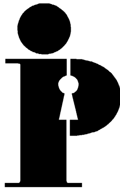

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2496-I

Appeal MA08-194

City of Toronto

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BACKGROUND:

On April 26, 2006, the City of Toronto (the City) issued a Request for Proposals (Proposal No. 3412-06-3061) (the First RFP) for the selection of a technology solution for a customer service strategy whose aim was to improve public access to City services. The project was named the 3-1-1 Customer Service Strategy (the 3-1-1 Project). The new technology would allow the public to speak with a customer service agent and obtain information about City services 24 hours a day, 7 days a week and 365 days a year, by calling one telephone number (3-1-1). The 3-1-1 number would replace the hundreds of different phone numbers that were previously required to obtain information on various City services. The City established a five-stage evaluation process for the First RFP. The City also retained a fairness monitor for the 3-1-1 Project to ensure that the procurement process was conducted fairly and impartially. Two bidders, the requester in this case and another company (the affected party) met the requirements of stages 1 through 4 of the evaluation process. However, when both bidders were deemed non-compliant with stage 5 of the evaluation process dealing with pricing, the First RFP was cancelled. Subsequently, the City directed that the two bidders who had met stages 1 through 4 of the First RFP be deemed pre-qualified bidders in a second Request for Proposals.

On March 17, 2007, the City issued a second Request for Proposals (Proposal No. 3412-07-3010) (the Second RFP), a "limited competitive call" inviting fresh pricing proposals from the requester and the affected party only on pricing. Both the requester and the affected party submitted proposals in response to the Second RFP. In accordance with the terms of the Second RFP, the City engaged a new fairness monitor (the Fairness Monitor) to monitor the RFP process. On October 3, 2007, the requester learned that the affected party had been the successful bidder.

On June 13, 2008, the City issued a news release in which it announced that it had entered into a contract with the affected party for the delivery of the 3-1-1 technology solution. The City stated in the release that the contract calls for the implementation of a new 3-1-1 contact centre for the City, along with a five-year maintenance support option. The City also indicated in the release that it had entered into the implementation phase with the affected party and would publicly launch the contact centre in June 2009. I understand that the official launch of the 3-1-1 contact centre occurred on September 24, 2009.

As the unsuccessful bidder in the City's procurement process, the requester is now seeking information regarding the evaluation of that process.

NATURE OF THE APPEAL:

The City received the following seven-part request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the Second RFP:

> "Staff Recommendation Reports" (Staff Reports) and the associated Fairness Commissioner Reports (Fairness Reports) relating to at least three different points in time in the process used to arrive at the conclusions reached in the City of Toronto 3-1-1 Technology Solution Request for Proposal No. 3412-07-3010.

The particulars of the seven part request are stated as follows:

1. At the conclusion of the evaluation of [the Second RFP], with both technical points awarded and the [Second RFP] pricing envelope opened, [City] staff would have created a report that recommended a winning proponent based on the evaluation criteria of the RFP. [The requester] would like a copy of this report…

2. As per the terms of the use of a Fairness Monitor for this procurement, there would have been a written report (which may even be quite brief, consisting of notes, comments etc if not in full report format) by the Fairness Commissioner/Monitor (however referred to) that would outline their perspective of the principles of Fairness adhered to in the development and authoring of the staff report referred to in Point #1 above. Given that the Fairness report would not be referencing many specifics regarding confidential information pertaining to either competitive bid, unless the City has deviated from the nationally accepted practice for preparing Fairness Reports, [the requester] is expecting a copy with little to no redaction.

3. When City staff decided to invoke the Best and Final Offer (BAFO) process after the conclusion of the evaluation of the [S]econd RFP, another staff report would have been created directly following the evaluation of the BAFO process. [The requester] would like a copy of this report…

4. As outlined in Point #2 above, [the requester] is requesting the similar Fairness report that would have been prepared in relation to this staff recommendation report immediately following the BAFO process…

5. While it is common practice to simply use an existing staff recommendation report as the final report to Council seeking their approval on a contract award, this procurement did not follow common practice in that the entire recommendation process and contract award approval were joined in a confidential process that, in being very unconventional, effectively removed any right to Appeal to any vendor. Given this very uncommon practice…, we believe that there were likely further notes and discussions that could have led to the creation of yet another staff recommendation report (in the same way as Points #1 and #3 above). [The requester] would like a copy of this report…

6. As per points #2 and #4 above, the City would have needed a further Fairness [R]eport to confirm that the creation of the staff report referenced in Point #5 above adhered to all rules of fairness, as per the City's policy of using a Fairness [M]onitor as outlined in the Justice Bellamy Report, stemming from MFP Enquiry. [The requester] would like a copy of this report, whether it is a collection of unstructured notes or a formal document, …

7. As per Point #5 above, there could have been different reports produced by the evaluation team and other staff members of the [City], specifically a report to a Steering Committee of senior City staff (might be referred to by another name within the City) and another report to a Council subcommittee tasked with the 3-1-1 project from a political perspective. While point #5 references the notes and final recommendation report to council, Point #7 refers to other "versions" of recommendation reports prepared for these different committees. [The requester] would like a copy of these reports… As per other points above, [the requester] also expects to see any notes or comments captured by the Fairness Commissioner with respect to these recommendation reports to the various committees within the City.

The City issued a decision letter in which it granted partial access to the responsive records, denying access to the withheld portions pursuant to the discretionary exemptions in sections 6(1)(b) (closed meeting), 7 (advice to government), 11(economic and other interests), 12 (solicitor-client privilege) and 15(a) (information available to the public) of the *Act* and the mandatory exemptions in sections 10 (third party information) and 14 (personal privacy) of the *Act*. In its decision, the City indicated that no records exist in response to part 7 of the request.

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

During the mediation stage of the appeal, the City reiterated that it would not disclose any of the withheld information in the records.

The appellant advised the mediator that it wished to pursue access to most of the withheld information. However, the appellant indicated that it was *not* interested in pursuing access to information that was withheld pursuant to sections 14 and 15(a) of the *Act*. Accordingly, pages 36, 95, 102 to 107 and 155 of the records and the application of sections 14 and 15(a) to them are no longer at issue in this appeal.

The appellant advised the mediator that it believes records exist in response to part 7 of the request. Accordingly, reasonableness of search is also at issue in this appeal. The appellant also raised the application of the public interest override (section 16) regarding disclosure of the information at issue under sections 7 and 11.

I commenced my inquiry by issuing a Notice of Inquiry and seeking representations from the City on all issues, from the affected party and the Fairness Monitor on the application of the mandatory exemption in section 10 and from another affected party (the City's outside legal counsel) on the application of the discretionary exemption in section 12. The City, the affected party, the City's outside legal counsel and the Fairness Monitor all submitted representations and agreed to share the non-confidential portions with the appellant. In its representations, the City identified for the first time that with regard to its section 11 exemption claim, it is relying on sections 11(c), (d) and (e).

I then sought representations from the appellant by sending it the Notice of Inquiry, as well as the severed representations submitted by the City, the affected party, the City's outside legal

counsel and the Fairness Monitor. I severed portions of the representations received from the City, the affected party and the City's outside counsel due to confidentiality concerns. I shared the Fairness Monitor's representations in their entirety. The appellant submitted representations in response.

I then shared the appellant's representations in their entirety with the City and the affected party. I invited the City to respond to the appellant's representations on all issues and I sought further representations from the affected party on the appellant's interpretation of the application of the section 10 third party information exemption and the application of the section 16 public interest override.

Both the City and the affected party submitted reply representations. In its reply representations, the City indicates that it has "taken the opportunity to re-exercise its discretion under [the *Act*]." The City states that in light of the "current circumstances" it is "willing to provide additional access" to records responsive to parts 2, 3, 4 and 6 of the appellant's request. Specifically, the City indicates that it is prepared to release to the appellant all of Record 5 and portions of Records 3, 4, 6, 8 and 13 (all of these records are described below). The City attached, as an appendix to its reply, copies of the records it is prepared to disclose to the appellant. The City suggests that as a result of its re-exercise of discretion the appeal in relation to these records is now moot.

I commend the City for its efforts even if they were rather late in the process; however, I do not concur with the City's conclusion. While the City's re-exercise of discretion reverses the City's decision to claim discretionary exemptions for portions of the above records, it would not affect the application of any mandatory exemptions that have been claimed. In this case, the City has also raised the application of the mandatory exemption in section 10 to all of the records at issue in this appeal. In addition, the affected party has claimed the application of section 10 to the records at issue. I have no evidence that the City notified the affected party regarding its re-exercise of discretion. Therefore, based on the evidence before me, I conclude that both the City and the affected party continue to rely on section 10 to deny access to the information in the records. Accordingly, I must adjudicate the application of the section 10 mandatory exemption to all of the records at issue.

With regard to the application of the discretionary exemptions claimed for the above records [sections 7(1), 11(c), (d), (e), and 12], the City has also not specified in its reply how it is applying these exemptions to the information that remains at issue after the re-exercise of its discretion. Only in the case of one record, described below under the "Records" section of this order as "Draft Evaluation Process Guide for 3-1-1 Technology Pricing RFP" (Record 5), is this clear. The City has agreed to release Record 5 in its entirety. Therefore, the discretionary exemptions claimed for this record [sections 7, 11(c), (d), (e), and 12] are clearly no longer at issue and I need only consider the application of the mandatory exemption in section 10 to it. However, the City has proposed disclosing the remaining records in part, but has not provided any guidance as to how the discretionary exemptions it claimed initially should now be applied to the information that remains at issue after its re-exercise of discretion.

Accordingly, in order to be fair to all parties, I will adjudicate the application of the section 10 exemption to all of the records at issue in this appeal since section 10 is a mandatory exemption and the affected party is also relying on it. With regard to the discretionary exemptions, I will consider their application to those portions of the records that remain at issue after the City's re-exercise of discretion.

RECORDS:

There are thirteen records at issue in this appeal. I note that there are two pages contained within this group of records at issue that are not numbered. I view this as an inadvertent error and will consider these pages in my inquiry. One page falls between pages 11 and 12 of Record 1; I will assign it page 11b. The other page falls between pages 98 and 99 of Record 9; I will assign it page 98b. I also note that the City has assigned page number 137b to a page that falls between pages 137 and 138 of Record 13. I will also consider this page in my inquiry.

