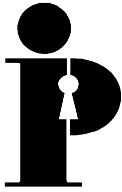

ORDER MO-2462

Appeal MA07-276

City of Toronto

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Guild Inn site (the site) is owned by the Toronto and Region Conservation Authority (TRCA) and leased to the City of Toronto (the City) under a long-term lease.

In 2003, City Council (the Council) declared the site surplus and authorized staff to set out terms and conditions for a long-term sub-lease of it through a Request for Proposal (RFP) process. Three RFPs were requested from three proponents; one development company responded.

In June 2005, Council gave approval for a letter of intent to be entered into with the development company (the successful proponent) to commence negotiations regarding a tri-party sub-lease for the redevelopment and revitalization of the site as a hotel (the Guild Inn Restoration Project).

The successful proponent assembled a consortium (the consortium) to undertake the project, comprised of itself, a private development company and a planning and development firm, and undertook a preliminary market analysis of the site's potential for success as a hotel, prepared business plans and conducted sub-lease and project document work. However, the successful proponent later decided not to proceed with the project for economic reasons.

The City then elected to defer the Guild Inn Restoration Project and began assessing how best to move forward.

On August 7, 2009, the City issued a press release confirming that Council had approved a plan by Centennial College (the College) to redevelop the site (the College Project). The press release confirmed that an "agreement in principle" had been reached between the City, Centennial College and the TRCA that would allow the College to "construct a new home for their Cultural and Heritage Institute," to include a "new hotel and a conference centre as well as restorations to the historic Bickford Residence." The release went on to state that the City "will sign a letter of intent with Centennial College for a long-term sublease with a not-for-profit corporation that will be incorporated and controlled by the [C]ollege." In July 2009 the 7-storey hotel was demolished, as reported in various press releases, setting the stage for the College Project to proceed.

The requester in this case is an association that represents a group of concerned residents. The requester submitted two access to information requests (set out below under "Nature of the Appeal") for information relating to the Guild Inn Restoration Project. As an interested stakeholder, the requester indicates that it is concerned about a "lack of openness and accountability" on the part of the City with regard to the handling of the Guild Inn Restoration Project. The requester states that it is seeking access to information in order to gain insight into the redevelopment process surrounding the Guild Inn Restoration Project up to the date of its requests.

NATURE OF THE APPEAL:

The City received two related access requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The first request was for the following:

- Information with respect to [a named individual's] activities related to the City's strategic and operational plans for the [site] and grounds, with time frames and information concerning key events and issues.

- Planning reports, financial spread sheets, workplans, service level agreements, and supporting correspondence concerning the [site] redevelopment from 2005 – the present.

The second request was for the following:

> Any reports, planning notes, or correspondence since 2005 held by the [Economic Development, Culture and Tourism Division (the EDCT) - Strategic Policy and Projects] unit, with respect to the [site] in Scarborough.

The City issued a decision letter in which it advised that as the requests involve the same records, the two requests would be combined and processed together. The City granted partial access to responsive information, denying access to the withheld information pursuant to sections 7 (advice or recommendations), 10 (third party information), 11 (economic and other interests) and 12 (solicitor client privilege) of the *Act*. The City provided the requester with an Index of Records.

The requester (now the appellant) appealed the decision of the City to this office.

Early in the appeal process, the appellant expressed the view that there is a public interest in the disclosure of the records at issue, pursuant to section 16 of the *Act*. Accordingly, section 16 was added as an issue in this appeal.

The appeal was initially assigned to a mediator, who attempted to effect a settlement.

During the course of the mediation stage, the City conducted another search for responsive records and located three additional records. The City issued a decision with respect to these additional records, denying access to them pursuant to sections 10, 11 and 12 of the *Act*. The City also produced a new Index of Records, which sets out the records at issue and the exemptions claimed by the City. During mediation, the appellant advised that it takes issue with the City's position on the disclosure of these records. In addition, the appellant believes that additional records exist. As a result, the adequacy of the City's search has also been added as an issue in this appeal.

Also during the course of mediation, the mediator attempted to contact several affected parties in an effort to obtain their consent to the release of the information relating to their organizations. Consent was not obtained.

With respect to the application of sections 10 and 11 of the *Act,* the City confirmed that it specifically relies upon sections 10(1)(a), 10(1)(c) and sections 11(c) and 11(d) of the *Act*, respectively.

The parties were unable to resolve the issues under appeal through mediation and the matter was referred to the adjudication stage for an inquiry.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from the City and the following seven affected parties: the successful proponent, a development company, a planning and development firm, a transportation consulting firm, an architectural firm, an engineering firm and the successful proponent's legal advisers. The City was asked to respond to all issues. The affected parties were asked to address only the application of the exemptions in sections 10 and 12, as they had been claimed for the information at issue in the records that affected their interests.

The City responded with representations on the application of the exemptions in section 10, 11 and 12, the application of the section 16 public interest override and its efforts to search for records responsive to the appellant's request. I note that while the City had initially raised the application of section 7 to Records 12 and 13 in its decision letter, it did not make representations on the application of this exemption to these records. The City has not provided any evidence regarding the application of section 7 to Records 12 and 13. In addition, it is not apparent from my review of the records that this exemption applies. I will, therefore, not discuss the section 7 exemption any further in this order.

Four of seven affected parties, namely the successful proponent, the development company, the architectural firm and the successful proponent's legal advisers, provided representations. Three of the affected parties (the successful proponent, the development company and the architectural firm) provided representations on the application of section 10, while the fourth affected party (the successful proponent's legal advisers) provided representations on the application of sections 10 and 12 to three records.

I then sought representations from the appellant and included with my Notice of Inquiry the City's severed representations. Portions of the City's representations were severed due to confidentiality concerns. I decided to not forward copies of the representations received from the four affected parties. The appellant responded with representations.

I then forwarded a copy of the appellant's representations to the City and invited it to provide reply representations. The City responded with reply representations, which I then forwarded to the appellant for comment. The appellant provided sur-reply representations.

RECORDS:

There are 303 pages of records at issue comprised of memoranda, correspondence, business plans and reports. All of the records have been withheld in full. The records and exemptions at issue are set out in the Index of Records, which I have appended to this order.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

Section 11(c) and (d): prejudice to economic interests and injury to financial interests

The City takes the position that sections 11(c) and (d) apply to the information contained in Records 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28 and 29. These sections read:

> 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;

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and 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 [Order P-1190].

For sections 11(c) or (d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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 records under consideration in relation to this exemption can be broadly categorized as follows:

- correspondence that relates to terms and conditions that were in the process of being or had been negotiated between the City and the successful proponent relating to the

negotiation of a long-term ground lease, including all ancillary documentation, for the Guild Inn Restoration Project (Records 2, 4, 5, 7, 8, 11, 21, 22, 27, 28, 29)

- correspondence that can be generally described as addressing activities or the status of activities related to the Guild Inn Restoration Project (Records 3, 6, 9, 10, 15, 16, 17, 18, 19 and 20)

- legal memoranda prepared by the successful proponent's legal advisers for the successful proponent (Records 12 and 13)

- draft business plan prepared by the consortium regarding the redevelopment of the site (Record 14)

- formal reports prepared by third parties for the Guild Inn Restoration Project (Records 23, 24, 25 and 26)

Representations

The City's representations on the application of section 11(c) are combined with its representations on section 11(d).

The City acknowledges that while the proposed Guild Inn Restoration Project fell through, it has every intention of pursuing the redevelopment of the site. In that vein, as noted above, the City and the TRCA have struck a tentative deal with Centennial College for the redevelopment of the site. The City fears that disclosing the contents of the records at issue could reasonably be expected to harm its economic and financial interests. The City describes this impact as follows:

> The City submits that a careful review of all of the information contained in the records at issue could reasonably reveal the City's strategies and deliberations with the successful proponent in the aborted project and in the setting of the terms and conditions of the various proposed draft agreements. The City submits that the disclosure of records, relevant to transactions and intentions not consummated but would have been acceptable to the City, could reasonably be expected to place the City at a disadvantage in any further negotiations on the redevelopment of this property. If the information contained in the records were to be disclosed, it could be used by proponents in their submissions to the financial disadvantage of the City, i.e., such information as operating costs, base lease amounts, etc. could reasonably be used as leverage by bidders. This would be detrimental to the City's economic and financial interests.

The appellant does not provide representations that address the application of the exemptions in sections 11(c) and (d).

Analysis and findings

I have carefully reviewed the City's representations and the records at issue. For the reasons that follow, I am satisfied that information which relates to any terms and conditions that were in the process of being, or had been negotiated between the City and the successful proponent, relating to the negotiation of a long-term ground lease in respect of the Guild Inn Restoration Project, including all ancillary documentation, qualifies for exemption under section 11(d) of the *Act*. Consequently, I find the contents of Records 2, 4, 5, 7, 8, 11, 12, 13, 21, 22, 27, 28 and 29 exempt pursuant to section 11(d).

