



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

ORDER PO-2827

Appeal PA08-273

Infrastructure Ontario



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NATURE OF THE APPEAL:

Infrastructure Ontario (IO) received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following information:

All “records” as defined under the *Act* that have been sent to and received from the Mayor of and the City of Windsor Ontario including their lawyers, representatives and consultants that deal with or are in respect of the Detroit/Windsor Tunnel [the Tunnel] from January 1, 2008 to date and continuing.

All “records” as defined under the *Act* that have been sent to the Mayor of and the City of Windsor Ontario including their lawyers, representatives and consultants that deal with or are in respect of a decision re financing the Tunnel i.e. there is a record that states that Infrastructure Ontario will finance the Tunnel in a certain amount of money that was forwarded to the City of Windsor recently. This letter may be in relation to an actual application by Windsor or after due diligence was undertaken by Infrastructure Ontario.

IO located the responsive records and advised the requester that it will cost an estimated fee of \$145.00 to continue processing the request, and that subject to payment of the fee, a decision would be rendered. IO also notified the City of Windsor (the City) of the request.

Upon receipt of the required \$145.00 fee along with a request for a fee waiver, IO advised the requester that the fee could not be waived in whole or in part, and provided him with the following breakdown of the fee:

Search time	120 minutes @ \$0.50/minute	=	\$60.00
Reproduction/Photocopying	200 pages @ \$0.20/page	=	\$40.00
Preparation for disclosure	90 minutes @ \$0.50/minute	=	<u>\$45.00</u>

Total \$145.00

IO issued a final decision granting the requester with access to some of the responsive records and denying access to all or parts of other responsive records citing the application of the exemptions in sections 17 (third party information), 18 (economic and other interests) and 22(a) (information currently available to the public).

The requester (now the appellant) appealed the decision issued by IO.

During mediation, IO specified that subsections 17(1)(a), (b), (c) and 18(1)(a), (d), and (e) of the *Act* have been applied to the severed or withheld records.

IO advised during mediation that section 22(a) has been applied to the disclosed Audited Financial Statements, which are now public records. In response, the appellant withdrew his request for the Audited Financial Statements. Therefore, section 22(a) is no longer at issue in

this appeal. The appellant also took the position that there exists a public interest in the disclosure of the records, under section 23 of the *Act*.

With respect to the search for a document pertaining to the City's decision to put the financing application on hold, IO advised that this decision was communicated verbally, and reiterated its position that no additional records exist. In response, the appellant indicated that the search for this document is no longer at issue in this appeal.

Also during mediation, with respect to the part of the request relating to continuing access to records, IO advised that no further records are expected to come into being, since this matter has been put on hold. However, IO advised that the continuing access request has been granted and that access decisions will be rendered on July 14, 2009, and July 14, 2010. As a result, the appellant indicated that the continuing access request was no longer at issue in this appeal.

No further mediation was possible and the file was transferred to adjudication. I sent a Notice of Inquiry, setting out the facts and issues in this appeal to IO and the City of Windsor (the City) initially, seeking their representations. I received representations from both parties. Copies of these representations were provided to the appellant, along with a Notice of Inquiry. Portions of these representations were withheld from the appellant due to my concerns about their confidentiality. Also added to the Notice of Inquiry sent to the appellant was the issue of the "Scope of the Request/Responsiveness of the Records", based on the appellant's communication to this office during the adjudication stage of the appeal. I received representations from the appellant. I sent a copy of the appellant's representations to IO and the City, seeking reply representations. I received reply representations from both parties.

RECORDS:

The records remaining at issue are described in the following chart:

Record	Description of Record provided by IO	Disclosed?	Sections Applied
2(b)	Named accounting firm's appraisal document containing the estimates of the fair market value of the operating rights of the Canadian and U.S. portions of the Tunnel	no	17
2(c)	Draft Operating Agreement concerning the financing and operation of the tunnel (including how revenues would be collected by the City of Windsor and the City of Detroit)	no	17
6	Email exchange re: agenda in relation to record no. 7(4) - which is a joint operating and financing agreement relating to the operation and financing of the Tunnel	part	17
7(4)	Draft Intergovernmental Agreement for Joint Operation and Financing relating to the management, operation and financing of the Tunnel	no	17
7(5)	Summary of Financial Analysis of how the funds from a potential \$75M loan to the City of Windsor from IO would be utilized and distributed.	no	17

Record	Description of Record provided by IO	Disclosed?	Sections Applied
7(6)	Assumptions with 4 different Tunnel financing scenarios	no	17
7(7)	Comparison of cash flows for each scenario	no	17
7(8)	Projected Capital Expenditures for the Project	no	17
7(9)	Comparison of audited financial statements for the Canadian portion of the Tunnel for years 2002 to 2007	no	17
9	Email regarding project financing, making reference to Record 2(b) and the financial information about the structure of the transaction	no	17 and 18
11	Email containing financial information about IO's ability to finance the loan and the purposes for which loan financing can be provided to the City of Windsor	part	17
13	Email re: Windsor-Detroit Tunnel Corporation Transaction (WDTC) Structure - a refinement of the proposed financial structure in Record 9	no	17
14	Email attaching excel version of Record 7(7)	no	17
15	Email from IO requesting clarification from the City of Windsor regarding the cash flow projections, Record 2(b) and related taxation issues	no	17
16	Email exchange re: loan range amount to be provided by IO to WDTC	part	17 and 18
17	Email containing draft financial statements of the WDTC (December 31, 2007)	no	17 and 18
19(a)	Severed portion of the loan application concerning specific project costs related to the Tunnel	part	17
19(c)	Certificate of No Litigation submitted as part of the loan application, listing current and perceived litigation which may impair the City of Windsor's ability to repay the loan	no	17

DISCUSSION:

BACKGROUND

The City provided information by way of background, as to the nature of the records at issue. In order to fully understand the facts in this appeal, I have reproduced the following from the City's representations:

The records requested are all related to the Windsor-Detroit Tunnel (the "Tunnel"), a motor vehicle tunnel under the Detroit River that connects the Cities of Windsor, Ontario and Detroit, Michigan, U.S.A.

