Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1450

Appeal MA-990302-1

City of Toronto

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NATURE OF THE APPEAL:

This is an appeal from a decision of the City of Toronto (the City) made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

As background, the appeal arises out of a decision by the City to undertake a redevelopment project at the corner of Yonge and Dundas Streets in downtown Toronto. Between February and May of 1998, the Ontario Municipal Board (the OMB) considered the City's redevelopment plan, including amendments to the Official Plan, Community Improvement Plan and Zoning By-law, and the City's application to expropriate land in connection with the project. In June of 1998, the OMB approved the plan, including the intended expropriations.

There is an impending hearing before the OMB to determine the compensation to be paid by the City to some of the former owners of the expropriated land, including the appellants. The appellants will be parties to this hearing.

The appellants made a request under the *Act* to the City for copies of all exhibits and documents filed by the City at the hearing before the OMB. The City granted access in full to one exhibit, and denied access to the remaining records, relying on the mandatory exemption in section 10(1) of the *Act* (third party information), the discretionary exemption found in section 11 (prejudice to economic, competitive or financial interests of the City) and the mandatory exemption in section 14 (unjustified invasion of personal privacy). The City also cited section 12 (solicitor-client privilege) in its decision as a basis for denying access to two specific records.

The appellants appealed the City's decision to deny access to certain records. During the course of mediation through this office, some issues were narrowed or clarified. After the appeal was filed, the City indicated that it intended to rely on section 12 (solicitor-client privilege) with respect to further records. The appellants objected to this, on the basis, among other things, that the City was precluded from raising an additional exemption at this stage in the process. During mediation, the City agreed to forgo its reliance on section 12 in this appeal. This was confirmed by the mediator in correspondence to the parties, as well as in the Report of Mediator.

I sent a Notice of Inquiry to the City and to three affected parties initially (a developer and two theatre companies), inviting representations on the issues raised by this appeal. In addition to the exemptions relied on by the City, I also included section 38(b) of the *Act* in the list of issues to be considered since it appeared that this provision may be relevant. I received representations from the City and two affected parties (the developer and one of the theatre companies). The appellants were sent the representations of the City, with the exception of certain portions which were severed for confidentiality reasons, as well as the representations of the affected parties in their entirety, and were also invited to submit representations. Finally, I sought reply representations from the City in relation to certain issues raised in the submissions of the appellants.

In this decision, unless otherwise indicated, references to "the theatre company" refer to the company which has provided representations in response to the Notice of Inquiry.

RECORDS:

The records pertain to Orders 1391 and 2937 of the OMB, and consist of the following:

Order 1391:

Exhibit 51A consists of three letters dated December 19, 1996. The first is an Offer to Lease from the theatre company to the City, containing the terms of a lease of part of the property to be redeveloped. The second is an Offer to Lease from the theatre company to the developer of the site, also containing the terms of a lease with respect to this redevelopment. The third letter contains the terms of an agreement (the letter agreement) between the City and the theatre company under which the company is to establish and operate a theatre complex on the property whether it leases the space directly from the City, or from the developer. All the letters are signed by the theatre company only.

Exhibit 54 is a report containing the financial analysis of the proposed redevelopment, prepared by a consultant for the City and dated January 16, 1998. Included in the report are financial projections for the proposed development, for the purpose of assisting the City in understanding whether or not redevelopment is viable from a market perspective as well as to demonstrate the likely magnitude of the cost to the City of the public square portion of the redevelopment. Also included in the report is an analysis of the financial aspects of proposals from the two theatre companies competing to be anchor tenants in the development, along with a conclusion as to which company has the better proposal. The report includes a narrative portion supported by the following exhibits:

Exhibit 1 - *curriculum vitae* of the consultant who prepared the report;
Exhibit 2 - 2 year financial plans with detailed cash flows for pessimistic and optimistic scenarios (December 1996), and financial statement analysis with respect to the two theatre companies;
Exhibit 3 - memorandum from the consultant outlining the results of his financial analysis of the scenarios proposed by the two theatre companies, including appendices setting out comparative financial projections (January 1997);
Exhibit 4 - 2 year financial plan with detailed cash flows (May 1997);
Exhibit 5 - letter from a developer (September 1997);
Exhibit 6 - 2 year financial plan with detailed cash flows (January 1998);
Exhibit 7 - memorandum from a member of City staff, containing an analysis of direct and indirect tax revenue projections from the redevelopment (January 1998).

Exhibit 89 is a lengthy memorandum, dated March 21, 1997, which summarizes the financial review of the developer's proposal for the redevelopment, by the same consultant. Detailed financial projections are contained in an appendix to the document.

Exhibit 91 is an Offer to Lease from the theatre company to the developer, dated May 5,1997, and signed by both parties.

Exhibit 93 is an Offer to Lease from the theatre company to the developer, dated December 2, 1996 and signed by both parties.

Exhibit 155 is a financial review of the development opportunity, containing detailed financial projections in the same format as the appendix to Exhibit 89 and marked "Corrected March 1997".

Order 2937:

Exhibit 1A, **Schedule B** (referred to hereafter as **Exhibit 1A**) is the first volume of the report of a real estate appraiser retained by the City. Essentially, it contains the appraiser's assessment of the cost of acquiring the properties to form part of the redevelopment, should the City proceed with an expropriation. Among other things, it identifies the 12 properties in question, their owners, nature of ownership (including encumbrances), purchase price, and appraised value. Some of the owners are individuals; most are corporations. The document includes the following appendices:

Appendix "A" -	Qualifications of the appraisers
Appendix "B" -	Photographs of the subject properties
Appendix "C" -	Zoning/height maps
Appendix "D" -	Excerpt from zoning by-law
Appendix "E" -	Summary Sales Chart (Yonge Street): a chart of market evidence, detailing sales of properties on Yonge Street, showing names of vendors (both individuals and corporations), purchasers (both individuals and corporations), and sale prices.

Exhibit 1B, **Schedule B** (referred to hereafter as **Exhibit 1B**) is the second volume of the report of the real estate appraiser. This part of the report estimates the market value of certain of the properties, as assembled redevelopment sites, on the assumption that the sites have been acquired by the City, cleared of existing buildings and are available for sale to one or more developers. The report includes market research in respect of lease rates and terms for retail premises located along Yonge Street, Bloor Street and other downtown locations, in which the names of some retailers and their lease rates are provided There is also market research in respect of sales of sites in the downtown or Yonge Street area acquired in anticipation of retail, non-retail or condominium development. The summaries of these sales include the names of vendors and purchasers (individuals and corporations), and sale prices.

Exhibit 13, Schedule B (referred to hereafter as **Exhibit 13**) is the memorandum of agreement between the City and the developer, setting out the terms pursuant to which the developer, as purchaser, will acquire, develop and lease the property. Exhibit 13 is dated September 10, 1997.

The City relies on sections 10(1) and 11 of the *Act* with respect to all of the above records, and on section 14 with respect to Exhibits 1A and Exhibit 1B. In its representations, the City also submits that section 14 applies to Exhibit 54.

PRELIMINARY MATTERS

Based on the representations of the appellants, **Exhibit 54 (Exhibit 1)** (the resume of the consultant) is no longer in issue, nor is Appendix "A" to **Exhibit 1A** (qualifications of the appraisers).

The appellants have also indicated that they are not seeking access to **Exhibit 54 (Exhibit 5)**, which is a letter from a third party to the City's consultant. Further, they are not seeking access to any information pertaining to two other third parties, Ryerson University and a fast food franchise located on the University's premises, which may be found in the records. Since I am satisfied that the information of these two parties can be reasonably severed from other information in the records, references to the records below are meant to exclude those portions of the records which relate to these two parties.

