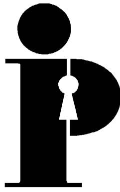

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2518

Appeal MA09-9

Town of LaSalle

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

NATURE OF THE APPEAL:

This appeal arises from a request for an agreement of purchase and sale and other documentation pertaining to the failed sale of the Town of Lasalle's Town Hall.

The Town of Lasalle (the Town) received a request from a newspaper reporter under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of the report that went before Town council about the sale of the Town Hall. The requester also sought access to "the sale document" and advised that "this issue was dealt with in-camera at the November 11, 2008 meeting."

The Town identified records responsive to the request, including an agreement of purchase and sale, and, relying on the discretionary exemptions at sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 11(e) (economic and other interests), 12 (solicitor-client privilege) and 15(b) (information soon to be published) and the mandatory exemptions at 10(1)(a) and 10(1)(b) (third party information) of the *Act*, denied access to them, in full.

The requester (now the appellant) appealed the Town's decision.

After the appeal was filed, but before the deadline to claim additional discretionary exemptions set out in section 11.01 of this office's Code of Procedure, the Town sent correspondence to this office advising that it had decided not to proceed with the sale of the property in question. In its letter, the Town referred to a media release which confirmed that the sale would not proceed. The Town advised that as a result of the media release it was no longer relying on section 15(b) of the *Act*. Accordingly, the application of that exemption is no longer at issue in the appeal. The Town further advised that it was now also claiming the application of the discretionary exemptions at sections 11(c) and (d) of the *Act* (economic and other interests) to deny access to the requested information. The Town, however, did not send a new decision letter to the appellant, as required by section 11.01 of the Code.

During mediation, the Town reconsidered its decision with respect to some of the responsive records. After notifying a third party under section 21 of the *Act* to obtain its position on disclosure but receiving no response, the Town issued a supplementary decision letter. In the letter, the Town advised the appellant that it was adding sections 11(c) and (d) as applicable exemptions and confirmed that it was no longer relying on section 15(b). The Town then granted partial access to certain responsive records as outlined in the amended index of records that accompanied the supplementary decision letter. Upon receipt of the supplementary decision letter and the amended index, the appellant advised the mediator that she only sought access to the withheld portions of the agreement of purchase and sale. As set out in its index, the Town only relies on sections 10(1)(a) and (b), 11(c), (d) and (e) and 12 of the *Act* to deny access to the withheld portions of this record. Accordingly, as a result of mediation, the other responsive records and the application of the exemptions set out at sections 6(1)(b) and 7(1) are no longer at issue in this appeal. Finally, during mediation the appellant took the position that there is a compelling public interest in disclosure of the withheld portions of the agreement of purchase and sale. Accordingly, the potential application of the public interest override at section 16 of the *Act* was added as an issue in the appeal.

Mediation did not resolve the appeal and it was moved to the adjudication phase of the appeals process, where an adjudicator conducts an inquiry under the *Act*.

I commenced my inquiry by sending a Notice of Inquiry setting out the facts and issues in the appeal to the Town and the third party. Both the Town and the third party provided representations in response. The Town agreed to share its representations with the appellant. The third party asked that its representations be withheld due to confidentiality concerns. I then sent a Notice of Inquiry to the appellant along with a complete copy of the Town's representations. In order to address the third party's confidentiality concerns I summarized its representations in the Notice of Inquiry. The appellant provided representations in response. I determined that the appellant's representations raised issues to which the Town and the third party should be given an opportunity to reply. Accordingly, I sent a letter to the Town and the third party, accompanied by the appellant's non-confidential representations, inviting their submissions in reply. Only the Town provided reply representations.

RECORD:

Remaining at issue are the withheld portions of a conditional agreement of purchase and sale.

PRELIMINARY ISSUE - LATE RAISING OF DISCRETIONARY EXEMPTIONS

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

As set out above, in its initial decision letter, the Town only claimed that the mandatory exemptions at sections 10(1)(a) and 10(1)(b) and the discretionary exemptions at sections 11(e) and 12 of the *Act* applied to the conditional agreement of purchase and sale.