The information at issue and the sections that may apply are described in the following table:

Record #	Description	Sections That Could Apply
1 (pages 1-15, including page 11b)	Staff Report, dated February 1, 2007, and attachments (16 pages)	6(1)(b), 7, 10, 11(c), (d) and (e), 12, 16
2 (pages 16-17)	Memorandum, dated April 13, 2007 (2 pages)	6(1)(b), 7, 10, 11(c), (d) and (e), 12, 16
3 (pages 18-20)	Cover letter to Fairness Opinion prepared by Fairness Monitor, dated April 14, 2007 (3 pages)	10, 11(c), (d) and (e), 12, 16
4 (pages 21-35)	Fairness Opinion, dated April 14, 2007 (15 pages)	10, 11(c), (d) and (e), 12, 16
5 (pages 37-55)	Draft Evaluation Process Guide for 3-1-1 Technology Pricing RFP (19 pages)	10, 16
6 (pages 56-64)	Draft opinion letter from Fairness Monitor to City, dated June 19, 2007 (9 pages)	7, 10, 11(c), (d) and (e), 12, 16
7 (pages 65-67)	Internal City memorandum, dated June 8, 2007 (3 pages)	7, 10, 11(c), (d) and (e), 12, 16
8 (pages 68-94)	Fairness Opinion, dated June 19, 2007 (27 pages)	10, 11(c), (d) and (e), 12, 16
9 (pages 96-101, including page 98b)	Briefing note, dated June 20, 2007 (7 pages)	7, 10, 11(c), (d) and (e), 12, 16

10 (pages 108-115)	Attachment to Staff Report, dated September 4, 2007 (8 pages)	6(1)(b), 7, 10, 11(c), (d) and (e), 12, 16
11 (pages 116-118)	Briefing note, dated June 20, 2007 (3 pages)	6(1)(b), 7, 10, 11(c), (d) and (e), 12, 16
12 (pages 119-128)	Legal opinion, dated July 31, 2007 (10 pages)	6(1)(b), 7, 10, 11(c), (d) and (e), 12, 16
13 (pages 129-154, including page 137b)	Fairness Opinion, dated June 20, 2007 (26 pages)	10, 11(c), (d) and (e), 12, 16

DISCUSSION:

CLOSED MEETING

Section 6(1)(b)

The City relies on the exemption in section 6(1)(b) to deny access to Records 1, 2, 10, 11 and 12.

Section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

Previous orders have held that, for this exemption to apply, the City must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting;
2. a statute authorizes the holding of the meeting in the absence of the public; and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.

[Orders M-64, M-102, MO-1248]

I will review each part of this three-part test to determine whether the aforementioned records qualify for exemption under this section.

Part 1- a council, board, commission or other body, or a committee of one of them, held a meeting

To satisfy the first requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that City Council held a meeting.

With regard to Records 1 and 2, the City states that these records comprise

> a confidential report, and attachments (including a confidential legal opinion from outside counsel as well as other attachments), dated February 1, 2007, that was submitted to the City's General Government Committee meeting of February 15, 2007 and then forwarded to the City Council's meeting[s] of March 5, 6, 7 and 8, 2007.

The City adds that the "report itself is marked confidential and the minutes for the City Council meeting indicate that the report was considered *in camera*."

Similarly, with respect to Records 10, 11 and 12, the City describes these records as

> a confidential report, and attachments (including a confidential legal opinion from outside counsel as well as other documents), dated September 4, 2007, that was submitted to the City's General Government Committee meeting of September 18, 2007 and then forwarded to City Council's meeting of September 26 and 27, 2007.

Once again, the City states that the "report itself is marked confidential and the minutes for the City Council's meeting indicate that the report was considered *in camera*."

The appellant does not challenge the City's interpretation of part 1 of the test under section 6(1)(b). Rather, the appellant voices its concern that the City has applied the section 6(1)(b) exemption too broadly and that the records at issue do not themselves reflect the confidential deliberations of City Council.

On the evidence presented, I accept that *in camera* City Council meetings occurred on March 5, 6, 7 and 8, 2007 and September 26 and 27, 2007. Accordingly, I find that Records 1, 10, 11 and 12 meet part 1 of the test under section 6(1)(b). However, with regard to Record 2, I am not satisfied that this record meets part 1 of the test under section 6(1)(b). Record 2 is a memorandum prepared by the Chair of the City's Evaluation Panel that documents events relating to the Second RFP, including the Evaluation Panel's views on the outcome of the competition. It is dated April 13, 2007 and appears to be in draft form. Although the City would like to me to view Record 2 in conjunction with Record 1, I see no basis for so doing. Record 1 relates to a review of the First RFP during *in camera* Council meetings held on March 5, 6, 7 and 8, 2007, while Record 2 addresses the Second RFP, a process that had not yet commenced when the March 2007 Council meetings occurred. Absent any evidence from the City that Record 2 was considered during a Council meeting, I find that that this record does not meet part 1 of the

test under section 6(1)(b). As all three parts of the test under section 6(1)(b) must be met, I therefore conclude that Record 2 does not qualify for exemption under section 6(1)(b).

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

To satisfy the second requirement of the three-part test for the section 6(1)(b) exemption, the City must establish that a statute authorized the holding of the City Council meetings in the absence of the public.

The City states that it was authorized to hold closed meetings under section 190(2) of the *City of Toronto Act, 2006*. The City relies on paragraphs (a) and (f) of section 190(2), which state:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the City or local board;
>
> …
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

With regard to the application of section 190(2)(f), the City states that as a result of complications in the RFP process, the City was required to obtain legal advice in order to determine how best to address these complications. The City submits that the reports at issue were "drafted to provide solicitor-client privileged advice, as well as other advice and factual background material to City Council so that reasonable decisions concerning the obtaining of goods and services security could be made." It is the City's view that because there is "clearly legal advice included in the reports, the information therein is also privileged." The City states that the reports include a detailed description of the legal advice provided on the issues under consideration regarding the RFP process. The City submits that the contents of the records clearly confirm that the "solicitor-client advice" was discussed in a substantive way during the course of *in camera* Council meetings.

In response, the appellant submits that "[w]hile section 190(2)(f) authorizes a closed meeting for legal advice, it is not so broad as to be used to cloak other records that are not confidential communications between counsel and his or her client…" The appellant adds that only the legal advice and "communications *necessary* for that purpose" may be the subject of a closed meeting. The appellant acknowledges that legal advice communicated from counsel to his or her client is privileged and would be included in the authority under section 190(2)(f). However, the appellant is concerned that the City may be trying to improperly extend the privilege to documents or communications created by other parties that were prepared in other contexts.

Turning to my analysis, I have carefully reviewed the parties' representations and the records at issue, and I am satisfied that the City held Council meetings on March 5, 6, 7 and 8, 2007 and September 26 and 27, 2007 for the purpose of discussing and considering advice that is subject

to solicitor-client privilege within the meaning of section 190(2)(f) of the *City of Toronto Act, 2006*. While I acknowledge the appellant's concerns regarding the scope of section 190(2)(f), I remind the appellant that in order to meet part 2 of the test under that section, the City need only establish that the *subject matter* of the meeting is advice that is subject to solicitor-client privilege, including communications necessary for that purpose. Accordingly, it is not necessary for the City to establish that all of the information for which it seeks the application of the section 6(1)(b) meets the requirements of the solicitor-client communication privilege exemption in section 12 of the *Act*.

On my review of the records themselves, I am satisfied that Council met on the dates in question to discuss and review legal advice received from its outside counsel. In the circumstances of this case, and given the nature of the subject matter, I am also satisfied that the City was authorized to hold these meetings in their entirety in the absence of the public. Accordingly, part 2 of the test under section 6(1)(b) has been met.

Part 3 – disclosure of the record would reveal the actual substance of the deliberations of the meeting

To satisfy the third requirement of the three-part test for the section 6(1)(b) exemption, an institution must establish that disclosure of the record would reveal the substance of the deliberations of the closed meeting.

In Order MO-1344, former Assistant Commissioner Tom Mitchinson addressed the application of part 3 of the test in section 6(1)(b) to the minutes of a closed meeting held by a school board. He stated:

> To satisfy the third requirement of the test, the Board must establish that disclosure of the record would reveal the actual substance of the deliberations of this *in camera* meeting. As I found in Order M-98, the third requirement would not be satisfied if the disclosure would merely reveal the **subject** of the deliberations and not their **substance** (see also Order M-703). "Deliberations" in the context of section 6(1)(b) means discussions which have been conducted with a view to making a decision (Orders M-184, M-196 and M-385).

In Order M-1160, former Assistant Commissioner Mitchinson considered the application of section 6(1)(b) to handwritten notes and minutes of an *in camera* meeting where fully executed Minutes of Settlement relating to a complaint against a Chief of Police under the *Ontario Human Rights Code* were reviewed. The former Assistant Commissioner stated:

> In my view, these two records deal with the subject of the human rights complaint and the outcome of the mediation exercise, but not the substance of any deliberations about this matter. The terms of settlement were simply reported to the Board at the January 20 meeting. The Board did not, and it would appear did not have authority to, discuss these terms with a view to approving or making a decision about them. Therefore, I find that the third requirement has not been established for these two records, and that they do not qualify for exemption

In Order MO-2337, Assistant Commissioner Brian Beamish examined the application of section 6(1)(b) to portions of reports to the Community Services Committee (the CSC) of the City regarding an investigation into the theft of an unattended fire truck. In finding that part 3 of the test under section 6(1)(b) was not satisfied with regard to the records at issue, he stated:

> From my review of the records at issue, I find that at the time of the meeting with the CSC and Council, all decisions had been made regarding the discipline of the affected parties and were reflected in fully executed Minutes of Settlement. Therefore, contrary to what is suggested by the City, no further decisions or deliberations by the CSC or City Council were required, nor was it possible to implement any additional disciplinary actions.
>
> While I accept that disclosure of these records might reveal the *subject* of discussions, I do not find that disclosure of these records would either reveal the *substance* of deliberations on the information contained in the record, nor would it reveal any discussions that took place leading up to any decisions that might have been taken.
>
> Accordingly, I find that none of these records meet part 3 of the test and, therefore, they do not qualify for exemption under section 6(1)(b).

With regard to the circumstances of this case, the City submits that Council and City committees went *in camera* "to discuss the contents of [Records 1, 10, 11 and 12]." The City states that these records were comprised of "advice [and] factual background material" that addressed whether or not certain actions should be taken. The City acknowledges that while there may not have been active "debate" during the course of these closed meetings, the contents of the records were "deliberated," to the extent that they were "reviewed," "discussed" and "considered" during the course of these meetings. The City submits that Council considered the confidential reports (Records 1and 10) as evidenced by the fact that Council voted on the recommendations set out in the reports in subsequent open sessions of Council. The City states that disclosure of the records at issue would reveal the substance of the discussions that took place at the closed City Council meetings, including the legal and financial implications of taking particular courses of action. The City concludes that disclosure of the records at issue would reveal the "actual deliberations" of Council during the course of its *in camera* meetings and that, therefore, the third part of the test under section 6(1)(b) has been met.

The appellant states in response that the section 6(1)(b) exemption "narrowly applies to only protect the confidentiality of authorized closed meeting deliberations […] not simply to protect records in respect of the subject matter of the deliberations." The appellant adds that to the extent the exemption is being used to "shield records that do not reveal Council's *in camera* deliberations, it is wrongly applied." The appellant states that the substance of the City's representations suggests that the records it is attempting to shield under the section 6(1)(b) exemption are "broader than the actual deliberations of Council."

Turning to my analysis on the application of part 3 of the test, I adopt the approaches taken by former Assistant Commissioner Mitchinson and Assistant Commissioner Beamish. I am

satisfied that their approaches provide a consistent and coherent approach to the examination of part 3 of the test under section 6(1)(b). In this case, based on my review of the records for which the City continues to claim this exemption, I find that disclosing their contents would reveal the substance of the Council deliberations that took place *in camera* in March and September of 2007.

In the case of Record 1, in my view, it is clear that Council deliberated over various options after the decision to cancel the First RFP. The particulars of these options and a recommended course of action are set out in the attachment to the February 1, 2007 Staff Report, which forms part of Record 1. In my view, of central importance to the deliberative process is a legal opinion obtained from outside counsel on the viability of the options under consideration. The legal advice provided is described in the attachment to the Staff Report. Under the circumstances, I am satisfied that disclosure of Record 1 would reveal the context behind the legal opinion that was sought, the contents of the legal advice given and the substance of Council's deliberations during the course of *in camera* Council meetings that took place on March 5, 6, 7 and 8, 2007. Accordingly, I find that part 3 of the test has been met for Record 1.

