would remain confidential;[129] and

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[122] Order MO-2070 (July 24, 2006).
[123] Order PO-2557 (March 21, 2007).
[124] Order PO-2371 (February 22, 2005).
[125] Order PO-2467 (April 27, 2006).
[126] Orders PO-2043 (September 13, 2002) and PO-2526 (November 17, 2006).
[127] *Ibid.*
[128] Order MO-2048 (April 27, 2006).
[129] Order MO-1225 (July 16, 1999).

- the terms of an RFP form part of a contract and the terms of the contract are publicly available.[130]

4. Is There a Reasonable Expectation of Prejudice or Harm?

[45] In applying this part of the test for the third party exemption, the IPC has sought to strike a balance between transparency and government accountability, and third party economic interests.[131] As a result, to establish that the particular harm in question can reasonably be expected to result from disclosure of a record, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm."[132] The IPC has stated that the need for public accountability requires detailed and convincing evidence to demonstrate how the harms could reasonably be expected to result from disclosure. More recently, the IPC has emphasized the need to ensure that the evidence of harm be particularized. In Order PO-2594, the IPC held that the harms were not made out in relation to the amount of tonnage removed from a licensed pits and quarries. Even though the amount of tonnage of gravel removed from pits and quarries was required by statute to be provided to the Ministry annually, the maximum amount that could be removed was public information. The IPC held that the third party had not provided sufficient information to explain the harm that would result from disclosure of the annual amounts and therefore ordered the information disclosed.[133]

[46] The meaning of the words "could reasonably be expected to" remains contentious.[134] In the *Worker Advisor*[135] decision, the Ontario Court of Appeal held that a "possibility of harms," not a "probability," was the underpinning of the phrase. However, there remains ambiguity as to the application of the test in the context of financial or commercial harm, as opposed to physical harm as was the context in the decision.[136] The IPC has stated that this exemption applies to the "less compelling harm" of possible financial loss and therefore it would be appropriate to apply a different standard to this exemption, that being "a reasonable expectation of probable harm."[137] The Ministry of Health and Long Term Care

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[130] Order MO-2193 (May 11, 2007).
[131] Order MO-1645-F (May 7, 2003).
[132] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[133] Order PO-2594 (July 11, 2007).
[134] See Chapter 12.2.
[135] *Big Canoe v. Ontario (Minister of Labour)* (1999), 46 O.R. (3d) 395 (C.A.).
[136] Section 20 of FIPPA and section 13 or MFIPPA.
[137] Order PO-1802 (July 10, 2000).

argued, in 2000, that this interpretation is incorrect but the IPC did not accept this argument.[138]

[47] The IPC has distinguished between detailed and convincing evidence which establishes a reasonable expectation of harm and evidence amounting to speculation of possible harm. The latter is not sufficient.[139] Similarly, an assertion that harm will result from disclosure has been found insufficient in many cases. In this regard, parties should not assume that harms are self evident or can be substantiated by submissions that essentially repeat the words of the Act. A third party must show clearly and directly how the information could be used to harm their position.

[48] While the IPC has stated that the third party, rather than the institution, is in the best position to provide evidence explaining why it is reasonable to expect that disclosure will result in harm, both the institution and the affected party are advised to make representations.[140] Where a third party does not make representations, it may be that the harm arguments will be undermined.[141]

[49] The IPC has stated that the fact that the record may contain information which could be misleading does not alone constitute a harm for the purposes of the exemption. Similarly, the fact that nothing can be gained by providing access is not sufficient to establish harm.[142] The IPC has also noted, adopting an approach by the British Columbia Information and Privacy Commissioner, that harms may vary depending on the size of the parties. In Order PO-2558, the IPC held that the relative size of the parties could be relevant in determining whether, and to what extent, disclosure would in fact harm an entity.[143]

[50] In Order PO-2557, the IPC found that the harms were not satisfied in relation to disclosure of research by a professor in relation to the safety of drinking water and methods to disinfect it. The IPC held that since the data was already published, disclosure would not prejudice the competitive position of the professor in the academic world. As well, since the professor and researchers had obtained "considerable compensation" for the study, the IPC did not find that there would be commercial exploitation. Moreover, the chemical company involved in the study did not provide sufficient information to establish loss of exclusive ownership of the data. In addition, the IPC was not convinced

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[138] *Ibid.*

[139] Order PO-2200 (October 29, 2003) citing *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.).

[140] Order PO-2295 (June 22, 2004).

[141] Order PO-2222 (December 23, 2003).

[142] Order MO-1452 (July 6, 2001).

[143] PO-2558 (March 23, 2007), adopting B.C. Commissioner's Order 57-1995.

that such experimentation would not longer be done at a publicly regulated site if the information was disclosed. In the result, none of the harms were held to apply.

[51] However, in PO-2556, the IPC applied this exemption to an academic "econometric" study of the issues surrounding the taxation of tobacco. The IPC found that the study provided to the Ministry of Finance, if disclosed, could be used by "competitors in the tobacco industry ... to seriously undermine the affected party's market position by taking advantage of the conclusions described therein to increase their own market position." [144]

a) Prejudice to Competitive Position or Negotiations (subsection 17(1)(a) of FIPPA and subsection 10(1)(a) of MFIPPA)

[52] To qualify under this element of the third party exemption, a third party must show how the information could be used to harm their competitive position or negotiations and that the degree of compromise could represent significant prejudice to their competitive position.

(i) Significant prejudice to the competitive position of the third party

[53] The issue of whether the disclosure of information will cause significant prejudice to the competing position of a third party has been the focus of recent orders and appears difficult for a third party to prove. For example, previous orders found that disclosure of unit prices would enable a competitor to gain an advantage over the third party by adjusting its bid to undercut future business contracts and this could reasonably be expected to result in competitive harm.[145] Current orders, however, have stated that a bid price which would reveal financial details of a contract and allow competitors to adjust their bids accordingly in future bidding processes in an attempt to undercut the affected party could not reasonably be expected to significantly prejudice the affected party's competitive position.[146] As stated above, it is imperative that submissions to the IPC in respect of this part of the third party exemption state clearly and directly how the disclosure of the specific information in the record could be used to significantly harm a third party's competitive position. To this end, the competitive nature of the industry is an important consideration.[147] The IPC may also consider whether the third parties compete for the institution's business, rather than the other way around.[148]

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[144] PO-2556 (March 15, 2007).
[145] Orders P-408 (February 10, 1993) and M-511 (April 21, 1995).
[146] Order PO-2435 (December 16, 2005).
[147] Order PO-2367 (February 4, 2005).
[148] Order MO-2070 (July 24, 2006). See also Order MO-2103-I (October 19, 2006).

