

# ACCESS FACT SHEET

## Third Party Information Exemption

Public institutions typically have information about outside, or “third party” organizations. Often this information is collected from organizations doing business with institutions. While Ontario's *Freedom of Information and Protection of Privacy Act* and *Municipal Freedom of Information and Protection of Privacy Act* give people the right to access records held by institutions, there are exceptions to that right, including where disclosure could harm a third party's business interests. This exception is commonly referred to as the “third party exemption.”

When an institution receives a request for records that include information related to a third party, it must determine if the third party exemption applies to justify withholding the records.

### DETERMINING IF THE EXEMPTION APPLIES

The exemption applies if the record satisfies **all** three parts of this test:

1. the record contains certain types of business information
2. the information was supplied in confidence, either implicitly or explicitly
3. disclosure could cause harm to the third party



## Part One: Type of Information

The exemption applies to the following types of information:

**Trade secrets**—a secret process, design or formula used for an organization's economic advantage, such as a proprietary recipe for a soft drink, or algorithm used by a search engine. If the information is used in a trade or business, is not generally known, has economic value from not being generally known, and the organization makes efforts to keep it secret, then the information may be considered a trade secret (**Order PO-2010**).

**Scientific information**—relating to the work of scientific experts, such as the observation and testing of a specific hypothesis (**Order PO-2010**) or the results of raw data analysis.

**Technical information**—prepared by a professional in the applied sciences or mechanical fields, such as architecture, engineering or electronics, usually describing the construction, operation or maintenance of a structure, process, equipment or thing (**Order PO-2010**).

**Commercial information**—relating to the buying, selling or exchange of products or services (**Order PO-2010**). This may include:

- product information
- tenders
- marketing strategies
- cost quotations
- price, supplier and customer lists
- client information or business proposals

**Financial information**—relating to money matters and finances. Unlike commercial information, financial information must contain or refer to specific data. This may include:

- accounting methods
- financial statements
- pricing practices
- bid information
- property tax information
- sales revenues
- employment costs (**Order PO-2010**)

**Labour relations information**—about the collective bargaining relationship between an employer and its employees, such as labour dispute plans (**Order P-1540**) or collective bargaining strategies (**Order PO-2010**).

## Part Two: Supplied in Confidence

How do you know if the information was **supplied**?

- When a third party provides information directly to the institution, the information is considered to be supplied.
- If the institution produces or calculates the information on its own, then the information is not considered supplied.
- If the institution and the third party create the information together, or if it is a product of business negotiations, then it is not considered supplied (**Order PO-2020**).

A contract between an institution and a third party does not normally qualify as having been supplied because its terms are mutually generated. However, even information in a contract may be treated as supplied if it:

- allows accurate inferences to be made about underlying confidential information (the inferred disclosure exception)
- consists of information supplied by a third party that cannot be negotiated, such as financial statements or product designs (the immutability exception) (**Order MO-1706**)

How do you know if the information was provided **in confidence**?

- Information is considered supplied in confidence when there is a reasonable expectation of confidentiality, either implicit or explicit, when it is provided (**Order PO-2020**).

## Part Three: Harm From Disclosure

The third party exemption may apply if harm could reasonably be expected to result from disclosure. The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. Without needing to prove that harm is a certainty, it must demonstrate a risk of harm that is well beyond the merely possible or speculative. How much and what kind of evidence is needed will depend on the nature of the information and the facts of the case.

Harms might include one or more of the following:

- significant damage to the third party's competitive position
- significant interference with contractual or other negotiations
- similar information no longer being supplied by the third party to the institution, where it is in the public interest that such information continues to be provided
- undue loss or gain to any party

## NOTIFYING THE THIRD PARTY

If the information:

1. might contain business information and
2. might have been supplied in confidence

then the institution must notify the affected third party of the request before disclosing the record (**Order PO-1694-I**).

The third party is generally in the best position to understand if there are possible harms from disclosure. The third party should be informed of its right to provide consent—or object—to the disclosure, in writing. The third party should also be advised that if it objects to disclosure, it should provide detailed and convincing evidence to support its claim that the exemption applies.

The institution must consider the submissions by the third party and then make a decision to disclose, partially disclose, or withhold the record. The third party and the requester have the right to appeal the institution's decision to our office.

For more information about *FIPPA* and *MFIPPA* exemptions, watch our webinar, *Understanding Exemptions in FIPPA and MFIPPA*.

## A NOTE ON OPEN CONTRACTING

Open contracting is the practice of routine, proactive disclosure of contracting information. It covers the entire process, and includes contracts funded by combinations of public and private sources. The IPC encourages government institutions to design their procurement process with proactive disclosure in mind. Only proprietary and limited personal information needs to be withheld.

A number of benefits can result from adopting open contracting:

- fewer freedom of information requests received by an institution
- improved public confidence and trust
- enhanced accountability on spending
- increased fairness and competition during the contracting process

For more information on open contracting and proactive disclosures, please see our guidance document, *Open Contracting: Proactive Disclosure of Procurement Records*.

If you have any further questions about the third party exemption, open contracting, or Ontario's access and privacy laws, please contact us at, [info@ipc.on.ca](mailto:info@ipc.on.ca) or 1-800-387-0073.