The [City of Windsor] is the owner of the portion of the Tunnel situated in Canada (the "Canadian Tunnel"). The City of Detroit ("Detroit") is the owner of the portion of the Tunnel situated in the U.S.A. (the "U.S. Tunnel")...

[The City] desires to enter into the agreement with Detroit ...in order to ensure that: (a) the Tunnel, which has been declared by the Government of Canada by special legislation to be “a work or undertaking for the general advantage of Canada”, will remain in public ownership, and under public control and management; (b) the Tunnel will continue to provide convenient vehicular access between the downtowns of Windsor and Detroit; and (c) the Tunnel will operate as a unitary and integrated tunnel in accordance with the provisions of an agreement.

Other persons and corporations, ..., desire to acquire a franchise or lease that will give them control of the U.S. Tunnel for terms between 75 and 99 years...

[The City] retained [a] law firm ...to lead [it]’s negotiations with Detroit and to represent it and give it legal advice in respect of the Tunnel including, without being limited to, ...obtaining financing for the ...the transaction with Detroit which includes, among other things, the possibility of financing provided by Infrastructure Ontario...

Since the Ambassador Bridge and the Tunnel are the only options for vehicular travel between Windsor and Detroit, the continued operation of the Tunnel is essential to the economies of Canada/U.S.A., Ontario/Michigan and Windsor/Detroit. ...

[The City] decided that it was in its interest to acquire control of the U.S. Tunnel from Detroit to ensure that [the above] concerns ...herein are dealt with and its financial interests in the Tunnel are protected. ...Negotiations between [the City] and Detroit have not been terminated and are expected to continue ...

The negotiations between [the City] and Detroit explored a number of structures for the transaction. Detroit would not agree to sell the U.S. Tunnel to Windsor so negotiations began with Detroit agreeing to grant [the City] a 75 year franchise to operate the U.S. Tunnel in consideration of payment of a US\$75 Million fee ...

On about 26 November, 2007,...[the City], entered into confidential discussions with [IO] respecting a loan to finance the transaction with Detroit... [IO] was aware that the loan was an integral part of the transaction with Detroit...

[IO] asked [the City] to supply it with confidential financial information in support of its proposed loan application. ...[The City] supplied [IO] with the information that was requested.

On about 29 May, 2008, a formal loan application was supplied to OI...

Detroit experienced problems with its Mayor during 2007 which resulted in the Mayor’s resignation and his replacement by an interim mayor and administration. Elections for a mayor will be conducted in 2009 and, in accordance with Detroit’s

constitution; the mayor elected will bring in a new and different administration. [The City] and Detroit have remained in contact and negotiations between them respecting the Tunnel are expected to resume as soon as circumstances will permit. Until that occurs, all agreements, commitments and obligations between them that are in place continue in force and effect.

THIRD PARTY INFORMATION

I will first determine whether the mandatory exemption at sections 17(1)(a), (b) and (c) applies to the records, which read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

Part 1: type of information

The records at issue were provided to IO by the City in order for IO to conduct its due diligence and credit review on the City's loan application.

IO submits that all of the records contain financial information. It provided details of the types of financial information it submits is contained in each record at issue. Previous orders have discussed the meaning of financial information as information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

The City agrees with IO that the records contain financial information. In addition, it submits that certain records also contain commercial information. Previous orders have discussed the meaning of commercial information as being information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

The appellant did not provide representations on this issue.

Analysis/Findings re: type of information

Based on my review of the records, I agree with IO that the records contain financial information. In this appeal, IO received a loan application with ancillary credit documentation from the City requesting financing for the Detroit-Windsor Tunnel.

The records also contain commercial information which in this appeal relates to the buying, selling or exchange of services concerning the Tunnel. Therefore, part 1 of the test has been met with respect to the records.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020 and PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

IO submits that the City directly supplied the records to it with respect to its application for financing for the Project. IO states that:

Examples of certain records being supplied directly to [IO] by the [City] can be found in Record[s] 2 and 19, in addition to numerous e-mails which contain attachments supplied directly between Infrastructure Ontario, [the City and the City’s lawyers] (Record[s] 7(4), (5), (6), (7), (8), (9), 9, 13, 14).

The City agrees with IO that the records were supplied by it to IO.

The appellant disagrees that the records were supplied as the records were the subject of negotiations between the City and Infrastructure Ontario.

Analysis/Findings re: Supplied

Based upon my review of the records, I find that the information in them was supplied to IO by the City.

These records were either directly supplied to IO or disclosure of the records would reveal or permit the drawing of accurate inferences with respect to information supplied by the City [Orders PO-2020 and PO-2043].

Although Records 2(c) and 7(4) are agreements, both records are draft agreements and neither agreement was entered into with IO. None of the records were created as a result of negotiation between the City and IO, therefore, I have found that these records are supplied [Orders PO-2018, MO-1706].

In Confidence

In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

IO submits that:

...[the City] submitted its loan application and supporting documentation to [IO] in confidence with the implicit understanding that such documentation would not be disclosed to the general public...

