

# INTERPRETATION BULLETIN

## Third Party Information

This interpretation bulletin discusses the third party information exemption, as set out in **section 17(1)** of the *Freedom of Information and Protection of Privacy Act* (FIPPA) and **section 10(1)** of the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA). It outlines the considerations relevant to determining whether the third-party information exemption applies.

Sections 17(1) of FIPPA and 10(1) of MFIPPA state:

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/if<sup>1</sup> 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;

<sup>1</sup> Note that FIPPA uses “where”, and MFIPPA uses “if.”



- (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.

## Purpose of the third-party information exemption

A third party is a party whose interests may be affected by disclosure of the records at issue. The third party is often referred to as an affected party.

The purpose of the mandatory exemptions in sections 17(1) of FIPPA and 10(1) of MFIPPA is to protect certain confidential information that third parties, such as businesses or other organizations, provide to government institutions,<sup>2</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>3</sup>

### The three-part test for the third party information exemption to apply

For sections 17(1) FIPPA/10(1) MFIPPA to apply, the party arguing against disclosure must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) FIPPA or of section 10(1) MFIPPA will occur.

<sup>2</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

<sup>3</sup> Orders **PO-1805**, **PO-2018**, **PO-2184** and **MO-1706**.

## Part 1: Type of information

The IPC has described the types of information protected under section 17(1) of FIPPA and section 10(1) of MFIPPA as follows:

**Trade secret** includes information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- (a) is, or may be used in a trade or business;
- (b) is not generally known in that trade or business;
- (c) has economic value from not being generally known; and
- (d) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.<sup>4</sup>

Information that is generally known in a trade or business, or is known to customers, and/or the employees of those customers is likely not a trade secret.<sup>5</sup>

Information that is openly shared during a request for proposal (RFP) process is likely not a trade secret.<sup>6</sup>

**Scientific information** is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. For information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion by an expert in the field.<sup>7</sup>

**Technical information** is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field, and describes the construction, operation or maintenance of a structure, process, equipment or thing.<sup>8</sup>

**Commercial information** is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.<sup>9</sup> The fact that a record might have monetary value now or in the future does not necessarily mean that the record itself contains commercial information.<sup>10</sup>

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4 Order [PO-2010](#).

5 Order [PO-3790](#).

6 Order [MO-3132](#).

7 Order [PO-2010](#).

8 Order [PO-2010](#).

9 Order [PO-2010](#).

10 Order [P-1621](#).

**Financial information** is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>11</sup>

**Labour relations** means relations and conditions of work, including collective bargaining. It is not restricted to employer/employee relationships. The IPC has found that labour relations information includes:

- discussions regarding an agency’s approach to dealing with the management of their employees during a labour dispute;<sup>12</sup> and
- information compiled during the negotiation of pay equity plans (for example, exchanges between a hospital and the bargaining agents representing its employees).<sup>13</sup>

The IPC has found that labour relations information does **not** include:

- names, duties and qualifications of individual employees;<sup>14</sup>
- an analysis of the performance of employees on a project;<sup>15</sup>
- an account of an alleged incident at a child care centre;<sup>16</sup> or
- the names and addresses of employers who were the subject of levies or fines under workers’ compensation legislation.<sup>17</sup>

## Part 2: Supplied in confidence

### Supplied

For sections 17(1) FIPPA/10(1) MFIPPA to apply to third-party information, the information contained in the records must have been “supplied” to the institution by a third party.<sup>18</sup>

Information may qualify as having been “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the making of accurate inferences with respect to information supplied by a third party.<sup>19</sup>

It is up to the third-party resisting disclosure to demonstrate that the information was “supplied”.<sup>20</sup>

11 Order [PO-2010](#).

12 Order [P-1540](#).

13 Order [P-653](#).

14 Order [MO-2164](#).

15 Order [MO-1215](#).

16 Order [P-121](#).

17 Order [P-373](#), upheld in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

18 Order [MO-1706](#) and Order [PO-1974](#).

19 Orders [PO-2020](#) and [PO-2043](#).

20 [Toronto-Dominion Bank v. Ryerson University](#), 2017 ONSC 1507.

