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

FINAL ORDER MO-2468-F

Appeal MA-060119-1

City of Toronto

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BACKGROUND:

This appeal arises from a request made to the City of Toronto (the City) for records relating to a transaction between the City and Toronto Hydro Street Lighting Inc. (THSLI). THSLI subsequently became amalgamated with Toronto Hydro Energy Services Inc. (THESI) and continued under the name THESI. THESI is 100% owned by Toronto Hydro Corporation (Toronto Hydro). In this order, I will refer to all actions taken by THSLI and/or THESI as those of THESI.

The following background provided by the City and THESI is helpful in understanding the issues in this appeal. The City states:

> The City and Toronto Hydro are separate legal entities, and they are also separate institutions for the purposes of the [*Municipal Freedom of Information and Protection of Privacy Act* (the *Act*)].
>
> The City is an institution pursuant to paragraph (a) of section 2(1) of the *Act*. Toronto Hydro is designated an institution pursuant to section 1(3) of Ontario Regulation 392-91 under the *Act*, which provides that "every corporation incorporated under section 142 of the *Electricity Act*, *1998* is designated as an institution." Section 142 of the *Electricity Act, 1998* permits a municipality to cause a corporation to be incorporated under Ontario's *Business Corporations Act* (OBCA) for the purpose of generating, transmitting, distributing or retailing electricity.

The City indicates that it is the sole shareholder of Toronto Hydro. The City states further that on December 31, 2001, THSLI became a separate subsidiary of Toronto Hydro, as required under the *Ontario Energy Board Act*. According to THESI, "Toronto Hydro Energy Services Inc." was amalgamated with "Toronto Hydro Street Lighting Inc." in September 2006 and continued as THESI. THESI confirms that it is an institution under the *Act*, as it is a corporation established pursuant to section 142 of the *Electricity Act*.

The City states further:

> Until February 1, 2003, [THESI] performed all of the City's street lighting work. Then the City contracted out 20% of the work to an outside company…as the result of competitive tender so that [THESI] provided maintenance for North York, Toronto and East York, and Etobicoke York districts, while [another supplier] did the work for Scarborough (Toronto East District).
>
> Early in 2005, however, Toronto Hydro declared an interest in purchasing certain City street lighting assets, through which [THESI] would be able to secure 100% of the City's maintenance and construction work when the [other supplier's] contract expired in January 31, 2006.
>
> On February 14, 2005, the Policy and Finance Committee discussed the application of proceeds in the 2005 operating budget from the City's investment in Toronto Hydro and from a potential sale of City assets to [THESI].

At its meeting of March 8, 2005, the Works Committee requested the Chief Financial Officer and Treasurer and the City Solicitor to include the results of the pilot project on street lighting maintenance in the Toronto East District in their report to the Policy and Finance Committee on the outcome of negotiations relating to the sale of certain assets to [THESI].

A confidential staff report dated September 15, 2005 was subsequently prepared by the City Manager and the Deputy City Manager and Chief Financial Officer for the Policy and Finance Committee on Street and Expressway Lighting Asset Sale to Toronto Hydro.

The purpose of the staff report was to "obtain additional authorities to complete the sale of City street and expressway lighting assets to [THESI] and to enter into related operating, maintenance and capital contracts."

On September 28, 29 and 30, 2005, City Council considered the report in camera. Additional confidential staff reports relating to further issues concerning the sale of the assets and related labour relations matters were prepared and discussed in camera by the Policy and Finance Committee and City Council.

At its meeting of December 14 and 15, 2005, City Council considered a report dated December 9, from the Deputy City Manager and Chief Financial Officer and City Solicitor on the Finalization of the Agreements for the Street and Expressway Lighting Asset Sale.

City Council prepared By-law 1084-2005 which authorized the "entering into an agreement for the sale of the City of Toronto Street and Expressway Lighting Assets to Toronto Hydro Street Lighting Inc…"

On December 31, 2005 [THESI] purchased the street and expressway lighting assets from the City for a cash consideration of $60.0 million. Concurrently, [THESI] entered into a service agreement with the City to provide street and expressway lighting services to the City for a period of 30 years, commencing January 1, 2006.