Within 35 days of being notified of the appeal, the Town notified this office that it would also be relying on the discretionary exemptions at sections 11(c) and (d) of the *Act*. During the mediation stage of the appeal, the Town sent the appellant a supplementary decision letter claiming the application of sections 11(c) and (d).

The Town submits:

> With respect to the late claiming of discretionary exemptions, the Town maintains that due to conditions of the sale not being met, the transaction failed resulting in a media release to that effect and the removal of exemption 15(b) as the details of the purchase and sale transaction would no longer be published. Therefore, the

> late discretionary exemptions of 11 (c) and (d) were applied as the record contained information relating to the possible use or value of the town owned property and the Town's ability to successfully negotiate the sale of this property in the competitive real estate market. The disclosure of this information could reasonably place the Town at a disadvantage in any future negotiations of this property where a proposed purchaser would be in a position to know under what terms and conditions the Town is willing to negotiate, what the Town accepts as fair market value and use the information as leverage in their negotiations, thereby affecting the Town's competitive and financial interests.

Analysis and Findings

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

Section 2.03 of the Code of Procedure provides that a failure to follow any procedure in the Code does not for that reason alone render an appeal, or any step in an appeal, invalid. In this case, the Town indicated that it would be claiming the application of sections 11(c) and (d) within the 35 day period, but only complied with the procedural requirement that this be contained in a new written decision sent to the appellant and this office, after the 35 day period had passed. In my view, this has not resulted in any significant prejudice to the appellant, nor has it compromised the integrity of the process. By claiming the additional discretionary exemptions no delay in the processing of the appeal has resulted and the appellant has had full opportunity to address the application of these additional exemptions during the exchange of representations. In the circumstances, I find that the prejudice to the Town in disallowing its reliance on sections 11(c) and (d) would outweigh any prejudice to the appellant in allowing it. As a result, I will consider the application of sections 11(c) and (d) in this appeal.

THIRD PARTY INFORMATION

The Town claims that the withheld portions of the conditional agreement of purchase and sale qualify for exemption under sections 10(1)(a) and (b) of the *Act*.

Sections 10(1)(a) and (b) 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; or
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied.

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.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial or financial information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (b) of section 10(1) will occur.

Part 1: type of information

The types of information listed in section 10(1) have been discussed in prior orders:

> *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].

I have reviewed the withheld information and I find that it qualifies as commercial and/or financial information as it refers to the buying or selling of land.

Part 2: supplied in confidence

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)].

The third party and the Town submit that the financial and/or commercial information in the record was supplied to the Town explicitly in confidence. The Town relies on Orders P-87 and P-218 and submits:

> The Town asserts that information concerning the conditional purchase and sale agreement was supplied in confidence by the third party to the Town and that it was to remain that way until such time as both parties completed due diligence and all investigations into the terms of the conditional agreement of purchase and sale were completed and both parties were satisfied with the negotiated terms of the transaction.

> … the Town expected that these investigations would be completed and satisfied within the 90 day period set out in the conditional agreement. The ultimate result was that the investigations produced unsatisfactory results and the conditions were not removed and the transaction did not proceed. If the investigations had produced satisfactory results, then the deal would be consummated and all elements of the transaction would become public.

The Town also explained that the reason the transaction was not fully completed was because "the Town decided not to lift its conditions."

The appellant submits that the purchase was negotiated "based on the terms and conditions added to the contract rather than just being information supplied by the buyer." The appellant relies on Orders P-251 and MO-2287, in support of her position that the Town has not met the burden that the information was "supplied."

The withheld information is contained in a conditional agreement of purchase and sale that was signed by both parties. As acknowledged by the Town in its representations, "the Town solicitor negotiated on behalf of the Town the agreement of purchase and sale." In this appeal, the agreement was negotiated and signed. The transaction failed due to certain conditions not being met and the Town deciding not to remove them. This does not alter the fact that for a time the agreement was in force, albeit conditionally. In my view, this situation falls within the type of contract involving an institution and a third party that will not normally qualify as having been "supplied" for the purpose of section 10(1). In my view, the withheld information was mutually generated, rather than "supplied" by the third party.