In reaching this conclusion I rely on the analysis and findings of former Assistant Commissioner Tom Mitchinson in Order PO-1894. In that order, the Assistant Commissioner made the following statements regarding the application of the provincial equivalent of section 11(d) [section 18(1)(d) of the *Freedom of Information and Protection of Privacy Act*] to information relating to the proposed sale of real property by the Ontario Realty Corporation, on behalf of the Ontario government, to a prospective purchaser:

> Having reviewed the records, I am satisfied that information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act*. I am also satisfied that records containing information about the possible uses or value of the property also qualify for exemption under this section. I accept that until the purchase and sale of the property has been finalized, it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Furthermore, disclosure of prospective uses and the value placed on the property by various parties could similarly be disadvantageous. Given that the ORC is charged with the responsibility for the proper administration of the land holdings of the Government of Ontario, I find that premature disclosure of this type of information could reasonably be expected to be injurious to the financial interests of the Government of Ontario.
>
> Accordingly, any correspondence or documentation regarding the possible use or value of the property (Records 58, 62-63, 70 and 277); any records containing information regarding proposals from the affected parties regarding the property, including possible uses and value of the property, as well as any analysis of the proposals (Records 191-195, the undisclosed portions of Record 205, Records 208 and 278-279); any records referencing the possible conditions on the sale of the property, and related negotiations (Records 218-219, 220, 315, 320-325, 327-328, 329-332, 336, 352-362, 377-379 and 433-436); drafts of Agreements of Purchase and Sale, and notations and summaries concerning the drafts (Records 224-238, 240-250, 269-273 and 288-300); and the executed conditional Agreement of

> Purchase and Sale (Records 301-311 and 420-432) qualify for exemption under section 18(1)(d) of the *Act*.

I acknowledge that the circumstances in this case are somewhat different than those in Order PO-1894. In Order PO-1894, the information at issue related to a transaction that was ongoing. In this case, the Guild Inn Restoration Project has been abandoned. However, as stated above in the "Background" section to this order, the City has reached an agreement in principle with Centennial College and the TRCA for the development of a new Cultural Heritage Institute for the College on the site, with a letter of intent pending. In my view, until a deal between the City, the College and the TRCA has been consummated, the terms and conditions that had been discussed and were being negotiated between the City and the successful proponent with respect to the Guild Inn Restoration Project, including ancillary correspondence related to these issues, could reasonably be expected to prejudice the City's negotiations with Centennial College and result in financial harm to the City.

In particular, I make the following findings regarding the thirteen records that fall into this category.

Record 8 contains the terms of a letter of intent entered into between the successful proponent and the City regarding the future negotiation of a long-term ground lease for the Guild Inn Restoration Project. In my view, disclosure of this record at this time could reasonably be expected to impact the negotiation of a letter of intent between the City and Centennial College, which would be injurious to the City's financial interests.

I also find that Records 2, 4, 5, 7, 11, 22, 27, 28 and 29 contain terms and conditions that were being negotiated by the City and the successful proponent regarding a ground lease for the Guild Inn Restoration Project. I am satisfied that disclosure of these records at this time could reasonably be expected to be injurious to the City's financial interests as it prepares to enter negotiations with Centennial College over a ground lease for the redevelopment of the site.

As described above, Records 12 and 13 are legal memoranda prepared by the successful proponent's legal adviser for the successful proponent's review. Each memorandum provides detailed recommendations regarding the proposed terms and conditions for a ground lease that were under negotiation at that time between the City and the consortium. Each memorandum also includes notations in the margins that appear to have been made by an unidentified City employee. The notations include questions for the City's Legal Department and comments that recommend specific revisions to the proposed terms and conditions for the ground lease. I find that disclosure of the contents of Records 12 and 13 could reasonably be expected to be injurious to the financial interests of the City as it prepares to enter negotiations with Centennial College over a ground lease for the redevelopment of the site.

Record 21 is somewhat different. It is a letter from the EDCT to the successful proponent that addresses issues pertaining to an apparent breakdown in the relationship between the City and the successful proponent. However, in documenting these issues, the letter also reveals terms

and conditions that had been allegedly agreed to by the City and the successful proponent. I find that disclosure of the contents of Record 21 could reasonably be expected to be injurious to the financial interests of the City as it prepares to enter negotiations with Centennial College over a ground lease for the redevelopment of the site.

For all of the above reasons, I find Records 2, 4, 5, 7, 8, 11, 12, 13, 21, 22, 27, 28 and 29 exempt pursuant to section 11(d).

Records 3, 6, 9, 10, 15, 16, 17, 18, 19 and 20 can be generally described as correspondence that addresses activities or the status of activities related to the Guild Inn Restoration Project. This correspondence includes dialogue between the successful proponent and the City regarding progress on the project and critical path logistics (Records 9, 15, 16, 17, 18 and 19), approvals (Record 6) and communication about the ongoing participation of a particular party in the project (Record 20). I am not persuaded that their disclosure could reasonably be expected to lead to any of the harms identified in sections 11(c) or (d), and I find that they do not qualify for exemption.

As described above, Record 14 is a draft business plan submitted to the City by the consortium for the Guild Inn Restoration Project. I have not received representations from the City regarding any harms under sections 11(c) or (d) that it would experience in the event of disclosure. The table of contents of the business plan is divided into four sections that can be described as follows: the project team, the project vision and scope, financial projections and appendices. The appendices are not attached to the record at issue. This record essentially presents the consortium's vision for the Guild Inn Restoration Project. On my review of the record, I see no basis for concluding that its disclosure could reasonably be expected to lead to the harms identified in sections 11(c) or (d), and I find that it does not qualify for exemption.

Records 23, 24, 25 and 26 comprise four reports prepared by third parties in furtherance of the Guild Inn Restoration Project. Record 23 is a report prepared by the transportation consulting firm that addresses urban transportation considerations for the site. Records 24, 25 and 26 are three reports prepared by the architectural firm that set out a restoration and redevelopment strategy (Record 24), a subsequent preservation/restoration strategy (Record 25) and a site plan development and management strategy (Record 26). Once again, I have not received representations from the City regarding any harms it would experience under sections 11(c) or (d) upon disclosure of these specific records to the appellant. On my review of these records, I see no basis for concluding that their disclosure could reasonably be expected to lead to the harms identified in sections 11(c) or (d), and I find that they do not qualify for exemption.

THIRD PARTY INFORMATION

The City has claimed the application of sections 10(1)(a) and (c) to all of the records at issue, with the exception of Record 1. As stated above, seven affected parties were invited to make representations on the application of the section 10 exemption. Three of the affected parties (the successful proponent, the development company and the architectural firm) responded with

representations on the application of the section 10 exemption to the information in the records that affects their interests. A fourth affected party (the successful proponent's legal advisers) has also raised the application of sections 10(1)(a) and (c) to Record 1. The City did not raise the application of section 10 to Record 1. However, since section 10 is a mandatory exemption I will consider its application to Record 1. The other three affected parties did not make representations. Despite being invited to make representations on the application of the section 10 exemption, the appellant's representations do not address the application of this exemption. I will now examine the application of sections 10(1)(a) and (c) to Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26, which are the records remaining at issue, excluding those I have found exempt under section 11(d).

Sections 10(1)(a) and (c) 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, 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;
>
> ...
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 10(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 10(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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In this case, the parties resisting disclosure of the records at issue are the City and four affected parties (the successful proponent, the development company, the architectural firm and the successful proponent's legal advisers). Consequently, the onus of proving that the section 10(1) exemption applies to the records at issue lies with these parties.

For section 10(1) to apply, the City and the four affected parties 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

To satisfy part 1 of the section 10(1) test, the City and the four affected parties must prove that the records reveal a trade secret or scientific, technical, commercial, financial or labour relations information.

The records clearly do not reveal any labour relations information. The meaning of the other types of information listed in section 10(1) of the *Act* has been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

> *Commercial information* is 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].
>
> *Financial information* refers to 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 provided representations on part 1 of the test. The City states that the records at issue contain commercial, financial and technical information. Neither the affected parties nor the appellant provided representations on part 1 of the test.

On my review of the records, I am satisfied that they contain commercial, financial and technical information. Accordingly, I find that part 1 of the test under section 10 has been met.

Part 2: supplied in confidence

To satisfy part 2 of the section 10(1) test, the City and the four affected parties must prove that the information in the records at issue was supplied to the City in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(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, 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 10(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]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

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]

Once again, only the City has provided representations that address part 2 of the test under section 10.

Summary of the City's representations

The City states that the information at issue in the records was "supplied to the City or would reveal information that was supplied to the City by the [successful] proponent, [the successful proponent's legal advisers], or by other third parties in the [consortium]."