In the case of Records 10, 11 and 12, I find that these records relate to issues surrounding the evaluation of the Second RFP and, in particular, the BAFO evaluation process that was used to assess this RFP. Record 10 contains a summary of the legal advice provided by both the City's internal solicitors and outside legal counsel regarding issues central to the BAFO evaluation process. Record 11 consists of a briefing note that provides a comprehensive review of the BAFO evaluation process, including the results of the evaluation in this case. Record 12 comprises the full text of the legal opinion that was provided by outside counsel, which is summarized in Record 10. Record 12 provides a detailed discussion of the scope of outside legal counsel's mandate, a complete review of the RFP process (including the BAFO evaluation process), and an analysis of the legal issues and outside counsel's views on the possible outcomes of those legal issues. On the evidence before me, I am satisfied that Council deliberated over the substance of these records during the course of *in camera* Council meetings held on September 26 and 27, 2007 with a view to determining how to resolve issues relating to the outcome of the Second RFP. While Record 11 does not reveal the contents of the legal opinion set out in Record 12 and summarized in Record 10, I am satisfied that its contents are related closely enough to the legal advice provided. I am satisfied that disclosing Record 11 would reveal the context behind the legal opinion that was sought, the contents of the legal advice given and the substance of Council's deliberations during the course of *in camera* Council meetings that took place in September 2007.

Accordingly, I find that part 3 of the test under section 6(1)(b) has been met for Records 10, 11 and 12.

In conclusion, I find that all three parts of the test under section 6(1)(b) have been satisfied to exempt Records 1, 10, 11 and 12, in their entirety, from disclosure.

Section 6(2)(b) – exception to the exemption

Section 6(2)(b) sets out an exception to the exemption in section 6(1)(b). It reads:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
>> in the case of a record under clause (1)(b), the subject matter of the deliberations has been considered in a meeting open to the public;

The appellant takes the position that the exception in section 6(2)(b) applies. The appellant states that if City Council dealt with and therefore considered the subject-matter of the deliberations in an open meeting then the section 6(1)(b) exemption cannot apply.

However, the City states that there is no evidence that the subject-matter of the deliberations was discussed at an open meeting of Council. With reference to Order M-353, the City submits that a "distinction should be made between the **product**, or the results of deliberations […], and the **subject-matter** (Order M-208)." The City states that while the recommendations contained in the records at issue were voted upon in open session, the subject-matter or substance of the deliberations themselves was never revealed.

Based on the information provided to me by the City, I am satisfied that the subject matter of the deliberations of the *in camera* meetings of March 5, 6, 7 and 8, 2007 and September 26 and 27, 2007 have not been considered in a meeting open to the public. Therefore, I find that the exception in section 6(2)(b) is inapplicable to the circumstances in this appeal.

To summarize, I find that Records 1, 10, 11 and 12 are exempt under section 6(1)(b) of the *Act*.

Absurd result

During the course of reviewing the records while conducting my inquiry it came to my attention that discrete portions of Records 4, 8 and 13 contain identical references to the substance of the March 5, 6, 7 and 8, 2007 *in camera* deliberations that are contained in Record 1. While it is clear that the City has not claimed the application of section 6(1)(b) to these portions of Records 4, 8 and 13, I have concluded that not exempting this information under section 6(1)(b), while finding the same information in Record 1 exempt, would cause an absurd result. Accordingly, for reasons of consistency, I find this information in Records 4, 8 and 13 is also exempt under section 6(1)(b).

SOLICITOR-CLIENT PRIVILEGE

General principles

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.

Section 12 contains two branches as described below. The institution must establish that one or the other (or both) branches apply.

Branch 1

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)].

At common law, 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.)].

Branch 2

Branch 2 arises from the latter part of section 12, and in particular, the reference to a record " … 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." It 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.

Parties' representations

The City has indicated in its representations that it relies on both the branch 1 solicitor-client communication privilege and the branch 2 statutory solicitor-client communication privilege.

The City's representations on the application of the section 12 exemption to the records at issue are brief and general in nature. The City states that it seeks the protection of section 12 for the following two categories of records:

1. Reports which were provided in confidence by the City's solicitors (both internal and external) to City Council, which contained legal advice from the solicitors to City Council; and,

2. Documents that reproduce information articulated by the City's outside counsel to City Council.

The City adds that at all times it treated the records at issue as confidential communications and did not share their contents with anyone that was not part of the solicitor-client relationship. The City submits that at no time has there been a waiver of the privilege.

In response, the appellant acknowledges that legal advice communicated from counsel to a client is privileged and exempt under section 12. However, citing the Divisional Court's decision in *Ontario (Minister of Finance) v. Information and Privacy Commissioner (Ont.)* 102 O.A.C. 71 (Div. Ct.), the appellant states that the exemption "does not extend to other documents or communications of parties prepared in other contexts." The appellant adds that the exemption is "limited to communication to legal counsel where the dominant purpose for their preparation was obtaining legal advice."

Analysis and findings

I found above that the section 6(1)(b) exemption applied to Records 1, 10, 11 and 12 and, in so doing, I concluded that those records contained legal advice that is subject to solicitor-client privilege. These are the same records that the City has described under category 1 above, as being exempt under section 12. Having found this information exempt under section 6(1)(b) I need not make a determination on the application of section 12 to them.

However, the City has claimed the application of section 12 to all of the records and so I must examine the application of the solicitor-client privilege exemption to the information remaining at issue in the records, except in cases where the City has re-exercised its discretion and decided to disclose the information.

I have carefully reviewed the information remaining at issue. I find that with the exception of some information that falls within category 2 and other snippets of information that contain the advice of the City's legal department, the records remaining at issue do not qualify for exemption under either the branch 1 solicitor-client communication privilege exemption or the branch 2 solicitor-client communication privilege.

Dealing first with the application of the branch 1 communication privilege, I find that the records remaining at issue do not comprise 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. These communications can be described generally as follows:

- Internal City communications regarding aspects of the procurement process (Records 2, 7 and 9)

- Correspondence from the Fairness Monitor to the City (including his Fairness Reports) (Records 3, 4, 6, 8 and 13)

In my view, with the exception of the information identified above (that is, information that falls within category 2 and snippets of information provided by the City's legal department to the City), I have no evidence that the information remaining at issue in the records qualifies for exemption under the branch 1 solicitor-client communication privilege exemption. None of this information comprises direct communications of a confidential nature between a solicitor and client for the purpose of obtaining or giving professional legal advice, nor does it form part of a continuum of communications between a solicitor and client or comprise part of a legal advisor's working papers directly related to seeking, formulating or giving legal advice.

I will now provide a more detailed explanation for my conclusion that the information that falls into category 2 and the snippets of information provided by the City's legal department to the City are exempt under section 12.

Privilege may extend to those portions of a record that contain communications between counsel and a client for the purpose of giving or receiving legal advice. The Divisional Court addressed this issue in *Ontario (Minister of Finance) v. Information and Privacy Commissioner (Ont.)*, cited above. In that case, Sharpe J. (as he then was), speaking on behalf of the Divisional Court, determined that the exemption protecting solicitor-client privilege should be viewed as "class-based," that is, one that protects the entire communication and not merely those specific items which involve actual advice. However, in making this determination, Sharpe J. also addresses the limits of the "class-based" interpretation of the solicitor-client privilege exemption. In this regard, he states:

> I would hasten to add that this interpretation does not exclude the application of s. [4(2)], the severance provision, for there may be records which combine communications to counsel for the purpose of obtaining legal advice with communications for other purposes which are clearly unrelated to legal advice. I would also emphasize that the privilege protects only the communication to legal counsel. If facts communicated to legal counsel are to be found in some other form in the records of the Ministry, those records are not sheltered from disclosure simply because those same facts were disclosed to legal counsel. Similarly, documents authored by third parties and communicated to counsel for the purpose of obtaining legal advice do not gain immunity from disclosure unless the dominant purpose for their preparation was obtaining legal advice: *Ontario (Attorney General) v. Hale* (1995), 85 O.A.C. 229 (Div. Ct.).

In the circumstances of this case, I find that portions of the records remaining at issue contain legal advice that was communicated to the City by either a City solicitor (information in Records 2, 3, 4, 6 and 8) or its outside legal counsel (information in Records 4, 6, 8 and 13). Applying the Divisional Court's analysis, I am satisfied that this information is exempt pursuant to the branch 1 solicitor-client communication privilege exemption. The records also contain information that is not privileged and is severable; these non-privileged portions are not exempt under branch 1.

Dealing briefly with the branch 2 solicitor-client communication privilege exemption, I find that none of the records remaining at issue were "prepared" by or for counsel employed or retained by the City for use in giving legal advice. Accordingly, I find that the branch 2 solicitor-client communication privilege exemption does not apply to the information at issue in the records.

ADVICE OR RECOMMENDATIONS

General principles

Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

"Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations," the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised.

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations;
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

Examples of the types of information that have been found not to qualify as advice or recommendations include

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

  [Orders P-434, PO-1993, PO-2115, P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.), PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Information and Privacy Commissioner)*, cited above.]

Section 7(2) provides a list of mandatory exceptions to the section 7(1) exemption. Section 7(2)(a) is the only exception that appears to possibly be relevant in this case. It states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:
>
> > factual material;

Parties' representations

The City continues to claim the application of section 7(1) to Records 2, 6, 7 and 9. The City has provided examples in its representations of where it believes disclosure of information in these records would reveal advice or recommendations. However, since the examples themselves reveal the alleged advice or recommendations contained in the records, I am not in a position to reproduce them in this decision. I do, however, describe the records generally below without revealing their contents. In its initial representations, the City also takes the position that the records, taken as a whole, constitute advice and that any portions that are not so characterized are either exempt from disclosure by way of another claimed exemption or would constitute a series of disconnected words or phrases with no coherent meaning or value.

The appellant challenges the City's holistic view of the application of the section 7(1) exemption to the records at issue. The appellant states that only actual recommendations or advice is exempt. The appellant mentions that section 7(2)(a) indicates that the exemption cannot be claimed in respect of "factual material" and notes that the City is attempting to do so in several identified instances. The appellant submits that the City is not entitled to claim the exemption "broadly." Rather, it is required to review "each line and word of a record" in order to determine what is advice or recommendations and what is not.

In reply, the City states that it did not claim section 7(1) for "factual material, or other information, which did not contain recommendations or advice." The City adds that its review involved considering "each line" and "each word" of the various records to determine the extent to which section 7(1) applied. The City also states that it considered the application of the exception of section 7(2) in considering its analysis.

Analysis and findings

Having carefully reviewed the parties' representations and the records at issue, I conclude that portions of the records at issue fall within section 7(1) while other portions do not as they constitute factual or background material.

Record 2

Record 2 is a memorandum prepared by the Chair of the Evaluation Panel for review by a City representative regarding the processing of the Second RFP. At one point in the memorandum, the author provides a clear recommendation to the recipient regarding the suggested outcome of the Second RFP. In my view, this recommendation is clearly exempt under section 7(1).