Infrastructure Ontario's management and loan operation and credit staff are the only members who have access to such information supplied by the [City] for the purpose of credit review. Such information is used for internal purposes only and not for disclosure to the general public...

[The City] notes that [we] have consistently treated the loan application and all the information involved in contractual negotiations ...including the materials and information supplied to [IO] in support of the loan as completely confidential, and have dealt with such in a manner intended to prevent disclosure as indicated herein. The loan application and all the information supplied to [IO] ... is not available to the public from any other source." ...

It is respectfully submitted that eligible borrowers under Infrastructure Ontario's loan program submit financial information, including business cases, for the purposes of acquiring financing for the capital projects. They do not submit such financial information in order to have it disseminated to the general public. The affected parties, in providing financial information to Infrastructure Ontario, do so in order to obtain financing for their capital projects. There is an implicit expectation of confidentiality with regards to this information when it is submitted [Order PO-1957].

The City agrees with IO that the records were supplied by it with a reasonable expectation of confidentiality. It submits that:

... distribution of documents and information has been consistently and scrupulously restricted to Mayor [of Windsor], [name] Manager of Corporate Services and [name] the director of the Windsor Tunnel Commission and reports to Windsor's Council were in camera and did not include copies of documents. The model and the financial projections supplied to [IO] ...were generated by Windsor staff in the Corporate Services Department who were made aware of the requirement for confidentiality and all the documents and information were

supplied to IO in confidence and with the reasonable expectation of confidentiality, explicit and implicit. [IO] staff were all made aware of the circumstances under which negotiations between Windsor and Detroit were being conducted and the requirement for confidentiality.

The appellant did not provide direct representations on whether the records, if supplied, were supplied in confidence. However, he did submit that Record 2(b) was part of the process used to arrive at the \$75-million value for the loan requested by the City from IO, as a result, he submits that the Mayor of the City of Windsor has waived any confidentiality with respect to the document by using it as part of his justification in a newspaper quotation.

Analysis/Findings re: In Confidence

Based upon my review of the records, I find that the information in them was supplied by the City in confidence to IO. The City had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided [Order PO-2020].

Furthermore, I find that the records have been prepared for a purpose that would not entail disclosure and have been treated consistently in a manner that indicates a concern for their protection from disclosure by the City prior to being communicated to IO [Order PO-2043]. Concerning Record 2(b) in particular, I find that the information contained in that record has not been disclosed or made publicly available, even though the existence of this record may have been cited in a newspaper article.

Therefore, I find that part 2 of the test has been met.

Part 3: harms

General principles

To meet this part of the test, the institution and/or the third party must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

IO argues that sections 17(1)(a), (b) and, (c) apply. I will now deal with each item of the test in part 3 separately.

Section 17(1)(a): prejudice to competitive position

IO did not provide specific representations concerning each record, other than Record 2(b). It submits that:

...disclosure of all the records at issue in this appeal will prejudice significantly the competitive position of the City with respect to other parties seeking to acquire an interest in the U.S. side of the tunnel as they could use such information in their direct negotiations in acquiring rights to the tunnel.

It is submitted that a number of other interested entities, including the Detroit Windsor Tunnel, LLC [DWT] and the owner of the Ambassador Bridge (the "Interested Parties") have expressed interest in acquiring the rights to own, control, and operate the U.S. side of the tunnel. Disclosure of all the records at issue in this appeal would substantially interfere with negotiations with the City of Detroit regarding the tunnel by the City of Windsor as these interested parties would unduly take advantage of the figures contained in the records that have been submitted to Infrastructure Ontario for financing the Project. Additionally, these Interested Parties could correspondingly use the financial information supplied by the City of Windsor to Infrastructure Ontario for their own purposes and for their own advantage of negotiating a deal with the City of Detroit, thus significantly interfering with the contractual negotiations of the City of Windsor.

One record in particular that could be used by the Interested Parties in negotiating their own deal with the City of Detroit is record 2(b) ([named accounting firm's] Appraisal Document). It is submitted that [the accounting firm] was specifically employed by [the City's lawyer] for the purposes of obtaining a fair market value of the operating rights of the Canadian and U.S. portions of Detroit-Windsor Tunnel and contains confidential assumptions and financial valuation projections. Disclosure of such record to the general public would prejudice the competitive position of the City of Windsor and would make it possible for the Interested Parties to interfere with the City of Windsor's negotiations with the City of Detroit by possibly undermining and undercutting figures contained within [Record 2(b)].

The City provided both confidential and non-confidential representations concerning the specific records at issue in this appeal. In the non-confidential portions of its representations, it submits as follows:

Record 2(b) - Appraisal Document

[The City's lawyer] employed [accounting firm named in Record 2(b)] to evaluate for him the Canadian Tunnel and U.S. Tunnel separately and also the entire Tunnel to assist him with the negotiations and enable him to advise Windsor. He has possession and control of the valuations. The negotiated fee was based on restricted distribution and use of the valuation which does not include delivery to

or use by third parties. The valuations have been kept confidential and when requested by Detroit he refused to give them copies on the ground it was prejudicial to Windsor's interests. The valuations contain assumptions and projections that a third party would find useful...

[Record 2(b)] reveals confidential commercial and financial information and contains [the accounting firm's] estimate of the fair market value of the operating rights of the ...Tunnel under three different scenarios...

The confidential information contained in [Record 2(b)] would permit Detroit and each of Windsor's competitors to prepare its own estimate of value of the U.S. Tunnel and use the financial information to understand how Windsor arrived at the price of US\$75 Million and how any premium that might have been involved was calculated. Release of [Record 2(b)] while Windsor and Detroit are negotiating can reasonably be expected to prejudice and interfere significantly with the contractual negotiations with Detroit as provided by section 17(1)(a)...