Consequently, I find that the Town and/or the third party have failed to satisfy part 2 of the three-part section 10(1) test with respect to the withheld information.

Although the Town and the third party submit that the information that I have found to be mutually generated was supplied explicitly "in confidence," it is not necessary to consider the "in confidence" element of part 2 of the three-part test, because I have already found that the Town and/or the third party have failed to satisfy the preliminary requirement that the information in the agreements was supplied to the Town.

As a result of my finding, it is not necessary that I also consider whether disclosure of the information could reasonably be expected to lead to the harms contemplated in sections 10(1)(a) and/or (b) of the *Act*.

ECONOMIC AND OTHER INTERESTS

The Town also takes the position that the withheld portions of the conditional agreement of purchase and sale qualify for exemption under sections 11(c), (d) and (e) of the *Act*.

Those 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;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution.

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11 (c) or (d) to apply, the institution 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 need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363].

Sections 11(c) and (d)

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 [Orders P-1190 and MO-2233]. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the

institution's economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

However, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution's economic interests, competitive position or financial interests for the purpose of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

Section 11(e)

In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598]. Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Orders P-348 and PO-2536]. The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow [Order PO-2034].

Representations

The Town submits:

> In negotiating the sale of municipally owned property the Town focuses on obtaining the highest price possible for its ratepayers. As these negotiations include conditions of the sale which must be met, it is essential that these conditions remain confidential to ensure that such information cannot be exploited by a proposed purchaser when the transaction fails. It is therefore a reasonable expectation of harm to the financial position of the Town.

> …
>
> This situation involved a willing buyer and a willing seller and conditional terms were negotiated that were satisfactory to both parties so as to allow each party the opportunity to seriously investigate the viability of the transaction. The purchase price is only one aspect of a sale transaction. A variety of terms and conditions are possible, all of which have some impact on costs associated with the transaction and are specific to the circumstances surrounding the motivation of each party. For these reasons all of the terms and conditions of any potential agreement of purchase and sale and any reports to Council must be kept in strict confidence so as to protect the ability of the Town to negotiate potential future offers without causing prejudice to the Town's competitive position or its economic financial interests.
>
> The Town's claim of exemption under Section 11(c) and (d) arose as a result of the fact that the property deal fell through. The justification for claiming an exemption under these subsections has previously been addressed. … In fact, to disclose this information may prejudice the Town's economic and financial interests in its ability to negotiate a potential future sale of any Town property, including the Town Hall site.
>
> …
>
> The Town relies on Order MO-1474. In that instance, the City of Toronto applied the same exemptions that the Town is claiming with respect to records involving an agreement of purchase and sale. The Adjudicator upheld the institution's decision to withhold portions of the agreement of purchase and sale, consistent with previous Orders of the Commission being MO-1228 and MO-1258.

The appellant submits that the Town has not provided "detailed or convincing evidence" to support its exemption claim and is speculating about possible harm. The appellant submits:

> There are many safeguards in the free market system that could ensure the town gets the best price for its property. Firstly, the "normal" way property is sold is a seller lists the property, states a price and buyers come forward to negotiate a sale. This was not done so it's unknown if the price the town negotiated for its property is "the highest price" for taxpayers.
>
> Secondly, the town didn't use a competitive bidding process and allow the public to see whether the offer was in line with market value.
>
> Thirdly, when the town goes out to sell the property in the future, it is important to note the town is the seller not purchaser. It can refuse an offer it doesn't deem fair and hold out for a price it wants.
>
> Fourthly, when the terms of sale are revealed, any future bidder will know what the town is willing to accept. While some purchasers might underbid the price, others might go above it thinking they can win a bidding war by offering more

> money. If there is a competitive bidding process, the town is almost assured at getting what it had already previously accepted.

In response, the Town submits:

> The appellant speculates that unless the sale is on the open market, or unless a competitive bidding process is used, the Town cannot obtain the "highest price possible" but this speculation is made in the abstract without any knowledge of the negotiations and discussions that took place between the parties. Such speculation is of no value. The appellant has no evidence that the Town did not research market value nor that the Town accepted a price it did not want or that the Town deemed was unfair. In fact the land comparison study was disclosed to the requestor with the amended Index of Records and Exemptions Applied.