Another preliminary matter was raised by the representations of the City. In those representations, the City states that "[d]uring mediation, the City also applied section 12 to additional records, but this application of section 12 is no longer at issue." However, in one portion of the City's submissions in relation to section 10(1) of the *Act*, the City asserts that "solicitor client privilege applied and continues to apply" to two records. A similar reference is found in the City's reply representations. To the extent that the City *appears* to wish to re-introduce the applicability of section 12 to some of the records, I find that it is precluded from so doing. As the City itself has alluded to, the City specifically withdrew its reliance on section 12 during the mediation process. Although it is within my discretion to permit the City to raise this issue again nonetheless, I find no good reason to permit it in this appeal. In the circumstances here, including the discussions on this issue during mediation and the agreements reached in that process, I find that it would undermine the orderly processing of appeals and integrity of the appeals process, and particularly the mediation process, to permit the City to revive its reliance on section 12. My decision on this issue is consistent with other orders of this office which have considered similar efforts to raise discretionary exemptions late in the process: see, for instance, Order P-1137.

It should be noted that, in any event, the records which the City claims are covered by solicitor client privilege are found below to be exempt from disclosure under section 11 of the *Act*.

DISCUSSION:

THIRD PARTY INFORMATION

Because of my conclusion that section 11 applies to exempt **Exhibits 1A and 1B,** and **Exhibit 54 (narrative portion and Exhibits 2, 4 and 6)**, it is not necessary to consider the application of section 10(1) to these records. In this section, therefore, I will discuss **Exhibits 13, 51A, 54 (Exhibits 3 and 7), 89, 91, 93, and 155**.

Section 10(1) of the *Act* provides:

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.

Section 10(1) exists in recognition of the fact that in the course of carrying out public responsibilities, governmental agencies often find themselves in possession of information about the activities of private businesses. In Order PO-1805 Senior Adjudicator David Goodis, discussing the purposes of the provincial equivalent to section 10(1), stated that this provision was designed to "protect the 'informational assets' of businesses or other organizations which provide information to government institutions".

Although, as stated in other orders, one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace.

In applying section 10(1), previous orders have held that in order to support an exemption from disclosure under this section, institutions or affected parties must establish 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; **and**

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 (a), (b) or (c) of subsection 10(1) will occur.

[Orders 36, P-373, M-29 and M-37]

Part 1: Type of Information

Prior orders have found that commercial information is "information which relates solely to the buying, selling or exchange of merchandise or services": see, for instance, Order P-493. "Financial information" has been found to mean information relating to money and its use or distribution, containing or referring to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (see Orders P-228, P-295 and P-394).

The City and the developer submit that the records contain the affected parties' commercial and financial information. The theatre company asserts, with respect to certain identified categories of information in the records, that these portions contain commercial and financial information. The appellants submit in general that

> [t]he records in question are not comprised only of commercial or financial information and since neither the City nor affected parties have claimed that any of the other information contained in the reports is scientific, technical or labour relations information then portions of the records which are not commercial or financial in nature should be severed and disclosed.

On my review of the exhibits under consideration and the representations of the parties, I am satisfied that the information in them constitutes either commercial or financial information within the meaning of the *Act*, and consistent with the above orders. My determination includes

- **Exhibit 13**, which is the 79-page memorandum of agreement between the City and the developer setting out the terms pursuant to which the developer will acquire, develop and lease the property;
- **Exhibits 51A, 91 and 93**, which contain the terms of proposed or executed commercial contracts between the theatre company and the developer, or the theatre company and the City, including specific figures for minimum annual rent, percentage rent and construction allowance;
- **Exhibit 54 (Exhibits 3 and 7)** which consist of a financial analysis of the proposals of two theatre companies and an analysis of tax revenue projections;
- **Exhibit 89**, a memo summarizing the financial review of the developer's proposal for the redevelopment, including detailed calculations of financial projections; and
- **Exhibit 155**, which is an updated version of Exhibit 89.

I do not accept the submissions of the appellants that portions of the above records are not commercial or financial in nature and ought to be severed and disclosed. Given that the records as a whole were created as part of the financial planning, negotiation and completion of commercial transactions, I am satisfied that they ought to be treated as a whole for this part of the section 10(1) exemption test.

Part 2: Supplied in Confidence

The second part of the three-part test under section 10(1) encompasses two components: it must be shown that the information was "supplied" to the institution, and that the supply of the information was "in confidence".

The requirement that it be shown that the information was "supplied" to the institution reflects, once again, the purpose in section 10(1) of protecting the informational assets *of the third party*. As stated in 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) (the Williams Commission Report), which provided the foundation of this *Act*:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself. The fact that the commercial information derives from a non-governmental source is a clear and objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind (pp. 312-315) [emphasis added].

Because the information in a contract is typically the product of a negotiation process between two parties, the content of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 10(1) of the *Act*. Records of this nature have been the subject of a number of past orders of this office. In general, the conclusions reached in these orders is that for such information to have been "supplied", it must be the same as that originally provided by the affected party, not information that has resulted from negotiations between the institution and the affected party: see, for instance, Order PO-1698, dealing with the provincial equivalent of section 10(1). However, it should also be noted that although some terms in a contract may mirror proposals originally made by an affected party, in the absence of anything to suggest that such terms were negotiated separately, the contract will be treated in its entirety as the product of negotiation: see Order MO-1393.

In general, the City submits that the information at issue was supplied by the developer, the theatre companies or other third parties, either directly to the City, to its solicitors, to its consultants, or to the developer who in turn forwarded this information to the City. The City further submits that this information was supplied in confidence. It states:

> The City submits that the whole development process has from its earliest stages been subject to a high level of confidentiality. In the RFQ (and RFP) issued by the City, the City specifically advised proponents that the "confidentiality of records and information concerning this Project must be maintained at all times"

> and "...confidential financial information will remain confidential in accordance with the provisions of the Act..." The proponents were also told that if the three parts of section 10 of the *Act* are met, then their proprietary information would not be disclosed.
>
> In addition, the information contained in the records at issue was the subject of deliberations of in-camera meetings of Council and various committees. Further, the City went to extensive lengths during the OMB hearing to preserve the confidentiality of these documents: portions of the hearing relating to these records were held in camera; parties to the hearing were required to execute confidentiality undertakings, and an order was obtained from the OMB subsequent to the hearing, requiring that these documents remain confidential. The parties' intentions regarding confidentiality are clearly manifested in that process.

As described above, **Exhibit 13** is the memorandum of agreement between the City and the developer, and consists of written terms plus schedules.

In relation to Exhibit 13, the City states that this record is based on information supplied in confidence by the developer, and includes the financial and commercial information of two other parties (Ryerson University and a fast food franchise). As I have indicated above, the appellants have stated that they are not seeking access to any information pertaining to these two other parties.
The City submits that the confidentiality of the information contained in this record is expressly addressed at page 51, in the following paragraph:

> [The developer] (and its respective agents) shall keep the terms of this Agreement in strictest confidence, except as may be agreed upon in writing to the City. The City shall keep the terms of this Agreement in the strictest confidence, except as shall be required by law.

The developer does not make any specific submissions as to the "supply" of this information, although it also refers to the confidentiality provision at page 51 of the agreement.

The appellants submit that Exhibit 13 clearly fails the "supplied" test as it is, being an agreement, by its very nature a product of negotiation between the City and the developer. It is said that neither the City nor the developer has identified what parts of Exhibit 13 were supplied, rather than negotiated. No evidence has been provided as to how the information was supplied, such as the form in which it was supplied, and when and in what circumstances it was supplied. Given this, it is not possible to determine for what reason the information was given, and by and to whom it was given.