On the "in confidence" component of part 2 of the test, the City submits that the information at issue was supplied to the City in confidence, either explicitly or implicitly. With regard to those records that it states were supplied explicitly in confidence, and that remain at issue, the City cites Records 9, 14 and 26, indicating that these records contain express language that they were supplied in confidence to the City. The City states that the remaining records at issue were supplied implicitly in confidence to the City, due to the "sensitivity of the information they contained." The City adds that all third parties provided their information to the City with a reasonable expectation that it would be held in confidence and that staff with the City handled this information in a manner that is consistent with a commitment to confidentiality and non-disclosure.

Analysis and findings

Having reviewed the City's representations and the contents of the records at issue, I am satisfied that those records that are actually marked "confidential" were supplied to the City by third parties with an express expectation that they would be held in confidence. Falling into this category are Records 9 and 14. I note that the City has also indicated that Record 26 (The Guild

Cultural Precinct Report – Site Plan Development and Management Strategy) contains express language that it was supplied in confidence by a third party. Having carefully reviewed this document, I find no such express language. As to whether Record 26 and the remaining records at issue were supplied to the City implicitly in confidence, I find that it is reasonable to accept for the purposes of my analysis, that these records were supplied in confidence due to the sensitive nature of their contents, and particularly in light of my findings below on the harms test under sections 10(1)(a) and (c).

Part 3: harms

General principles

To satisfy part 3 of the section 10(1) test, the City and the four affected parties must prove that the prospect of disclosure gives rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

With respect to the quality of evidence required, the parties resisting disclosure 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].

Section 10(1)(a) and (c)

The representations received from the City and the four affected parties provide similar arguments with respect to the harms contemplated by both sections 10(1)(a) and (c) of the *Act*. Consequently, I will consider the application of these two provisions together.

In order to satisfy the requirements of section 10(1)(a), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

In order to satisfy the requirements of section 10(1)(c), the parties resisting disclosure must provide detailed and convincing evidence to establish that disclosure of the information in the records at issue could reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency.

Summary of the parties' representations

The City submits that the disclosure of the information at issue in the records "could significantly prejudice [the affected parties'] competitive position or interfere significantly with their contractual or other negotiations or result in them sustaining an undue financial loss."

The City states, in particular:

> It is a well-known principle that disclosure is disclosure to the world. The details of an aborted commercial proposal including […] budget and staffing costs, technical plans/drawings, etc. could prejudice the [affected parties'] competitive position or adversely affect their ability to negotiate on other development projects with other municipalities or potential clients. Similarly, if at some future date, another RFP is issued by the City for the redevelopment of the Guild Inn (or some other process is determined), this would place the [affected parties] at a disadvantage as other bidders or industry competitors would be able to undercut or make use of the disclosed information to promote their proposals or to enhance their own bids.

The City also makes representations regarding the reasons the successful proponent decided not to proceed with the Guild Inn Restoration Project and how disclosure of these reasons could "reflect negatively upon third parties, particularly [the successful proponent], which could result in an undue loss to third parties and in undue gains to others."

The representations received from the four affected parties are brief.

The successful proponent and the development company, which together with the planning and development firm, formed the consortium, submitted identical representations. They state that all communications, documents and representations made to the City, with respect to their negotiations regarding the redevelopment of the site, with the exception of those presentations made in a public forum, are of a "private, sensitive and proprietary nature." They submit further that any disclosure of this information has the "potential to expose trade secrets to our competitors […]."

The architectural firm states that the information in the records that concerns its interests is proprietary in nature and the disclosure of it "may negatively impact" its business by "exposing this information to competitors in [its] field."

The successful proponent's legal advisers restate the substantive portions of sections 10(1)(a) and (c), but do not provide any elaboration as to how the harms enumerated in these sections would result if Record 1 was disclosed.

Analysis and findings

I have carefully considered the parties' representations and reviewed the contents of Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26. For the reasons that follow, I find that disclosing the information in these records could not reasonably be expected to "prejudice significantly" the competitive position of the affected parties [section 10(1)(a)] or result in an undue loss for them or an undue gain for their competitors [section 10(1)(c)].

First, the issue for me to decide is whether disclosure could reasonably be expected to harm the affected parties' interests. I acknowledge that the City has attempted to provide some measure of insight into the nature of the harms that "could" result in the event of disclosure. However, while the City has indicated that disclosure of certain types of information could put the affected parties at a competitive disadvantage in any future RFP processes regarding the redevelopment of the Guild Inn, the City has failed, in my view, to provide detailed and convincing evidence into the nature of those harms and how disclosure of the information in the records could reasonably be expected to cause those harms. In addition, the City also suggests that disclosure of the records would provide insight into the reasons the successful proponent decided not to proceed with the Guild Inn Restoration Project and that disclosure of these reasons could reflect negatively upon third parties, particularly the successful proponent, which could, in turn, result in undue losses to third parties and undue gains to others. I do not find this evidence compelling or convincing. The reasons behind the successful proponent's withdrawal from the Guild Inn Restoration Project have been well documented publicly, including in a report from the City Counsellor for Ward 43 in May 2007, which is available on the Counsellor's website.

Second, the affected parties should be in the best position to provide the requisite "detailed and convincing" evidence to establish a reasonable expectation of harm under sections 10(1)(a) or (c). However, of the seven affected parties that were invited to provide representations on the application of the section 10 exemption only four responded and, of those four, the representations that they provided on the harms test are extremely brief, highly speculative and do not provide insight into the nature of the harms that would ensue upon disclosure. Two affected parties refer to highly speculative "potential" harms, while a third affected party expresses concern that disclosure "may" negatively impact its business by exposing the information to competitors. The fourth affected party simply restates the operative wording of sections 10(1)(a) and (c) and claims the application of these exemptions to Record 1. In my view, the affected parties' representations fall far short of the detailed and convincing evidence required to evince a "reasonable expectation of harm."

Third, as noted above, the majority of the records at issue address activities or the status of activities related to the Guild Inn Restoration Project. On the face of these records, I see no evidence that disclosure of them could reasonably be expected to result in the harms contemplated by section 10(1)(a) or (c). I acknowledge that the draft business plan (Record 14), the restoration and redevelopment strategy (Record 24), a subsequent preservation/restoration strategy (Record 25) and a site plan development and management strategy (Record 26) all contain detailed information relating to the proposed Guild Inn Restoration Project, including

historical information about the site, project vision, financial projections, transportation considerations and restoration plans and drawings. However, in my view, this information is project specific and dated (all of the reports are more than three years old). None of the information in these records reveals trade secrets or the financial inner workings of any of the affected parties that authored these reports. Most importantly, I have been provided with no specific evidence of how the information contained in these records would be of any value to competitors today as economic conditions, restoration strategies and techniques and the needs of public institutions have undoubtedly changed through the passage of time.
In conclusion, I find that the City and the four affected parties have not provided "detailed and convincing" evidence that disclosing the contents of Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26 could reasonably be expected to lead to the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

SOLICITOR-CLIENT PRIVILEGE

I will now examine the application of section 12 to the records remaining at issue, namely Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26.

The discretionary exemption in section 12 contains two branches. The City must establish that one or the other (or both) branches apply.

Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

Branch 1: common law privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

Solicitor-client communication privilege

Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank* (cited above)].

In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
>> A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .

> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

Branch 2: statutory privileges

Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

Statutory solicitor-client communication privilege

Branch 2 applies to a record that was "prepared by or for counsel employed or retained by an institution for use in giving legal advice."

Statutory litigation privilege

Branch 2 also applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation."

Representations

In its representations the City indicates that it is relying on the privileges in both branches 1 and 2. However, the City's representations only address the branch 1 exemptions. In addition, despite being invited to make representations that address the specific records affected, the City has offered only general statements regarding the application of the section 12 exemption in the circumstances of this case without reference to the specific records at issue.

With regard to the branch 1 solicitor-client communication privilege, the City states that its program area has indicated that it partnered with its legal department (the Legal Department) at every step of the process, including the seeking of legal advice on the terms of the RFP and negotiations on the draft terms and conditions of a letter of intent and various proposed agreements. The City submits that if the withheld records were disclosed, they would reveal the confidential advice provided by the Legal Department throughout the process on a variety of key issues. In addition, the City states that while not all of the records were created or prepared by the Legal Department, the records constitute their working papers directly related to the seeking, formulating or giving of legal advice. The City, therefore, submits that the solicitor-client communication privilege applies to the records at issue.

With regard to the branch 1 litigation privilege exemption, the City states that the information in the records at issue relates to a "failed initiative where possible litigation may arise." The City states that the Legal Department has indicated that there is a "possibility of litigation proceedings." The City points to a chart prepared by the Legal Department, and enclosed with its representations, which identifies specific records that it claims are exempt under either branch 1 solicitor-client communication privilege or litigation privilege. The City's inference is that the

chart was prepared in anticipation of future litigation. This chart was not shared with the appellant since doing so would have revealed the contents of information at issue.