[54] The IPC has found that competitive harm could reasonably be expected to occur where there is a request for:

- detailed information relating to pricing[149] and bid breakdowns;[150]
- client lists;[151]
- a process or a design which was the result of significant expenditure;[152]
- information that had been developed over a number of years and that disclosure could allow competitors to upgrade their working procedures, to increase or replicate press coverage, or to copy or subvert the various agreements in the proposal;[153]
- maps where a business had gone to considerable expense and effort to engage in the industry and disclosure would reveal detailed information which was critical to the success of the business;[154]
- drawings and plans submitted as part of a building permit application in which the design of the structures was unique, had economic value and the third party was in the process of having it reviewed for patent/trademark, could reasonably be expected to significantly prejudice the party's competitive position and the value of its assets;[155]
- detailed information about a third party's methods and techniques for the implementation and functioning of its product, which had been developed over a great deal of time and through trial and error;[156]
- details about a drug's history, development and chemical make-up, as well as application and pricing details;[157]
- unique information contained in a project proposal that disclosed a particular approach to the project taken by the party;[158]
- information where a third party had plans to research, develop, commercialize and market vaccines that were developed over many years of research and through the expenditure of millions of dollars;[159] and

[149] Order P-166 (May 4, 1990).
[150] Order M-250 (January 20, 1994).
[151] Order MO-2070 (July 24, 2006).
[152] Order PO-1818 (September 22, 2000).
[153] Order P-750 (September 8, 1994).
[154] Order PO-2158 (June 30, 2003).
[155] Order MO-1957 (August 30, 2005).
[156] Order MO-2070 (July 24, 2006).
[157] Order PO-2528 (November 28, 2006).
[158] Order MO-2164 (February 22, 2007).
[159] Order P-1629 (November 6, 1998).

- pending negotiations concerning the establishment of a waste management facility;[160]
- Bombardier's financial, technical and business plans for the development of the C-Series aircraft as part of its proposal for government funding to locate its assembly site in Ontario.[161]

[55] The IPC has found competitive harm could *not* reasonably be expected to occur where there is a request for:

- a tender submission where it was alleged that its disclosure would reveal the expertise of the staff of the tendering company and would thereby encourage other companies to "raid" the staff;[162]
- information that simply confirmed that a funding arrangement was in place for a given period of time, and identifies the overall amount of public funds the institution allocated for the operation of this particular facility without disclosing the individual funding details for rental arrangements or other operating component costs which could have an impact on the party's competitive position;[163]
- portions of records which relate to the institution's requirements which must be met by the commercial third party in order for the project to receive funding from the institution;[164]
- information regarding a total amount of pricing, rather than a detailed breakdown of pricing or costs (as a total is considered too general to create any reasonable probability that its disclosure could significantly prejudice competition);[165]
- information was prepared by a firm that was no longer carrying on business;[166]
- information which was already available to the public or generally known within the industry;[167]
- information which would not be useful to a competitor;[168]

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[160] Order MO-2179 (March 29, 2007) and Order PO-1894 regarding a pending commercial transaction.
[161] Order PO-2569 (April 26, 2007). The site chosen for the assembly plant was ultimately not Ontario.
[162] Order P-418 (February 24, 1993). See also Order PO-2529 (November 30, 2006).
[163] Order PO-1695 (July 13, 1999).
[164] Order P-1306 (November 27, 1996).
[165] Order PO-2128 (March 18, 2003).
[166] Order PO-2390 (May 12, 2005).
[167] Order PO-2172 (July 31, 2003).
[168] *Ibid.*

- information about a company which was listed as "active" in its Corporate Profile Report but had demonstrated no registered activity for over a decade;[169]
- contract details, even though they could serve as a guide to competitors or may subject a consultant working for an institution to a more competitive bidding process for future contracts;[170]
- the form and structure of the bid or proposal, or its general format or layout, even where it could be used as a "template" in future bids;[171]
- aggregate amounts billed by counsel retained by institutions where the hourly billing amounts may not be deduced from the aggregates.[172]

(ii) Interference with contractual or other negotiations of a person, group of persons, or organization

[56] This portion of subsection 17(1)(a) FIPPA and subsection 10(1)(a) of MFIPPA is often relied upon in the context of union negotiations as well as contractual negotiations that have not yet been finalized.

[57] The IPC has found that:

- summaries of contingency plans for possible labour stoppages would seriously prejudice union negotiations;[173]
- details of cost projections and labour relations strategies could reasonably be expected to interfere significantly with pending collective agreement negotiations;[174]
- it is reasonable to expect that disclosure of labour relations information that would be used in upcoming discussions and negotiations with employees would result in harm;[175]
- where the requester is seeking documents exchanged while negotiating a commercial transaction which is not yet complete, disclosure would reasonably be expected to result in significant prejudice to the competitive position of third parties;[176] and

[169] Order MO-2125 (November 27, 2006).
[170] Orders PO-2435 (December 16, 2005) and PO-2485 (July 19, 2006).
[171] Orders MO-2176 (March 27, 2007), MO-2151, PO-2478, PO-2435 and PO-2575.
[172] Order MO-2208 (June 29, 2007).
[173] Order P-1464 (October 9, 1997).
[174] Order MO-1462 (August 24, 2001).
[175] Order PO-2343 (November 12, 2004).
[176] Order PO-1894 (April 11, 2001).