I accept the appellants' arguments with respect to Exhibit 13. As I have set out above, the content of contracts between an institution and a third party do not typically qualify as having been "supplied" to the institution. The mischief addressed by section 10(1) does not apply where information is the product of negotiations. There may well be instances where information in a contract can be considered the "informational asset" of the third party, where it is the same as

that which was originally supplied by that third party, but there must be a sufficient factual basis for this kind of determination. Absent this, it is reasonable to conclude that contractual terms have been negotiated between the parties to it.

In the case before me, I have the broad assertion by the City that Exhibit 13 is "based on" information supplied in confidence by the developer. Against that are the general understandings about the negotiated nature of contracts, which form the basis of the orders in this area. On my review of the facts and representations, I find no basis to distinguish Exhibit 13 from other contracts between institutions and third parties which have failed to meet the requirement that the information in them be "supplied" by the third party. Apart from the mere assertion, there is no evidence which establishes that any of the terms of Exhibit 13 are a direct reflection of information given by the developer, without contribution by the City.

In sum, I find that Exhibit 13 is precisely what it purports to be, a document which records agreements reached, rather than a document which records information supplied by the developer to the City. It does not meet the requirement that the information in it was "supplied in confidence" by a third party.

In relation to **Exhibits 51A, 91 and 93**, the City submits that these records were prepared and submitted by the theatre company to the City and/or the developer in confidence, in the context of confidential negotiations between the City and the developer, and the developer and the theatre company. An indication of the confidentiality surrounding these negotiations, and the records themselves, is that the records supplied by the theatre company were sent directly to the attention of the president and chief executive officer of the developer. Documents sent to the City were directed to the City's project director.

The developer submits that in general terms, Exhibits 51A, 91 and 93 would have been supplied to the City as part of the negotiations with the City to conclude the project. Consistent with normal commercial practice in such matters, all exchanges of information would have been implicitly in confidence between the parties.

In its representations with respect to Exhibits 51A, 91 and 93, the theatre company focuses on information it terms "Rentals", which consists of the specific figures found in these records for minimum annual rent, percentage rent and construction allowance. The theatre company states that the Rentals were sent in confidence to the City by it and by the developer as part of the City's review of the developer's proposal for the project. It is said that "none of the offers to lease originated with the City." Further, the company submits that its explicit understanding at the time of supplying the City with the offers to lease containing the Rentals was that they were being provided on a confidential basis. It asserts that the City advised it that the confidentiality of such documents would be maintained at all times, subject to the *Act*. Further, it submits that it, and the developer, have made great efforts to ensure that such information is not contained in any public document. For instance, the notice of lease registered on title to the redevelopment property evidencing its leasehold interest does not contain any financial terms of the rent payable under the lease. It has been the company's policy with respect to its Canadian operations not to disclose any rental information in public documents.

The appellants submit that Exhibit 51A is comprised in part of two records which constitute proposed contracts with the City. They state that "by their very nature they are the products of negotiation". The appellants submit that the "rentals in an offer to lease are at the very heart of the negotiations between parties in land leases" and are not proprietary information. The appellants rely on the reasoning in Order P-1105, in which, it is submitted, the Adjudicator found that various agreements being exchanged by the parties represented the various stages of the "give and take" of the negotiation process between the parties and found that the information in the agreements in question was not "supplied". Further, the appellants assert that there are no reasonable and objective grounds in which to base the claim to confidentiality.

I agree with the reasoning in Order P-1105 that it is not determinative which party prepared the records. Rather, what is important is whether the information contained in a record was supplied to an institution by a third party. As well, I agree with the reasoning in that order that the status of an agreement as either a draft or a final document also is not determinative of whether the information in it was "supplied" to the institution. In Order P-1105, the Adjudicator found that information contained in draft agreements was not "supplied" within the meaning of the provincial equivalent to section 10(1) of the *Act*, in that they represented various stages of a "give and take" between the institution and a third party.

However, other orders have found that proposals given to an institution by third parties as part of a bidding process, and records containing information regarding the "terms and ongoing negotiations" between an institution and a third party contain information supplied to that institution in confidence (see, for instance, PO-1804 and PO-1887-I, which deal with the sale of land by the Ontario Realty Corporation).

It is apparent that each case must be determined on its own facts. In the circumstances before me, I find that the information in any Offers to Lease passing between the theatre company and the developer were "supplied" to the City by these affected parties. Even if it could be said that they reflect the "give and take" of negotiations, these negotiations were between two third parties. On this basis, therefore, I am satisfied that the information in Exhibits 91, 93 and one of the letters in Exhibit 51A (the Offer to Lease from the theatre company to the developer) was "supplied" to the City, and does not reflect the product of negotiations between the City and others.

I am also satisfied that the two remaining letters in Exhibit 51A (the Offer to Lease from the theatre company to the City and the proposed letter agreement between the theatre company and the City) were "supplied" to the City by the theatre company. On the face of these letters, they are proposals from the company to the City. There is nothing in these documents to indicate that the information in them was the product of a process of "give and take". The appellants submit that the Offer to Lease was preceded by another offer, dated December 2, 1996 and that the changing lease rates being offered to the City are clearly the product or the subject matter of negotiations. The theatre company states, however, that none of the offers to lease originated with the City. Although the matter is not without doubt, I find that without clear evidence otherwise, the terms of an offer, as distinct from the terms of an agreement, can reasonably be regarded as having been "supplied" by the party making the offer. In this case, the evidence is not sufficiently clear that the proposals from the theatre company to the City were the product of negotiation.

I am also satisfied that the evidence as to the circumstances in which Exhibits 51A, 91 and 93 were supplied to the City, and other evidence as to how the parties treat this information, support a conclusion that they were supplied "in confidence".

The City submits, in relation to **Exhibits 54, 89 and 155**, that each of these is marked "confidential". It is said that Exhibits 54 and 89 were prepared by the consultant based on information supplied in confidence by the developer and the theatre companies. The consultant in turn provided the documents to the City's lawyer on a confidential basis for use in the OMB hearing. The City states that these records also include some of the confidential information contained in Exhibit 13, for example, information supplied explicitly or implicitly in confidence to the consultant by a number of affected retailers and property owners relating to disturbance damages, business losses etc.

In relation to these exhibits, the developer relies on the submissions made with respect to Exhibit 13.

The theatre company objects to the release of all financial information provided by or relating to it as set out in these exhibits. It submits that such information was sent to the City in order for the City's consultant to prepare these reports. The substance of the information used in the consultant's report is the same as that provided by the theatre company, although the form of such information may have been amended by the consultant. Further, it submits that it was the explicit understanding of the company at the time of supplying this information to the City's consultant that the information was being supplied on a confidential basis.

It is submitted that the financial information was prepared by the theatre company for internal financial planning and forecasting. It is its own work product. In some instances, the financial information (for example, the concession revenues) have been developed by it over a significant period of time. This type of site-specific information, it is said, would not in circumstances other than the present, be disclosed to any individual outside of the corporate family and in fact, the information is generally only known by the executives, the accounting department and the auditors of the company, which auditors are subject to confidentiality concerns. Thus, the financial information has been treated by the theatre company in a manner that indicates concern for its protection prior to its supply to the City.

The appellants submit that the City and the affected parties have not met the onus of proving that the information in these exhibits was supplied. The financial analyses in these exhibits do not indicate the source of the information within the analyses. Without knowing the form of the original information supplied by the theatre company, it is impossible to determine if it is the same in either substance or form as in these exhibits or if one can draw accurate inferences with respect to the information supplied by the theatre company. The appellants also note that the other theatre company whose proposal is analysed in these exhibits has not objected to the release of the records although it was analysed in the same manner as the objecting theatre company.