The determination whether the information at issue was “supplied” by a third party is mainly a question of fact “that must be determined on the basis of the record before the decision-maker”<sup>21</sup> and all of the surrounding circumstances.<sup>22</sup>

The contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the purpose of sections 17(1) FIPPA/10(1) MFIPPA. Contractual provisions are generally treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where it reveals information that originated from one of the parties.<sup>23</sup>

A winning bidder’s proposal is not transformed from being supplied to being mutually generated where the winning bidder’s proposal contains certain terms that later become incorporated into the institution’s contract with that party.<sup>24</sup> On the other hand, where a winning proposal becomes, on acceptance, the basis of the commercial arrangement between the parties and no separate contract is created, the terms of that winning proposal are mutually generated and not supplied.<sup>25</sup>

The IPC has held that the intention of the third-party information exemption 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.”<sup>26</sup>

The general rule that contractual information is negotiated between the parties rather than supplied by the third party to the institution is subject to two exceptions:

1. **The “inferred disclosure” exception.** This exception applies where disclosure of the information in a contract would allow someone to make accurate inferences about underlying non-negotiated, confidential information supplied to the institution by a third party.<sup>27</sup>
2. **The “immutability” exception.** This exception applies where the contract contains non-negotiable information supplied by the third party that is not susceptible to change. Examples are financial statements, underlying fixed costs and product samples or designs.<sup>28</sup>

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21 [Toronto-Dominion Bank v. Ryerson University, 2017 ONSC 1507](#) and [Merck Frosst Canada Ltd. v. Canada \(Health\), \[2012\] 1 S.C.R. 23](#).

22 Orders [MO-2870](#) and [PO-3192](#).

23 This approach was approved by the Divisional Court in [Boeing Co.](#), cited above, and in [Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al., 2013 ONSC 7139 \(CanLII\) \(Miller Transit\)](#). Also see Order [PO-3892](#).

24 Order [MO-3058-F](#).

25 Order [MO-2093](#).

26 Orders [PO-2384](#) and [PO-3830](#).

27 Order [MO-1706](#), cited with approval in [Miller Transit](#), cited above at para. 33.

28 [Miller Transit](#), cited above at para. 34.

Information created by the institution about a third party, such as test results, analyses, evaluations, scores, reports or recommendations, will generally not be considered to have been supplied by the third party. This is so even if such analyses were based on information provided by the third party unless the inferred disclosure exception applies.<sup>29</sup>

Where information simply identifies a business entity in the context of entering into a business relationship, without more substantial information contained in the record, it will likely not be considered supplied to.<sup>30</sup> However, in circumstances in which there is more substantial information provided about the third party, the IPC may find that the supplied to test was met.

## In confidence

The party arguing against disclosure must also show that the individual supplying the information expected the information to be treated confidentially, and that their expectation is reasonable in the circumstances. An expectation of confidentiality must be based on reasonable and objective grounds.<sup>31</sup> Simply claiming confidentiality alone will not be sufficient.<sup>32</sup>

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

1. **Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.** The intention to keep information confidential must be stated. For instance, records intended to be kept confidential will often contain markings of confidentiality. Such markings must be consistent with a deliberate intention to keep the documents confidential,<sup>33</sup> and not just boilerplate language.<sup>34</sup> Conversely, the absence of any markings of confidentiality may be found to be more consistent with the absence of such intention.<sup>35</sup>
2. **Treated consistently by the third party in a way that indicates a concern for confidentiality.** Here the party claiming the exemption must show that the information was treated in a manner that implied an understanding or expectation of confidentiality<sup>36</sup> at the time the information was provided. An affected party's expectation of confidentiality may arise impliedly from the institution's