- request for records where there are pending negotiations concerning the establishment of a waste management facility.[177]

b) Expectation that Similar Information Would No Longer be Supplied (subsection 17(1)(b) of FIPPA and subsection 10(1)(b) of MFIPPA)

[58] In order to successfully claim that the harm in this provision could reasonably be expected to occur, the representations must provide clear and specific evidence that it is reasonable to expect that the information could not be supplied in future if it was disclosed.[178] The fact that information would be less likely to be supplied to the institution or that it would be a factor to consider in the future is not sufficient to comply with this provision.[179] Rather, the test is whether the information would no longer be supplied. Furthermore, it must be in the public interest that similar information continue to be supplied.[180]

[59] The IPC has found that the harm in this provision could reasonably be expected to occur where:

- grant applications contained detailed information about their funding sources and disclosure of the information was not necessary to submit the granting agency to public scrutiny;[181]
- a parallel scheme with similar requirements for disclosure had collapsed due to widespread opposition to disclosure;[182] and
- there is evidence that the institution relies heavily on voluntary cooperation to receive information;[183]
- Bombardier's financial, technical and business plans for the development of the C-Series aircraft as part of its proposal for government funding to locate its assembly site in Ontario.[184]

[60] The IPC has found the harm in this provision could *not* reasonably be expected to occur where:

- the institution is entitled to the information by statute; for example, under the *Environmental Protection Act*, third parties

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[177] Order MO-2179 (March 29, 2007) and Order PO-1894 regarding a pending commercial transaction.
[178] Orders P-400 (January 15, 1993) and P-1061 (November 24, 1995).
[179] Order P-278 (March 4, 1992).
[180] Order P-1597 (July 16, 1998).
[181] Order P-777 (October 13, 1994).
[182] Order P-1061 (November 24, 1995).
[183] *Ibid.*
[184] Order PO-2569 (April 26, 2007). The site chosen for the assembly plant was ultimately not Ontario.

are required to provide specific types of information to the Ministry of the Environment and the Ministry has the legal authority to obtain it. Therefore, the argument that similar information would no longer be supplied was rejected since the institution could compel the information.[185] This is the case even where information is provided voluntarily.[186] However, where information was provided pursuant to the *Ontario Heritage Act*, but the quality of the information was much higher than what was required by statute and it was in the public interest that the institution continues to receive as much detailed information as possible, this exemption applied;[187]

- a party has something to gain by providing the information because the IPC is not convinced that the information will no longer be supplied.[188] For example, it is not credible to argue that firms will no longer provide the cost-related information required in order to obtain government contracts,[189] that information required in support of an application before the Building Code Commission will no longer be supplied where individuals find it to be in their interest to seek such a hearing,[190] where the information is supplied pursuant to a contractual obligation,[191] or where past work experience including details of similar contracts is an important part of a competitive selection process, [192] where information is provided to support a request for financial assistance because the institution would not provide assistance without the information;[193]
- the institution and third party are in a close and long-standing contractual relationship such that disclosure could not reasonably be expected to jeopardize the relationship in the future;[194]
- it is reasonable that the party would provide this information to the institution; for example, it is reasonable to expect that an insurance provider would provide details of its risk management services to the institution which is its client;[195]

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[185] Order PO-1666 (April 13, 1999). See also Order M-1143 (August 7, 1998).
[186] Order PO-1803 (July 11, 2000).
[187] Order PO-1702 (August 17, 1999).
[188] Order MO-1750 (February 6, 2004).
[189] Order P-710 (June 23, 1994).
[190] Order P-295 (May 1, 1992).
[191] Order P-219 (January 31, 1991).
[192] Order MO-1888 (December 21, 2004).
[193] Order P-1463 (October 7, 1993).
[194] Order P-1597 (July 16, 1998).
[195] Order PO-2128 (March 18, 2003).

- third parties will continue to bid on government business even though the form and structure of the bid or proposal, or its general format or layout, could be used as a "template" in future bids.[196]

c) *Undue Loss/Undue Gain* (subsection 17(1)(c) of FIPPA and subsection 10(1)(c) of MFIPPA

[61] Prejudice to the party's competitive position under subsection (1)(a) and undue loss/gain under this provision are typically argued and applied together since harm to a party's competitive position usually results in undue loss to that party and undue gain to that party's competitor. "Undue" has been interpreted by the IPC to mean excessive, disproportionate, not suitable, not owed.[197]

[62] The IPC has found that undue loss or gain could reasonably be expected to occur where:

- there was demonstrable potential for lost revenue through disclosure of a third party's mailing list;[198]
- records reveal the steps taken in the development of a product which cost millions of dollars to research and create;[199]
- the records contain client lists;[200]
- the records provide considerable detail about a third party's methods and techniques for the implementation and functioning of its product, which had been developed over a great deal of time and through trial and error;[201]
- a party has made a substantial investment in time, energy and money in the development of the information and others with an interest in similar information would be able to adversely make use of the fruits of the party's labour thereby causing it to suffer an undue loss;[202]
- Bombardier's financial, technical and business plans for the development of the C-Series aircraft as part of its proposal for government funding to locate its assembly site in Ontario.[203]

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[196] MO-2176 (March 27, 2007), MO-2151, PO-2478, PO-2435
[197] Order P-1614 (September 25, 1998).
[198] Order P-76 (July 17, 1989).
[199] Order P-246 (November 1, 1991).
[200] Order MO-2070 (July 24, 2006).
[201] *Ibid.*
[202] Order PO-1860 (January 26, 2001). See also Order PO-2467 (April 27, 2006).
[203] Order PO-2569 (April 26, 2007). The site chosen for the assembly plant was ultimately not Ontario.

[63] The IPC has found that undue loss or gain could *not* reasonably be expected to occur where information was prepared by a firm that is no longer carrying on business.[204] It has also found that third parties will not suffer undue loss even though the form and structure of the bid or proposal, or its general format or layout, is disclosed under the Act and could be used as a "template" in future bids.[205] Undue loss or gain was also not found in relation to the aggregate billing amounts of counsel retained by an institution where the hourly billings could not be deduced from the aggregate.[206]

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C. Key Contexts for Subsection 17(1) of FIPPA and subsection 10(1) of MFIPPA

1. Tenders

a) Type of information

[64] When an institution issues a Request for Proposals ("RFP"), the tender submissions or bids the institution receives have been the subject of numerous access requests. These records will generally be found to qualify as commercial information since they relate to the proposed terms of a commercial relationship between the institution and a third party. They will often also contain financial information such as the pricing and operating costs of a project.[207]

b) Supplied

[65] Bids have generally been found to be information originally "supplied" to the institution,[208] as they are prepared by the third party in response to the RFP and supplied to the institution. However, as soon as the winning proposal is accepted and included in a contract for goods or services the information is considered by the IPC to be a product of negotiation since the institution had the opportunity to accept or reject the proposal,[209] and the terms of the bid submitted by the third party become the essential terms of the negotiated contract.[210]

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[204] Order PO-2390 (May 12, 2005).
[205] Orders MO-2176 (March 27, 2007), MO-2151, PO-2478, PO-2435
[206] Order MO-2208 (June 29, 2007).
[207] Order PO-2453 (February 28, 2006).
[208] Orders MO-1889 (December 22, 2004) and PO-2367 (February 4, 2005).
[209] Order PO-2467 (April 27, 2006).
[210] Order PO-2453 (February 28, 2006).