The appellants further submit that if Exhibit 13 is disclosed, so should these exhibits. Since the information in Exhibit 13 was the product of negotiation and accordingly not supplied, the information in Exhibits 54, 89 and 155 was therefore also the product of negotiation.

With respect to the issue of whether the information in these exhibits was supplied "in confidence", the appellants submit that specific documents in Exhibit 54 are marked as confidential. The inference therefore ought to be that the other parts which have not been so marked do not reflect any implicit or explicit understanding of confidentiality. The appellants submit that because there is no evidence as to what information was supplied to the author of Exhibits 54, 89 and 155 or whether the information in those exhibits reflects the information provided by the affected parties it is difficult to understand how confidentiality should be impressed on the exhibits. It is asserted that there is no evidence that the proprietary and financial information which the affected parties claim has been treated consistently as confidential is contained in these exhibits.

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Exhibit 54 (Exhibit 3) is marked "confidential" and is a memo from the consultant to an official with the City dated January 22, 1997 containing a financial analysis of the proposals of the two theatre companies. The memo includes a narrative summary, as well as four appendices in chart form presenting a comparison of the proposals under four scenarios. It is apparent that the memo as a whole presents and extrapolates from information which has been supplied by the two companies as part of their proposals, such as the base rent, percentage rent and total rent. From the entire context, including the explicit references to confidentiality on this document, and the representations of the theatre company, I am satisfied that the information of the two companies contained in or revealed by Exhibit 54 (Exhibit 3) was supplied in confidence to the City's consultant within the meaning of section 10(1) of the *Act*.

Exhibit 54 (Exhibit 7) is a memo dated January 15, 1998 containing an analysis of the impact of the proposed redevelopment on property taxes. It includes a narrative portion, a table, and an appendix. The narrative portion and table estimate the changes in market values on and around the site which may be expected if the project goes ahead, and the increases to municipal property taxes as a result. The appendix lists each property included in the analysis, the names of the owners (which include individuals as well as corporations or other entities), the assessed value of the properties and anticipated changes to property taxes on each property. It is reasonable to conclude that this information was either readily available to the City from its own records or was produced by its consultant, and the City provides no specific evidence to establish otherwise. I find, accordingly, that the information in Exhibit 54 (Exhibit 7) does not meet the requirement that it was "supplied in confidence" to the City by third parties.

Exhibit 89 is a memo from the consultant which summarizes the financial review conducted by him of the developer's proposal for the redevelopment, as of March 1997. The memo is marked "draft and confidential". The consultant calculates the Net Present Value of various components of the development opportunity for the City and the developer, Internal Rates of Return and Returns on Investment. There is a narrative portion accompanied by Appendices which detail the calculations in chart form. The Appendices provide information about such matters as anticipated cinema revenues to the developer based on, among other things, cinema ticket prices,

attendance, concessions, minimum annual rent and percentage rent, other anticipated revenues, development costs and the City's anticipated revenues and expenses.

I am satisfied that Exhibit 89 contains information supplied by the developer and the theatre company to the City's consultant. By its very nature, most if not all of the information as to the developer's revenues and expenses and cinema revenues in the Appendices would have been supplied by these parties. On the basis of the representations and the evidence before me, I am also satisfied that this information was supplied in confidence. I have considered whether it is reasonable to arrive at a different conclusion for some parts of the memo, such as the narrative portion, which contain information likely supplied by the City or produced by its consultant. However, I find it impracticable to sever the Exhibit, since the analysis contained in it is linked to and builds upon information supplied by the affected parties. Accordingly, I find that the Exhibit as a whole meets the requirement that the information in it or revealed by it was "supplied in confidence" by the affected parties.

Exhibit 155 is an updated version of the Appendices to Exhibit 89 and for the same reasons as above, I find that this record meets the requirement of information "supplied in confidence" by the affected parties.

In conclusion, I find that **Exhibit 13 and Exhibit 54 (Exhibit 7)** do not contain information "supplied in confidence" by the affected parties. Since each component of section 10(1) must be satisfied, I find that Exhibit 13 and Exhibit 54 (Exhibit 7) do not qualify for exemption under this section.

I have found that **Exhibits 51A, 54 (Exhibit 3), 89, 91, 93 and 155** meet this portion of the three-part test under section 10(1). I will now turn to consider whether there is a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information in them is disclosed.

Part 3: Harms

The words "could reasonably be expected to" appear in the preamble of section 10(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm": see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and Ontario (Minister of Labour) v. Big Canoe, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.) and Orders PO-1745 and PO-1747.

With respect to sections 10(1)(a) and (c), the City submits, among other things, that the theatre complex business is a highly competitive one, and theatre operators have been and remain under substantial financial pressure. In support of this, the City quotes from recent news articles describing the financial difficulties of the theatre industry. In this context, the City submits, the commercial and financial information of the theatre companies contained in the records at issue

is especially sensitive. They record these companies' negotiations with either the City or the developer and the financial compromises each third party was able or willing to make and, accordingly, reveal the limits on their abilities to operate in a particular market in a particular location.

The City further submits that if this information were to be disclosed, established entertainment and/or retail complexes in the market area who view this project as competition could attempt to use this information to enhance their own positions at the expense of the project. Potential competitors could also use this information to undermine the third parties' ability to proceed with this project or to negotiate on future developments, which would result in undue financial loss to the third parties and undue gain to its competitors.

The City also submits that disclosure of the records at issue could cause harm to the developer's competitive position, interfere with its contractual or other negotiations or result in it sustaining an undue financial loss.

The developer submits, with respect to Exhibits 51A, 91 and 93, that the information about annual rental rates, minimum annual rent formulas, percentage rent and other commercial terms and conditions contained in these records disclose its competitive position in relation to its largest tenant for the project, the release of which would result in the harm identified in subsection 10(1)(a) of the *Act*. Knowledge of the terms the developer has negotiated with its major tenant would confer a significant advantage to its competitors for similar projects in the future, and would damage its business relationship with its major tenant and with prospective tenants.

The developer submits in relation to other records at issue that the information in the records reflect commercial arrangements, conditions and commitments which reflect the competitive advantage it brings to the project as a commercially viable and profitable enterprise. Again, it is said that release of this information would harm the developer within the meaning of subsection 10(1)(a) of the *Act*.

The theatre company provided lengthy submissions on this part of the appeal. It should be noted that the theatre company has consented to disclosure of most of the provisions in Exhibits 51A, 91 and 93 (the offers to lease), as described above. The company submits that the provisions for which it has consented to disclosure are common lease terms in the movie theatre industry. It has thus not taken the position that the disclosure of these terms will result in any reasonably foreseeable harm to its interests.

With respect to the information for which it has not consented to disclosure the theatre company submits that the records provide a nearly complete picture of its financial position at this site. It is not information which is commonly known throughout the industry and in essence, would provide its competitors with a market research report which is not available in any other source or manner. The theatre company submits that the majority of movie theatres are located on premises which are rented by the theatre corporation. Specific examples given as to the impact that disclosure of the information will have on the ability of the theatre company to compete are:

- a competitor with a location in the downtown Toronto area may use the Rental information in the renegotiation or renewal of its lease within the subject area to negotiate lower rates and thus gain a competitive advantage over the theatre company;
- a competitor could use the Rental information to re-evaluate a proposed deal at a location that competes with the theatre company. For example, the competitor may not have been prepared to enter into a lease at the rate offered by the landlord, but might enter into such transaction if it could use the theatre company's Rental information to negotiate a rental rate that makes the competitor's location more profitable;
- with access to the Financials of the theatre company, a competitor will be able to evaluate the profitability of the theatre company at this location, potentially deciding to provide more competition in the area by entering into arrangements for an additional theatre complex in the area;
- a competitor may use the Financials to determine the financial condition of the theatre company and develop a more detailed business plan to compete with it;
- a competitor could use the theatre company's financial projections contained in the Financials to better understand how the theatre company will evaluate a future deal, thereby improving the competitor's opportunity to take away potential profitable sites from the theatre company;
- a competitor could use the Financials to develop a better model in analysing its own evaluation process; and
- a competitor could use the Financials to convince a supplier or other third party to deal with the competitor rather than the theatre company because of the competitor's greater financial strength.