NATURE OF THE APPEAL:

In January 2006, the requester submitted a request to the City under the *Act* for access to the following information:

> All documents related to the purchase of Toronto's street lights and expressway lights by [THSLI], including but not limited to the following:
>
> - The agreement(s) of sale.

- The agreement(s) for [THSLI] to provide street lighting and expressway lighting services to the City.
- Staff reports related to the sale.
- Staff reports related to the service agreement(s).

The City located approximately 271 pages of responsive records and granted access to one page in a decision letter dated February 13, 2006. Access to 62 pages was denied under the discretionary exemptions at sections 6(1)(b) (closed meeting) and 15(a) (information available to the public). In addition, the City informed the requester that there was information in the first 208 pages to which the mandatory exemption at section 10(1) (third party information) may apply and that notice would be given to THESI as the third party pursuant to section 21 of the *Act* to offer the opportunity for THESI to make representations.

In a second decision letter dated March 15, 2006, the City informed the requester that partial access to information contained in the first 208 pages of records may be granted as these did not meet the requirements of the mandatory exemption for third party information at section 10(1). THESI was provided an opportunity to appeal.

During this time, the requester (now the appellant) appealed the City's decision to deny access to certain records which had been withheld under section 6(1)(b) of the *Act*. The appellant also informed this office that he would not pursue an appeal of the decision to deny access to one of those records (pages 252-271) because the same record was already the subject of a related matter (Appeal MA-050410-1). The appellant also chose not to pursue an appeal of the part of the decision relating to records for which the City was claiming the application of section 15(a).

In a third decision letter issued May 5, 2006, the City wrote that it would be granting partial access to the records referred to in the March 15, 2006 letter as THESI had not objected to their disclosure. However, the remaining portions of those records, which form parts of the agreements requested, were withheld under section 10(1). The City also mentioned for the first time in this decision letter that it was claiming the application of sections 11 (valuable government information) and 14(1) (personal privacy) to deny access to the undisclosed portions of certain records.

No mediation of the issues was possible and this appeal was moved to the adjudication stage of the process. In correspondence sent to this office in June 2006 regarding the related appeal (MA-050410-1), the appellant expressed dissatisfaction with what he construed as the City's unwillingness to engage in mediation to resolve any of the issues in this appeal because of its concurrent involvement with him in the related appeal.

Shortly thereafter, and while the adjudicator previously assigned to this appeal was preparing the initial Notice of Inquiry to send to the City, correspondence was received from the appellant, confirming that on July 5, 2006, he had received copies of the records to which the City was granting either partial or full access (per the May 5, 2006 decision letter) and that he would be pursuing his appeal of the City's decision to deny access to the undisclosed portions. In

particular, the appellant confirmed that he was appealing the City's decision to deny access to pages 20, 23-87, 150-163, and 164-206. The appellant noted that there were several additional pages included with the consecutively numbered ones, namely 77A & B, 82A and 84B. As well, he indicated that the City had identified that a number of pages were duplicated in the records.

The City did not provide this office with a copy of the May 5, 2006 decision letter, nor did it provide copies of the approximately 208 pages of records first identified in its February 13, 2006 decision and then dealt with in the May 5, 2006 decision. At the previous adjudicator's request, the City forwarded copies of the records, its decision and an index of records to this office.

The appellant stated that he did not wish to include any duplicated records in his appeal in relation to pages 218-221, 222-231, 232-236 and 241-251. After the previous adjudicator's review of the records said to be duplicated, she was satisfied that pages 157 to 169, 171-173, 175, 177-182, 184 and 186 are in fact duplicates of others and she removed these pages of the records from consideration in this appeal.

On August 23, 2006, the appellant corresponded with the City by email, requesting clarification of certain matters relating to the responsiveness of some of the records identified. The appellant also raised the possibility that the City had not conducted an adequate search for records in response to his request and listed four different records, or categories of records, he believed existed but had not yet been identified or located. The appellant's email communication with the City was copied to this office. The City did not respond to the appellant, which led to a number of communications from the appellant expressing dissatisfaction with the City's approach to the request and appeal processes.