Record 2(c) - Draft Operating Agreement regarding the Tunnel

...Windsor and Detroit are actively negotiating an agreement respecting the U.S. Tunnel, DWT is the lessee of the U.S. Tunnel until 2020 and the owner of the Ambassador Bridge desires to acquire an interest in the U.S. Tunnel.

Record 6 - Email

The City relies on its submissions relating to Record 2(c) in support of its position that Record 6 should not be disclosed.

This record contains information about Record 7(4), which is another version of the joint operating and financing agreement (Record 2(c)).

Record 7(4) - Draft Intergovernmental Operating Agreement

This record is another version of Record 2(c).

Record 7(5) - Summary of Financial Analysis of Windsor/Detroit Transaction

In order for Windsor to consider a transaction so structured it was necessary to project the payback and determine the feasibility of the loan. A financial model was prepared. The financial results of the operation of the U.S. Tunnel were projected under various scenarios using the confidential commercial and financial information available to Windsor referred to herein and the capital expenditures projected by Windsor...

Record 7(6) - Assumptions

The assumptions used to project the payback, determine the feasibility of the loan and prepare the Summary of Financial Analysis were developed by Windsor

based on confidential commercial and financial information that is apparent upon examination of the assumptions.

Disclosure of components of the ... transaction documents and confidential commercial and financial information will permit a competitor to calculate cost and profit data of the U.S. Tunnel by working back from the disclosed information and also applying commercial and financial data applicable to the Canadian Tunnel to the U.S. Tunnel.

Record 7(7) - Tunnel Comparison of Cash Flows

The City relies on its submissions concerning Records 7(5) and 7(6) in support of its position that these records should not be disclosed.

Record 7(8) - Capital Cost Projections

The City also relies on its submissions concerning Records 7(5) and 7(6) and submits that:

This schedule also uses confidential commercial and financial data available to Windsor to project the capital cost of the work that will be necessary to repair and maintain the Tunnel for the period 2008 to 2082. The information generated in this schedule was needed to project the payback and feasibility of the loan and is a component of the data used to prepare the summary of the financial analysis.

Record 7(9) - Comparison of Audited Financial Statements

This schedule is a comparison of the financial statements made by Windsor. The financial statements themselves are available to the public and the public is at liberty to make its own analysis thereof. The public should not be entitled to have access to the schedules of financial information ... to support the loan application that was supplied to IO in confidence, explicitly and implicitly.

The disclosure of the comparison of financial statements as it is formatted indicates financial trends that are interpreted by Windsor and can reasonably be expected to prejudice significantly the competitive position of Windsor.

Record 9 - E-mail and attached flow chart

IO asked Windsor for a transaction flow chart that set out the structure of the transactions between Windsor/Detroit and the anticipated flow of the loan funds ...

Our e-mail ...contained a description of the transaction structure that was being negotiated at that time and outlined the transaction...

The e-mail and attachment read together contain the detailed transaction structure proposed by Windsor and of the amounts and flow of funds...

Disclosure of the e-mail and attachments could reasonably be expected to prejudice significantly Windsor's competitive position with respect to [any] person seeking to acquire an interest in the U.S. Tunnel.

Record 11 - E-mail re Eligibility for Funding

This e-mail ... requests a transaction flow diagram that outlines the structure of the transactions and indicates certain transaction considerations imposed by IO ... and contains references to the documents and information that Windsor had supplied to IO in confidence, explicitly and implicitly. In particular, the e-mail refers to [Record 2(b), the Appraisal] Report and expressly states financial information including a value attributed to the U.S. Tunnel by [the accounting firm].

Record 13 - E-mail and attachment re: Transaction Structure

This e-mail describes certain refinements to [the] loan application that revise the structure of the loan and a chart is attached that explains the changes. The e-mail and attachment also review alternatives to the structure as previously outlined and reveal commercial and financial information that was supplied to IO in confidence, explicitly and implicitly.

Disclosure of the e-mail and attachment could reasonably be expected to prejudice significantly Windsor's competitive position by revealing financial information respecting the transaction with Detroit being negotiated.

Record 14 - E-mail and attachment re: Cashflow Comparison Spreadsheet

The City refers to its representations concerning Records 7(5) to 7(7) and submits that:

[In this record] the cash flows generated by the U.S. Tunnel and Canadian Tunnel are projected ...

[This] financial information ... would be very useful to Detroit and any competitor...

Record 15 - E-mail re: WDTC Financial Information

This e-mail contains IO's questions with regard to the cash flows that were submitted by Windsor. ... The questions themselves provide an insight into the negotiations and reveal financial information that should remain confidential for all of the reasons set out [with respect to Record 13]

Record 16 - E-mail re: Loan Rang Amount

The e-mail exchange consists of 3 separate e-mails... IO's e-mail reflects the results of its review of all the confidential financial information it was supplied...

Record 17 - E-mail and attachment re: Financial Information

This is a series of e-mails. ...Windsor supplied IO with draft [financial] statements for the purposes of its loan application because the audited statements were not yet available. The audited financial statements are completed and are now available to the public and the draft statements should not be released.

Record 19(a) - Loan Application

Record 19 consists of [the] application to IO for a \$75 million loan, (and attached documents) including detailed financial information concerning the litigation (the "arbitration") with DWT and Windsor's position in respect thereof...