29 Order [PO-2668](#).

30 Orders [PO-1816](#) and [PO-3055](#).

31 Orders [PO-2020](#), [PO-2043](#), [PO-2371](#) and [PO-2497](#), upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

32 Orders [MO-2070](#) and [MO-2182](#).

33 Orders [MO-2088](#) and [PO-3937](#).

34 Order [PO-2180](#).

35 Order [PO-3850](#).

36 Order [PO-3937](#).

policies, procedures or practices<sup>37</sup> or from confidentiality undertakings and measures taken by the third party<sup>38</sup>. An implied expectation of confidentiality may be found even in the absence of explicit markings of confidentiality<sup>39</sup> and even in respect of draft documents.<sup>40</sup>

3. **Not otherwise disclosed or available from sources to which the public has access.** Information that is otherwise publicly accessible will not support a reasonable expectation of confidentiality.<sup>41</sup>
4. **Prepared for a purpose that would not entail disclosure.**

The claim of confidentiality will be assessed on the facts of each case. For example, in one case, the IPC found that building permit application drawings for a specified address were supplied to the city by a third party, but that there was no objective basis to conclude that the drawings were provided in confidence, given the nature of the records and the fact that the city had not provided any assurance of confidentiality to the third party.<sup>42</sup>

## Part 3: Harms

### Could reasonably be expected to cause...

Parties resisting disclosure of a record cannot simply claim that the harms under sections 17(1) FIPPA/10(1) MFIPPA are obvious based on the record. They must provide sufficient evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding situation, parties should not assume that the harms under sections 17(1) FIPPA/10(1) MFIPPA are obvious and can be proven simply by repeating the description of harms in the acts.<sup>43</sup>

Parties resisting disclosure must show that the risk of harm is real and not merely possible, hypothetical or speculative.<sup>44</sup> However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the circumstances and the seriousness of the consequences were the information to be disclosed.<sup>45</sup>

37 Orders [PO-2436](#), and [PO-2294](#).

38 Orders [MO-3628](#), [MO-3427](#), and [MO-1750](#).

39 Orders [MO-2070](#), [MO-2283](#) and [PO-3548](#).

40 Orders [MO-1914](#) and [PO-4049](#).

41 [PO-3574](#), [MO-3080-I](#) and [MO-2193](#).

42 Order [MO-4466](#).

43 Orders [MO-2363](#) and [PO-2435](#).

44 *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

45 *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616.

In applying sections 17(1) FIPPA/10(1) MFIPPA, to a government contract, a balance must be struck between the need for government transparency and accountability for how public money is spent, and the need to protect against harm to a third party's economic interests.<sup>46</sup>

### **Significant prejudice to competitive position / undue loss or gain**

Parties arguing the section 17(1)(a) and (c) FIPPA /10(1)(a) and (c) MFIPPA harms should explain how disclosure could reasonably be expected to:

- prejudice significantly the competitive position of the affected party, and/or
- interfere significantly with the contractual or other negotiations of the affected party.

Some factors in assessing competitive harm can include:

- Expenditure of time and resources spent for development.<sup>47</sup>
- The competitive nature of the industry.<sup>48</sup>
- How critical the information is to the success of a business.<sup>49</sup>
- Usefulness of the information to a competitor.<sup>50</sup>
- Whether risk of competitive harm may have lessened with the passage of time.<sup>51</sup>
- Specific price amounts and breakdown of pricing.<sup>52</sup>

Sections 17(1)(a) and (c)/10(1)(a) and (c) are often claimed together because these harms can be similar.

### **Similar information would no longer be supplied**

Sections 17(1)(b) FIPPA/10(1)(b) MFIPPA seek to protect information that a third party could reasonably be expected to stop supplying to the institution if it is disclosed. A claim that third parties will be less likely to provide such information in the future is not sufficient.<sup>53</sup> Such a claim will also not succeed if the third party is statutorily or contractually required to provide the information in any event,<sup>54</sup> or stands to benefit by providing it.<sup>55</sup>

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46 Order [PO-2435](#).