The appellant has also submitted that portions of the records at issue contain "factual information" and I agree that some of the information contained in Record 2 falls into this category. This raises the possible application of the exception in section 7(2)(a). In my view, the following information in Record 2 qualifies as factual information:

- background information regarding the procurement process and the Evaluation Panel

- comparative pricing information submitted by the two proponents, which is presented in chart format

In and of itself, this information does not "advise" or "recommend" anything, nor can it be seen as predictive of the advice or recommendations that would ultimately be given [Order PO-1993]. This information lends itself to severance, under section 4(2) of the *Act*, because it can be separated from the recommendation in Record 2, without revealing the substance of the recommendation or permitting the drawing of accurate inferences as to the nature of the recommendation, while still retaining its meaning or value. Accordingly, I find that the factual information in Record 2 falls within the exception in section 7(2)(a) and is, therefore, not exempt under section 7(1).

I note as well, however, that Record 2 contains "numerical scores" for the two proponents. The numerical scores form part of the aforementioned chart. There are two components to the numerical scores:

- a "Technical Points" category, which reflects scores assigned to each proponent in the First RFP

- a price per technical point category, which was used to determine the proponent with the best price in the Second RFP

The treatment of numerical scores under section 13(1) [the provincial Act equivalent of section 7(1)] was addressed by Adjudicator Laurel Cropley in Order PO-1993. In that case, the Ministry of Transportation's position was that the numerical scores represent the judgment of an evaluator with respect to a consultant's proposal, including its strengths and weaknesses, and conveys to senior staff the evaluator's recommendations as to which consultants should be awarded contracts. As a result, the Ministry argued that the numerical scores contain or amount to "advice or recommendations" of public servants. In concluding that the numerical scores did not qualify as advice or recommendations under section 13(1), Adjudicator Cropley stated:

> It appears that the awarding of a contract (in either system) is based on a non-discretionary application of an established formula or pre-set criteria. If, as the Ministry suggests, after totaling up the scores, there is no further assessment of the information contained therein, no balancing or options or opinion to put forward, I am somewhat at a loss to understand the nature of the advice being given. In other words, rather than the selection panel putting the consultant forward to the Chairperson (or any other senior management for that matter) with a recommendation that this party be awarded the contract, it appears that the process is designed such that, once the mechanics of the assessment are completed, based on the application of established criteria, there is no discretionary decision to be made; there is no advice to be accepted or rejected during the deliberative process.
>
> Even if there is an element of discretionary decision-making, that is, an ability of the recipient to accept or reject the awarding of the contract to a particular

consultant, in my view, the development of the advice or recommendations would only occur once the completed scores for the technical component are given to the Chairperson (or Manager) and the remaining calculations are made based on the overall compilation of all of the variables.

I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.

As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations **within the deliberative process**. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.

Support for this approach to the interpretation of section 13(1) can be found in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) at p. 292:

> A second point concerns the status of **material that does not offer specific advice or recommendations, but goes beyond mere reportage to engage in analytical discussion of the factual material or assess various options relating to a specific factual situation. In our view, analytical or evaluative materials of this kind do not raise the same kinds of concerns as do recommendations.** Such materials are not exempt from access under the U.S. act, and it appears to have been the opinion of the federal Canadian government that the reference to "advice and recommendations" in Bill C-15 would not apply to material of this kind [16].
>
> Similarly, the U.S. provision and the federal Canadian proposals do not consider professional or technical opinions to be "advice and recommendations" in the requisite sense. Clearly, there may be difficult lines to be drawn between professional opinions and "advice." Yet, it is relatively easy to distinguish between

> professional opinions (such as the opinion of a medical researcher that a particular disorder is not caused by contact with certain kinds of environmental pollutants, or the opinion of an engineer that a particular high-level bridge is unsound) and the advice of a public servant making recommendations to the government with respect to a proposed policy initiative. The professional opinions indicate that certain inferences can be drawn from a body of information by applying the expertise of the profession in question. **The advice of the public servant recommends that one of a possible range of policy choices be acted on by the government.** [emphases added]

Adjudicator Cropley adds that even if a broader definition were adopted for "advice" and "recommendations," to include, for example, all expressions of opinion on policy-related matters, she would not find the numerical scores exempt because they are "primarily of a factual or background nature." She states that the scores do not on their own "'advise' or 'recommend' anything, nor can they be seen as predictive of the advice or recommendations that would ultimately be given."

The Divisional Court upheld Order PO-1993 [*Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* [2004] O.J. No. 224 (Divisional Court)] and the Court of Appeal, in turn, upheld the Divisional Court's decision [*Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)* [2005] OJ No. 4047 (Ontario Court of Appeal); application for leave to appeal dismissed, [2005] S.C.C.A. No. 563, File No. 31224 (S.C.C.)].

I concur with and will apply Adjudicator Cropley's reasoning to the numerical scores found in Record 2. In this case, numerical scoring criteria were established for both the First RFP and the Second RFP. These were "pre-set criteria" similar to the information at issue in PO-1993. In my view, the numerical scores in this case simply reflect the application of established evaluation criteria. There is no discretionary decision made in reaching the scores. The numerical conclusions reached in the record only reflect the outcome of the application of the evaluation criteria. I do not accept that these scores represent the judgment of the Evaluation Panel for the purpose of making a recommendation to senior City staff. Accordingly, I find that the section 7(1) exemption does not apply to the numerical scoring information in Record 2.

To summarize, I find that a portion of Record 2 provides a recommendation regarding the outcome of the Second RFP and is exempt under section 7(1). However, I find that the remaining information in this record does not qualify for exemption under section 7(1).

Record 6

Record 6 is a draft opinion letter from the Fairness Monitor to a senior staff person at the City, which reports on the status of the Second RFP. Although the City has provided representations on the application of section 7(1) to particular portions of this record, in my view, these representations do not assist me in my analysis. However, as a result of the City's re-exercise of

discretion, I note that the City is no longer claiming the application of section 7(1) to the background historical and factual information regarding the procurement and evaluation processes contained in this record. In reviewing this record, I also note that I have already found a small part of the record to be exempt under section 12.

I have undertaken a careful analysis of the record and find that the parts of the record remaining at issue do not qualify for exemption under section 7(1) as they comprise the following:

- pricing information provided by the appellant and the affected party
- numerical scoring information (categorized under "Technical Points" and "price per technical point")

Following my analysis of similar information in Record 2, above, I find that this information does not qualify for exemption under section 7(1).

Record 7

Record 7 is a memorandum from the Chair of the City's Evaluation Panel to two senior staff at the City on aspects of the evaluation process for the Second RFP. Again, although it has claimed the application of the exemption to this record, the City has not provided representations that specifically address the application of this exemption to the contents of this record.

Much like Records 2 and 6, Record 7 contains background factual and numerical scoring information pertaining to the procurement and evaluation processes, particularly with respect to the BAFO evaluation process. However, on my careful review of its contents this record does not contain a recommended course of action that will ultimately be accepted or rejected by the person being advised. On the contrary, it contains conclusions based on the numerical data presented in the record. In my view, this is not advice or recommendations within the meaning of section 7(1). Accordingly, I find that Record 7 is not exempt under this section.

Record 9

Record 9 is an internal briefing note that seeks direction on the selection of a proponent based on the outcome of the BAFO evaluation process. The City does provide representations on the application of section 7(1) to the contents of this record. The City acknowledges that the record "sets out the relevant background materials" and then requests that a decision be made on a series of issues. The City goes on to describe portions of the record, as examples of information that, in its view, contain advice or recommendations. However, in my view, these examples do not assist the City in establishing the application of section 7(1) to this information. Accordingly, my analysis is based on my careful review of the contents of the record.

There are three components to the record:

- a formal briefing note, which sets out some contextual background, the issues to be determined, the results of the BAFO process and a comparative analysis of the results,

- an attachment, which provides further analysis of the results of the BAFO process and sets out a series of recommendations, and

- a second attachment, which contains budgetary information for the City in relation to the pricing offered by the appellant and the affected party.

In my view, neither the formal briefing note nor the second attachment contains "advice" or "recommendations" within the meaning of section 7(1). These parts of the record clearly provide factual information, including a review of the outcomes of the BAFO process and the City's budget in relation to aspects of the project and analytical information, comprised of a comparative analysis of each proponent's pricing. However, these parts of the record do not suggest a course of action that will ultimately be accepted or rejected. Accordingly, I find that they do not qualify for exemption under section 7(1).

With regard to the first attachment, I find that on page 6 of this document there is a series of four "recommendations." I am satisfied these recommendations qualify for exemption under section 7(1) as they suggest a clear course of action that will ultimately be accepted or rejected by the person being advised. However, with respect to the remaining information in this part of the record, I find that it is comprised of factual, background information and numerical scoring information. In keeping with my analysis above, I conclude that none of this information consists of "advice" or "recommendations" within the meaning of section 7(1). Accordingly, I find that it is not exempt under the section 7(1) exemption.

To summarize my conclusions under section 7(1), I have found portions of Records 2 and 9 exempt under this section. However, I have also found that the information remaining at issue in Records 2 and 9, as well as those portions at issue in Records 6 and 7, do not qualify for exemption under section 7(1).

THIRD PARTY INFORMATION

The City has claimed the application of the mandatory exemptions in sections 10(1)(a) and (c) to all of the records at issue. In addition to sections 10(1)(a) and (c), the affected party has also raised the application of section 10(1)(b). Accordingly, I will now examine the application of sections 10(1)(a), (b) and (c) to the information remaining at issue in Records 2, 3, 4, 5, 6, 7, 8, 9 and 13.

Sections 10(1)(a), (b) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied; or

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

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 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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 the affected party. Consequently, the onus of proving that section 10(1)(a), (b) or (c) applies to the records at issue lies with these parties.

For section 10(1)(a), (b) or (c) to apply, the City and/or the affected party must satisfy each part of the following three-part test:

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

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

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

Part 1: type of information

The City submits that the records at issue contain commercial, financial and technical information. The affected party also submits that the records at issue contain commercial and financial information.

These terms have been defined in previous orders of this office as follows:

> *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 records at issue pertain to the implementation and evaluation of the City's procurement process for the 3-1-1 Project. Very broadly speaking, they relate to a proposed commercial enterprise. In addition, many of the records contain the financial information of both the appellant and the affected party, including their proposed overhead and labour costs and cost accounting practices. As well, the records contain technical information relating to the evaluation processes followed in the assessment of the proposals received through the procurement process. For the purposes of this discussion, I accept that the records meet the first part of the section 10(1) test.

Part 2: supplied in confidence

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

The requirement that information be "supplied" to an 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 17(1). The provisions of a contract, in general,

have been treated as mutually generated, rather than "supplied" by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is agreed upon with little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

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 to 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. Loukidelis and John Doe* [2008] O.J. No. 3475 (Div.Ct)].

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]

The City submits that the information contained in the documents obtained through the procurement process was "expressly obtained in confidence." The City states that the "two proponents supplied the information at issue to the City **in confidence**, either implicitly or explicitly." The City also states that the reports prepared by outside counsel and the Fairness Monitor were "provided and received as confidential communications, and have been treated at

all times as confidential materials." The City adds that "all dealings with the outside counsel and Fairness Monitor were done with an express expectation of confidentiality."

The affected party submits that the records at issue contain the details of the proposals it submitted to the City. The affected party states that disclosure of this information would permit the drawing of accurate inferences regarding the information it actually supplied to the City in respect of its pricing policies and practices. The affected party submits that the records contain information that it communicated to the City in confidence, either explicitly or implicitly, as part of the bidding and tendering process.

The Fairness Monitor's representations suggest that, to the extent the information he provided in his reports was supplied to the City, it was supplied with the understanding that it would be publicly disclosed in the interests of transparency.