Record 19(c) - Certificate of No Litigation

The certificate of litigation and the detailed financial information contained therein ...contain information respecting the litigation, the disclosure of which, although important to the loan application, can reasonably be expected to result in undue prejudicial loss to Windsor by affecting the outcome of the litigation. The certificate was prepared solely for the purposes of the loan application and was intended to make full disclosure respecting the litigation.

The appellant submits that:

Records cannot be kept secret under this *Act* merely because they may used in Detroit negotiations

How can ... documents NOT released to Detroit and which were never going to be released breach confidentiality covenants and in a deal that is dead.

In looking at the documents set out, all of this material would have had to have been provided to the public before the Agreement was signed under [the City's lawyer] statement that:

"Residents and council in Windsor will soon be privy to more details of the multimillion-dollar transaction...."

"I've said all along from square one I will not recommend a deal to the City of Windsor that did not make business sense," he said. "My intention has not changed..."

In reply, IO submits that:

...despite the fact that negotiations between Infrastructure Ontario and the City of Windsor for requested financing for the Detroit-Windsor Tunnel Project are currently on hold, it is intended that negotiations will be carried on between the two parties in the near future. Notwithstanding this assertion, Infrastructure Ontario submits that despite the fact that the transaction is on hold, the records for which Infrastructure Ontario is claiming exemptions under [the *Act*] do not automatically lose their exemption status because a particular loan transaction has not come to completion.

The City submits in reply to the appellant's representations that the transaction is not dead. It states that:

The transaction is between Windsor and Detroit, the municipalities that own the tunnel. As negotiations progressed the structure of the transaction had to change to accommodate U.S.A., Michigan and Detroit constitutional and legislative restrictions that affect Detroit's capacity and power to make an agreement with Windsor. There is one transaction and it is wrong to suggest that with each change in or refinement of the structure of that transaction there is a new or different transaction and that negotiations begin fresh.

... negotiations are delayed until Detroit decides to resume negotiations.

...Windsor does not expect negotiations with Detroit to resume until a Mayor is elected and, if necessary, a new administration is installed.

...When negotiations resume, Windsor's negotiations with Detroit would be significantly interfered with and adversely affected by the requested disclosure of the records.

Analysis/Findings

I have carefully reviewed the records at issue, along with the representations of the parties, including the confidential representations of the City and IO. I note that all of the records were supplied to IO in support of the City's application for a loan. This loan was being sought by the City in order that it would be able to have the necessary financing to enter into an agreement with the City of Detroit. This agreement would provide the City with a 75 year franchise to operate the U.S. portion of the Tunnel.

There are other entities which have an interest in acquiring the rights to own, control, and operate the U.S. side of the Tunnel. I agree with the City that disclosure of all the records at issue in this appeal would substantially interfere with the negotiations between the City and the City of Detroit regarding the Tunnel as these interested parties could take advantage of the information contained in the records that have been submitted by the City to IO for financing the Project to

negotiate their own deal with the City of Detroit. Disclosure of the records could reasonably be expected to interfere significantly with the City's pending negotiations with the City of Detroit.

In making my decision, I have considered Order PO-1894, where former Assistant Commissioner Tom Mitchinson decided that section 17(1)(a) applied to records concerning a pending sale of a property. One of the conditions of sale related to the zoning of property, which was the subject of an appeal to the Ontario Municipal Board (OMB). Though the hearing before the OMB appeal was complete at the time Order PO-1894 was issued, the decision of the OMB remained pending. In making his decision, Former Assistant Commissioner Mitchinson stated:

Given the status of the sale and the possibility that the Ministry may have to enter into a new process should the current conditional Agreement of Purchase and Sale not close, in my view, disclosure of the records could reasonably be expected to result in significant prejudice to the competitive position of the third parties - both the prospective purchaser and the unsuccessful City bidders.

The circumstances of this appeal are similar to those in Order PO-1894, in that the records at issue relate to a pending commercial transaction.

As disclosure of the information in the records could reasonably be expected to prejudice significantly the City's competitive position or interfere significantly with its negotiations to acquire an interest in the U.S. side of the Tunnel, I find that part 3 of the test has been met. As I have found that section 17(1)(a) applies to the records, there is no need for me to also consider if sections 17(1)(b) and (c) apply and also whether section 18(1) applies to Records 9, 16 and 17.

Therefore, subject to my discussion below of the possible application of the public interest override in section 23, I find that the information in the records is exempt by reason of section 17(1)(a) of the *Act*.

PUBLIC INTEREST OVERRIDE

I will now determine whether there is a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 17(1) exemption.

Section 23 states:

An exemption from disclosure of a record under sections 13, 15, 17, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*’s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the 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].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391, M-539]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568]
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

The existence of a compelling public interest is not sufficient to trigger disclosure under section 23. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

IO submits:

The information contained in the records will not serve the purpose of informing the public about the tunnel Project to express a specific “public opinion” or to make a specific “public choice.” The information in the records pertains to a financial transaction related to the tunnel project for which the City of Windsor

has applied for a loan to Infrastructure Ontario. Apart from giving a competitive advantage to other interested parties, it is submitted that the disclosure of the records will not fundamentally cause the public to make a specific opinion about the transaction, nor will the disclosure cause the public to specifically choose on a course of action...

[N]one of the records at issue in this appeal pertain to any specific “public safety issues” relating to the tunnel Project ...but, rather the records pertain to more specific financial information with respect to a contemplated loan transaction between the two parties...

Infrastructure Ontario submits that it has already disclosed a significant number of records to the appellant by way of his request and the information contained within the disclosed records is more than adequate to satisfy and address any particular issues that the appellant may have.