As alluded to above, one of the four affected parties, namely the successful proponent's legal advisers, submitted representations on the application of section 12 to three records, including Record 1, a legal memorandum prepared by the successful proponent's legal advisers for their client. The successful proponent's legal advisers state that the memorandum consists of "direct communications of a confidential nature between [it] and its client for purposes of giving professional legal advice, communication within [the firm], as agents of the clients, made for the purpose of giving professional legal advice, and legal adviser's working papers directly related to formulating and giving legal advice to its client."

The appellant does not offer any comments on the City's reliance on the branch 1 solicitor-client communication privilege exemption. With regard to the branch 1 litigation privilege exemption, the appellant states that it considers the City's argument about the "possibility" of legal action "specious." The appellant asserts that legal action is "far from probable unless the records reveal some type of wrongdoing on the part of City staff." The appellant adds that it recognizes that "anything may be possible, but [legal action] is not probable and therefore not a reason to deny local stakeholders access to records concerning a redevelopment that directly affects their everyday lives."

The reply and sur-reply representations received from the City and the appellant respectively do not, in my view, contribute any meaningful additional arguments to the discussion surrounding the application of the section 12 exemption.

Analysis and findings

The records at issue under the section 12 exemption can be categorized as follows:

1. Memorandum prepared by the successful proponent's legal advisers for their client, the successful proponent, which were also provided to the City (Record 1)

2. Correspondence exchanged between the Legal Department and the successful proponent (Record 18)

3. Correspondence exchanged between the successful proponent and the EDCT (Record 9)

4. Correspondence exchanged between the consortium or individual members of the consortium and the EDCT (Records 15, 16, 17, 19 and 20)

5. Correspondence exchanged between the TRCA and the EDCT (Record 3)

6. Correspondence exchanged between the TRCA and the Legal Department (Record 6)

7. Correspondence exchanged between members of the consortium (Record 10)

8. Business plans and reports prepared by various affected parties (Records 14, 23, 24, 25 and 26)

Although each record category is unique, there is an over-arching similarity to them: none of the records involve direct communications of a confidential nature between the Legal Department and employees or other representatives of the City. That being the case, the question for me to determine is to what extent communications between the successful proponent and their legal advisers (Category 1), the Legal Department and third parties (Categories 2 and 6), other City departments and third parties (Categories 3, 4, 5 and 8) and third parties (Category 7) qualify for exemption under section 12. I will refer to four headings during the course of my analysis.

The section 12 solicitor-client privilege exemption is designed to protect the interests of government institutions, not outside parties. This view is articulated in the following passage from Order MO-1338 of former Senior Adjudicator David Goodis:

> In my view, the solicitor-client privilege exemption is designed to protect the interests of a *government* institution in obtaining legal advice and having legal representation in the context of litigation, not the interests of other parties outside *government*. Had the Legislature intended for the privilege to apply to non-government parties, it could have done so through express language such as that used in the third party information and personal privacy exemptions at sections 10 and 14 of the *Act*. This interpretation is consistent with statements made by the Honourable Ian Scott, then Attorney General of Ontario, in hearings on Bill 34, the precursor to the *Act*'s provincial counterpart:
>
> > Section 19 is a traditional, permissive exemption in favour of the solicitor-client privilege. The theory here is that in the event the government either commences litigation or is obliged to defend litigation, it should be able to count on the fullest accuracy and disclosure from its employees.
> >
> > . . . . .
> >
> > If you do things to discourage the client from telling the lawyer the true story, then the *government* does not get good legal advice. Again, the judgement is, "Yes, we exclude the information, but because we are protecting this value that is important." It is important that the *government*, which is spending taxpayers' money, should be able to be certain that public servants tell our lawyers the truth. We do not want to discourage public servants from telling our lawyers the truth by saying to them, "Everything you say is going to be open in a couple of days in the newspapers." [emphasis added by the Senior Adjudicator]

> > [Ontario, Standing Committee on the Legislative Assembly, "Freedom of Information and Protection of Privacy Act" in *Hansard: Official Report of Debates*, Monday, March 23, 1987, Morning Sitting, p. M-9, Monday March 30, 1987, Morning Sitting, p. M-4]
>
> Thus, where the client in respect of a particular communication relating to legal advice is not an institution under the *Act*, the exemption cannot apply. The only exception to this rule would be where a non-institution client and an institution have a "joint interest" in the particular matter . . .

The above passage from Order MO-1338 has been followed and applied by this office (see, for example, Order MO-1900R, which was affirmed in Order MO-1923-R, and Order MO-2454). I also note that the view expressed in these decisions is consistent with the doctrine of waiver, which, as noted below, generally applies where solicitor-client communications are disclosed to a third party such as the City.

In this case, the parties have provided me with very general representations on the application of the section 12 exemption to the records at issue. Accordingly, my analysis is based primarily on my review of the records.

Communications between the successful proponent and its legal advisers (Category 1)

There is one record at issue under this category, Record 1, which I have described as a memorandum prepared by the successful proponent's legal advisers for its client, the successful proponent, which was also provided to the City. I will first address the application of the section 12 privileges to the successful proponent's legal advisers followed by a review of these privileges from the City's perspective.

Application of section 12 privileges and the successful proponent

As a general rule, where an otherwise privileged communication is disclosed to a third party, the intention of confidentiality is negated and the privilege is waived [J. Sopinka *et al.*, *The Law of Evidence in Canada* (2nd ed.), (Markham: Butterworths, 1992), at p. 669; R. Manes *et al.*, *Solicitor-Client Privilege in Canadian Law*, (Markham: Butterworths, 1993), at p. 207; *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)].

Waiver may not apply where the third party is found to have a common interest with the disclosing party [*General Accident* (above); Order MO-1678].

In this case, the memorandum was authored by the successful proponent's legal advisers for review by the successful proponent. However, the memorandum was also forwarded to the City, which *prima facie* constitutes waiver absent any joint or common interest between the successful proponent and the City, since the intention of confidentiality is negated by this action.

Therefore, in my view, in order for one of the branch 1 privileges to apply to the successful proponent, I must find the existence of a common interest between the successful proponent and the City with regard to the Guild Inn Restoration Project. If I find that no common interest exists, then subject to any contrary evidence provided by the successful proponent and the City, I must conclude that there has been waiver.

The decision in *SNC-Lavalin Engineers & Constructors Inc. v. Citadel General Assurance Co.* (2003), 63 O.R. (3d) 226 (Master), set out a number of criteria to be considered to determine if solicitor-client privilege has been waived when a privileged communication from a solicitor to his client is shared with another person:

1. Solicitor-client privilege should not be lightly interfered with and should be deemed waived only in the clearest of cases in order to maintain public confidence in a client's right to communicate in confidence with his solicitor. Any conflict with respect to waiving this privilege should be resolved in favour of maintaining the confidentiality.

2. Each case is to be determined on its own unique facts.

3. Did the client intend the communication from the solicitor to remain confidential when copied to a third party? Conversely, did the client intend to waive the privilege?

4. Did the client intend that the third party would maintain the document as confidential in his hands?

5. Was the presence of the third party, or the copying of the communication to the third party, required to advance the client's interests? The standard of what is required to advance the client's interests is not a high one.

6. Does the person to whom the communication is copied have a common interest with the client? What is the nature of the relationship?

7. The interest of fairness must be considered in determining whether solicitor-client privilege over a communication has been waived.

8. Although the onus of establishing solicitor-client privilege is on the party asserting the privilege, the onus of establishing waiver of that privilege is on the party asserting waiver.

The above list provides a useful framework for the waiver analysis. However, not all of the listed criteria are to be given equal weight, and the presence or absence of any of them may or may not be determinative of the waiver question.

In addition, with regard to criterion 8, as I stated above, a *prima facie* case of waiver has been established, and the successful proponent and the City now have the burden of proving that waiver did not occur.

Neither the successful proponent's legal advisers nor the City has provided representations that address waiver or common interest. Without representations on these issues, it becomes difficult to interpret the intentions of the successful proponent and the City, particularly in the context of the above criteria. That said, in my view, based on my review of Record 1, the key criterion in this case is criterion #6, common interest and the nature of the relationship between the successful proponent and the City.