[66] The IPC has analyzed the concept of information being "supplied" to the institution in the RFP context in relation to the stages of the tendering process as follows:

(i) Proposal Submission

- Bids qualify as information originally supplied to the institution.[211] During negotiations, the position of the third party is supplied.[212]

(ii) Accepted Proposal

- While previous IPC orders considered proposals which were subsequently duplicated in the final contract to be "supplied" rather than a product of negotiation,[213] more recent IPC decisions have confirmed that this is no longer the case. Since the institution has had the opportunity to accept or reject a proposal it is considered a negotiated agreement (as opposed to information "supplied" to the institution).[214] Even where a contract is preceded by little negotiation or exactly duplicates the terms proposed by the third party, the IPC has considered these records to be the product of negotiation or a form of negotiation.[215]

(iii) Tender information contained in schedules to a final contract

- Schedules to a contract are considered "wholly incorporated into the contract by reference"[216] and are therefore not considered "supplied" to the institution. Where the underlying tender and a pricing sheet that accompanied the tender were contained in the schedules to the contract, a manually crossed through option on the pricing sheet supported the finding that a negotiation process had occurred.[217]

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[211] Orders MO-1889 (December 22, 2004) and PO-2367 (February 4, 2005).
[212] Order PO-2018 (May 30, 2002).
[213] Order P-1611 (September 10, 1998).
[214] Order PO-2467 (April 27, 2006). See also *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)* (2005), 200 O.A.C. 134 (Div. Ct.), leave to appeal to the Ont.C.A. denied, Doc. M32858 (C.A.).
[215] Order PO-2371 (February 22, 2005).
[216] Order PO-2384 (April 19, 2005).
[217] *Ibid.*

(iv) Scoring of Bids

- Scoring evaluations of various proposals do not meet the "supplied" component of the test where the disclosure of scores assigned would not reveal the information contained in the proposals.[218] This is because the information is generated by the institution, as it is calculated or derived from information supplied or devised by subjective evaluation of the information actually supplied.[219]

[67] The exceptions to the general rule that contractual information is negotiated (rather than supplied) will apply where the information is relatively "immutable" or not susceptible of change or where disclosure of information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party.[220] In MO-2193, while the RFP terms for the winning bidder formed part of the contract and was therefore not supplied, provisions for building the Fire Hall, Bid Bond documents and a project organization chart continued to be "supplied".[221]

c) In Confidence

[68] There are multiple factors to be weighed when considering the reasonableness of an expectation of confidentiality with respect to bids submitted as part of a tender process. In some cases, confidentiality assurances are explicitly given, in other cases an expectation of confidentiality can be implied. Many IPC orders have acknowledged that given the competitive nature of particular industries, it would be reasonable for an organization submitting proprietary information to do so with an expectation of confidentiality. This recognizes that the there is a reasonable expectation of confidentiality with respect to the financial details of bid submissions such as unit prices or information that has a proprietary value to a business, subject to the "supplied" test regarding the winning bidder.[222]

[69] Where an open tender process takes place, it is common practice that the names of the bidder and the total proposed cost are announced as part of a public tendering process, however, details of the bid are not. In these circumstances, a reasonable expectation of confidentiality will not be

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[218] Order MO-1814 (July 16, 2004), PO-1818 (September 22, 2000) as well as *Ontario (Ministry of Transportation) v. Consulting Engineers*, 2005 CanLII 34228, Ont. C.A., September 26, 2005, leave to SCC dismissed, April 13, 2006.
[219] Orders MO-1789 (May 17, 2004) and P-1553 (April 1, 1998).
[220] Order P-1605 (August 21, 1998), reiterated in MO-2052 (May 3, 2006). See also Order MO-2115 (November 7, 2006) and PO-2575 (May 11, 2007).
[221] MO-2193 (May 11, 207).
[222] PO-1816 (August 31, 2000) and MO-1887 (December 21, 2004).

found with respect to the public information. The IPC has stated that a reasonable expectation of confidentiality can be found until the moment the envelopes are opened and the successful bidder announced, thereafter the total amount is not considered confidential.[223] Often, bids will be submitted in a sealed envelope. Where this is the case, the approach has varied and there are often other factors to be considered such as a notice provision and the institution's internal policies and treatment of such information. Where a bid was submitted in an envelope marked confidential, but the RFP alerted the bidder that the information provided was subject to disclosure under the Act in the form of a notice provision requiring the bidder to clearly identify confidential information, the information was not provided with a reasonable expectation of confidentiality.[224] Where an institution submits that it has a practice of keeping records confidential, this supports a finding of a reasonable expectation of confidentiality.[225] However, where an institution wants to make its policies on confidentiality clear to third parties, it ought to include these policies in a notice provision rather than relying on the implicit expectations of the parties.[226] Where the RFP terms form part of the contract for a successful bidder, then the IPC has held that the terms incorporated into a publicly available contract are not confidential.[227]

d) Reasonable expectation of harm

[70] The IPC's recent statements discussing the role of access to information legislation in promoting government accountability is highly relevant to tender submissions. Where information relates directly to government expenditure of taxpayer funds, the need for detailed and convincing evidence to support the harm of disclosure is compelling. Without access to such information, there would be no meaningful way to subject the operations of the institution to effective public scrutiny.

[71] The IPC has also stated that the fact that a third party may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them. However, and very importantly, a distinction was drawn between revealing a third party's bid while the competitive process is underway and disclosing the details of contracts that have actually been signed. In addition, the IPC has held that disclosure of information pertaining to the "form and structure" of a proposal, such as the table of

[223] Orders P-1124 (February 14, 1996) and MO-1364 (November 16, 2000).
[224] Order MO-1889 (December 22, 2004).
[225] Order PO-2294 (June 16, 2004).
[226] Orders PO-2453 (February 28, 2006) and MO-2048 (April 27, 2006)
[227] Order MO-2193 (May 11, 2007)

contents and headings used within the document, could not reasonably be expected to cause significant prejudice.[228]

[72] The IPC has found that that an expectation of one of the harms was reasonable in the following circumstances:

- where negotiations between the third party and the institution have not yet been finalized the IPC has found that disclosure would reasonably be expected to result in significant prejudice to the third party;[229]
- where several financial issues had to be addressed before it could be said with any certainty that the project would continue, it was found that the disclosure of such information could prejudice the project;[230]
- where a proposal was the result of the application of the third party's skills and knowledge in identifying business opportunities, it was considered the "informational asset" of the third party and competitors would be able to benefit, without charge, from the application of the third party's skills;[231] and
- where disclosure would allow a competitor to determine profit margins and mark-ups.[232]