Public Interest in Non-Disclosure of the Records

... Infrastructure Ontario provides eligible Ontario public bodies with access to affordable loans to build and renew local public infrastructure under Infrastructure Ontario’s Loan Program. Should the disclosure of the records at issue be permitted, eligible borrowers may resist or hesitate in submitting sensitive financial information to Infrastructure Ontario to conduct its credit review. The result of this would be that Infrastructure Ontario would be unable to conduct a thorough credit review and analysis and the loan application may be rejected. As a consequence, improvements to infrastructure in the Province of Ontario may be hindered as a result of an incomplete loan application being submitted to Infrastructure Ontario.

...Infrastructure Ontario respectfully submits that it has invested a significant amount of skill, time, judgment, money and effort pertaining to this particular loan transaction. Disclosure of the records at issue in this appeal would harm Infrastructure Ontario’s economic interests, and would disrupt the existing business model and relationship that it has established with existing and potential borrowers in the Province of Ontario. Infrastructure Ontario, the Province of Ontario and ultimately the citizens of Ontario benefit from this relationship between eligible borrowers and Infrastructure Ontario as the loan program offers a unique ability for borrowers to access low cost financing for improving their local infrastructure.

Lastly, disclosure of the records at issue would also harm the commercial interest of Infrastructure Ontario by allowing other lenders in the Province of Ontario to use such information for the purposes of their own credit review and analysis of a potential borrower. This would in turn result in the loss of potential clients and revenue stream to Infrastructure Ontario. Such economic loss is contrary to the public interest.

The City submits that:

...it is in the public interest to uphold the exemptions. ...[T]he protections granted to Windsor under the *Municipal Act* should not be overridden by requests under [the *Act*] for the production of records not otherwise available and that only serve to advance a third party's private interests. There is no compelling reason that the records should be made public until negotiations between Windsor and Detroit are completed and there is no risk of harm to Windsor as owner of the Canadian Tunnel in the disclosure of such records.

The appellant submits that:

...this is a major transaction for a city such as Windsor and that the City refuses to reveal any details even when specifically asked by its citizens, it is in the public interest to disclose the records. Moreover, the City's lawyer himself was prepared to reveal records to justify entering into the transaction. The City accordingly should be prepared to disclose records when the transaction is dead to justify that it did not waste \$2 million on legal and consulting fees.

Disclosing documents even if their numbers are considerable is irrelevant if the key documents have not been disclosed at all. As an example, if the loan range is very low and yet the City carried on in the transaction knowing that it could never be completed, then not only have taxpayer dollars being wasted but also the reputation of the City may have been hurt because it misled the City of Detroit who may have thought that the City was able to complete the transaction.

It is also vital to understand why Infrastructure Ontario would believe that it has the power to make a loan that in effect is a loan to a foreign jurisdiction that is virtually bankrupt. Why would Infrastructure Ontario loan money to Detroit when municipalities across the Province are desperate for funds?

The basis of the statements being made are that the eligible borrowers have information that they want to hide from their taxpayers. There is nothing that demonstrates that Infrastructure Ontario would be at all hampered. ...All that is being done is that bald assertions are being made to protect the positions of Windsor and itself from public scrutiny.

The City provided specific representations in reply to the appellant's representations. It submits that:

...the appellant does not accept that Windsor is a corporation that acts through its Council which is elected to represent the corporation and that the Council is the custodian of its powers. The Council combines both legislative and administrative functions and its decisions bind all the ratepayers. In the exercise of certain of those powers described in section 239 of the *Municipal Act* it is permitted to do so in closed meetings to preserve the confidentiality of the subject

matter of those meetings because it is in the interest of the corporation and in the public interest to do so. [The appellant] states that “taxpayers have a legitimate right to know that ... government is looking out for taxpayers’ interest”. That is true, however Council has not made a decision respecting the tunnel and negotiations will be severely and adversely affected if there is premature public disclosure of the details of the negotiations. Moreover Windsor’s competitors and Detroit would gain confidential information that would assist them to structure and restructure their own proposals. It has been made clear, as [the appellant] admits, that when an agreement with Detroit is made the transaction documents will be made public and considered by Council in a meeting open to the public before Council makes a decision whether to approve or disapprove the transaction...

Analysis/Findings

What the appellant is seeking to obtain from disclosure of the records is the information that the City supplied to IO in support of its loan application. This application has not been finalized and is on hold pending the resumption of negotiations between the City and Detroit to allow the City to operate the U.S. portion of the Tunnel.

Based upon my review of the records and the parties’ representations, including the confidential portions of the City’s and IO’s representations, I agree with the City and IO that there is no compelling reason that the records should be made public during the negotiation process between the City and Detroit. In particular, I am not persuaded that any public interest exists in the disclosure of the information in the records that would outweigh the purpose of the section 17(1) exemption. Section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2371, PO-2384 and MO-1706].

The information at issue is sensitive commercial and financial information and relates to an ongoing business transaction between the City and the City of Detroit in order to secure funds for the City to obtain an interest in the U.S. portion of the Tunnel. In my view, there exists a public interest in the non-disclosure of information that could reasonably be expected to negatively impact on the ability of these parties to complete this transaction.

In the circumstances of this appeal, I am not persuaded that the disclosure of the records at issue would provide the appellant with the information he is seeking to permit the public to review the activities of the City. The appellant primarily wants to know if the City is financially able to complete the transaction with the City of Detroit. The records contain information supplied by the City to IO for a loan application to finance this transaction. Neither the loan application nor the agreement between the City and the City of Detroit has been finalized.