In Order MO-1923-R I addressed a similar issue involving the application of the section 12 exemption to a copy of a legal opinion that had been prepared for the Cathedral Church of St. James (the Church) by its counsel, which was later provided to the City by another lawyer for the Church. The opinion related to a proposed residential and commercial development at the southeast corner of Church Street and Adelaide Street East in Toronto, which contains the St. James Cathedral, the Parish House and the Diocesan Centre (the Cathedral Lands). At the time, the Cathedral Lands had been the subject of a long-standing and acrimonious land use and developmental rights dispute. My decision in Order MO-1923-R affirmed my decision in Order MO-1900-R. One of the issues I dealt with in Order MO-1923-R was the extent to which the Church could rely on the solicitor-client exemption in section 12. In finding that none of the privileges under section 12 were available to the Church or the City, I ordered the record disclosed to the requester in that case. With regard to the Church's claim of privilege, I reviewed the relevant criteria from the *SNC-Lavalin* case. My analysis of "common interest" (criterion #6) in Order MO-1923-R is particularly relevant. On this issue I stated as follows:

> At all relevant times, the Church (with the developer) was and remains a private party, making a proposal to the City that it accept its density transfer proposal. As the public body charged with making zoning decisions, the City stands in the position of public regulator or law maker. The City in this case cannot be considered a private party working in collaboration with the Church, or dedicated to advancing the Church's interests. It would be fundamentally inconsistent with the City's common law and statutory role as impartial guardian of the public interest to consider the City and the Church to have a "common interest" and to represent "a united front against a common foe", that being other members of the public who happen to oppose the density transfer. In these circumstances, the City must be considered to have nothing closer than an "arm's length" relationship.
>
> Another way of testing whether there can be said to be a "common interest" between two parties is to ask whether it would be "reasonably possible for the same counsel to represent both" [see *Canadian Pacific Ltd. v. Canada (Competition Act, Director of Investigation and Research)*, [1995] O.J. No. 4148 (Gen. Div.), at para. 27]. In my view, counsel would be in a conflict of interest

> situation if he or she were asked to represent both a proponent of the density transfer proposal (the Church) and the municipal government that is deliberating on the matter and deciding whether it is in the public interest to accept the proposal (the City).
>
> Another point which weighs against a finding of common interest is the fact that the City has declined to assert a common interest with the Church, despite the fact that, prior to Order MO-1900-R, I invited the City to comment on (among other things) Order MO-1338, which discussed the principle of common interest in detail.

Turning to this case, in my view, the circumstances currently before me are analogous to those in Order MO-1923-R. Accordingly, as explained in more detail below, I find that my analysis and findings in Order MO-1923-R on the common interest criteria are applicable here.

The successful proponent is a private entity that had been chosen to lead the Guild Inn Restoration Project. As it did in dealing with the proposed redevelopment of the Cathedral Lands, the City stands in the position of public regulator or law maker. The City cannot, therefore, be considered a private party working in collaboration with the successful proponent, or dedicated to advancing the successful proponent's interests. It would be fundamentally inconsistent with the City's common law and statutory role as impartial guardian of the public interest to consider the City and the successful proponent to have a "common interest" and to represent "a united front against a common foe," that being other members of the public who opposed the Guild Inn Restoration Project. In these circumstances, the City must be considered to have nothing closer than an "arm's length" relationship with the successful proponent.

Finally, while it is not determinative of the waiver issue, the criterion of "fairness" (criterion #7) is, in my view, relevant in this case. In *Canadian Municipal and Planning Law*, (Toronto: Carswell, 1983), Stanley M. Makuch articulated the public interest in fair and transparent municipal processes as follows (at pp. 267-268):

> This chapter deals with the legal requirements for access to information, notice, hearings, and conflict of interest provisions at the municipal level. The reasons for such requirements are numerous . . .
>
> [A] sense of "fairness" often demands openness in local government. Municipal governments affect the lives of their citizens in many direct and important ways. The rezoning of a particular area of a municipality can have an important impact on property values . . . Although decisions affecting these matters generally are not viewed as determining legal rights and thus do not require notice and a hearing, they do affect "rights" in the popular sense. It is important, therefore, that an opportunity to participate in the shaping of one's community should be provided. Access to information and decision-making is a pre-requisite for such

> participation while conflict of interest legislation can help to ensure that decisions are not made for private gain.
>
> Finally, it is clear that municipalities in rezoning individual parcels of land . . . can be performing quasi-judicial functions and affecting rights in the narrower legal sense. In such cases, traditional legal values reflected in the rules of natural justice and in the concept of procedural fairness demand due process protection.

For all of the reasons set out in the discussion above, I find that the "fairness" criterion does not support a conclusion that the successful proponent did not waive, either expressly or impliedly, any privilege it may have had in the memorandum when it sent a copy of it to the City.

Having determined that no common interest exists between the successful proponent and the City, and absent any evidence regarding the successful proponent's intentions (or those of its legal advisers) in forwarding a copy of Record 1 to the City, I am satisfied that the successful proponent waived any privilege it may have had under the branch 1 common law solicitor-client communication privilege when it provided the City with copies of these records.

With regard to the branch 1 litigation privilege, I note that the representations submitted by the successful proponent's legal advisers do not address the application of that privilege to the memoranda. In any event, having already concluded that any privilege that may have existed for the successful proponent was lost due to waiver, any finding regarding the application of common law litigation privilege would also be negated by waiver. Accordingly, it is not necessary for me to review the application of the branch 1 litigation privilege exemption to the records relating to the successful proponent.

I will deal briefly with the application of the branch 2 privileges to the records relating to the successful proponent. Again, the representations submitted by the successful proponent's legal advisers do not address the branch 2 privileges. However, for the sake of completeness, I will address their application in this case. The branch 2 privileges are clearly designed to protect an institution's privilege, not that of an outside party. The memorandum was not "prepared by or for counsel ***employed or retained by an institution*** for use in giving legal advice or in contemplation of or for use in litigation." [emphasis added] It was prepared by the successful proponent's legal advisers for use in giving the successful proponent legal advice. In the absence of a common interest, the branch 2 privileges do not apply to protect the successful proponent's solicitor-client communication or litigation privileges.

Application of section 12 privileges and the City

As stated above, the solicitor-client communication privilege exemption protects direct communications of a confidential nature between a lawyer and a client. The copy of the memorandum at issue is a not confidential communication between a City lawyer and a City client and I would, therefore, conclude that it is not subject to common law solicitor-client communication privilege under section 12 of the *Act*.

In its representations, the City acknowledges that some of the records at issue were created or prepared by other parties. In making this statement the City may have been referring to the memorandum. However, the City's position is that despite the fact it did not author these records, they are protected by solicitor-client communication privilege since they constitute its "working papers" directly related to the seeking, formulating or giving of legal advice.

In my view, the memorandum does not qualify for exemption under the "working papers" analysis. In reaching this conclusion, I have considered the analysis and findings of Adjudicator Steven Faughnan in Order MO-2231. In that case, Adjudicator Faughnan was required to distinguish between two copies of a letter, one of which had found its way into a City zoning file in relation to a particular matter. One of the copies of the letter had handwritten notations on it. The other did not. It was the non-annotated version of this letter that was at issue in the appeal. In addressing the application of the branch 1 solicitor-client privilege exemption to the non-annotated version of the letter, Adjudicator Faughnan first found that it was not the type of communication that falls within the first part of branch 1 of section 12 either as a direct communication between a solicitor and client for the purpose of obtaining legal advice or as part of any continuum of communications between them in that connection. He then concluded that the non-annotated version of the letter did not fall within the working papers component of the branch 1 solicitor-client privilege exemption. In reaching this latter conclusion, Adjudicator Faughnan states:

> Nor can it be said that the unannotated version of this letter comprises part of the lawyer's working papers. The fact that the contents of this letter comprise the <u>subject matter</u> of the advice that was sought or given does not transform it into the lawyer's working papers. It is only where a record contains or would reveal the contents of a communication between the solicitor and client that it would so qualify. For example, where a record reveals the thought processes of the lawyer in formulating legal advice, such as the lawyer's notes of his or her research or comments on or legal impressions concerning the subject matter of the advice, it would qualify under the working papers component of solicitor-client communication privilege. The unannotated version of the letter at issue in this appeal does not do so and, therefore, does not qualify under this component of the communication privilege.

I endorse Adjudicator Faughnan's analysis and apply it to the circumstances of this appeal. The memorandum constitutes a written communication between the successful proponent and its legal advisers. It does not in any way contain communications between a lawyer employed by the City's Legal Department and another City department. In addition, the memorandum does not reveal the thought processes of a lawyer employed by the City's Legal Department in formulating legal advice. Accordingly, I find that these records do not qualify for exemption under the branch 1 solicitor-client privilege working papers component.

By way of comparison, Records 12 and 13, which I found exempt under section 11(d), are also legal memoranda prepared by the successful proponent's legal advisers. These records contain

the notations of a City employee in their margins. The notations include questions for the City's Legal Department and comments that recommend specific revisions to legal documents. In my view, while these notations do not appear to be authored by a lawyer within the City's Legal Department, they were clearly directed to the Legal Department for review and response. Under the circumstances, had I not found them exempt under section 11(d), I would have found them exempt under the working papers component of the branch 1 solicitor-client communication privilege exemption since they contain notes and comments that are directed to the City's Legal Department for a response and action.