2. Contracts

[73] The IPC has drawn a distinction between "revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed."[233] In the former context the information is more likely to fall within the third party exemption than the latter. Indeed, the IPC has indicated that "the details of contracts between the [institution] and those who partner with it in providing public services will usually be available for public scrutiny. Only in rare cases, where a third party or an institution denying disclosure can provide "detailed and convincing" evidence to support the harms outlined in [the exemption], will disclosure not be ordered."[234]

[74] Previously, the IPC had not *assumed* that RFP terms of the successful bidder that formed part of the contract were *negotiated.* Contract terms

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[228] Orders PO-2478 (June 20, 2006), MO-2088 (September 26, 2006) and MO-2164 (February 22, 2007).
[229] Order PO-1894 (April 11, 2001). See also Orders PO-2435 (December 16, 2005) and PO-2485 (July 19, 2006).
[230] Order MO-2088 (September 26, 2006).
[231] Order MO-1851-I (October 8, 2004).
[232] Order P-1248 (August 27, 1996).
[233] Orders PO-2435 (December 16, 2005) and PO-2485 (July 19, 2006).
[234] Order PO-2485 (July 19, 2006).

could be exempt if (i) they contained a reproduction of the information originally supplied to the institution or (ii) if disclosed, they would permit the drawing of accurate inferences with respect to the non-negotiated information actually supplied to the institution. Post the 2005 Annual Report, the IPC Orders reflected a different approach; contracts are by their nature negotiated. The successful bidder's RFP terms found in a contract were not supplied since they were subject to *a form of negotiation.* Accordingly, even information from a third party that is exactly reproduced in an agreement did not qualify for exemption since the IPC has held that there is an element of negotiation in any agreement. This eliminates the application of this exemption to many records from third parties.

[75] The IPC has indicated that "the details of contracts between the [institution] and those who partner with it in providing public services will usually be available for public scrutiny."[235] Even if information is found to be supplied in confidence, third parties may find it difficult to provide detailed and convincing evidence that disclosure could reasonably be expected to result in the harms listed in the exemption. The IPC has stated that subjecting a party to a more competitive bidding process is not considered significant prejudice to their competitive position or undue loss to them. This attitude stems from the IPC's view that contracts entered into by institutions ought to be available to the public to ensure accountability. The consequence is that little if any information related to contractual negotiations between an institution and a third party will qualify for exemption under the current analysis of the IPC.

[76] The following are general comments which might provide a basis for submissions:

- the word "supply" is not present in the French version of the legislation and its absence may call into question the significance that has been placed on this requirement;
- the evidentiary standard is likely possible harm rather than "probable" harm since the legislation uses the words "could reasonably be expected to result in harm"-financial harm is very difficult to predict;
- the purpose of the third party exemption, as it was articulated in the Williams Commission Report, is that businesses should be allowed to protect their commercially valuable information, the disclosure of business secrets through freedom of information Act requests would be contrary to the public interest;[236] and

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[235] *Ibid.*

[236] Williams Commission Report at p. 313.

- one of the reasons that the Legislature included the third party exemption that some information that institutions collect constitute a valuable asset, the disclosure of which could impair a firm's ability to compete effectively in the marketplace.[237]

a) Type of information

[77] Records containing contractual information will generally be found to qualify as commercial information since they relate to the commercial relationship between the institution and the third party. They will often also contain financial information such as a breakdown of costs for a project.[238]

b) Supplied

[78] Contracts between an institution and a third party are generally not found by the IPC to contain or reveal information "supplied" to an institution. This reflects the IPC's view of a contract as the expression of an agreement between two parties. Although, in a sense, the terms of a contract reveal information about each of the contracting parties, in that they reveal the kind of arrangements the parties agreed to accept, this information is not in itself considered by the IPC to be proprietary information that qualifies for exemption. The provisions of a contract, in general, have been treated as "negotiated", rather than "supplied" by the third party.[239]

[79] The IPC has analyzed the concept of information being "supplied" in the contracting context as follows:

(i) Letter of Intent

- While it is a preliminary stage of negotiation, it is essentially a contract which contains negotiated information and therefore does not qualify for exemption.[240]

(ii) Draft Agreement

- The status of an agreement as either a draft or a final document does not impact on the determination of the "supplied" issue. The information contained in drafts reflects

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[237] Order PO-1805 (July 13, 2000).
[238] Order PO-2433 (December 7, 2005) and PO-2575 (May 11, 2007).
[239] Order P-36 (December 28, 1998) upheld in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).
[240] Order P-581 (November 22, 1993).

various stages of a give and take between the institution and the third party during the negotiation process.[241]

(iii) Accepted Proposal

- As discussed above, previous orders have considered proposals which were subsequently duplicated in the final contract to be information originally "supplied" to the institution by the third party rather than a product of negotiation.[242] More recent decisions, however, have confirmed that this is no longer the case. The moment a proposal is accepted, it is considered a negotiated agreement since the institution has had the opportunity to accept or reject the proposal.[243] These accepted bids represent a "form of negotiation" and hence the information is not supplied.[244]

(iv) Binding Contracts

- The general rule is that a contract is not supplied and therefore does not qualify for exemption. Even where a contract is preceded by little negotiation or reflects the exact terms proposed by the third party, the IPC has considered these records to be the product of negotiation.[245]

(v) Non-binding Contracts

- Unenforceable contracts qualify for the third party exemption. For example, where a contract addendum was delivered and subsequently retracted and replaced by another addendum it was not an enforceable contract and therefore qualified as "supplied"[246]

(vi) Schedules to Contracts

- Schedules are considered wholly incorporated into a contract by reference and are therefore not exempt.[247]

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[241] Order MO-1684 (September 11, 2003).
[242] Order P-1611 (September 10, 1998).
[243] Order PO-2467 (April 27, 2006), upheld as reasonable in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).
[244] Order PO-2435 and reiterated in PO-2579 (May 24, 2007).
[245] Order PO-2371 (February 22, 2003). In PO-2435 (December 16, 2005) the IPC noted that acceptance of a consultant's bid in response to an RFP is a form of negotiation and thus the bid, even involving unit pricing, is not exempt. In PO-2384 (April 19, 2005), a bid, once adopted into a contract, becomes negotiated.
[246] Order PO-2467 (April 27, 2006).
[247] Order PO-2384 (April 19, 2005).