The theatre company also submits that it will be at a disadvantage when negotiating any future leases with potential landlords because the landlord will have access to the Rentals and Financials that would not otherwise be available. Therefore, the floor for negotiation of the rental payments to be made by the theatre company will be the rent payable at this project.

With respect to section 10(1)(a), the appellants submit, among other things, that the representations by the City and affected parties as to the harm that could be suffered to their competitive positions are merely speculative. It is submitted that no evidence has been supplied to support the assertions of harm, and that the parties have misunderstood the difference between evidence and allegations or speculation. The appellants state that evidence to support the allegations is easily obtainable, for instance, in the form of an affidavit from an expert in commercial real estate leasing such as a representative from a commercial real estate realtor. Further, the appellants submit that there is no quantification of the alleged harms, such as the difference in rental rates which would significantly impact the theatre company's ability to operate or continue to operate.

The appellants also note that the other theatre company whose information is found in the records has not objected to the release of the information. Accordingly, it is submitted, the representations of the theatre company in regards to harm are of limited value given that one of its prime competitors in Toronto has not objected to the disclosure of the information.

The appellants submit that the representations of the developer are less detailed and even more speculative than either the City's or the theatre company's, and they are a classic example of

generalised assertions of fact in support of what amounts, at most, to speculations of possible harm.

Finally, the appellants assert that the harms alleged by the City, the theatre company and the developer are not described in relation to each record. They submit that in order to discharge the burden of proof under section 10(1), the evidence of harm must relate specifically to the record and cannot amount to a mere generalised speculation regarding all the records.

The appellants refer to a number of orders in which, they submit, this office has rejected similar speculations of possible harm as constituting the evidence necessary to establish the third part of the section 10(1) test.

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As the parties are aware, the adjudicative process of this office ordinarily involves the review of written submissions rather than an oral hearing. Generally, parties to an appeal are not required to and do not submit affidavit evidence with their submissions. There may be cases where the submission of affidavit evidence is preferable and even essential to the fact-finding process, but in many appeals, including those in which section 10(1) of the *Act* is raised, written representations have been found to contain the evidence required to support the application of the exemption under consideration.

In one recent example, in Order PO-1813, Assistant Commissioner Tom Mitchinson accepted the unsworn submissions of affected parties describing the harm which may be reasonably expected to occur should unit price information in relation to the provision of radiation oncology services be disclosed. That decision is consistent with other orders which have considered the application of section 10(1) or its provincial equivalent to unit price information contained in bid submissions, as described in Order PO-1791:

> A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the records: Orders P-166, P-610 and M-250. Past orders have also upheld the application of section 17(1)(a) where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts: Orders P-408, M-288 and M-511.

I accept, in the case before me, that information about minimum annual rent, percentage rent and construction allowance in **Exhibits 51A, 91 and 93** may be used to gain a competitive advantage in the same way as the unit price information discussed in the above orders. I also accept the submissions of the theatre company, which I find to be detailed, concrete and more than merely speculative assertions of fact, as evidence that the disclosure of this kind of information in conjunction with the financial information in the other exhibits could reasonably be expected to lead to harm to its competitive position.

I do not infer from the failure of the other theatre company to provide submissions in this appeal that it consents to the disclosure of its information, and I do not understand the appellants' submissions to be to this effect. The question is whether the failure by another similarly affected party to specifically object to disclosure of information undermines the position that such disclosure would harm the competitive interests of the enterprises to which it pertains. I am not inclined to attribute such significance to the absence of representations by an affected party. As I have noted elsewhere (see Order PO-1791), the absence of representations may be important if it results in a lack of evidence, but that is clearly not the case here.

I am not satisfied that a reasonable expectation of harm has been established for those provisions in Exhibits 51A, 91 and 93 for which the theatre company has consented to disclosure, and which can be readily severed from the portions which I have found meet the "harm" part of the section 10(1) test. The developer has not consented to the disclosure of those provisions, but I accept the submissions of the theatre company that those provisions are common lease terms in the movie theatre industry. Given this, I am not convinced by the submissions of the developer that there is a reasonable likelihood of harm to the competitive interests of the developer from the disclosure of these common lease terms.

One of the letters contained in Exhibit 51A is the proposed letter agreement submitted by the theatre company to the City. The theatre company has consented to full disclosure of this document, and I find no reasonable likelihood of harm to the competitive interests of any affected party from its disclosure. It should be noted that this agreement contains provisions relating to Ryerson University to which the appellants do not seek access, and which can be reasonably severed.

I find that the "harm" part of the section 10(1) test is established with respect to the information in **Exhibit 54 (Exhibit 3)**. As I have discussed above, this memo from the consultant to an official with the City contains a financial analysis of the proposals of the two theatre companies. The memo includes a narrative summary, as well as four appendices in chart form presenting a comparison of the proposals under four scenarios. The memo presents and extrapolates from information which has been supplied by the two companies as part of their proposals, such as the base rent, percentage rent and total rent. I accept the submissions of the theatre company as to the reasonable likelihood of harm to its competitive interests should this information be disclosed. Although the other theatre company has not made representations, many of the submissions on harm to competitive interests are equally applicable to both companies.

I also find a reasonable likelihood of harm to the competitive interests of affected parties from disclosure of the information in **Exhibit 89**. As I have indicated, the Appendices to this Exhibit provide information about such matters as anticipated cinema revenues to the developer based on, among other things, cinema ticket prices, attendance, concessions, minimum annual rent and percentage rent, other anticipated revenues, development costs and the City's anticipated revenues and expenses. I have already found that the information about minimum annual rent and percentage rent meets this part of the section 10(1) test. I am satisfied that other commercial or financial information found in the Appendices also meets this part of the test, and I accept in particular the submissions of the theatre company on the reasonable likelihood of harm to their competitive interests from disclosure. Consistent with my discussion earlier, I find it

impracticable to sever the specific commercial or financial information in the Appendices which squarely meets this part of the test from the other, more general information contained therein (such as in the narrative portion), as the analysis in Exhibit 89 begins with and builds upon that information.

For the same reasons as above, I am satisfied that **Exhibit 155**, which is an updated version of the Appendices to Exhibit 89, also meets the "harm" part of the section 10(1) test.

In conclusion, I have found that information under the headings of "minimum annual rent", "percentage rent" and "construction allowance" in Exhibits 51A, 91 and 93, and the entirety of Exhibits 54 (Exhibit 3), 89 and 155 meet the "harm" part of the section 10(1) test and are exempt from disclosure. I have also found that the portions of Exhibits 51A, 91 and 93 which meet the "harm" part of the test can be readily severed from those that do not.
Because of my conclusions, it is only necessary to consider the application of section 11 of the *Act* to the "common lease terms" in Exhibits 51A, 91 and 93, the letter from the theatre company to the City in Exhibit 51A, Exhibit 54 (Exhibit 7) and Exhibit 13, none of which qualify for exemption under section 10(1). As well, I will now discuss the application of section 11 to Exhibit 54 (narrative portion, plus Exhibits 2, 4 and 6), Exhibit 1A and Exhibit 1B..