Analysis and finding

In Order PO-1853 former Assistant Commissioner Tom Mitchinson addressed the application of the provincial equivalent of section 11(c) to records pertaining to a pending sale of land by an institution. Although an agreement of purchase and sale was not one of the records at issue in that appeal, the records did contain information relating to the conditions and bargaining positions taken by the institution in the transaction. In upholding the application of the provincial equivalent of section 11(c), and considering an allegation of impropriety somewhat similar although not identical to that made by the appellant in this appeal, the former Assistant Commissioner wrote:

> The appellant's argument appears to be that, because there are concerns about the propriety of the proposed sale - and its allegedly unusual nature - the disclosure of the records would not prejudice the future competitive position of the institution. The appellant is, in effect, asking me to make a finding regarding the propriety of the proposed sale and, based on a finding of impropriety, determine that section 18(1)(c) does not apply. It is not within my mandate to make such a finding. Rather, I must determine, based on the evidence and argument provided to me, whether the Ministry has established the requirements of the section 18(1)(c) exemption claim. The considerations raised by the appellant are appropriately dealt with under section 23 of the *Act* [the provincial equivalent section to section 16 in the appeal before me].
>
> I am satisfied that the undisclosed portions of Records 8, 9 and 10 contain information which relates to the bargaining positions, terms and conditions that the Ministry adopted in negotiating the sale of land with the prospective buyer. This sale has not yet closed, and I accept the Ministry's position that, prior to closing, disclosure of the severed portions of the records could reasonably be expected to prejudice the economic interests or competitive position of an institution, particularly in the event that the property would have to be re-marketed. The records contain the Ministry's positions and proposed negotiating strategies regarding the property and, in the event the property has to be re-

> marketed, I accept that disclosure of this information could have a prejudicial impact on subsequent negotiations with a new purchaser. Accordingly, I find that the undisclosed portions of Records 8, 9 and 10 qualify for exemption under section 18(1)(c) of the *Act*.

In Order PO-1894, former Assistant Commissioner Mitchinson found that a signed agreement of purchase and sale that was conditional on zoning approvals, and that had not closed, was exempt under the provincial equivalent of section 11(d). He wrote:

> … 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 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 [Ontario Realty Corporation] 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 the prospective uses and the value placed on the property by various parties could similarly be disadvantageous.

In Order PO-2720 Adjudicator Catherine Corban considered former Assistant Commissioner Mitchinson's determination in Order PO-1894 in the course of upholding an institution's application of the provincial equivalent of section 11(c) to a conditional lease agreement. She wrote:

> Following the reasoning taken by former Assistant Commissioner Mitchinson in Order PO-1894, I accept the University's argument that the conditional nature of the lease arrangement renders the University particularly vulnerable to the harms contemplated by section 18(1)(c). As in Order PO-1894, the current lease arrangement has not yet commenced and should the conditions precedent not be met before the automatic termination date, the arrangement will not go forward. Should that occur, the University may be required to enter into new negotiations with another party. I accept the University's position that not only is it quite possible that the conditions precedent might not be met before the automatic termination date but also, that should that occur, the University could reasonably be expected to be put in a position where it has to negotiate a new lease arrangement. In my view, the University has provided sufficiently detailed and convincing evidence to demonstrate that disclosure of the severed information could reasonably be expected to prejudice its economic interests and its competitive position in those negotiations by revealing to the parties of future negotiations sensitive information about the University's bargaining position.
>
> Accordingly, given the conditional nature and the specific terms of this particular lease arrangement and the evidence adduced by the University, I am satisfied that the University has satisfied the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Worker's Compensation Board)*

> cited above, and has established that disclosure of the severances at issue could reasonably be expected to prejudice its economic interest or the competitive position.

In my view, the principles set out in these orders are equally applicable to the conditional agreement of purchase and sale before me in this appeal. In my view, with the exception of certain information discussed below, the Town has provided sufficiently detailed and convincing evidence to demonstrate that disclosure of the remaining severed information could reasonably be expected to prejudice its economic interests and its competitive position in those negotiations by revealing to the parties to future potential negotiations sensitive information about the Town's bargaining position relating to the Town Hall. Accordingly, I find that this information qualifies for exemption under sections 11(c) and/or (d) of the *Act*.