(vii) Contract Extensions and Renewals

- These are also not considered information "supplied" by a third party to an institution.[248]

[80] There are a limited number of exceptions to the general rule that contractual information is negotiated rather than supplied.[249] Once example is when the information in the contract is relatively "immutable" or not susceptible of change. Examples of this type of information are product samples or fixed costs such as overhead costs that determine a floor for a term of a contract.[250] Another instance is where it can be argued that a specific provision in a contract contains "informational assets" of a third party that the institution would not otherwise be in possession of.[251] An example of this type of information is a party's financial statements.[252] Finally, where disclosure of information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party, this information will also be "supplied" to the institution.[253]

[81] The IPC has found that contractual information was "supplied" where:

- the institution is not a party to the contract but has a copy of it for other reasons; for example, where a contract is sent to an institution for the purpose of keeping the institution informed of progress rather than for the purpose of negotiating with the institution;[254]
- background information contained in a contract;[255]
- emails were exchanged between members of the institution's staff containing details of the third party's proposal which revealed information supplied by the third party;[256] and
- provisions for building a Fire Hall, Bid Bond documents and project organization Chart.[257]

[82] The IPC has found that the following records related to contracts were "negotiated", rather than supplied:

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[248] *Ibid.*
[249] Order PO-2371 (February 22, 2005).
[250] *Ibid.*
[251] Order PO-2018 (May 30, 2002).
[252] Order PO-2371 (February 22, 2005).
[253] Order P-1605 (August 21, 1998), reiterated in Order MO-2052 (May 3, 2006) and PO-2575 (May 11, 2007).
[254] Orders PO-2343 (November 12, 2004) and MO-1373-I (November 30, 2000).
[255] Order PO-2467 (April 27, 2006).
[256] Order MO-1851-I (October 8, 2004).
[257] Order MO-2193 (May 11, 2007)

- a signed contract addendum;[258]
- terms in the schedules to an agreement;[259] and
- estimates which had a signature line for a client to indicate approval, and which were in fact signed;[260] and
- hourly or per diem terms and renewal terms that form part of an agreement for the provision of consulting services.[261]

c) In Confidence

[83] Many orders have acknowledged that given the competitive nature of particular industries, it would be reasonable for an organization submitting proprietary information to do so with an expectation of confidentiality. This recognizes that the there is a reasonable expectation of confidentiality with respect to the financial details of bid submissions such as unit prices or information that has a proprietary value to a business.[262]

d) Reasonable expectation of harm

[84] Transparency and government accountability are key purposes of the Act, and the role of access to information legislation in promoting government accountability and transparency is even more compelling when the information sought relates to government expenditure of public funds. Therefore, when third parties have argued that disclosure of their contractual terms could reasonably be expected to result in commercial harm under (1)(a), result in similar information no longer being supplied under (1)(b) and undue loss to them and undue gain to their competitors under (1)(c), their submissions have often been found to lack the level of detailed and convincing evidence required under the Act.

[85] The following information can be helpful in providing detailed and convincing evidence that disclosure could reasonably be expected to result in harm:

- the highly competitive nature of the industry; the high frequency of competition between businesses in the industry for the type of contract in question; that competition is usually through a bidding process similar to the one at issue; each company is looking for any advantage they can use against their opponents in the bidding process; the information contained in the record is useful and valuable to competitors; the extent to which this type of information is known or not

[258] Order PO-2467 (April 27, 2006).
[259] Order PO-2433 (December 7, 2005).
[260] Orders PO-2382 (April 14, 2005) and PO-1816 (August 31, 2000).
[261] PO-2579 (May 24, 2007).
[262] Orders PO-1816 (August 31, 2000) and MO-1887 (December 21, 2004).

known in the industry and specifically how competitors could use this information to the disadvantage of the third party;

- the information described is valuable proprietary information that was created and developed by the third party over many years; the expertise developed by the third party and referred to in the record is unique, proprietary and valuable; the product provided in the industry is highly specialized;
- the third party has developed, as a result of experience, a unique approach and format for responding to requests for proposals or quotations, including the ways in which a party describes its methodologies, and its unique features;
- if the information were disclosed, the third party's competitors in this competitive business will gain access to the confidential information respecting technology, methodologies, the manner in which the party structures its proposals and a window into the financial and commercial information of the party; and
- competitors would use this information to appropriate proprietary information and shape their own proposals in a way that would undermine and under-price the third party's bids; competitors would obtain an advantage in every bidding competition against the party; competitors would gain valuable insight into how a competitor bids and would be able to increase their market share against the party causing it to lose current or prospective clients and therefore incur losses; disclosure would also result in the third party laying off its workforce as a result of the losses.

[86] The IPC has found that an expectation of harm was not reasonable in the following circumstances:

- in the case of a signed contract, where disclosure of financial details could provide competitors with details of financial arrangements and might lead to the competitors putting in lower bids resulting in a more competitive bidding process in future contracts, this has been found to not significantly prejudice their competitive position or result in undue loss to them;[263]
- with respect to a claim that third parties will no longer provide information when they are competing for a contract, since there is a financial motivation for the third party to continue to submit detailed financial information;[264] and
- form and structure of a proposal since each project varies.[265]

[263] Orders PO-2435 (December 16, 2005), PO-2478 (June 20, 2006), MO-2193 (May 11, 2007).
[264] Order PO-1816 (August 31, 2000).
[265] Orders PO-2575 (May 11, 2007), and see PO-2151, PO-2478 and PO-2435.

[87] The IPC has found that that an expectation of one of the harms was reasonable in the following circumstances:

- where negotiations between the third party and the institution have not yet been finalized, the IPC has found that disclosure would reasonably be expected to result in significant prejudice to the third party;[266]
- where a proposal was the result of the application of the third party's skills and knowledge in identifying business opportunities, it was considered the "informational asset" of the third party and competitors would be able to benefit, without charge, from the application of the third party's skills;[267] and
- where disclosure would allow a competitor to determine profit margins and mark-ups.[268]

[88] In past IPC orders where information relating to pricing, material variations and bid breakdowns in the record would enable a competitor to gain an advantage on the third party by adjusting their bid and underbidding in future business contracts, this exemption applied.[269] However, as discussed above in relation to subsections 17(1)(a) FIPPA and 10(1)(a) MFIPPA, this is now more difficult to prove as highlighted by the recent rejection of the submission that disclosing specific pricing information could reasonably be expected to result in harm. The IPC has communicated that consultants and other contractors with government agencies must be prepared to have their contractual arrangements scrutinized by the public; otherwise, public accountability for the expenditure of public funds is incomplete.[270]

(i) Time has passed since the record was supplied to the institution

[89] The IPC has determined that the risk of competitive harm and harm to negotiations lessens through the passage of time.[271] Accordingly, where a significant amount of time has lapsed since the record was created, a third party will find it difficult to convince the IPC that disclosure could reasonably be expected to result in any of the harms listed in the Act.