ECONOMIC AND OTHER INTERESTS OF AN INSTITUTION

Sections 11(c) and (d), on which the City relies in this appeal, state:

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

In order to establish the requirements of the sections 11(c) or (d) exemption claims, the City must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections resulting from disclosure of the records: see, for instance, PO-1747 and my discussion of "could reasonably be expected to" above.

The City's representations on the application of section 11 can be broadly characterized as relating to its ability to maintain the confidentiality of third party information, and its ability to complete the expropriation process.

With respect to the first, the City submits that partnership with the private sector is of great importance and achieves numerous public objectives. The ability of the City to initiate and successfully complete projects such as the Yonge/Dundas Redevelopment project depends on commercial sensitivity, including the keeping of third party commercial and financial information confidential.

The City submits that if it cannot guarantee that it can negotiate in confidence, it will find that the private sector is unwilling to participate further in this (or any other future) partnerships with the City. Private sector parties will not negotiate with the City if their proprietary information cannot be held confidential, particularly from other competitors. This would diminish the economic benefits that flow to the City from such partnerships. Similarly, financial benefits may not accrue to the City if it cannot carry out the other components of this project or other public-private projects in future, as the result of not being able to engage private sector participants.

Moreover, it is said, the City is continuously competing with private sector developers and other municipalities for key participant tenants such as the theatre company. The City must act in a manner that does not compromise its best interests. Its ability to maintain the confidentiality of third party information including the financial terms of tenant lease agreements etc. is crucial to the City's competitive position.

With respect to the second aspect of the City's position on section 11, the City submits that its expropriation process with respect to the various parcels is far from being completed. The records contain sensitive and confidential information relating to its expropriation process including an assessment of the cost of acquiring properties, financial impact on the City in proceeding with the project etc.

The City states that apart from the pending compensation hearing before the OMB involving the "appellant's clients ", there is a substantive number of outstanding matters that have not yet been resolved with respect to other owners and tenants. The City continues to be engaged in a number of mediation, negotiation and litigation processes, which it outlines in an appendix to its submissions.

The City submits that release of the information at issue could interfere significantly with the City's ongoing and future negotiations with landowners and tenants who have not yet settled compensation or other issues relating to the expropriation of their properties. Release of this information may accord these parties an unfair advantage since they may seek to use the information as leverage in their negotiations. Disclosure could seriously jeopardise the City's position and could result in undue costs in litigation, unforeseen and expensive delays etc. and therefore could reasonably be expected to prejudice the economic interests of the City or be injurious to its financial interests.

The City refers to a number of orders which it submits support its position.

The affected parties have not made representations with respect to the application of section 11.

The appellants submit that the City has failed to provide detailed and convincing evidence to meet the evidentiary burden under sections 11(c) and (d). They repeat their earlier submissions that the City's representations are mere allegations without sufficient particulars, particularly on the question of the effect of disclosure on the ability of the city to seek out private sector partners.

The appellants submit that the financial benefits of such transactions outweigh the disclosure risks to private parties. The submissions of the City on this point are mere speculation which is

not supported by any evidence. It has failed, for instance, to provide affidavit evidence from parties with whom it entered into the relevant transactions establishing that they would not have negotiated with the City if disclosure of information was an issue. The appellants assert that I should draw an adverse inference in regards to the City's submissions in the absence of such evidence, which could easily have been obtained. Other evidence which it said could have been submitted by the City is evidence from a commercial real estate agent or the City's own real estate/property department involved in the acquisition and sale of properties.

The appellants submit that there is no evidence of other projects in which the City is involved that are of a similar nature to the redevelopment project, and in which it may be prejudiced by disclosure. There is no evidence of how disclosure could prejudice its "competitive position", and such assertions are speculative only.

Further, it is submitted that Exhibits 1A and 1B are not related to negotiations with the private sector, but are appraisal reports prepared for the City for a transaction that has closed. Accordingly, their disclosure cannot harm the City's economic and other interests. The appellants refer to orders which have found that appraisal reports should be disclosed where the transaction is complete. In this case, it is said, the sale of the Yonge Dundas lands by the City to the developer has been concluded.

With respect to the appraisal reports, the appellants assert that it is unfair and unjust for the City to refuse disclosure. The OMB will have to determine the value of these properties based on appraisal reports. The City has retained the same appraiser who prepared Exhibits 1A and 1B to prepare appraisal reports for the compensation hearing. If this appraiser valuated the properties in the appropriate manner as required by his profession the City should suffer no prejudice, as Exhibits 1A and 1B should be consistent (but for the impact of time) with the appraisal reports prepared for the OMB compensation hearings. Exhibits 1A and 1B will allow the appellants to test the fairness and accuracy of the new appraisal reports provided to them by the City.

The appellants submit that the City has provided no evidence to distinguish Exhibits 1A and 1B from similar appraisal reports prepared by the same appraiser and provided to the appellants. The appellants suggest, in essence, that if other appraisal reports have been disclosed without fear of prejudice, then there is no basis to assert prejudice to the position of the City by the disclosure of Exhibits 1A and 1B.

I provided the City with an opportunity to reply to this last submission by the appellant. The City acknowledges that pursuant to the *Expropriations Act*, it is required to disclose certain appraisal reports during expropriation and compensation hearings. Although Exhibits 1A and 1B may contain some of the same and similar information as the appraisal reports served and/or disclosed to the appellants pursuant to the *Expropriations Act*, they are separate and their status is distinct. Exhibits 1A and 1B were not entered as exhibits at the OMB hearings and have never been provided to the appellants for any proceedings. The City submits that there is no requirement under the *Expropriations Act* for these records to be released to the appellants so that they can "test the fairness and accuracy" of those documents that have been disclosed to them.

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I will begin by considering the City's argument that it will be prejudiced in its ability to find private sector partners in projects such as the one at hand, if it is unable to guarantee the confidentiality of third party proprietary information. In my view, the City's concerns here are met by the provisions of section 10(1) of the *Act*. As I have discussed above, section 10(1) protects commercial information of third parties which may find its way into the hands of government. Given this, the section 10(1) exemption provides precisely the guarantee of confidentiality of third party proprietary information which the City states it requires in its dealings with private sector partners. In this appeal, as I have found a number of records to constitute third party proprietary information as protected by section 10(1), it unnecessary to determine whether they might also be exempt under the City's section 11 theory.

To the extent that other records do not qualify for exemption under section 10(1), it is because I have found, as set out above, that they do not constitute confidential third party proprietary information within the meaning of that section. It is not clear whether the City would extend its theory under section 11 to records which do not meet the requirements of section 10(1). Otherwise stated, it is not clear whether the City would assert that it would be prejudiced in its ability to attract private sector partners if it cannot assure the confidentiality of information which extend beyond the limits of the section 10(1) exemption. Assuming that the City's position goes this far, and that it would be a valid theory under section 11, I am unable to accept such an assertion without a more substantive evidentiary basis than that provided. The City's representations do not establish that its ability to negotiate with the private sector would be prejudiced by the absence of confidentiality protection for information which falls outside the section 10(1) exemption.