The appellant's representations do not directly address the question of whether the information was supplied in confidence.

Having reviewed the records and the parties' representations, I find that some of the records at issue contain information that was supplied in confidence, either implicitly or explicitly, by the affected party to the City with respect to the procurement process for the 3-1-1 Project. This information includes pricing figures provided by the affected party in support of its bid. Accordingly, I find that this information meets part 2 of the test under section 10(1) and I will consider the application of the part 3 harms test to it.

However, some of the records also contain information that was not supplied in confidence to the City, in particular:

- financial terms agreed to between the City and the affected party,

- information that relates to the procurement and evaluation processes,

- information relating to the numerical scores (or "technical points") assigned to the appellant and the affected party by the City, and

- evaluation findings of the Fairness Monitor (apart from references to any pricing information).

While some of this information is marked "confidential," it was not, in my view, "supplied" by a third party to the City within the meaning of part 2 of the test.

As discussed above, the terms of a contract between an institution and a third party will not normally qualify as having been "supplied" within the meaning of section 10(1), even where the contract substantially reflects terms proposed by a third party and where the contract is agreed upon with little or no negotiation. Similarly, pricing information contained within a contract has also been found not to meet the supplied test under section 10(1) [see, for example, Orders PO-2859, PO-2453 and PO-2435], subject to the "inferred disclosure" and "immutability"

exceptions. Neither the City's nor the affected party's representations address the relevance of these exceptions. The City submits that it is not withholding information that is reflected in the final agreement between it and the affected party. However, the City did not provide a copy of the contract.

Despite the City's argument, the evidence before me, to the effect that the financial terms that were proposed by the affected party and ultimately accepted by the City after the conclusion of the BAFO evaluation process, points in the opposite direction. I, therefore, find that the financial terms proposed by the affected party formed the basis of a contract. In addition, as stated above, I have not been provided with any evidence that the terms of such an agreement qualify for exclusion under the "inferred disclosure" and "immutability" exceptions. Accordingly, I find that these terms do not meet the supplied test under section 10(1).

I also find that information in the records that discusses the procurement and evaluation processes, including background or contextual information and evaluation methodology and criteria, does not meet the supplied test, since it was generated by the City.

The information relating to the numerical scores (or "technical points") attributed to the appellant and affected party by the City's evaluation committee does not include information that was "supplied" to the City by the appellant and affected party. In Order PO-1993, which was upheld at both the Divisional Court and Court of Appeal in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, cited above, Adjudicator Laurel Cropley found that evaluation information did not qualify as having been "supplied" to an institution by a proponent in an RFP as this was information that was created by the institution for the purposes of its evaluation analysis. I accept Adjudicator Cropley's reasoning and apply it to the circumstances of this case. I find that in this case the technical points assigned by the City to the appellant and the affected party do not meet the supplied test under section 10(1) since this was information that was generated by the City as part of its evaluation analysis.

With regard to the analysis, findings and recommendations of the Fairness Monitor, I find that although some of this information was "supplied," it was not supplied with the intent that it be held in confidence. As a result, I find that this information does not meet the in confidence component of part 2 of the test under section 10(1).

As the above information does not meet both elements of part 2 of the test under section 10(1) I cannot find it exempt under this section since all three parts of the test must be met in order for the exemption to apply. However, since I am already considering the harms test in relation to the pricing information, for the sake of completeness, I will consider the harms test in regard to all of the information at issue under section 10(1).

Part 3: harms

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

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

Parties' representations

The City states in its initial representations that the information concerning the affected party constitutes its "informational assets," which if disclosed to the public "could […] be exploited in the future by the competitors of the affected part[y]." In making this argument, the City also includes the "financial information of the proponents." The City concludes that due to the nature of the information in question, it is "fair for the City to assume that this information may cause harm to the third part[y] who provided it to the City in confidence."

As stated above, the affected party relies on the exemptions in sections 10(1)(a), (b) and (c) to deny access to the information at issue in the records. The affected party provides submissions regarding the harms that, in its view, could accrue under these sections in the event of disclosure.

With regard to the harms under sections 10(1)(a) and (c), the affected party states:

> Disclosure of the Records could significantly prejudice the competitive position of [the affected party] and interfere with future contractual negotiations of [the affected party]. We respectfully submit that any disclosure of information about pricing strategies for software products and services can be used by competing providers in order to put their own responding strategies into place earlier, or otherwise attempt to shore up their own market share, to the detriment of the first provider. We also submit that pricing information could permit a competitor to underbid an RFP or other similar proposal and disclosure of the price submissions would permit competitors to calculate future price submissions and pricing structures. Competitors would be in a position to estimate and undercut best and final offers submitted for consideration or if prices varied, a customer not receiving a favourable price from a provider might try and negotiate the price downward or secure an interchangeable product provided by a competitor. In such cases, a reasonable expectation existed that the disclosure of the Records would result in a significant prejudice to the competitive position (Order P-47). In the software market, [the affected party] submits that it is not unreasonable to expect that these practices might occur.
>
> […] [The affected party's] ability to submit unique proposal structures will be compromised in the future if the Records are disclosed (Order P-222). Disclosure of unit pricing information has been held to possibly prejudice significantly the competitive position or interfere with contractual negotiations of the affected party (Order M-288, M0-250, M-145). The figures contained in the Records, such as the license fee, support and maintenance fees and taxes are the equivalent of the unit prices in these circumstances. Additionally, [the affected party]

> submits that disclosure of the pricing practices and strategies could result in undue gain to [the affected party's] competitors, as described above (Order P-607, P-877).

With respect to harms under section 10(1)(b), the affected party submits:

> Competitive bidding is an essential process used to ensure that organizations efficiently compete for business. In particular, the City must be able to fairly evaluate the strengths and weaknesses of the proposals it receives (Order M-511) and businesses, such as [the affected party], must have the assurance that when they prepare detailed bids in response to an RFP […] the records containing the commercial and financial information related to their organization will not be disclosed. Information of this nature is key to the internal operations of an organization and is essential to the bidding process. The disclosure of the Records, and more specifically, the information contained within the Records that relates to [the affected party], could result in similar information no longer being supplied to […] the City. Organizations will not participate in a tendering process in the future if there is a possibility that core commercial and financial information related to their business will be disclosed to the public. It is in the public interest that this information continues to be supplied to institutions such as the City, as it enables the City to evaluate the various alternatives and procure the best result. Otherwise, the City may only be left with a few, if any, alternatives to secure the products or services it desires. The disclosure of the Records may only affect [the affected party's] participation in future tendering processes; however, it is still a harm affecting the City and ultimately, the people of the City of Toronto.

As noted above, I also invited the Fairness Monitor to provide representations on the application of the section 10(1) exemption since, as the author of several of the records at issue, his views and opinions are reflected throughout the records and he stands to be impacted by the disclosure of some of the information at issue. He offers the following views:

> [T]here is one bed-rock principle that is always articulated regarding public sector procurements, namely that they must be **"fair, open and transparent"**.
>
> While the concept of fairness may require subjective judgment, "open and transparent" is a much more binary construct. Accordingly, with very few exceptions, if any, a public sector agency should expect to fully disclose its evaluation results and any independent audit/fairness opinions associated with the project. Evaluation reports and assessment opinions should be written with this principle in mind. That is, they should exclude any information which could be construed as confidential to one of the parties.

The Fairness Monitor concludes that he does "not believe that the section 10 exemption applies to the records at dispute including both City originated documents and [his] own reports."

The appellant states that since the award of the contract to the affected party, it has repeatedly sought an explanation from the City regarding the "grounds for the rejection of its bid and the evaluation criteria used in selecting [the affected party]." While the appellant acknowledges receiving some information from the City, it claims that the City has not provided a "satisfactory explanation of the evaluation process or criteria it used in this procurement, forcing the appellant to invoke [the *Act*]." The appellant states that it has requested "only non-confidential information relating to the difference in cost/technical point scores (C/S) between itself and [the affected party], simply to satisfy itself that the procurement process was fair." The appellant submits that the City's "secrecy concerning the appellant's requests for information is not something that should be countenanced in public procurement processes." The appellant submits that the City's position to date regarding the sharing of information about the procurement process is inconsistent with several of the recommendations issued by Madam Justice Denise Bellamy in her final report on the Toronto Computer Leasing Inquiry and the Toronto External Contracts Inquiry Report (the Bellamy Report).

The appellant submits that the representations provided by the City and the affected party "amount to mere assertions as to the elements that need to be proved" in order for the section 10(1) exemptions to apply. The appellant asserts that both the City and the affected party have failed to provide evidence sufficient to satisfy the harms tests under sections 10(1)(a), (b) or (c).

The appellant supports the views of the Fairness Monitor in advocating for the release of the withheld information. The Appellant states that its interest in the information at issue centres on its concerns regarding the fairness of the procurement process. In light of these concerns, the appellant sought access to "Staff Reports" and "Fairness Reports" regarding the procurement process. With reference to the wording in paragraph 2 of its request, the appellant states that it expected to receive the Fairness Monitor's reports with "little or no redaction" on the basis that the reports "would not be referencing many specifics regarding confidential information pertaining to either competitive bid […]."

The appellant adds that "where millions of dollars of public funds are at issue, information that would enable an objective assessment about the fairness of the process, including the difference between competing bids, cannot be considered 'confidential'."

With regard to the affected party's assertions under section 10(1)(b) that in the event of disclosure organizations will no longer participate in tendering processes, the appellant claims that this "amounts to an assertion without any evidentiary support […]." The appellant submits that the "disclosure of the C/S scores does not violate any of [the] concerns [regarding the release of commercial or financial information]."

I invited the City and the affected party to respond to the appellant's representations with reply representations.

As alluded to above, the City revealed in its reply representations that it was prepared to re-exercise its discretion and disclose some of the information at issue in the records. This proposed disclosure includes some of the historical background and factual information relating to the bidding and evaluation phases of the 3-1-1 Project. However, despite the City's proposal,

it continues to withhold similar information in other records, as well as all of the financial information submitted by the appellant and the affected party and the technical numeric information related to the evaluation phase of the procurement process. In taking this revised position, the City does not offer any further insight into its views on the harms issue.

The affected party provided further representations to support its view that it would experience harms under sections 10(1)(a), (b) and (c) if the information at issue in the records was to be disclosed to the appellant. With regard to section 10(1)(a), the affected party states that disclosure would "allow a competitor, such as the appellant, to calculate the profit margin and mark up on technology services being offered to the City, as well as estimating and tendering practices of [the affected party]." The affected party adds that, armed with this knowledge, a competitor could set their bids "with certainty, resulting in the loss of future contracts of a similar type […]." The affected party also suggests that "[t]his could result in undue gain to competitors […], who would be in a better position to bid against [it]." The affected party adds that "its relationship with its own vendors and sub-contractors could be significantly prejudiced if the fee arrangements" that had been negotiated with them were to become public. The affected party states that it negotiated "special prices" with its own vendors and sub-contractors and then passed these savings on to the City. The affected party submits that since the appellant has access to the RFP documents, it would be aware of the "number of end users of the technology being licensed to the City" for the 3-1-1 Project. The affected party concludes that the appellant "will therefore be able to determine the 'per unit' pricing of the software and hardware being purchased by the City." The affected party adds that "because support and maintenance services are offered at a rate which is equivalent to a percentage of the license fee, if any of these figures are disclosed, the appellant may be able to ascertain the fees being charged" by the affected party for "such products and services" as well as the "associated profit margin or mark up." The affected party states that if its competitors have access to its "unit price" information the competitors would have a distinct advantage when competing for future business contracts by adjusting their prices or underbidding in an effort to present more attractive bid offers."