47 Order [PO-1818](#).

48 Order [PO-2774](#).

49 Order [PO-2158](#).

50 Order [PO-2158](#).

51 Order [MO-2249-I](#).

52 Order [MO-2193](#).

53 Orders [PO-3459](#) and [PO-4051](#).

54 Order [PO-3916](#).

55 Order [MO-1750](#).

The IPC will examine whether it is in the public interest that similar information continue to be supplied to the institution. The IPC will also consider harm that would result if similar information were no longer voluntarily supplied to the institution, and the extent to which the institution heavily relies on it.<sup>56</sup>

For example, in one case, the IPC upheld a university's decision to withhold technical services agreements supplied in confidence to the university for the purpose of scientific testing because it accepted that if the information was publicly disclosed under the act, there was a reasonable basis to conclude that similar information would not be provided to the university in the future. The IPC concluded that the fact that similar information would no longer be provided in the future was harmful because it would result in lost revenue to the university.<sup>57</sup>

### **Undue loss or gain**

Sections 17(1)(c) FIPPA/10(1)(c) MFIPPA seek to protect information that, if disclosed, could result in the third party suffering undue losses or others experiencing undue gains.

The IPC has defined the word “undue” as excessive, disproportionate, not suitable, not owed.<sup>58</sup>

Sections 17(1)(a) and (c) FIPPA/10(1)(a) and (c) MFIPPA are often claimed together because these harms can be similar.

### **Reveal information supplied in a labour relations dispute**

Sections 17(1)(d) FIPPA/10(1)(d) MFIPPA seek to protect information that if disclosed could reasonably be expected to reveal information supplied to a conciliation officer, or reports prepared by a conciliation officer, mediator, labor relations officer or other neutral third parties appointed to resolve labor relations disputes.

### **Tax information (under section 17(2) of FIPPA only)**

FIPPA section 17(2) states:

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.

This provision protects information about businesses that the government receives for tax purposes.<sup>59</sup> If this type of information was to be disclosed, corporate taxpayers may be more hesitant to voluntarily disclose it, hence the reason for the mandatory exemption.<sup>60</sup>

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56 Order [PO-3459](#).

57 Orders [PO-4358](#) and [PO-4076](#).

58 Orders [P-1614](#) and [MO-3395-I](#).

59 Order [PO-3675](#).

60 Order [PO-3675](#).

This exemption is intended to be interpreted and applied narrowly.<sup>61</sup>

Section 17(2) of FIPPA does not prevent the taxpayer to which the tax liability accrues from obtaining this information upon request.

### Exception to the third-party information exemption

Section 17(3) of FIPPA and section 10(2) of MFIPPA state:

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

### Notice to affected third parties

Under section 28(1) of FIPPA / 21(1) of MFIPPA, there is a requirement for an institution that intends to disclose third party information to first notify the affected party in writing. This notice must:

- state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests of the third party,
- state that the head intends to release the information, the record or part of the record,
- describe the contents of the record that relate to the third party,
- state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed,
- state that the third party is being given an opportunity to make representations concerning disclosure, and
- state that a decision will be made within 30 days about whether to give the applicant access to the record.

Within 30 days of giving notice to the affected third party (but no sooner than 21 days after giving notice or one day after receiving the affected party's response), the head of the institution must decide whether to grant access to the record and give written notice of their decision to both the applicant and the third party.

If the head's decision is to grant access to the records at issue, the affected third party may appeal this decision to the IPC within 30 days from the date of the written notice of the decision. The head must not disclose the records until the third party has been given the opportunity to appeal the decision, and if they do appeal, until such time as the appeal is heard and resolved by the IPC.

For additional information, please see the [Third Party Information Exemption fact sheet](#).

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61 Orders [P-373](#) and [PO-2802-I](#).