I will now turn to the second facet of the City's arguments under section 11, relating to the effect of disclosure on ongoing and future litigation and negotiations. In Order MO-1228, Adjudicator Holly Big Canoe reviewed the application of section 11(d) with respect to a property appraisal report commissioned by the City of Ottawa in relation to a proposed redevelopment of City lands. Adjudicator Big Canoe accepted the City's submission that disclosure of the record could reasonably be expected to be injurious to the financial interests of the City, where negotiations with the developer had not concluded:

> The City submits that the recommended proposal and developer for the Revitalization Project has not yet been approved by Council nor has a decision yet been made to sell any portion of the Park at a particular price. The City submits that until Council has met and approved the sale of the property and the sale has been closed, disclosure of the Report could be expected to prejudice the financial interest of the City in attempting to obtain a fair return for the sale of the Park property. Disclosure at this time could also reasonably be expected to adversely affect the negotiations with the developer, according to the City.
>
> The Report contains specific information relating to existing and proposed income generating strategies, various pricing scenarios as they pertain to the recommended and potential uses, and information which reveals potential profit and loss data in relation to the various options for redevelopment. The report also contains specific information on lease rates, lease and sales negotiations strategies and makes reference to potential overhead and operating expenses related to the

> development proposals which are currently under review by Council. In my view, disclosure of this detailed information at this stage in the process could weaken the City's negotiating position and interfere with its ability to obtain a fair return on its property. Accordingly, I am satisfied that disclosure of Record 3 could reasonably be expected to be injurious to the financial interests of the City, and section 11(d) applies.

The reasoning in the above order was referred to in Order MO-1258, in which Senior Adjudicator David Goodis found that disclosure of records revealing financial information which was relevant to ongoing and possible future negotiations concerning the development matters at issue, and related pending litigation before the OMB, would adversely affect a municipality's position in the negotiations and as in the hearings, and were accordingly exempt from disclosure under sections 11(a) and (c).

Other orders have found that disclosure of the terms negotiated between the ORC and a prospective purchaser in circumstances where the purchase and sale of the property had not yet been finalized, could also reasonably be expected to be injurious to the financial interests of the provincial government. If the sale was not finalized and the ORC was compelled to find a new purchaser for the property, disclosure of the terms could place the ORC in a disadvantageous position with future potential purchasers: see, for instance, PO-1894 and PO-1887-I.

I am satisfied that the circumstances of the appeal before me are akin to those cases in which a transaction between an institution and a third party has not yet been finalized. In arriving at this conclusion, I do not accept the appellants' submissions that the appraisal reports relate to a transaction which has closed, with the sale of the lands to the developer. Although the City has sold the properties to the developer, it is still in the process of establishing the price which it will ultimately pay for the land which was expropriated and then sold. The City's liability is thus still not known. The expropriation hearings involving the appellants are part of the process of establishing the City's liability, but there are as well, as established by Appendix B to the City's submissions, a number of other former owners and tenants of the properties with whom the City is in negotiations and/or litigation over compensation for the expropriation.

I find that the information in **Exhibits 1A and 1B**, which contain an assessment of the feasibility and cost of acquiring a number of specific properties to form part of the redevelopment project, is relevant to the issues over which the City is still in litigation or negotiation, namely the price to be paid for the expropriated property. Disclosure of this information could adversely affect the City in the ongoing and future litigation and negotiations with former owners and tenants of the properties. I am satisfied that disclosure can reasonably be expected to prejudice the City's economic interests or be injurious to its financial interests, and these records are accordingly exempt under section 11(c) and (d) of the *Act*.

For the same reasons, I also find that section 11(c) and (d) also apply to exempt **Exhibit 54 (Exhibits 2, 4 and 6)** from disclosure. These parts of Exhibit 54 incorporate detailed estimated land assembly costs of the different parcels of land into the consultant's analysis of cash flows over pessimistic and optimistic two-year financial plans. I am satisfied that disclosure of the information in these records could likewise adversely affect the City in its litigation and

negotiation over these very land assembly costs, and they accordingly meet the requirements of sections 11(c) and (d).

Although the information in the **narrative portion** of **Exhibit 54** is less detailed than that contained in the Exhibits to Exhibit 54, it does include an analysis of the acquisition costs to the City in proceeding with the redevelopment, potential business loss and disturbance damage claims, and expropriation costs. I am satisfied that disclosure of this information could adversely affect the City in its outstanding litigation and negotiations over such matters and this record therefore also meets the requirements of sections 11(c) and (d). I have considered whether it would be reasonable to sever portions of this document, but have concluded that the analysis contained in the narrative links together a number of elements and ought to be considered as a whole for the purpose of this exemption claim.

I am not satisfied that section 11(c) or (d) applies to exempt **Exhibit 54 (Exhibit 7)**. As I have described above, this record is an assessment of the tax impact of the redevelopment, in particular, the anticipated increased tax revenues to the City. It is not clear to me that this information will be relevant to the City's ongoing litigation and negotiations with former owners and tenants, and the City has not provided any specific submissions on the connection between them.

I am also not satisfied that section 11(c) or (d) applies to exempt the "common lease terms" in **Exhibits 51A, 91 and 93**, the letter from the theatre company to the City in **Exhibit 51A**, or **Exhibit 13**. I find that the City's representations do not establish a link between the information in these records and its ongoing litigation and negotiations. Accordingly, I am unable to conclude that the disclosure of this information could reasonably be expected to result in prejudice to the City's economic or financial interests within the meaning of sections 11(c) or (d).

PERSONAL INFORMATION/INVASION OF PRIVACY

The City has only relied on the personal privacy exemption with respect to records which are either no longer in issue or which I have found exempt from disclosure under other provisions, and it is accordingly unnecessary to make a determination on these records here. However, since the personal privacy exemption is a mandatory exemption, and it appears that one of the records to which no exemptions have been found to apply may contain personal information **[Exhibit 54 (Exhibit 7**)], I have decided to consider its applicability to that record.

"Personal information" under the *Act* is defined, in part, to mean recorded information about an identifiable individual, including any identifying number assigned to the individual [paragraph (c)] and the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual [paragraph (h)].

Where records contain personal information within the meaning of the *Act*, they may qualify for exemption under section 14(1) which prohibits the disclosure of such information to another person, unless the disclosure does not constitute an unjustified invasion of personal privacy.

In Order 23, former Commissioner Sidney B. Linden found that information about the municipal location of a property and its estimated market value was not personal information, even where the name of the owner was known. Rather, such information was "about a property", and not "about an identifiable individual". More recently, in Order M-800, Assistant Commissioner Tom Mitchinson decided that information revealing the names, property addresses and property tax arrears for properties owned by individuals qualified as personal information for the purposes of the *Act*.

Exhibit 54 (Exhibit 7), as described above, contains an analysis of the expected tax revenue increases to the City from the redevelopment. The Appendix to this record is a detailed list of properties on and around the site of the redevelopment. The list sets out the roll number for each property, the street address, the name of the owner (which in some cases is an individual and in other cases an incorporated or unincorporated entity), the analyst's estimate of the percentage increase to value of the property as a result of the redevelopment, the assessed value, the 1988 market value (taken from a market value assessment impact study prepared for the City), an assumed vacancy rate (which is the same for all properties), the amount of property tax based on the 1988 market value, and the estimated increase to property tax based on the estimated increase to that value.

Having reviewed the orders cited above, and others which are similar (for instance, Order PO-1786-I, PO-1847 and MO-1392), I am satisfied that information in Exhibit 54 (Exhibit 7) which reveals that an identifiable individual is an owner of a property is "personal information" within the meaning of the *Act*. However, I am also of the view that it is possible to sever the names of individual property owners from the Appendix, an approach suggested by the appellants within the context of similar information in the records. Once the names are severed, the remaining information in Exhibit 54 (Exhibit 7) is no longer personally identifiable and does not raise the applicability of the exemption under section 14(1) of the *Act*. In arriving at this conclusion, I am supported by the approach taken in Order M-800, in which personal identifiers were severed from the balance of information in the records at issue.