In addressing the unfair competitive advantage that the affected party perceives the appellant would gain through disclosure of the information at issue, the affected party states:

- the appellant could use the information to develop a strategy against the affected party in future competitive bidding,

- the appellant could use the records to enhance or design its own system, bypassing the considerable expense or research and development behind the affected party's strategies, and

- the appellant could utilize information contained in the records for its own sales activities.

Analysis and findings

Having carefully reviewed the records at issue and the representations received from the City, the affected party, the Fairness Monitor and the appellant, I find I am not persuaded that disclosing the information at issue could reasonably be expected to result in any of the harms outlined in sections 10(1)(a), (b) or (c) of the *Act*.

I agree that disclosing information relating to a procurement process must be approached in a careful way, applying the tests developed over time by this office, and other adjudicative bodies, while appreciating the commercial realties of a procurement process and the nature of the industry in which the procurement occurs [see Order MO-1888]. Each case must be considered on its own merits, with a view to the quality of the evidence presented and the impact of other factors, such as the positions taken by affected parties, the passage of time, and the nature of the records and the information at issue in them. As well, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability.

The importance of transparency and government accountability is a key reason for requiring "detailed and convincing" evidence under section 10(1), as articulated by Assistant Commissioner Brian Beamish in Order PO-2435. In Order PO-2435, Assistant Commissioner Beamish addressed the application of section 17(1) [the provincial Act equivalent of section 10(1)], to the disclosure of specific pricing information or per diem rates paid by a government institution to a consultant. While acknowledging that in some "rare and limited circumstances" disclosure might result in the harms section set out in section 17(1)(a), (b) or (c), he found that in the circumstances of that appeal it did not. In support of his conclusions, Assistant Commissioner Beamish stated:

> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should *not* assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.
>
> In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385). Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In *Public Government for Private People*, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

> …a broad exemption for all information relating to businesses would be both unnecessary and undesirable. Many kinds of information about business concerns can be disclosed without harmful consequence to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served. Business information is collected by governmental institutions in order to administer various regulatory schemes, to assemble information for planning purposes, and to provide support services, often in the form of financial or marketing assistance, to private firms. All these activities are undertaken by the government with the intent of serving the public interest; therefore, the information collected should as far as practicable, form part of the public record…the ability to engage in scrutiny of regulatory activity is not only of interest to members of the public but also to business firms who may wish to satisfy themselves that government regulatory powers are being used in an even-handed fashion in the sense that business firms in similar circumstances are subject to similar regulations. In short, there is a strong claim on freedom of information grounds for access to government information concerning business activity.

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:

> It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.

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 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [e-Physican Project], there would be no meaningful way to subject the operations of the

> project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA [Service Level Agreement] and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.
>
> While I can accept the Ministry's and SSHA's [Smart Systems for Health Agency] general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I accept and will apply the above reasoning of Assistant Commissioner Beamish to the circumstances of this case. I acknowledge the concerns raised by the City and the affected party and, in particular, those presented by the affected party. However, I find that they fall short of the detailed and convincing evidence required to meet the harms test under sections 10(1)(a), (b) or (c).

Turning to the particular facts of this case, I find that the information at issue falls into the following two general categories:

- information that relates to the procurement process (including background or contextual information, procurement chronology, evaluation criteria and process, Fairness Monitor's analysis, findings and recommendations, numerical scoring information, and the views and opinions of various City staff regarding the procurement process), and

- pricing information provided by the appellant and the affected party in support of their respective proposals.

The first category of information is the broadest and encompasses the majority of the information in the records. Records 2, 3, 4, 5, 6, 7, 8, 9 and 13 all contain information that falls into this first category. In my view, the representations offered by the City and the affected party focus exclusively on the harms that would accrue if the pricing information in the second category is disclosed. Their representations do not specifically address the harms that would result if the information relating to the procurement process is disclosed.

I acknowledge that the City has attempted, albeit late in the process, to address the disclosure of some of the information in this first category through its proposed re-exercise of discretion. However, as noted above, I have no evidence that the City notified the affected party of its re-exercise of discretion and, based on the evidence presented, the affected party has maintained its reliance on section 10(1) to all of the information in the records. I also note, that despite the City's re-exercise of discretion, it continues to deny access to information relating to the bidding and evaluation phases of the procurement process in some records (including the conclusions of the Evaluation Panel in Record 2 and the views of senior City staff in Record 9) along with all of the numerical scoring information.

As already stated, it is only in very limited circumstances where an institution or affected party can demonstrate that disclosure of information relating to a public procurement process could reasonably be expected to result in any of the harms outlined in sections 10(1)(a), (b) or (c). Neither the City nor the affected party have demonstrated that disclosure of the information in the first category of records relating to the procurement process, including the numerical scoring information, background contextual information, evaluation criteria, evaluation results and independent fairness opinions associated with the project, could reasonably be expected to result in any of the harms outlined in sections 10(1)(a), (b) or (c). Accordingly, I find that the first category of information is not exempt under section 10(1).

The second category of information is comprised of pricing information provided by the appellant and the affected party. It is found in Records 2, 6, 7, 8, 9 and 13. I find that this information can be broken down into the following sub-categories:

- appellant's proposed pricing information
- affected party's proposed pricing information
- financial terms agreed to between the City and the affected party

Pricing information has been found to meet the harms test under section 10(1) where, for example, information could be extrapolated by a knowledgeable party to reveal the actual dollar values of various components of an affected party's proposal [Order PO-2853] or rental rate breakdowns, including amounts for net rent, realty taxes and operating costs, provide a formula that could be exploited as a template by third party competitors [PO-2859].

However, I am not convinced that disclosing the pricing information in this case could reasonably lead to the harms set out in sections 10(1)(a), (b) or (c).

First, I see no reasonable basis for withholding the appellant's own pricing information. Clearly, this is information that the appellant supplied to the City and although it is probably not of great interest to the appellant on its own, disclosing it could not, in my view, lead to any of the harms under sections 10(1)(a), (b) or (c).

Second, with regard to the affected party's proposed pricing information, in my view, these figures simply disclose the amounts that the affected party is proposing to charge for the project, including its total cost (Records 2, 7 and 8), its total cost in relation to the City's numerical scoring system (Records 2, 7, 8 and 9), its costs for various components of the project (such as, software licensing, hardware maintenance and application support) (Records 6, 7, 8, 9 and 13) and its projected operating costs over a defined period of time (Records 6, 8 and 13). In other words, these numbers do not reveal, on the evidence presented, any underlying formulae that could be exploited by a competitor or provide any insight into the methodology behind the figures. Other figures, such as the amounts for GST and PST that are set out in Record 2, are simply calculations that flow naturally from the proposed pricing figures. I recognize that both the City and the affected party have provided representations regarding the harms that could accrue under sections 10(1)(a), (b) and (c) should this information be revealed. The City uses highly speculative language to describe the harms that could accrue to the affected party in the event of disclosure. The City suggests that upon disclosure the information "could" be exploited in the future by competitors and adds that it is "fair for the City to assume" that this information "may" cause harm to the affected party. I find the City's representations vague and lacking in necessary specificity.

The affected party's representations are somewhat more detailed, although they too make vague references to harms under sections 10(1)(a), (b) or (c).

With regard to harms under sections 10(1)(a) and (c), the affected party describes a number of possible harms that could accrue in the event its pricing information is disclosed. These include the following:

- the use by competitors of pricing strategies for software products and services to formulate their own responding strategies,

- the ability of competitors to calculate the profit margin and mark up on technology services being offered to the City,

- the ability of competitors to determine the affected party's "per unit" pricing, and

- the ability of competitors to undercut the affected party's "special prices" with its vendors and sub-contractors.

While I acknowledge that these are all *potential* harms, the affected party's representations fail to convey *how* the information at issue could reasonably be expected to lead to these harms. Based on the evidence before me, the financial information at issue, including the figures for software licensing and hardware maintenance, is simply aggregate prices. This information does not, taken on its own, convey pricing strategies or provide insight into how the figures could convey

an advantage to the affected party's competitors. As well, to echo the words of Assistant Commissioner Beamish in Order PO-2435, the fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice its competitive position or result in undue loss to it.

With respect to the harms under section 10(1)(b), the affected party states that disclosure of the information at issue "could" result in similar information no longer being supplied to the City. The affected party also states broadly that organizations will choose to not participate in tendering processes in the future if there is a possibility that core commercial and financial information will be disclosed to the public. I find the affected party's representations on section 10(1)(b) speculative, general in nature and lacking in the necessary particulars to establish that disclosure of its pricing information could reasonably be expected to result in the harms set out in section 10(1)(b).

An important consideration with respect to harms arising from the disclosure of the affected party's pricing information is the impact of the passage of time. The procurement process that is the subject of the appellant's request commenced almost four years ago and was concluded over two years ago. The 3-1-1 Project has now been implemented. The 3-1-1 telephone number went live on September 24, 2009. In my view, with the passage of time, the pricing information contained in the records would be of limited value. I have no specific evidence to suggest that this pricing information would be of any value to competitors today as the economic landscape, the conditions in the technology sector and the needs of public institutions have likely changed over time.

Taking all of the above circumstances into account, I find that the affected party's proposed pricing information does not meet part 3 of the test, and therefore does not qualify for exemption under sections 10(1)(a), (b) or (c).

With regard to the financial terms agreed to between the City and the affected party, which I have found do not meet the supplied test, I am also satisfied that this is not sensitive confidential information. Like the pricing information I have just referred to, these figures are contractual terms that, with the passage of time, would also be of limited historical value today, and I have no specific evidence to suggest that it would have any value to competitors. The evidence in that regard is highly speculative. Based on the evidence before me, I find that the financial terms agreed to between the City and the affected party do not qualify for exemption under sections 10(1)(a), (b) or (c).

To summarize, I find that none of the information at issue in the records qualifies for exemption under sections 10(1)(a), (b) or (c).

ECONOMIC AND OTHER INTERESTS

As stated above, the City claims that sections 11(c), (d) and (e) apply to all of the records at issue in this appeal. These sections state:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

(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 Williams Commission Report, cited above, 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)*, cited above].

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].

Section 11(c) is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

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]

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Order PO-2064].

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034].

The City's representations concerning sections 11(c), (d) and (e) state as follows:

> The disclosure of the records at issue containing confidential financial and commercial information could […] reasonably be expected to prejudice the City's economic interests or its competitive position or be injurious to its financial interests.
>
> …
>
> The harms to the City are two-fold. One, the information provided to the City was confidential tendering information which, if generally disclosed to the public would place a chill over third parties providing such information to the [City], and would result in the City having less detailed information to make its decisions. As a result of this information not being provided, the City's abilities to make such a determination would be affected, leading to a prejudice in the City's economic interests.
>
> Secondly, the disclosure of this information would reveal the manner in which the decisions and evaluation of technical data were made by the City. The public knowledge of the information would allow persons to prejudice the City's competitive position by taking steps in relation to the interpretive decisions made in response to data or the outside consultant opinions given in relation to this data.
>
> Similar to Order P-941, this is a situation where the disclosure of specific research materials used in making decisions would allow parties to use this information to interfere with the City's competitive position. The requesting party (or any party) could attempt to gain an unfair advantage by tailoring their information in such a way as to use the form rather than the content which would result in an [advantage] in the evaluation. For example, in the present circumstances, the disclosure of the information about scoring or process, would allow the

> unsuccessful bidder to analyze the numbers of the finalists to suggest that the price per technical point analysis favours or does not favour the various parties as required and thereby suggest that a different approach be taken.