Furthermore, another public process or forum has been established to address public interest considerations. Once the loan has been arranged with IO and an agreement with Detroit is made the transaction documents will be made public and considered by City Council in a meeting open

to the public before Council makes a decision whether to approve or disapprove the transaction [Orders P-123/124, P-391, M-539 and PO-2734].

Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld records or portions of records.

FEES

I will now determine whether the fee of \$145.00 should be upheld.

As the fee in this appeal exceeds \$25.00, IO was required to provide the appellant with a fee estimate. Where the fee is \$100 or more, the fee estimate may be based on either

- the actual work done by the institution to respond to the request, or
- a review of a representative sample of the records and/or the advice of an individual who is familiar with the type and content of the records.

[MO-1699]

The purpose of a fee estimate is to give the requester sufficient information to make an informed decision on whether or not to pay the fee and pursue access [Orders P-81, MO-1367, MO-1479, MO-1614, MO-1699].

The fee estimate also assists requesters to decide whether to narrow the scope of a request in order to reduce the fees [Order MO-1520-I].

In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated [Order P-81, MO-1614].

This office may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 460, as set out below.

Section 57(1) requires an institution to charge fees for requests under the *Act*. That section reads:

A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,

- (a) the costs of every hour of manual search required to locate a record;
- (b) the costs of preparing the record for disclosure;
- (c) computer and other costs incurred in locating, retrieving, processing and copying a record;

- (d) shipping costs; and
- (e) any other costs incurred in responding to a request for access to a record.

More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 460. Those sections read:

6. The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For manually searching a record, \$7.50 for each 15 minutes spent by any person.
4. For preparing a record for disclosure, including severing a part of the record, \$7.50 for each 15 minutes spent by any person.
5. For developing a computer program or other method of producing a record from machine readable record, \$15 for each 15 minutes spent by any person.
6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

6.1 The following are the fees that shall be charged for the purposes of subsection 57(1) of the *Act* for access to personal information about the individual making the request for access:

1. For photocopies and computer printouts, 20 cents per page.
2. For records provided on CD-ROMs, \$10 for each CD-ROM.
3. For developing a computer program or other method of producing the personal information requested from machine readable record, \$15 for each 15 minutes spent by any person.

4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the personal information requested if those costs are specified in an invoice that the institution has received.

7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is \$100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.

(2) A head shall refund any amount paid under Subsection (1) that is subsequently waived.

9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

IO submits that the fee estimate of \$145.00 was based on a review of electronic records that were contained in its email database and a review of hardcopy records by retrieving copies of financial information pertaining to the loan application submitted by the City of Windsor. The fee was comprised of the following:

- Search Time - 120 minutes @ \$0.50 per minute/per person = \$60.00
- Preparation for Disclosure - 90 minutes @ \$0.50 per minute = \$45.00
- Reproduction/Photocopying - 200 pages @ \$0.20 per page = \$40.00

Concerning the fee for the search time, it submits that:

Prior to any records search in relation to a request, the responsible department within Infrastructure Ontario is notified of the request. A meeting is held with the responsible officials in charge of the subject matter of the request. Following that meeting, responsive records related to that request are downloaded to a secured database for Infrastructure Ontario's freedom of information team to review and retrieve. The actual time period involved in such a process took 4 hours for this particular access request, although the estimate that was provided indicated a 2 hour search window.

Concerning the fee for the preparation time, it submits that in order to prepare the records for disclosure to the appellant, the freedom of information team at Infrastructure Ontario had to undertake the following steps:

- Consulting with internal staff and third parties in applying any particular exemptions under [the Act] with respect to the responsive records and discussing the justification for applying those exemptions
- Redaction of records based on the exemption claimed

- Extensive photocopying of the redacted records for disclosure which are sent to the third party in conjunction with the third party notice and ultimately the appellant.

The actual time period involved in preparing the records for disclosure took 3 hours, although the estimate that was provided to the appellant indicated a 1 1/2 hour search window. As this was a voluminous access request in terms of records, Infrastructure Ontario had to delineate between a substantial amount of responsive and non-responsive records in order to successfully respond to the appellant's request.

Concerning the fee for photocopies, IO submits that:

In preparing the responsive records for disclosure Infrastructure Ontario had to photocopy over 1000 pages. As most of the responsive records were e-mails/attachments and hardcopy documents, reproduction of the same was the only option to respond to the request. The estimate provided to the requester indicated only 200 pages would be reproduced.

In this appeal the appellant has paid the fee of \$145.00, obtained disclosure of the non-exempt records, and is pursuing access to the records or portions of records that IO is claiming to be exempt. The appellant did not provide representations in response to the Notice of Inquiry as to whether IO has complied with the fee provisions in the *Act* and Regulation 460.

Analysis/Findings

As stated above, the purpose of a fee estimate is to provide the requester with sufficient information to make an informed decision on whether or not to pay the fee and pursue access to the requested records. In the current appeal, upon review of IO's representations, I find that the fee in this appeal was determined by IO in a proper manner and I uphold IO's fee of \$145.00.

FEE WAIVER

I will now determine whether the \$145.00 fee should be waived.

Section 57(4) of the *Act* requires an institution to waive fees, in whole or in part, in certain circumstances. The appellant relies on section 57(4)(c). This section reads:

A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering,

whether dissemination of the record will benefit public health or safety;

Section 8 of Regulation 460 sets out additional matters for a head to consider in deciding whether to waive a fee. This section reads:

The following are prescribed as matters for a head to consider in deciding whether to waive all or part of a payment required to be made under the Act:

1. Whether the person requesting access to the record is given access to it.
2. If the amount of a payment would be \$5 or less, whether the amount of the payment is too small to justify requiring payment.