PUBLIC INTEREST IN DISCLOSURE

In the representations of the appellants, reference is made to section 16 of the *Act*, which provides:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

It should be noted that section 16 was not listed as an issue in dispute in the Report of Mediator, produced in consultation with the parties. Nevertheless, I will deal with it here. I found it unnecessary to ask the other parties for their submissions in reply to the submissions of the appellants on section 16.

Section 16 incorporates two components which must be established in order for this section to apply. There must be a "compelling public interest in the disclosure of the record", and this interest must "clearly outweigh the purpose of the exemption" [see, for instance, Order P-1398,

upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner) (1999)*, 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.), dealing with the provincial equivalent to section 16].

In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices (Order P-984).

If a compelling public interest is established, it must then be balanced against the purpose of any exemptions which have been found to apply, in this case, sections 10(1), 11 and 14. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information which has been requested.

The appellants submit that a compelling public interest exists which clearly outweighs the exemptions to disclosure. They submit that the records relate to a project to be undertaken on public lands and the sale of public lands, and disclosure of the records will permit the public to evaluate whether public monies have been spent appropriately and whether a sufficient return has been generated. The appellants refer to Order PO-1804-F, in which Assistant Commissioner Tom Mitchinson discusses the public interest in the disposal of public property by the Ontario Realty Corporation.

It is submitted that the public concern is compelling given the current well publicised financial troubles the City is experiencing. In such a context, the public is entitled to know and evaluate the financial basis of the redevelopment project and whether council acted in a fiscally responsible manner. The expenditure of public monies or the sale of public properties and the financial evaluation of such transactions and the subsequent financial impact on the City contained in the records should not be kept secret; otherwise the public cannot know if council acted in its best interests. The public should have access to the records so it can determine whether it is appropriate for the City to assemble private and individually owned properties and play the role of a developer or whether that function should remain with the private sector.

The appellants also submit that there is a public interest in ensuring that the City deals fairly and justly with the owners of properties it expropriates. The records in question will allow the expropriated parties to test the accuracy and reliability of the valuation evidence the City will present in the expropriation compensation hearings. Beyond its applicability to the current expropriations, the disclosure of this type of information will ensure that in future dealings with expropriated owners the City acts in a fair and just manner.

Again, the appellants submit that the transactions to which the records pertain are complete and any prejudice to the City or the affected parties is not supported by sufficient evidence and does not exist or is minimal.

I accept that there exists a compelling public interest in the disclosure of at least some of the records. Whether or not there may not be a compelling public interest in knowing the details of every commercial transaction into which the City enters, the one at issue here is a particularly high-profile, high-expenditure and important public venture. I find no compelling public

interest, however, in the disclosure of the information to which section 14(1) applies, that is, the names of property owners in Exhibit 54 (Exhibit 7).

I will now turn to consider whether the public interest clearly outweighs the purposes of the section 10(1) and section 11 exemptions which I have found apply.

The purposes of section 10(1) of the *Act* were articulated in *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) (the Williams Commission Report):

> ... The accepted basis for an exemption relating to commercial activity is that business firms 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 for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information (p. 313).

Clearly, the purposes of the section 10(1) exemption are serious, and are intended to protect the public interest in the manner expressed by the Williams Commission (see Order PO-1688).

With respect to section 11(c), previous orders have stated in discussing its provincial equivalent:

> The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. [Orders M-862, P-1190 ((upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner),* [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and P-1210]

Taking the above into account, as well as the facts and representations submitted by the parties, I find that the compelling public interest present in this appeal does not clearly outweigh the purposes of the exemptions which I have found applicable. I have reached this finding based on the following reasons:

- I have decided to order disclosure of Exhibit 13, which is the Memorandum of Agreement between the City and the developer, and such disclosure will reveal the terms of the City's involvement in the redevelopment, enhancing public scrutiny of this undertaking;

- the City's involvement in the redevelopment has already been the subject of a lengthy Joint Board hearing of the Ontario Municipal Board, a statutory body empowered to approve the amendments to the Official Plan, Community Improvement Plan and Zoning By-Law necessary to the redevelopment, and before which most of the records were entered as exhibits;

- in carrying out its responsibilities under the *Planning Act*, including the approval of the above, the OMB is directed by statute to have regard, among other things, to "the protection of the financial and economic well-being of the Province and its municipalities" [R.S.O. 1990, c. P-13, s.2(l)];

- one aspect of the public interest in disclosure submitted by the appellants, the ability of the expropriated parties to test the accuracy and reliability of the valuation evidence the City will present in the expropriation compensation hearings, is closer to a private interest;

- the interest of the appellants as litigants in the disclosure of information relevant to the valuation of the expropriated properties is a matter which the OMB is capable of addressing as part of its control of the process of those hearings.

In light of the above, I find that the public interest concerns in the disclosure of records beyond those which I will order to be disclosed, does not clearly outweigh the purposes of the sections 10(1) and 11 exemptions. Therefore, I find that section 16 of the *Act* does not apply in the circumstances of this appeal.

ADDITIONAL MATTERS

In their representations, the appellants submit that a consistent reading of the purpose and intent of the *Act* mandates disclosure of the records in question. They refer to the provisions of sections 7(2)(c) and (f) of the *Act* in support of their position. These provisions provide mandatory exceptions to the exemption found in section 7(1) for "advice or recommendations of an officer or employee of an institution or a consultant retained by an institution". The appellants submit that sections 7(2)(c) and (f), which relate to "a report by a valuator" and "a feasibility study or other technical study...relating to a policy or project of an institution", indicate an intent by the legislature to provide access to valuation reports such as Exhibits 1A and 1B and feasibility studies and their supporting document such as Exhibits 54, 89 and 155.

I find no inconsistency between the application of section 11 in this appeal, and the provisions of section 7(2). I accept that the section 7(2) exceptions to the section 7(1) exemption represent an intent by the legislature to provide access to the sorts of records listed there, even if they might otherwise qualify for exemption *under that section*. Since the City did not rely on the section 7(1) exemption, the issue of whether some of the records in this appeal might have been covered by sections 7(2)(c) and (f) has not directly arisen. But even if the records here are the type of records described in those sections, I do not agree with the appellants' position that the section 7(2)(c) or (f) has the effect of overriding findings made under section 11. Whatever may be the significance of the section 7(2) exceptions to the interpretation or application of other

exemptions under the *Act*, I am satisfied that they do not lead to a right of access to records which have been found clearly and squarely to qualify for exemption under section 11.

ORDER:

1. I order the City to disclose Exhibit 13, with the exception of information about Ryerson University and the fast food franchise contained in the section entitled "II - Arrangements with Ryerson", and the provisions entitled "Construction Related to Parking Garage and Bookstore", "Other Design Matters Related to Ryerson", and "Securing Payment to Ryerson".

2. I order the City to disclose Exhibit 51A, with the exception of information about Ryerson University and the fast food franchise in the section entitled "Ryerson Property Considerations" in the letter agreement and with the exception of information about "minimum annual rent", "percentage rent" and "construction allowance" in the Offers to Lease.

3. I order the City to disclose Exhibit 54 (Exhibit 7), with the exception of the names of property owners who are natural persons or identify natural persons.

4. I order the City to disclose Exhibits 91 and 93 with the exception of information about "minimum annual rent", "percentage rent" and "construction allowance".

5. I uphold the City's decision to deny access to the remaining records at issue.

6. I may be contacted by the City if it has difficulty applying my directions as to any of the severances of the records to be disclosed.

7. I order disclosure to be made by sending the appellants a copy of the records, excluding the exempted portions, by no later than **August 7, 2001** but not before **July 30, 2001.**

8. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the records which it provided to the appellants.

Original signed by: June 29, 2001
Sherry Liang
Adjudicator