The previous adjudicator then completed the Notice of Inquiry to be sent to the City. Based on her consideration of the information received by this office from the appellant, she added "Scope of the Request/Responsiveness of Records" and "Search for Responsive Records" as issues in this appeal and included them in the initial Notice of Inquiry, dated September 26, 2006. This Notice of Inquiry was sent to the City and to THESI to seek representations on the issues pertinent to their respective involvement in this appeal. Both the City and THESI submitted representations. It should be noted that in its representations, THESI raised the application of section 52(3) of the *Act* to remove Record 3 from the ambit of the *Act*. In addition, the City claimed the application of section 10(1) to Records 4 and 5 for the first time in its representations. In view of the fact that section 10(1) is a mandatory exemption, the previous adjudicator indicated that she would be considering its application to those records in her disposition of this matter. Section 52(3) raises the question of whether the *Act* applies to records, and for that reason, the previous adjudicator included it as an issue in the appeal.

After addressing issues related to the sharing of representations on November 16, 2006, the previous adjudicator sent a modified Notice of Inquiry to the appellant on December 5th, enclosing copies of the non-confidential representations of the City and THESI.

On December 6, 2006, the previous adjudicator received copies of communications relating to an exchange between the City and the appellant. In these circumstances, and given the information already available to her relating to the scope of the appellant's request and the adequacy of the search conducted by the City in response, the previous adjudicator decided to issue an interim order on those issues before proceeding with the remainder of the inquiry.

In Interim Order MO-2135-I, issued December 20, 2006, Adjudicator Daphne Loukidelis addressed a number of the appellant's concerns about the manner in which the City had dealt with his access requests, initially and throughout the appeal process. She found that the City had interpreted the appellant's request too narrowly, and that its search for responsive records was not reasonable. As a result, she ordered the City to conduct a further search for responsive records and to issue a new access decision.

The appellant then provided his submissions to this office in response to the issues remaining in the Notice of Inquiry that was sent to him and also submitted two brief follow-up letters.

The City subsequently located a number of additional records and issued access decisions regarding them. Appeal files MA-060119-2 and MA-060119-3 were opened to deal with these records.

The previous adjudicator decided to seek reply submissions from the City and THESI, and sent them a Reply Notice of Inquiry along with copies of the appellant's representations and the two additional follow-up letters. In the Reply Notice of Inquiry that was sent to them, the previous adjudicator stated that she would not be addressing any of the issues that were dealt with in Interim Order MO-2135-I or raised by the appellant in his representations that pertained to Appeal MA-060119-2. She then indicated that the appellant appears to have raised the possible application of the public interest override at section 16 of the *Act*. She invited the City and THESI to provide representations on this issue.

The previous adjudicator also noted that the appellant had withdrawn his appeal of the denial of access to Records 4 and 5 by the City, and indicated that the application of sections 10(1) and 14(1) to these records will not be addressed further.

Both the City and THESI provided representations in reply. After addressing issues related to the sharing of representations on April 17, 2007, the previous adjudicator sent a modified sur-reply Notice of Inquiry to the appellant, enclosing copies of the non-confidential representations of the City and THESI. In the sur-reply Notice of Inquiry, the previous adjudicator set out the issues to be addressed by the appellant as follows:

> I am requesting submissions from you as regards … the late raising of a discretionary exemption by the City.
>
> The City has withdrawn its reliance upon section 6(1)(b) of the *Act* to deny access to Record 8 and has indicated that it will release this record to you.

Please consider the following new aspects of the City's position:

- The City has offered argument on the possible application of section 52(3)2 to Record 3, where previously the affected party had raised only paragraph 1 of the exclusion at section 52(3) to this particular record (see pp. 2-3 April 2nd representations);
- The City has also suggested in the Reply representations that section 6(1)(b) applies to exempt Record 3 (see p. 26);
- The City has made submissions on the application of the solicitor-client privilege exemption in section 12 of the *Act* to Record 7 (see p. 29);
- The City's submissions regarding Records 6, 7 and 9 raise the possible relevance of certain provisions of the *Securities Act*, R.S.O. 1990, c. S.5 (see pp. 23-25).