The City adds that it is concerned, in a general sense, with the disclosure of information relating to the scoring of the proposals received from the appellant and the affected party.

In response, the appellant states that the City's representations on the application of the section 11 exemptions are brief and "do not establish the harms it asserts applies." The appellant submits that the City's representations contain unsupported assertions regarding harms.

With regard to the City's concerns surrounding the disclosure of information relating to the scoring of proposals, the appellant submits that it is the manner in which the City scored the procurement that is "at the heart of any determination as to its fairness." The appellant states that information that addresses the fairness of the procurement process is precisely what it seeks.

The appellant also takes issue with the City's suggestions that disclosure of the information at issue would "place a chill over third parties" and "reveal the manner in which the decisions and evaluation of technical data were made by the City." The appellant argues that "transparency in the decision making process is what is expected." The appellant states further that when "a public institution spends millions of dollars on a major procurement project, the fairness reports in respect of the evaluation are intended to be and [are] quintessentially public."

The appellant takes particular note of the City's statement that an unfair advantage could be obtained by a bidder if "the disclosure of the information about scoring or process, would allow the unsuccessful bidder to analyze the numbers of the finalists to suggest that the price per technical point analysis favours or does not favour the various parties as required and thereby suggest that a different approach be taken." The appellant argues that this is precisely the kind of information that should be disclosed in order to determine whether the City acted fairly in administering its process. The appellant adds that "[f]irms invest in procurements to be treated fairly, and not changing the evaluation rules mid-stream would be a basic hallmark of fairness."

With respect to the City's reliance on section 11(e), the appellant notes that the City did not make any representations in support of the application of this exemption.

I completely concur with the representations provided by the appellant and, for the reasons that follow, I find that sections 11(c), (d) and (e) do not apply to the information at issue.

Dealing first with sections 11(c) and (d), the City must demonstrate that disclosure of the records at issue could reasonably be expected to lead to the harms outlined in these exemptions. To meet this test, the City must provide detailed and convincing evidence to establish a reasonable expectation of harm. Evidence amounting to mere speculation of harm will not be sufficient to meet the test. In my view, the City has provided speculative unsupported assertions of economic and financial harms in the event the information in the records is disclosed. The suggestion that disclosure will place a chill over third parties when they consider participating in future RFPs is self-serving and lacks the requisite detailed and convincing evidence to establish a reasonable

expectation of harm. The City's view, that providing the appellant and the public with insight into the evaluation process (including the scoring criteria used to determine the winner) would lead to the harms in sections 11(c) and (d), is again self-serving. To conclude, the City has not met the harms test under sections 11(c) and (d) and I, therefore, find that these exemptions do not apply to the records at issue.

With regard to section 11(e), as referenced above, the City must satisfy a four-part test in order for section 11(e) to apply. Although the City has raised this exemption, it has not provided any evidence to support its claim and the records themselves do not, on their face, provide the necessary evidence to satisfy the section 11(e) test. Accordingly, I find that section 11(e) does not apply to the records at issue in this appeal.

PUBLIC INTEREST OVERRIDE

The appellant has raised the possible application of the public interest override in section 16 to any records found exempt under section 7, 10, 11 and 12. Section 16 states:

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

Since section 16 cannot apply to override the application of the exemption in section 6(1)(b) I cannot consider its application to those records I have found exempt under section 6(1)(b) (Records 1, 10, 11and 12).

Although section 16 does not expressly include section 12, a recent decision of the Court of Appeal [*Criminal Lawyers' Association v. Ontario (Ministry of Public Safety and Security)* (2007), 86 O.R. (3d) 259 (leave to appeal granted, November 29, 2007, File No. 32172 (S.C.C.))] has opened the door to the broadening of the public interest override to include section 12 of the *Act*. In the *Criminal Lawyer's Association* case the Ontario Court of Appeal held that the exemptions in sections 14 and 19 of the provincial Act, which are equivalent to sections 8 and 12 of the *Act,* are to be "read in" as exemptions that may be overridden by section 23, the provincial equivalent to section 16 of the *Act*. On behalf of the majority, Justice LaForme stated at paragraphs 25 and 97 of the decision:

> In my view s. 23 of the Act infringes s. 2(b) of the *Charter* by failing to extend the public interest override to the law enforcement and solicitor-client privilege exemptions. It is also my view that this infringement cannot be justified under s. 1 of the *Charter*. … I would read the words "14 and 19" into s. 23 of the *Act*.

As already noted, leave to appeal to the Supreme Court of Canada was granted. Argument was heard on December 11, 2008 and judgment remains under reserve.

In this order, I have found some information exempt under sections 7(1) (information in Records 2 and 9) and 12 (information in Records 2, 3, 4, 6, 8 and 13). As I have not found that section 11 applies to any of the records, I need not consider the application of section 16 to that exemption.

In this section of the order I am ruling on the application of section 16 to the information in the records that I have found exempt under sections 7(1) and 12.

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.

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].
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 to exist where, for example:

- the records relate to the economic impact of Quebec separation [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 integrity of the criminal justice system has been called into question [Order P-1779]

- public safety issues relating to the operation of nuclear facilities have been raised [Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805]

- disclosure would shed light on the safe operation of petrochemical facilities [Order P-1175] or the province's ability to prepare for a nuclear emergency [Order P-901]

- the records contain information about contributions to municipal election campaigns [*Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773]

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].

- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding [Orders M-249, M-317]

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

- the records do not respond to the applicable public interest raised by 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.

Representations

The City submits that the appellant has not provided any “context or concern that would reveal any compelling public interest.” The City states that the appellant has not provided evidence of why the disclosure of the withheld information would serve a compelling public interest that clearly outweighs the information that the City seeks to protect.

The City acknowledges that a public interest may exist “in reviewing how [it] determined the criteria to be used in selecting the successful proponent for the 3-1-1 project and the costs of the project overall.” However, the City submits that any such interest would have been met by the City’s public disclosure of information relating to this project. The City adds that although it has withheld from the public specific details of the negotiations that took place in determining the criteria for selection of the successful proponent, it has disclosed considerable information to the public regarding the selection process and the cost to the public. In the interests of achieving transparency and achieving accountability, the City argues that it has made available to the public a number of reports and statistical information related to the project.

The City asserts that any compelling public interest that might exist does not outweigh the "privacy interests of the individuals that the exemptions serve to protect." The City submits that the appellant's request is advanced as matter of "private interest on the part of an unsuccessful RFP proponent, in relation to private interests vis-à-vis its business competitors or possibly against the City." The City states that "no public interest will be satisfied by revealing the information requested."

The appellant states that the fairness of the procurement process is behind the request for the information sought. The appellant acknowledges that while it "does have a private interest in accessing this information," it submits that the manner in which the procurement process was handled "raises significant issues about how decisions are made in respect of major expenditures of public funds and accordingly raises a compelling public interest." The appellant adds:

> As Justice Bellamy's inquiry into the City's procurement process confirmed, the public, including the 25,000 Ontario employees on the appellant's consortium team, has a great stake in the manner in which public bodies conduct procurements.

With regard to its private interest, the appellant acknowledges that it has a responsibility to account to its employees and shareholders for the loss of this bid in light of the large investment of time and money in the project. The appellant states that it participates in procurement processes regularly, winning some and losing others. However, regardless of the outcome the appellant submits that it is accustomed to receiving a "meaningful debrief," something it feels the City did not provide in this case.

The appellant submits that while the City has acknowledged in its representations that a public interest may exist in understanding the criteria it used to evaluate the proponents and the overall costs of the project, it fails to appreciate how it has met the public interest by refusing to reveal how the procurement process was evaluated.

In support of its position, the appellant refers to a portion of the Fairness Monitor's representations, wherein he states:

> [A] public sector agency should expect to fully disclose its evaluation results and any independent audit/fairness opinions associated with the project. Evaluation reports and assessment opinions should be written with this principle in mind. That is, they should exclude any information which could be construed as confidential to one of the parties.

The City was provided with an opportunity to submit reply representations in response to those received from the appellant. In addition to restating many of the points it made in its initial representations, the City submits that the "only interest that has been advanced in the present appeal is the appellant's interest as an unsuccessful RFP proponent in relation to its contentions of wrongdoing on the part of the City." The City states that the appellant is motivated "essentially [by] a private interest." The City adds that the appellant's private interest "does not become a public interest because this interest is directed against a public institution." The City

submits that the appellant has provided "no basis to conclude that there is any interest or demand by the public at large, for the specific information requested in the present appeal."

The City also submits that the appellant has "failed to establish any basis to conclude that the alleged public interest clearly outweighs any of the various purposes of the exemptions claimed." In this regard the City states as follows:

> No basis has been provided to conclude that the public interest in the particular information clearly outweighs the ability of persons employed by the City to be able to advise and make recommendations to City Council freely and frankly (section 7), or the protection of the solicitor-client relationship (section 12).

The City concludes that the "public interest in maximizing the economic return on City expenditures would constitute a public interest in non-disclosure of the requested information."

Analysis and findings

Dealing first with the information in Records 2, 3, 4, 6, 8 and 13 that I have found exempt under section 12, I find that there is no compelling public interest in its disclosure. Having carefully reviewed this information, I find that it does not on its own inform or enlighten the citizenry about the activities of the City by providing insight into the fairness of the procurement process in this case. In my view, any interest that may exist in this information is neither compelling nor public.

However, I reach the opposite conclusion with regard to the information in Records 2 and 9 withheld under section 7(1). In my view, there is a public interest in this information that outweighs the operation of the section 7(1) exemption.

Openness and transparency are critical components of any public procurement process involving the expenditure of taxpayers' money and history has shown that an absence of complete disclosure can lead to abuse. The City's computer leasing scandal, which precipitated the inquiries into the City's public procurement processes and led to the Bellamy Report is clear evidence of the effects of abuse. Accordingly, in order to safeguard against abuse, promote accountability and maintain public confidence in our institutions and their processes it is vitally important that procurement processes are run openly and that mechanisms are in place to monitor the processes to ensure that they are run fairly. These are some of the lessons imparted to the City in the Bellamy Report. Recommendations 129 and 229 of the Bellamy Report are particularly relevant in this regard. They state:

> 129. City Council should establish fair, transparent, and objective procurement processes. These processes should be structured so that they are and clearly appear to be completely free from political influence or interference.

> 229. Following the decision to award a contract, unsuccessful bidders are entitled to a debriefing explaining the evaluation process that led to the City's selection of the successful bidder.

Following the release of the Bellamy Report, Mayor David Miller issued the following hopeful statement:

> The lessons we have learned from Justice Bellamy will be important for the government of Toronto, and important for other governments as well.
>
> It is our job to restore and preserve the good name of good governance. We owe this to the people of Toronto.
>
> Also, as part of the new City of Toronto Act, and Toronto's maturation as a full-fledged government, we need to manage our own affairs, and be seen to manage our own affairs.
>
> We oversee a $7-billion dollar budget, employ 26,000 people, and deliver the services and facilities that are fundamental to the quality of life for all Torontonians, rich and poor. That places a tremendous responsibility upon us to ensure that people are dealt with honestly, transparently, and accountably.