A requester must first ask the institution for a fee waiver, and provide detailed information to support the request, before this office will consider whether a fee waiver should be granted. This office may review the institution's decision to deny a request for a fee waiver, in whole or in part, and may uphold or modify the institution's decision [Orders M-914, P-474, P-1393 and PO-1953-F].

The institution or this office may decide that only a portion of the fee should be waived [Order MO-1243].

Part 1: basis for fee waiver

Section 57(4)(c): public health or safety

The following factors may be relevant in determining whether dissemination of a record will benefit public health or safety under section 57(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
 - (a) disclosing a public health or safety concern, or
 - (b) contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record

[Orders P-2, P-474, PO-1953-F and PO-1962]

This office has found that dissemination of the record will benefit public health or safety under section 57(4)(c) where, for example, the records relate to:

- compliance with air and water discharge standards [Order PO-1909]
- a proposed landfill site [Order M-408]
- a certificate of approval to discharge air emissions into the natural environment at a specified location [Order PO-1688]
- environmental concerns associated with the issue of extending cottage leases in provincial parks [Order PO-1953-I]
- safety of nuclear generating stations [Orders P-1190, PO-1805]
- quality of care and service at group homes [Order PO-1962]

The appellant submits that:

... dissemination of the record will benefit public safety so that the fee should be waived completely or at least reduced significantly. The public is entitled to know that, after this transaction is concluded, any safety concerns can be dealt with satisfactorily. Moreover, since I write a BLOG in Windsor the information would be widely disseminated...

Moreover, there is also an issue of public safety involved since the Tunnel has been described as a “unique security risk” considering its location and its age. “There’s this inherent security concern with the proximity of that tunnel to the downtowns of both Detroit and Windsor.” Moreover, US Customs has stated that “the tunnel doesn’t meet their requirements.”

Taxpayers have never been told exactly what the risk is, what it would cost to eliminate that risk and whether any steps have been taken to eliminate it. Would there be enough money available after repayment to Infrastructure Ontario to ensure that the Tunnel could eliminate that risk and that it would remain safe for public use? Presumably that information must have been provided to Infrastructure Ontario as well in order for you to even consider providing a loan.

IO submits that:

...none of the records at issue in this appeal, nor their dissemination, relate to any specific “public health or safety issues”... The records pertain to more specific financial information with respect to a contemplated loan transaction between the two parties for acquisition rights and do not address “health” or border “security” issues and associated risks as described by the appellant related to the tunnel.

The mere fact that the responsive records may contain some information in some way relating to the public health or safety matters, as alluded to by the appellant, is not sufficient justification to warrant a fee waiver [Order P-425].

Analysis/Findings

The appellant is concerned about the security of the Tunnel. However, the wording of the appellant's request relates to the financing of a portion of the Tunnel. Although the appellant would probably disseminate the records, he has not demonstrated that the subject matter of the records relates directly to a public health or safety issue and that the dissemination of the records would yield a public benefit by disclosing a public health or safety concern. He has not sought specific records concerning a public health or safety issue, nor has he provided sufficient detail as to how his request for records is related to a public health or safety issue. Therefore, I cannot find that section 57(4)(c) is applicable in the circumstances as a basis for a fee waiver and I am not waiving the fee in this appeal.

SCOPE OF THE REQUEST/RESPONSIVENESS OF RECORDS

The appellant claims that there should be additional records responsive to his request.

Section 24 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
 - (a) make a request in writing to the institution that the person believes has custody or control of the record;
 - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

.
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

To be considered responsive to the request, records must "reasonably relate" to the request [Order P-880].

The appellant submits that:

I have received several hundred pages of documents from Infrastructure Ontario. They have claimed that I have received all of the documentation. Nevertheless, in a separate request by another Windsor taxpayer, he has asked City for the certain documents.

He has been advised that there are 2950 pages of documents. His request is much narrower than mine yet I have only been given a fraction of the number of pages that supposedly exist in the City's files and that of their Counsel.

In my respectful submission, the reason for the discrepancy must be determined and I must have reasonable satisfaction that all of the relevant records have been produced by Infrastructure Ontario.

In reply, IO submits that:

...it ...has listed all the records that it has in its custody and control from the City of Windsor in relation to this financing transaction in the index of records submitted to the appellant.

Additionally, pursuant to subsection 24(3) of the [the *Act*], should any further records become available to Infrastructure Ontario in relation to this transaction, Infrastructure Ontario has agreed that it shall provide a continuing access decision to the Appellant on July 14, 2009 and July 14, 2010.

Analysis/Findings

I have reviewed the information submitted by the appellant which relates to a different request by another requester. The appellant in this request sought records from IO received from the City of Windsor with respect of the Detroit/Windsor Tunnel from January 1, 2008.

The appellant provided me with two of the four parts of the request of the other requester. This requester sought records from the City of Windsor not from IO as is the case in this appeal. Upon my review of the two parts of the other request, I note that it includes records not at issue in this appeal, including records for the period from September 2005 to the end of 2007.

Based upon my review of the records at issue and the records disclosed to the appellant by IO, I find that have insufficient evidence to determine that additional responsive records exist with IO that are responsive to the appellant's request. Therefore, I dismiss this part of the appeal concerning the existence of additional responsive records.

ORDER:

I uphold Infrastructure Ontario's decision and dismiss the appeal.

Original Signed by: _____
Diane Smith
Adjudicator

_____ September 22, 2009