During the time accorded to the appellant for the preparation of his sur-reply representations, the City issued a revised decision letter respecting Record 8. In this letter, dated June 6, 2007, the City informed the appellant that it had reconsidered the release of Record 8 and would, instead, be claiming a new discretionary exemption to deny access to it. The City now seeks to apply section 15(a) (information otherwise available) to Record 8. A copy of the June 6th letter was sent to this office.

The appellant provided sur-reply representations. The previous adjudicator decided to send a sur-sur-reply Notice of Inquiry to the City, seeking representations on the late raising of several discretionary exemptions. The relevant excerpts from the appellant's sur-reply representations were enclosed with this Notice of Inquiry, as were the necessary corresponding contents from the appellant's brief of documents.

The City provided sur-sur-reply representations. The appellant continued to send additional correspondence to this office.

The file was subsequently transferred to me to complete the adjudication process.

It is important to note that appeals MA-060119-2 (recently resolved by my Order MO-2396-F) and MA-060119-3 (currently in adjudication) are closely linked to appeal MA-060119-1 as well as appeal MA-050410-1 (recently resolved by my Order MO-2389). All of these files had previously been dealt with by the same adjudicator, and the appellant raised a number of similar procedural and process issues in each file. All of these files were transferred to me to complete the adjudication process. In the interim decisions issued by the previous adjudicator and in the two decisions I issued in the related appeals, a number of these procedural and process issues were addressed. In my view, any decision issued by either the previous adjudicator or myself relating to these similar issues with respect to one appeal file should be construed as applying to all of the appeal files in this group, and will, therefore, be incorporated by reference into the other files, even though the substantive issues in each one will be dealt with separately.

This Order will address only the portions of the 271 pages of records originally located by the City that remain at issue, and the exemptions claimed for them. I am satisfied that the corollary concerns raised by the appellant regarding the manner in which the City had dealt with him have been adequately addressed in Interim Order MO-2135-I (issued in connection with Appeal MA-060119-1), Interim Order MO-2282-I (issued in connection with Appeals MA-060119-2 and MA-060119-3), a letter decision sent to the City by Adjudicator Loukidelis on November 13, 2007 in relation to similar issues raised by the appellant in Appeal MA-060119-2, and Order MO-2389.

RECORDS:

The following chart sets out the records remaining at issue following the activity on the file discussed above:

Record Number	**Page Numbers** (formerly record numbers)	**Description**	**Exemption**
1	20	Receipt dated December 31, 2005 – *denied in part*	s. 10(1) & 11
2	23-87	Agreement dated January 1, 2006 – *denied in part* (severances to 26 pages)	s. 10(1) & 11
3	150-156	Agreement dated January 2, 2006 – *denied in full*	s. 10(1) & 11 s. 52(3) *new - s. 6(1)(b)*
6	218-221	Staff Report dated November 10, 2005 – *denied in full*	s. 6(1)(b)
7	222-231	Staff Report dated December 9, 2005 – *denied in full*	s. 6(1)(b) *new - s. 12*
8	232-236	Staff Report dated December 9, 2005 *denied in full*	*new – s. 15(a)*
9	241-251	Staff Report dated February 14, 2005 – *denied in full*	s. 6(1)(b)

DISCUSSION:

PRELIMINARY MATTERS:

LATE RAISING OF NEW DISCRETIONARY EXEMPTIONS

As I indicated above, the City has raised the application of the discretionary exemptions in sections 6(1)(b), 12 and 15(a) to certain records for the first time during the adjudication stage of this appeal. The appellant took issue with the City's raising of these sections, and the late raising of a discretionary exemption is an issue in this appeal.

Previous orders issued by this office have held that the Commissioner or her delegate has the power to control the manner in which the inquiry process is undertaken. This includes the authority to set time limits for the receipt of representations and to limit the time frame during which an institution can raise new discretionary exemptions not originally cited in its decision letter.