The 3-1-1 Project was a massive and costly undertaking with far reaching implications for both the City and its citizens. Accordingly, I am satisfied that there is significant public interest in the process that preceded the implementation of the 3-1-1 Project, including the procurement process that led to the selection of the affected party as the successful proponent.

While the appellant has acknowledged having a private interest in the information at issue, private and public interests are not mutually exclusive. The information that I have ordered disclosed (including the views of the Fairness Monitor and the results of the BAFO evaluation process) will go a long way to providing valuable insight into the 3-1-1 Project procurement process. However, in my view, the information withheld under section 7(1) is also critical to gaining a full and complete understanding of the path that was followed by the City, including the factual and analytical basis behind the decision to select the affected party. In the interests of openness, transparency and government accountability the public has a right to a full and complete accounting of how its tax dollars were spent to select the successful proponent and fund the completion of the 3-1-1 Project.

I conclude that there is a compelling public interest in the disclosure of the information in Records 2 and 9 that I have found exempt under section 7(1) that clearly outweighs the purpose of the exemption.

I note that other exemptions were also claimed for this information in Records 2 and 9, namely the exemptions in sections 10, 11 and 12. I have already found above, under my discussion of solicitor-client privilege, that this information does not qualify for exemption under section 12. Accordingly, I am not required to consider the application of the public interest override in relation to section 12 for this information.

Based on my review of this information, the representations received and the tests for the exemptions in sections 10 and 11, I am also satisfied that this information is not exempt under those sections. As described above, both Records 2 and 9 are internal City communications. The information remaining at issue in these records comprises the views of City staff regarding the proposed outcome of the procurement process for the 3-1-1 Project. None of the information at issue was "supplied in confidence" within the meaning of that phrase in section 10(1). However, even if I were to find that this information did meet the "supplied in confidence" test under section 10(1), I have not been provided with detailed or convincing evidence by the City or the affected party that disclosure would result in a reasonable expectation of harm under sections 10(1)(a), (b) or (c). Accordingly, I find that the section 10(1) exemption does not apply to this information.

Turning to section 11, as noted above, the City has claimed the application of sections 11(c), (d) and (e) to all of the records at issue, including those portions of Records 2 and 9 that I am currently considering. With regard to the application of sections 11(c) and (d), the City has not provided me with the requisite detailed and convincing evidence to establish a reasonable expectation of harm under these sections in the event of disclosure. With respect to section 11(e), the City has provided no representations on the application of this exemption and, furthermore, the information in Records 2 and 9 does not, on its face, provide the necessary evidence to satisfy the section 11(e) test.

To summarize, I find that none of the information that I have found exempt under section 7(1) would qualify for exemption under sections 10(1) or 11. Accordingly, I will order this information disclosed, as a result of the application of the public interest override to the information in Records 2 and 9 that I have found exempt under section 7(1).

EXERCISE OF DISCRETION

General principles

The sections 6, and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, this office may determine whether the institution failed to do so and/or whether it erred in exercising its discretion by acting in bad faith, or by taking into account irrelevant considerations, or by failing 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)].

Relevant considerations

Relevant considerations may include those listed below. However, not all of those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

Representations

The City submits that it considered all relevant factors in arriving at its decision to apply the discretionary exemptions including the following:

- the purposes of the *Act*
- the relevant exemptions
- the age of information at issue
- whether disclosure would increase public confidence in the operation of the City,
- whether the requester has a sympathetic need to receive the information

- the nature of the information and the extent to which it is significant and/or sensitive to the City
- the competitive relationship between the appellant and the affected party
- the fact that the appellant is seeking information relating to both its participation in the procurement process and the participation of the affected party
- the fact that the City has provided information to the appellant through debriefing process and through correspondence

The appellant is rather critical of the manner in which the City has exercised its discretion, in particular, critiquing the relevance of many of the factors that the City has considered. The appellant submits that the City has "considered irrelevant factors and failed to consider relevant ones." At the heart of the appellant's representations is the view that the information at issue should be available to the public since openness and transparency in municipal government leads to enhanced public confidence in the operation of our municipal institutions. The appellant questions whether the City properly weighed this factor against those it considered. In addition, the appellant questions the manner in which the City considered the age and sensitivity of the information at issue, suggesting that a proper consideration of these factors points to disclosure. The appellant also questions whether a consideration of the competitive relationship between it and the affected party is appropriate since the discretionary exemptions the City has claimed are intended to protect the interests of the City and not that of a third party. The appellant concludes by stating that the factors considered by the City in its exercise of discretion "undermine the legitimacy of that exercise."

In reply, the City states that it properly exercised its discretion, by "balancing […] competing interests" prior to making an access decision. The City asserts that the appellant has provided no basis for suggesting that the City has erred in the exercise of its discretion. The City submits that the City's "initial access decision was the proper use of [its] discretion, having regard to all of the relevant considerations at the time."

Analysis and findings

I have carefully considered the representations received from the City and the appellant on this issue, including the City's re-exercise of discretion as reflected in its reply submission. In my view, although the City's representations touch on several factors it considered in the exercise of its discretion, I am not satisfied on the evidence it has presented that it did so properly. In particular, I am concerned that the City, prior to issuing its initial decision, did not properly balance the importance of and need for openness and transparency in its public procurement process against the application of the discretionary exemptions, as a means of increasing public confidence in the City's operations. Further, I concur with the appellant that a consideration of the competitive relationship between it and the affected party is an irrelevant factor when considering the application of the discretionary exemptions in section 6(1)(b) and 12.

Accordingly, I will order the return of this matter to the City for a proper exercise of discretion under sections 6(1)(b), 7 and 12 of the *Act*, to be based on relevant factors, with respect to the information withheld in Records 1, 2, 3, 4, 6, 8, 9, 10, 11, 12 and 13.

REASONABLE SEARCH

As stated earlier, the City submits that records that are responsive to part 7 of the appellant's request do not exist. The appellant believes that records do exist in response to part 7 of the request. Accordingly, reasonableness of search is an issue in this appeal.

Where a requester claims that additional records exist beyond those identified by the 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 that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

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.

Where a requester provides sufficient detail about the records that he is seeking and the institution indicates that records do not exist, it is my responsibility to ensure that the institution has conducted a reasonable search to identify any records that are responsive to the request. The *Act* does not require the institution to prove with absolute certainty that the records do not exist. However, in order to properly discharge its obligations under the *Act*, the institution must provide me with sufficient evidence to show that it has made a reasonable effort to identify and locate records responsive to the request [Order P-624].

A reasonable search would be one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request [Order M-909].

Representations

The City has provided representations regarding its search efforts, including an affidavit sworn by a senior City official.

The City states that there were "no 'reports' prepared by the evaluation team or other staff members for the Steering Committee other than the briefing notes located in response to the other [requested] items listed by the appellant." The City adds that no records were created that are responsive to part 7 of the appellant's request.

The affidavit evidence was provided by the City's Senior Corporate Management and Policy Consultant, Strategic and Corporate Policy, City Manager's Office (the Consultant). The Consultant submits as follows:

1. On or about April 16, 2008 she was advised by the Project Director for the 3-1-1 Project Management Office (PMO) of the appellant's access request that had been received by the City's Corporate Access and Privacy Office (CAP Office). She states that she was provided with a copy of the request. The Consultant submits that the Project Director asked her to be the liaison with the CAP Office since she had been involved in most aspects of the RFP process for the 3-1-1 Project and was the policy lead, procurement lead and issues management lead for the PMO.

2. On April 16, 2008 she sent an email to a member of the CAP Office to confirm her role as liaison and to seek clarification regarding the request. She states that she advised the CAP Office that she had many files to review herself and would also be coordinating with the Project Director, Information Technology and the City Solicitor who had been involved in the project with respect to the request.

3. On April 16, 2008 she reviewed all of her files in electronic format relating to the First RFP and the Second RFP and the subsequent BAFO process for the Second RFP. She submits that she also consulted that day with Legal Services and senior Information Technology staff.

4. On or about April 16, 2008 she located a number of responsive records. She advised the Director of the CAP Office that a package of these records were being sent to an access and privacy officer at the CAP Office.

5. Subsequently, she received an email from the Director of the CAP Office requesting additional records. On or about April 17 or 18, 2008, she delivered, electronically, additional responsive records to the CAP Office.

The appellant takes issue with the City's evidence, characterizing the Consultant's affidavit as "generic" in quality. The appellant argues that the affidavit "does not deal specifically" with part 7 of the request. The appellant adds that the affidavit "does not indicate how it was determined that such records do not exist and what steps were taken to locate these particular records."

In reply, the City submits that it has provided evidence that searches for records responsive to part 7 of the request were conducted by knowledgeable staff and that no documents responsive to this part of the request were located. The City reiterates that its searches determined that there are no further "reports" prepared by the evaluation team or other staff and that the only responsive records were those that were responsive to parts 1 to 6 of the request.

Analysis and findings

I have carefully reviewed and considered the parties representations. I acknowledge the appellant's concerns regarding the perceived lack of specificity in the Consultant's representations. However, in my view, the City's representations, including the Consultant's affidavit, are sufficiently detailed and credible regarding the efforts to locate records responsive to part 7 of the appellant's request. I accept the City's explanation that records responsive to part 7 of the request do not exist.

As stated above, the *Act* does not require the City to prove with absolute certainty that further records responsive to the appellant's request do not exist. Rather, the City must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records. In my view, the City has met this standard. I am satisfied, based on the information contained in the Consultant's affidavit, that the City took the appellant's request seriously from an early stage. The records clearly establish that the Consultant was the lead for the City on this procurement project and, as a result, was the most appropriate person to conduct the searches for responsive records. I am satisfied that the Consultant is an experienced City employee knowledgeable in the subject matter of the request and that she expended reasonable efforts to locate records which are reasonably related to the appellant's request. In short, I am satisfied that the City has conducted a reasonable search for responsive records, as required by section 17 of the *Act*.

ORDER:

1. I uphold the City's decision to withhold the information at issue in Records 1, 10, 11 and 12.

2. I order the City to disclose Records 5, 7 and 9 to the appellant in their entirety.

3. I order the City to disclose portions of Records 2, 3, 4, 6, 8 and 13 to the appellant by **March 24, 2010** but not before **March 19, 2010**, in accordance with the highlighted versions of these records included with the City's copy of this order. To be clear, the City should not disclose the highlighted portions of these records.

4. I order the City to re-exercise its discretion with regard to the information that I have found exempt under sections 6(1)(b) and 12, found in Records 1, 2, 3, 4, 6, 8, 10, 11, 12 and 13, and to advise the appellant and myself of the result of this re-exercise of discretion, in writing. If the City continues to withhold these parts of the records, I also order it to provide the appellant and myself with an explanation of the basis for exercising its discretion. The City is required to provide the results of its re-exercise of discretion, and its explanation, no later than **March 3, 2010**. If the appellant wishes to respond to the City's re-exercise of discretion, and/or its explanation for exercising its discretion to withhold information, the appellant must do so within 14 days of the date of the City's correspondence, by providing me with written representations.

5. In order to verify compliance with Provision 3, I order the City to provide me with copies of the severed records ordered disclosed in accordance with that provision.

6. I remain seized of this matter pending compliance with Provisions 2, 3 and 4 of this order.

Original Signed by: February 17, 2010
Bernard Morrow
Adjudicator