In my view, however, the Town has not provided me with sufficiently detailed and convincing evidence to substantiate a finding that disclosing the name, contact information and signing information of the third party would cause the types of harms contemplated by sections 11(c), (d) or (e).

While I am satisfied that disclosing the withheld terms and conditions could reasonably be expected to prejudice the Town's economic interests and its competitive position or be injurious to its financial interests, there was no detailed and convincing evidence before me about how revealing the name, contact information and signing information of the third party would cause the types of harms contemplated by sections 11(c) or (d).

Finally, as stated above, in order for section 11(e) to apply, the Town must show that the record contains "positions, plans, procedures, criteria or instructions, which are intended to be applied to negotiations." As set out above, the conditional agreement of purchase and sale is itself the final product of negotiation. In my view, the undisclosed information at issue, which is found in a signed conditional agreement of purchase and sale, does not contain positions, plans, procedures, criteria or instructions, which are intended to be applied to negotiations.

I will now consider whether section 12 applies to the name, contact information and signing information of the third party.

SOLICITOR CLIENT PRIVILEGE

The Town submits that section 12 of the *Act* applies to the withheld portions of the conditional agreement of purchase and sale.

Section 12 of the *Act* reads:

> 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.

Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

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 [Orders PO-2441, MO-2166 and MO-1925].

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.)].

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."

The Town submits that:

> The Town solicitor negotiated on behalf of the Town the Agreement of Purchase and Sale which is subject to solicitor-client privilege under Section 12 Branch 2 (statutory privileges). Branch 2 applies as the record was prepared by counsel retained by the Town of LaSalle in providing legal advice on the conditions contained therein.
>
> …
>
> The conditional agreement of purchase and sale was negotiated and reviewed by the Town's solicitor, who provided advice to the Town throughout the process on various terms and conditions sought to be included by both parties. Until such time as the terms and conditions of the potential sale were finalized and agreed to by both parties, the Town had no intention of waiving its solicitor-client privilege. Exemption 12 clearly applies.

The appellant submits that because the Town had always planned to release the agreement of purchase and sale, it was never subject to solicitor-client privilege.

The name and contact information of the affected party is contained in a negotiated conditional agreement of purchase and sale. Although a solicitor may have been involved in its preparation and negotiation, the information at issue does not represent a direct communication 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. Nor does it qualify as a record "prepared by or for counsel employed or retained by an institution for use in giving legal advice." In my view the withheld information does not qualify for exemption under section 12 of the *Act*.

PUBLIC INTEREST

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. [Emphasis added]

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.

The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption. [Order P-244]

Compelling public interest

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

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

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

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

- another public process or forum has been established to address public interest considerations [Orders P-123/124, P-391 and M-539]

- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations [Orders P-532, P-568, PO-2626, PO-2472 and PO-2614].

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter [Order P-613]

- the records do not respond to the applicable public interest raised by the appellant [Orders MO-1994 and PO-2607].

Purpose of the exemption

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.

An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption. [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)]

The Town provided a severed version of the conditional agreement of purchase and sale to the appellant. The Town submits that its intentions were to publish all the details of the transaction once the conditions had been lifted. The Town submits that by publicly disclosing that a Letter of Intent was received to purchase the property and that the negotiations had failed when the Town decided not to lift its conditions, a significant amount of information has already been disclosed. In the Town's view, this degree of disclosure is adequate to address any public interest considerations.

The appellant disagrees. She takes the position that there has not been an adequate degree of disclosure to address the public interest. The appellant submits that it has "never been made explicitly clear why the property deal failed because the terms and conditions have never been disclosed." The appellant submits that the manner in which the transaction took place and the reaction to the sale of the Town Hall support a compelling public interest in disclosure. In support of her position she provides copies of news stories and letters to the editor published in the Windsor Star.