I now turn to examine whether to City can rely on the litigation privilege exemption in branch 1 of section 12 in relation to Record 1.

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. This form of privilege encompasses communications between a solicitor or litigant and third parties even where the third parties have no need for or expectation of confidentiality. [See *Blank v. Canada (Minister of Justice)*]

As set out above, the dominant purpose test was articulated in *Waugh v. British Railways Board*, as follows:

> A document which was produced or brought into existence **either with the dominant purpose of its author, or of the person or authority under whose direction**, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection [emphasis added].

In Order MO-2231 Adjudicator Faughnan applied the above principles to the copy of the law firm letter that was at issue in that case and found that it did not qualify for exemption under the branch 1 litigation privilege exemption. In reaching this conclusion, he states:

> The dominant purpose that must be examined in this context is the dominant purpose of the lawyer who sent the letter and/or his client. In the case before me, the lawyer's letter sent to the City's Director of Planning and Development Law appears not to have been solicited by the City. On its face, this letter was created for the dominant purpose of the lawyer advancing a position to the City on behalf of his client with a view to persuading the City regarding a specific course of action. It was not created for the dominant purpose of litigation. Further, the dominant purpose must be the purpose of the party claiming the privilege. Whether or not litigation is or was contemplated by the City at any point with respect to the subject matter of this letter is not relevant. The City did not author the letter and I have not been provided with any evidence that the City directed that it be produced on its behalf.

In the *Blank* case, the Supreme Court of Canada did not find it necessary to resolve the issue "whether the litigation privilege attaches to documents gathered or copied - but not created - for the purpose of litigation". The Court observed that there were conflicting decisions of the Courts of Appeal of two provinces on this issue. It cited the conclusion of the British Columbia Court of Appeal in *Hodgkinson v. Simms* that copies of public documents gathered by a solicitor were privileged, where McEachern C.J.B.C. stated:

> It is my conclusion that the law has always been, and in my view, should continue to be, that in circumstances such as these, where a lawyer exercising legal knowledge, skill, judgment and industry has assembled a collection of relevant copy documents for his brief for the purpose of advising on or conducting anticipated or pending litigation he is entitled, indeed required, unless the client consents, to claim privilege for such collection and to refuse production.

The majority of the Court observed that this approach was rejected by the Ontario Court of Appeal in *General Accident v. Chrusz*: See *Blank v. Canada (Minister of Justice)*, cited above at paragraphs 62-63; *Hodgkinson v. Simms* cited above at page 142 [*Hodgkinson v. Simms* (1988), 33 B.C.L.R. (2d) 129]; *General Accident v. Chrusz*, cited above at pages 334-336. And also see: *Nickmar* [*Nickmar Pty. Ltd. V. Preservatrice Skandia Insurance Ltd.* (1985), 3 N.S.W.L.R. 44].

The Court in *Blank* went on to state (at paragraph 64) that even such an extended form of litigation privilege would not automatically exempt from disclosure otherwise discoverable documents which have simply been remitted to counsel or placed in the litigation file:

> Extending the privilege to the gathering of documents resulting from research or the exercise of skill and knowledge does appear to be more consistent with the rationale and purpose of the litigation privilege. That being said, I take care to mention that assigning such a broad scope to the litigation privilege is **not intended to automatically exempt from disclosure anything that would have been subject to discovery if it had not been remitted to counsel or placed in one's own litigation files. Nor should it have that effect**. [emphasis added]

Accepting for the purposes of my analysis that this "extended" form of common law litigation privilege is protected under Branch 1 of section 12, I find that the letter from the law firm does not qualify under this aspect of the privilege. Specifically, it was not selectively copied or gathered for the City lawyer's litigation file using his skill and knowledge as a lawyer. It was sent to him unsolicited by the law firm for the purpose of advancing the client's position.

I accept Adjudicator Faughnan's reasoning and apply it to the circumstances of this case. I am not convinced, based on the evidence before me, that Record 1 was created by the successful proponent's legal advisers for the dominant purpose of litigation. It was created to provide guidance and/or advice to the successful proponent during the course of negotiations. In my view, this document was created with a view to consummating a development deal for the Guild Inn Restoration Project. On my review of Record 1, there is no indication that litigation was even a remote possibility, let alone contemplated, at the time that it was created. In addition, I am not convinced on the evidence before me that Record 1 was selectively copied or gathered for or by the City's Legal Department for the City's litigation file using legal skill and knowledge. On the evidence before me these records were sent by the successful proponent's legal advisers to the City for review as part of the process of negotiating a development deal.

The branch 2 privileges are only available in the context of counsel, employed or retained by an institution, giving legal advice or conducting actual or reasonably contemplated litigation. As determined above under my branch 1 analysis, Record 1 was clearly prepared by the successful proponent's legal advisers for its client. Consequently, in my view it is clear that Record 1 was not prepared by counsel employed or retained by the City for the purpose of providing legal advice or conducting litigation. I, therefore, find that the branch 2 exemptions cannot apply to this record.

Communications between the Legal Department and third parties (Categories 2 and 6)

Records 6 and 18 are the only records at issue under this heading.

Record 6

Record 6 is a letter sent by a representative of the TRCA to a senior City solicitor. It sets out the TRCA's views regarding specific issues relating to a letter of intent that would eventually be signed by the successful proponent, the City and the TRCA. The record is also copied to two other representatives of the TRCA, a senior City employee and the TRCA's legal counsel.

Dealing first with the branch 1 solicitor-client communication privilege, on its face, this record is not a confidential communication between a solicitor and client. I have no evidence that the TRCA and the City's Legal Department had a solicitor-client relationship at the relevant time. However, despite the absence of a solicitor-client relationship between the TRCA and the City's Legal Department, I may find that Record 6 is protected by the common law solicitor-client communication privilege exemption if I am satisfied that a common interest exists between the City and the TRCA with regard to the matter that is the subject of the letter. I acknowledge that the TRCA has a formal working relationship with the City. I understand that the TRCA is governed by a board and that of its 28 board members 14 are representatives of the City appointed by City Council. I also appreciate that the TRCA owns the site and leases it to the City. I also note that during the course of negotiations between the various parties regarding the Guild Inn Restoration Project, the TRCA retained its own legal counsel, ostensibly to protect its own interests. Weighing all of these factors, and after closely reviewing the contents of Record

6, I find that a common interest does not exist between the City and the TRCA. In my view, Record 6 reflects the TRCA's own concerns with regard to the redevelopment of the site, with reference to its governing legislation, and requests that certain steps be taken by the City and the successful proponent. In my view, the language of this letter is not consistent with the existence of a common interest. I am also not satisfied on the evidence before me that Record 6 forms part of the City Legal Department's working papers as it does not on its face reveal the thought processes of a lawyer with the Legal Department in formulating legal advice.

With regard to branch 1 litigation privilege, I am not satisfied that Record 6 was prepared for the dominant purpose of reasonably contemplated litigation or that it was selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer.

To summarize, I find that the branch 1 privileges do not apply to Record 6.

Turning briefly to the branch 2 privileges, these statutory privileges are intended to apply to a record that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or conducting litigation. Clearly, Record 6 was not prepared by counsel employed or retained by the City. And, on the evidence before me, I am not satisfied that it was prepared for counsel employed or retained by the City. It was prepared by the TRCA for the purpose of advancing its own interests with the City.

Record 18

Record 18 is a letter sent by a senior solicitor with the City to the successful proponent. The letter is copied to several other parties, including the other members of the consortium, the successful proponent's legal advisers, the TRCA and a number of staff with other City departments. The letter can be described generally as a status update, setting out the City's understanding of where the parties were at in the negotiation process and outlining a number of issues on which the City required the successful proponent's response and action.

Dealing first with the application of the branch 1 privileges to Record 18, neither the City's representations nor the record itself supports a conclusion that this record falls within either of the solicitor-client communication privilege or litigation privilege exemptions.

Record 18 is clearly, on its face, a communication between two disparate parties engaged in a negotiation process. There is no evidence of a solicitor-client relationship between the City and the successful proponent. This was a letter that was shared widely by the Legal Department with a number of parties engaged in the negotiations surrounding the Guild Inn Restoration Project. I am also not satisfied on the evidence before me that Record 18 formed part of a City lawyer's working papers directly related to seeking, formulating or giving legal advice. On the evidence before me, Record 18 was prepared and sent to advance the negotiation process regarding issues related to the Guild Inn Restoration Project. In my view, it is clearly not a document that the branch 1 communication privilege exemption is intended to protect.

With regard to branch 1 litigation privilege, I am not convinced that Record 18 was prepared for the dominant purpose of reasonably contemplated litigation or that it was selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer. I reiterate, in my view, Record 18 was prepared and sent to advance the negotiation process.