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[266] Order PO-1894 (April 11, 2001).
[267] Order MO-1851-I (October 8, 2004).
[268] Order P-1248 (August 27, 1996).
[269] Orders P-408 (February 10, 1993), M-288 (April 10, 1992) and M-511 (April 21, 1995), reiterated in Order PO-1894 (April 11, 2001).
[270] Order PO-2435 (December 16, 2005).
[271] Order MO-1781 (April 23, 2004).

[90] For example:

- where information was between 18-24 years old and there had been public scrutiny of the issues addressed in the record, disclosure could not reasonably be expected to result in harm;[272]
- where information was between 4-14 years old and related to a project which had long since been completed, disclosure could not reasonably be expected to give rise to harm;[273]
- however, where information was 11 years old but the information continued to be sensitive in that it provided insight into the party's current strategies and positions given that the business cycle in the industry was approximately 25 years, a reasonable expectation of competitive harm was found.[274]

(ii) The identity of the Requester

[91] It is often the case that the requester is an opposing party or a competitor of the third party. While many parties have argued that the requester has improper intentions, the identity of the requester or its motives are not determinative of the issues to be decided.[275] Indeed, the motive of a requester is not a relevant consideration under FIPPA or MFIPPA.

[92] Concerns about disclosure to a group that opposes a third party is not considered detailed and convincing evidence of harm. For example, where the requester was a ratepayers group who opposed a farm owners' plans and sought access to documentation on a decision to grant a building permit to a new hog barn, this was not sufficient evidence to show a reasonable expectation of harm.[276]

[93] It should also be noted that disclosure under the Act is considered by the IPC to be "disclosure to the world".[277]

(iii) Parties are involved in litigation

[94] Many IPC orders have considered the application of the third party exemption when the third party and the requester are involved in litigation.

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[272] Order PO-2369-F (February 22, 2005).
[273] Orders MO-1981 (October 17, 2005) and MO-1889 (December 22, 2004).
[274] Order PO-2283 (May 18, 2004).
[275] Order PO-1924 (July 11, 2001).
[276] Order MO-1823 (August 27, 2004).
[277] Order M-96 upheld on judicial review in *Ontario Secondary School Teachers' Federation, District 39 v. Wellington County Board of Education et al.* (20 December 1994), Toronto 407/93 (Div. Ct.), leave to appeal refused (16 October 1995) Doc. M15357 (C.A.).

Whether the parties are currently involved in negotiation will be an important consideration since a record will qualify for exemption under the third party exemption where disclosure could reasonably be expected to prejudice negotiations. This exemption was also found to apply where the information dealt directly with unresolved litigation issues.[278] However, a possibility of litigation has not been held by the IPC to, in itself, be sufficient to argue that disclosure could reasonably be expected to significantly prejudice negotiations.[279] In considering whether disclosure would result in undue loss or gain,[280] the IPC has stated that disclosure of records which may be relevant to a civil action could not accurately be described as being "undue" since a determination of personal liability would be based on a finding by a court.[281]

[95] Where a document may be exempt from discovery in the civil litigation process, the IPC has determined that this does not mean that it will be exempt from a request under the Act.[282]

[96] Harassment may be a harm which gives rise to the exemption. This argument was put forward in Order P-2003. However, the IPC held that there was insufficient evidence to establish that the harassment had occurred. [283]

(iv) Do names qualify for exemption?

[97] The IPC has stated that the release of names of third parties is something that should be decided on a case by case basis.[284] Some orders have found that names and addresses of commercial entities do not normally qualify for exemption since names alone are not the type of information that qualifies as commercial information,[285] and the identities of parties who contract or engage in collaborative work with a government institution do not constitute an "informational asset" of the third party. For instance, the IPC has found that where the name of the company was well-known in its area of expertise, the submission that the name constituted commercial information was rejected on the basis that the name did not have the commercial connotation necessary.[286]

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[278] Order PO-2200 (October 29, 2003).
[279] Order PO-1732-F (November 19, 1999).
[280] See subsection 17(1)(c) of FIPPA and subsection 10(1)(c) of MFIPPA.
[281] Order PO-2043 (September 13, 2002).
[282] Order PO-1688 (June 16, 1999).
[283] Order PO-2003 (April 9, 2002).
[284] Order PO-1816 (August 31, 2000).
[285] Orders PO-373 (November 22, 1994), PO-1802 (July 10, 2000) and PO-2338 (October 28, 2004).
[286] Order PO-2200 (October 29, 2003).

[98] This can be contrasted with other decisions where the name of a business or commercial entity is linked with other information in such a way that the combined information qualifies as commercial information.[287] For example, a list of all practicing registered mortgage agents together with the registered mortgage broker with which they are affiliated provided as part of an application and renewal process for registering mortgage brokers under the *Mortgage Brokers Act* was considered commercial information supplied to the institution.[288] However, the fact that a commercial entity seeks to do business with an institution in and of itself is not sufficient to bring the information within the definition of commercial information.[289]

[99] While the names of staff and their positions included in a bid has been considered to not be "personal information", rather, information about the individuals' professional capacity, the resumes of the individuals has been determined by the IPC to be "personal information". [290] The IPC has noted that the context and the capacity of the individuals must be considered. In Order PO-2579, the IPC found that the physicians' names, income, assets and financial activities was not personal information since they were provided as part of a bid to provide contractual services and is in relation to professional services.[291]

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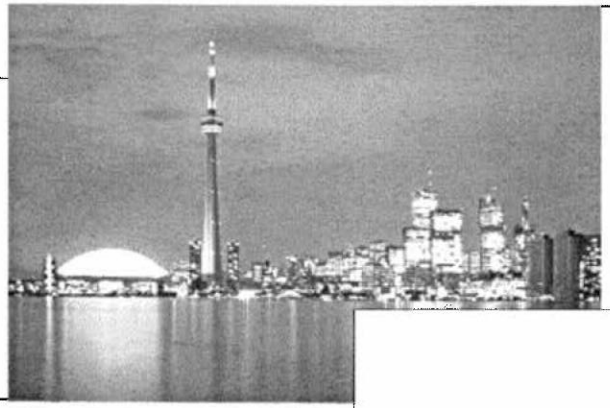
[287] Orders MO-1237 (September 29, 1999) and PO-1816 (August 31, 2000).
[288] Order PO-2025 (June 26, 2002).
[289] Order PO-1816 (August 31, 2000).
[290] Order PO-2575 (May 11, 2007) and MO-2193 (May 11, 2007).
[291] Order PO-2579 (May 24, 2007) reiterating what the IPC held in PO-2225.