The appellant submits that the Town Hall complex encompasses several buildings and is a prized piece of real estate located in the Town's commercial district. The appellant states that news of the sale "shocked residents and local developers alike." The appellant lists the following reasons why, in her view, the public was concerned:

- no one knew the Town Hall was up for sale

- the public was concerned about the cost and details about relocating the Town Hall, the police and fire headquarters and the library

- property developers were upset because they hadn't been given the opportunity to bid on the property.

The appellant submits that "(w)hen the deal fell through, many residents were relieved - even happy - because the whole sale had been such a mystery." The appellant submits that the public remains unaware whether the Town was getting a fair price for the land or if the purchaser was related to any town officials. The appellant states that this is particularly important because a few months after the sale fell through the town received a further offer for the property, which it addressed in a closed meeting, with one councilor declaring a conflict of interest.

The appellant further submits that the sale was announced some weeks after the Town councilor's had a closed meeting vote to sell the Town Hall. The appellant submits that, in her view, this closed meeting was improperly held, and the conditional agreement of purchase and sale should have been considered in a public meeting. In support of this submission, the

appellant provided a copy of a closed meeting complaint report and a copy of materials relating to the purchase of property by a neighbouring town. The appellant submits that when that neighbouring town council voted on the purchase, the documents included in the council agenda package, which was made available to the public, was the sale price, the name of the seller and a copy of the agreement of purchase and sale.

In it reply representations, the Town submits that while the appellant may have reported some negative comments from some individuals, the Town received a very small number of comments, written or verbal, about the matter. The Town submits that Town council members are elected to make decisions regarding the operation and direction of the Town as a whole and in doing so, it acts in the best interest of its ratepayers. The Town asserts that the closed meeting investigation referred to by the appellant found that the Town did not violate the *Municipal Act*.

The Town distinguishes the circumstances that took place in the neighbouring town from those it faced regarding the conditional agreement of purchase and sale. It submits that in the neighboring town, a by-law was passed approving the sale after an agreement had been reached. It submits that no by-law was passed by Town council because there was no agreement reached between the parties. It submits that if the Town had reached such an agreement on the sale of the Town Hall, then a public report and by-law would have prepared for the open council meeting, as was done in the neighbouring town.

The Town submits that:

> …(t)here are no public interest considerations to be resolved by disclosing why the deal fell through. In fact, to disclose this information may prejudice the Town's economic and financial interests in its ability to negotiate a potential future sale of any Town property, including the Town Hall site.

Analysis and Finding

The appellant's representations assert that the failed transaction has generated significant public interest. In the appellant's view, it is in the public interest that the terms and conditions of the proposed sale should be examined. The appellant also identifies concerns about the process followed for the sale of the property.

Based on the submissions made by the parties, I am satisfied that there exists a compelling public interest in the disclosure of information about the sale of the Town Hall. In my view, the withheld information would serve the purpose of informing or enlightening the Town's citizenry about the activities of their government, adding to the information the Town citizenry have to make effective use of the means of expressing public opinion or to make political choices.

The purpose of section 11 is to protect certain economic interests of institutions. 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 or compete for business with other public or private sector entities, and it provides discretion to refuse

disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

Having considered all relevant facts and the representations provided by the parties, I find that the compelling public interest present in this appeal does not clearly outweigh the purpose of the sections 11(c) and (d) exemption claims. I have reached this finding based on the following reasons:

- I have ordered that the name, contact information and signing information of the third party be disclosed;

- The appellant has been provided with most of the information contained in the conditional agreement of purchase and sale, except for the purchase price and some discrete terms and conditions

- The Town may enter into negotiations in the future involving the sale of the Town Hall.

Accordingly, the public interest override at section 16 does not apply.

ORDER

1. I order the Town to disclose to the appellant the withheld portions of the conditional agreement of purchase and sale that set out the name, contact information and signing information of the third party, that I have highlighted on the copies provided to the Town with this order, by sending the appellant a copy by **May 31, 2010**, but not before **May 26, 2010**.

2. I uphold the decision of the Town to withhold the balance of the severed portions of the agreement of purchase and sale.

3. In order to verify compliance with the terms of this order, I reserve the right to require the Town to provide me with a copy of the pages of the record as disclosed to the appellant.

Original signed by:____________________ April 27, 2010
Steven Faughnan
Adjudicator