To summarize, I find that the branch 1 privileges do not apply to Record 18.

Turning to the branch 2 privileges, while Record 18 was prepared by a lawyer within the City's Legal Department, I have no evidence that it was prepared for the purpose of providing legal advice or conducting litigation. Again, I am satisfied that Record 18 was prepared for the purpose of advancing a negotiation process. Therefore, I find that the branch 2 privileges do not apply to Record 18.

Communications between other City departments and third parties (Categories 3, 4, 5 and 8)

Records 3, 9, 10, 14, 15, 16, 17, 19, 20, 23, 24, 25 and 26 all fall under this broad heading. While the nature and substance of each record varies they share a common quality: they are all forms of communication between various City departments (other than the Legal Department) and various third parties, including the consortium (or the individual members of the consortium), the TRCA, the architectural firm and the transportation consultants.

Record 3

Record 3 consists of a letter from the TRCA to the City's EDCT. It provides input from TRCA staff regarding a report prepared by the architectural firm. It is clearly not a solicitor-client communication. Therefore, it can only qualify for exemption under the branch 1 solicitor-client communication privilege exemption if I am satisfied that it forms part of the working papers of a City lawyer or was forwarded to the lawyer by a client as part of a "continuum" in relation to legal advice. I am not satisfied on the evidence before me that Record 3 forms part of a City lawyer's working papers, or was otherwise provided to counsel by a client in connection with seeking, formulating or giving legal advice. On its face, the letter simply documents input from the TRCA to the EDCT into aspects of the architectural firm's report. With regard to branch 1 litigation privilege, I am not convinced that Record 3 was prepared for the dominant purpose of reasonably contemplated litigation or that it was selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer.

Turning briefly to the branch 2 privileges, Record 3 was not prepared by counsel employed or retained by the City. And, on the evidence before me, I am not satisfied that it was prepared for counsel employed or retained by the City. It was prepared by the TRCA for the purpose of making its views known on particulars to the City.

Accordingly, I find that the section 12 branch 1 and 2 privileges do not apply to Record 3.

Records 9, 15, 16, 17, 19 and 20

These records consist of letters sent to the City's EDCT by either the successful proponent (Record 9), a planning and development firm that is part of the consortium (Records 15 and 20) or the consortium (Records 16, 17 and 19). As described under my section 11 analysis, these letters address activities or the status of activities related to the Guild Inn Restoration Project. This correspondence includes dialogue between the successful proponent and the City regarding progress on the project and critical path logistics (Records 9, 15, 16, 17 and 19) and communication about the ongoing participation of a particular party in the project (Record 20).

Consistent with my section 12 analysis above, I find that these records do not comprise solicitor-client communications and can only qualify for exemption under the branch 1 solicitor-client communication privilege exemption if I am satisfied that they form part of the working papers of a City lawyer or part of a continuum of communications between a lawyer and client. I am not satisfied on the evidence before me that these records form part of a City lawyer's working papers or that they were provided to counsel by a client in connection with seeking, formulating or giving legal advice. These records simply document the progression of the project. With regard to branch 1 litigation privilege, I am not convinced that these records were prepared for the dominant purpose of reasonably contemplated litigation or that they were selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer.

With respect to branch 2, none of these records were prepared by counsel employed or retained by the City. And, on the evidence before me, I am not satisfied that they were prepared for counsel employed or retained by the City.

Accordingly, I find that the section 12 branch 1 and 2 privileges do not apply to Records 9, 15, 16, 17, 19 and 20.

Records 14, 23, 24, 25 and 26

These records can be described respectively as a draft business plan (Record 14), a transportation considerations report (Record 23), a restoration and redevelopment strategy (Record 24), a subsequent preservation/restoration strategy (Record 25) and a site plan development and management strategy (Record 26). Record 14 was prepared by the consortium for the City. Record 23 was prepared by the transportation consultants for the City. Records 24, 25 and 26 were all prepared by the architectural firm for the City.

Consistent with my section 12 analysis above, I find that these records do not comprise solicitor-client communications and can only qualify for exemption under the branch 1 solicitor-client communication privilege exemption if I am satisfied that they form part of the working papers of a City lawyer or part of a continuum of communication between a lawyer and client. I am not satisfied on the evidence before me that these records form part of a City lawyer's working papers or that they were provided to counsel by a client in connection with seeking, formulating

or giving legal advice. These records all appear to have been prepared for and submitted to the City in response to the City's pursuit of the Guild Inn Restoration Project. With regard to branch 1 litigation privilege, I am not convinced that these records were prepared for the dominant purpose of reasonably contemplated litigation or that they were selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer.

With respect to branch 2, none of these records were prepared by counsel employed or retained by the City. And, on the evidence before me, I am not satisfied that they were prepared for counsel employed or retained by the City.

Accordingly, I find that the section 12 branch 1 and 2 privileges do not apply to Records 14, 23, 24, 25, and 26.

Communications between third parties (Category 7)

Record 10 is the only record at issue under Category 7.

Record 10 consists of a memorandum from the principal of the planning and development firm to the principals of the successful proponent and the development company. Together they comprise the consortium. The memorandum is copied to the EDCT. The memorandum provides some background information about the sender's past experience with projects of this nature and his views regarding ownership and financing models.

Again, consistent with my section 12 analysis above, I find that Record 10 does not consist of a solicitor-client communication and can only qualify for exemption under the branch 1 solicitor-client communication privilege exemption if I am satisfied that it forms part of the working papers of a City lawyer or part of a continuum of communications between a lawyer and client. I am not satisfied on the evidence before me that Record 10 forms part of a City lawyer's working papers or that it was provided to counsel by a client in connection with seeking, formulating or giving legal advice. This record merely documents an involved party's regarding aspects of the Guild Inn Restoration Project. With regard to branch 1 litigation privilege, I am not convinced that Record 10 was prepared for the dominant purpose of reasonably contemplated litigation or that it was selectively copied or gathered by a City lawyer for the Legal Department's litigation file using skill and knowledge as a lawyer.

With respect to branch 2, Record 10 was not prepared by counsel employed or retained by the City. And, on the evidence before me, I am not satisfied that it was prepared for counsel employed or retained by the City.

Accordingly, I find that the section 12 branch 1 and 2 privileges does not apply to Record 10.

To summarize, I find that the section 12 exemption does not apply to Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26. Subject to my analysis of the City's exercise of discretion, I will order them to be disclosed to the appellant.

EXERCISE OF DISCRETION

I have found above that section 11(d) applies to exempt some of the information at issue. Section 11(d) is a discretionary exemption which permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The City's representations indicated that in making its decision to apply the discretionary exemption at section 11(d), it weighed a number of factors including the following:

- its economic, financial and competitive interests against accessibility to information as a means of instilling public confidence in its actions
- its right to protect its economic and financial interests in limited circumstances
- its duty to residents and ratepayers to make prudent business decisions while protecting its financial interests
- the importance of transparency in its decision making
- the public's interest in open and accountable government actions versus the City's economic and financial interests
- the availability of public information about the aborted project on its website and through other sources
- its engagement of the wider community on the redevelopment of the site through, for example, open public meetings

- the extent to which the requester has a sympathetic or compelling need to receive the information at issue

The appellant's representations did not specifically address the issue of whether or not the City properly exercised its discretion. However, the appellant's representations indicate that disclosure of the information at issue is necessary to ensure openness, transparency and direct accountability of municipal government to the citizens of the community affected by any redevelopment of the site. The appellant argues that the City and, in particular, its municipal councillor has not been forthcoming with information about redevelopment plans for the site, causing the citizens to lose trust in the City's processes. Due to this apparent lack of accountability and growing mistrust, the appellant seeks the information at issue to gain insight into the City's decision-making processes surrounding the site in the hopes of restoring a measure of public confidence in the City's operations.

I have carefully reviewed the representations of the parties and am satisfied that the City properly exercised its discretion and in doing so took into account only relevant considerations. I also find that the City did not exercise its discretion in bad faith, for an improper purpose or take into account irrelevant considerations.

Having regard to the above, and subject to my discussion of the public interest override below, I find that the City properly exercised its discretion not to disclose the information I found exempt under section 11(d) of the *Act*.

PUBLIC INTEREST OVERRIDE

I will now examine the application of the section 16 public interest override to the records I have found exempt under section 11(d).

Section 16 states:

> 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.

For section 16 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 [Orders P-984, PO-2607]. 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 or enlightening the citizenry about the activities of their government or its agencies, 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 [Orders P-984 and PO-2556].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and 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].