Heenan Blaikie

Third Party Commercially Valuable Information in Procurement

Access to Information Laws – What are the Implications for Procurement?

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IMLA's 72nd Annual Conference
October 28-31, 2007
Nashville, Tennessee
Priscilla Platt

Overview: Third-Party Information Exemption

- **FIPPA Exemption, s. 17**
- **MFIPPA Exemption, s. 10**

FIPPA Exemption

- **Section 17**
  - Third party information
    - 17(1) 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, where the disclosure could reasonably be expected to,
      - (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
      - (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
      - (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.

      ...

    - 17(3) A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

MFIPPA Exemption

- **MFIPPA, section 10**
  - Third Party Information
    - 10(1) A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
      - (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
      - (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
      - (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.
  - Consent to disclosure
    - 10(2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

Direction for this Exemption

- IPC 2006 Annual Report
  - **Need for transparent purchasing system.**
  - **Urged public posting of winning and losing bids.**
- IPC 2005 Annual Report
  - **"The need for public accountability in the expenditure of public funds is a very important reason why information about such contracts needs to be kept in the public view. All government organizations should make this clear – up front – when seeking outside help".**

The Test

- **4-Part Test: All parts of the test must be met.**
  - A. Particular type of information (i.e. commercial, financial, trade secret);
  - B. Supplied;
  - C. In confidence; and
  - D. Reasonable expectation of harms.

Part 1 of the Test: Particular Information

- **"Commercial" information**
  - Solely in relation to the buying, selling or exchange of merchandise or services (PO-2010).
  - Fact that it may have monetary value does not necessarily mean it contains "commercial information". (PO-1621)

- **"Financial" information**
  - Information related to money and its use or distribution and must contain or refer to specific data such as accounting methods, pricing practices, profit and loss data. (PO-2010)

Part 1 of the Test: Particular Information (cont'd)

- **"Trade Secret"**
  - Includes a formula, pattern, compilation, method, or process;
  - Not generally known;
  - Has economic value because it's not generally known; and
  - Efforts have been made to maintain its secrecy. (Order M-29).

Part 2 of the Test: "Supplied" - Contracts

- ***Boeing Co. v. Ontario (Ministry of Economic Development and Trade)* (2005), 200 O.A.C. 134 (Div.Ct.)**
  - The exemption protects the "informational assets" of businesses or other organizations that provide information to institutions.
  - Confirmed that the IPC's approach that information is not "supplied" if it is the subject of negotiation via a contract.
  - Fact that the contract was preceded by little negotiation or that the contract substantially reflects terms proposed by the third party does not mean it was "supplied".

Part 2 of the Test: "Supplied" – Contracts - Immutability

- **MO-2052**
  - Information that is "immutable" or not susceptible to change in the negotiation process; not information that is susceptible to change, but was not, in fact changed.
  - Such as the operating philosophy of a business or a sample of its products, financial statistics, fixed costs such as its overhead or labour costs in a collective agreement. (PO-2371).

- **MO-2115 (example where this was "supplied")**
  - Technical requirements for the site work and building construction for the facility.
  - How the bidder intends to construct the facility and perform the services (engineering and architectural information).

Part 2 of the Test: "Supplied" – Contracts – Inferred Disclosure

- **MO-1706 and PO-2371**
  - Disclosure of the information in a contract could permit accurate inferences to be made regarding underlying non-negotiated confidential information supplied by the affected party to the institution.

Part 2 of the Test: "Supplied" – Contracts – Bid Proposal

- **PO-2384**
  - A bid proposal may be "supplied" by the third party during the tendering process.
  - If the bid is successful and is incorporated into the contract or becomes the contract, it may become "negotiated" or not "supplied" information since its presence in the contract signifies that the other party agreed to it.

- **PO-2435**
  - The acceptance or rejection of a consultant's bid in response to an RFP is a form of negotiation even regarding unit pricing.

Part 2 of the Test: "Supplied" – Contracts – RFP Bid Scores

- ***Ontario (Ministry of Transportation) v. Consulting Engineers of Ontario*, 2005 Can LII 34228 (Ont. C.A.)**
  - RFP summary charts, construction scores assigned by the Ministry.
  - Scores for each bidder varied across different projects.
  - Future bids could not be manipulated if the scores were disclosed.
  - The bidding consultants could not point to any information actually "supplied" in confidence that would be revealed by the disclosure of the scores.
  - Bid score accessible.

Part 3 of the Test: Confidentiality

- **PO-2043**
  - Reasonable expectation of confidence (explicit or implicit)
  - Treated consistently as confidential prior to being communicated to government.
  - Not otherwise disclosed or available from sources to which the public has access.
  - Prepared for a purpose that would not entail disclosure.

Part 4 of the Test: Harms: "detailed and convincing evidence"

- ***Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*** **(1998), 41 O.R. (3d) 464 (C.A.)**
  - Speculation of possible harm is generally not sufficient.

Part 4 of the Test: Harms: Bid Proposals

- **PO-2435 and PO-2485**
  - Bid Proposals – Harms Met
    - Negotiations that are not yet finalized.
    - Financial issues yet to be addressed.

Part 4 of the Test: Harms: Undue Loss

- **Order PO-2509**
  - Disclosure of records relating to Bombardier's *C-Series* project would result in undue loss for Bombardier and undue gain for its competitors
  - Records contained information on financial needs and expectations, market analyses, technical product information, business plan strategies and forecasts.
    - "Although neither the Ministry nor Bombardier have linked specific records with specific harms, their representations clearly explain that should the information contained in the records fall into the hands of a competitor, it could reasonably be expected to use that information to gain a business advantage."

Access to Information and Privacy Group

Heenan Blaikie LLP
200 Bay Street, Suite 2600
Royal Bank Plaza, South Tower
Toronto, ON M5J 2J4

Contact:

Priscilla Platt
Tel: 416-360-3520
e-mail: pplatt@heenan.ca

Adam Kardash
Tel: 416-360-3559
E-mail: akardash@heenan.ca