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.)]. If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply [Orders PO-2072-F and PO-2098-R].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

As alluded to above, the appellant submits that the information it is seeking is necessary to ensure openness, transparency and direct accountability in municipal government to the citizens of the community affected by any redevelopment of the site. The appellant emphasizes that it is motivated solely by concern for the public interest. The appellant states that the residents of Guildwood will be directly affected by any redevelopment of the site and they are, therefore, entitled to know how any such redevelopment would affect their lives.

The City acknowledges that there "may be a public interest in any redevelopment of the […] site." The City asserts that it in recognizing this interest it has made "significant" amounts of information available through its website, ward councillors, community meetings and the media. The City, therefore, believes that the information that has been disclosed "adequately addresses any public interest that may exist in the redevelopment of the [site], in particular the aborted project." The City adds that it will continue to make information available about future redevelopment options. The City submits, however, that given the negative impact that disclosure of the sensitive information would have on its economic and financial interests, it submits that any public interest that may exist does not outweigh the application of the section 11(d) exemption.

On my review of the parties' representations, I am satisfied that there is a compelling public interest in disclosure of the records that I have found exempt under section 11(d). These records contain insight into the terms and conditions that were being negotiated between the City and successful proponent and/or the consortium regarding the Guild Inn Restoration Project, and I expect that the withheld information in those records would shed light on many important aspects of that proposed redevelopment project.

However, as stated above, the existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the exemption claimed. In my view, the public interest in the records I have found exempt under section 11(d) does not outweigh the application of that exemption under the present circumstances. As stated above, the City, Centennial College and the TRCA recently reached an agreement in principle for the redevelopment of the site and there are plans for the City to sign a letter of intent with the College for the negotiation of a long-term sublease with regard to that proposed project. I have found the records at issue exempt under section 11(d), on the basis that disclosure could reasonably be expected to be injurious to the City's financial interests as it prepares to sign a letter of intent and enter negotiations with the College over a ground lease for the redevelopment of the site. In light of the nature of this information, its potential use and the expected impact on the City upon disclosure, I am not prepared at this time to override the application of section 11(d). Perhaps, once a deal between the City, the College and the TRCA has been consummated, I might reach a different conclusion.

Accordingly, I find in the present circumstances that the public interest in the records I have found exempt under section 11(d) does not outweigh the application of the exemption and I, therefore, find that the public interest override does not apply.

ADEQUACY OF SEARCH

The appellant believes that further responsive records exist.

General principles

Section 17 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].

Previous orders of this office have established that when a requester claims that additional records exist beyond those identified by an institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17 [Orders P-85, P-221, PO-1954-I]. If I am satisfied by the evidence before me that the search carried out was reasonable in the circumstances, this ends the matter. However, if I am not satisfied, I may order the Police to carry out further searches.

The *Act* does not require the City to prove with absolute certainty that further records do not exist, but the Police must provide sufficient evidence to show that a reasonable effort to identify and locate responsive records has been made [Order P-624]. Similarly, although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

Representations

The City submits that it has responded fully to the appellant's request. In conducting its searches, it states that it did not seek clarification from the appellant since the request was clear and understood. The City states that its searches were conducted by a knowledgeable staff member, its Administrator at the EDCT. The City provided an affidavit from the Administrator.

The Administrator provided a reasonably detailed account of her searches. She indicates that she conducted searches between July 3 to 6, 2007 and July 10 to 11, 2007. The Administrator indicates that these searches involved the following:

- searching the filing cabinets at the Guild Project Office in all applicable files from 2005 to the date of the requests, including all correspondence files, departmental files (for Culture, Legal, Clerk's Office and TRCA), consultants', studies and surveys

- contacting a senior City solicitor to locate a specific City response letter to the successful proponent, a copy of which was provided to her

The Administrator states that all records located were then sent to the Manager of Cultural Affairs and then forwarded to the City's Corporate Access and Privacy Office.

The appellant did not provide representations that specifically touched on the search issue.

Analysis and findings

As previously stated, in appeals involving a claim that additional records exist, the issue to be decided is whether an institution has conducted a reasonable search for responsive records as required by section 17 of the *Act*. Furthermore, although requesters are rarely in a position to indicate precisely which records an institution has not identified, a reasonable basis for concluding that additional records might exist must still be provided.

I am persuaded by the available evidence that the City made a reasonable effort to identify and locate any existing records that are responsive to the appellant's request. In addition, I accept that the appropriate City staff conducted searches and that in doing so were armed with knowledge of the nature of the records said to exist, at least in part due to specific wording of the appellant's request. Furthermore, I note that the appellant has not provided any representations to refute the City's search efforts.

Accordingly, based on the information provided by the City and the circumstances of this appeal, I find that the search for records responsive to the request was reasonable for the purposes of section 17 of the *Act*, and I dismiss this part of the appeal.

ORDER:

1. I order the City to disclose Records 1, 3, 6, 9, 10, 14, 15, 16, 17, 18, 19, 20, 23, 24, 25 and 26 in their entirety by November 4, 2009 but not before October 30, 2009.

2. I uphold the decision of the City to deny access to Records 2, 4, 5, 7, 8, 11, 12, 13, 21, 22, 27, 28 and 29 pursuant to section 11(d) of the *Act*.

3. I uphold the City's search for responsive records.

4. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with a copy of the records that I have ordered disclosed to the appellant.

Original signed by: September 30, 2009
Bernard Morrow
Adjudicator

APPENDIX

Record #	Description	Exemptions Claimed/Sections that Could Apply
1 (pages 1-3)	Memo – from successful proponent's legal advisers to City's Legal Department	10(1)(a), (c) 12 16
2 (pages 4-18)	Correspondence – from City's Legal Department to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
3 (pages 19-20)	Correspondence – TRCA to City's EDCT	10(1)(a), (c) 11(c), (d) 12 16
4 (pages 21-30)	Correspondence – from City's Legal Department to the successful proponent	10(1)(a), (c) 11(c), (d) 12 16
5 (pages 31-38)	Correspondence – from City's Legal Department to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
6 (page 42)	Correspondence – from TRCA to City's Legal Department	10(1)(a), (c) 11(c), (d) 12 16
7 (pages 43-45)	Correspondence – from City's Legal Department to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
8 (pages 51-73)	Correspondence – from successful proponent to City's Legal Department	10(1)(a), (c) 11(c), (d) 12 16
9 (pages 74-75)	Correspondence – from successful proponent to EDCT	10(1)(a), (c) 11(c), (d) 12 16

10 (pages 76-77)	Memo – to successful proponent with copy to City	10(1)(a), (c) 11(c), (d) 12 16
11 (pages 78-80)	Correspondence – from successful proponent to EDCT and City's Legal Department	10(1)(a), (c) 11(c), (d) 12 16
12 (pages 81-87)	Memo – from successful proponent's legal advisers to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
13 (pages 88-90)	Memo – from successful proponent's legal advisers to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
14 (pages 91-112)	Draft Business Plan prepared by consortium	10(1)(a), (c) 11(c), (d) 12 16
15 (pages 113-116)	Correspondence – from planning and development firm to EDCT	10(1)(a), (c) 11(c), (d) 12 16
16 (pages 117-120)	Correspondence – from consortium to EDCT	10(1)(a), (c) 11(c), (d) 12 16
17 (pages 121-124)	Correspondence – from consortium to EDCT	10(1)(a), (c) 11(c), (d) 12 16
18 (pages 125-126)	Correspondence – from successful proponent's legal advisers to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
19 (pages 127-130)	Correspondence – from consortium to EDCT	10(1)(a), (c) 11(c), (d) 12 16
20 (pages 131-132)	Correspondence – from planning and development firm to EDCT	10(1)(a), (c) 11(c), (d) 12 16

21 (pages 133-134)	Correspondence – from EDCT to successful proponent	10(1)(a), (c) 11(c), (d) 12 16
22 (pages 135-136)	Correspondence – from successful proponent to EDCT	10(1)(a), (c) 11(c), (d) 12 16
23 (pages 137-151)	Report – The Guild Inn – Urban Transportation Considerations	10(1)(a), (c) 11(c), (d) 12 16
24 (pages 152-186)	Report – The Guild Inn Reuse Strategy – Restoration & Redevelopment Strategy	10(1)(a), (c) 11(c), (d) 12 16
25 (pages 187-252)	Report – The Guild Inn Condition Survey – Preservation/Restoration Strategy	10(1)(a), (c) 11(c), (d) 12 16
26 (pages 253-292)	Report – The Guild Cultural Precinct Report – Site Plan Development and Management Strategy	10(1)(a), (c) 11(c), (d) 12 16
27 (pages 293-296)	Correspondence – from successful proponent to EDCT	10(1)(a), (c) 11(c), (d) 12 16
28 (pages 297-299)	Correspondence – from successful proponent to EDCT	10(1)(a), (c) 11(c), (d) 12 16
29 (pages 300-303)	Correspondence – from successful proponent to EDCT	10(1)(a), (c) 11(c), (d) 12 16