The objective of the policy adopted by this office in relation to the time for raising discretionary exemptions is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but not at a stage in the appeal where the integrity of the process is compromised or the interests of the appellant would be prejudiced. This approach was upheld by the Divisional Court in the case of *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995) Toronto Docket 220/95, leave to appeal refused [1996] O.J. No. 1838 (CA).

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeal process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*.

Former Adjudicator Fineberg also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, it will be necessary to re-notify all parties to an appeal to solicit additional representations on the applicability of the new exemption. The result is that the processing of the appeal will be further delayed. Finally, former Adjudicator Fineberg made the important point that, in many cases, the value of information which is the subject of an access request diminishes with time. In these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

Representations

The City and the appellant were both asked to address the late raising of the discretionary exemptions in the circumstances of this appeal. As I indicated above, the appellant was given the opportunity to address this issue in sur-reply and the City was permitted to explain its reasons for doing so in sur-sur reply.

The appellant strenuously objects to the City's late raising of new discretionary exemptions and provides extensive representations outlining his position on this issue. In essence, he believes that the City is abusing the appeal process and submits that the integrity of the appeal process requires that the City's late claim be rejected. In particular, the appellant submits that the impact to his client of the late raising of new discretionary exemptions is increased cost and delay and, in effect, springs new exemptions on the appellant without sufficient time to evaluate and consider the claims. The appellant points out that if the City had a clear and compelling reason to claim the exemption in section 12 for Record 7 it would have rectified its error in not claiming it before it did – more that a year after issuing the first decision letter. In addition, the appellant submits that the reason given by the City as its basis for claiming section 6(1)(b) for Record 3 would have been known to it at the time of its initial decision. The appellant submits further that there is no prejudice to the City in denying it the ability to claim additional discretionary exemptions at the last minute.

The City submits that its late raising of sections 12 and 6(1)(b) to Records 7 and 3, respectively, was inadvertent and was not motivated by any improper purpose, nor was it done in bad faith. The City points out that the request was complex:

> as it required consultation with several divisions, a review of hundreds of records and consideration of several relevant exemptions…It was only when the City's corporate Access and Privacy (CAP) Office and the Legal Services division worked together to prepare the City's reply representations, was section 12 identified as being applicable to Record 7 and section 6(1)(b) was identified as being applicable to Record 3. The applicability of these exemptions only became evident after a very detailed examination of the records and consultation with legal counsel on the substantive issues on appeal.

The City goes on to explain the importance of the purposes underlying the exemptions in the circumstances, stating that maintaining solicitor-client privilege is an important City interest that must be protected where appropriate. The City submits that disclosure of Record 7 could compromise the communications protected by privilege, noting that "a lawyer's client is entitled to have all communications made with a view to obtaining legal advice in confidence." Citing *Maranda v. Richer* (2003), 232D.L.R. (4th), the City states:

> Only in extremely compelling circumstances should an institution be denied the ability to maintain privilege…Simply, the City is seeking to protect a privilege

> that the courts have recognized as central to the provision and receipt of legal advice; an interest that every lawyer must be intimately familiar with.

The City submits that Record 3 and 7 are sensitive in nature and that this factor should be given significant weight in determining this issue. Moreover, the City contends that there is no prejudice to the appellant. The City states:

> Order P-658 identifies several reasons why the prompt identification of discretionary exemptions is necessary to maintain the integrity of the appeals process. One of these reasons is to avoid delay which may result when additional representations are sought on the new exemptions. However, in this case, the Sur-Sur-Reply Notice of Inquiry advises that a modified Sur-Reply Notice of Inquiry was sent to the appellant on May 7, 2007 to seek representations…[and]goes on to advise that there were a number of substantive issues in the City's reply representations that the appellant was asked to address and, in addition, the appellant was asked to address the issue of the late raising of the exemptions. [emphasis in the original]

Relying on previous orders of this office (Orders P-1014 and MO-2070), the City submits that since supplementary notification was required for other reasons, there was no additional delay and the appellant was not prejudiced by the late raising of the additional exemptions. The City also submits that there is no evidence that the value of the information which is at issue has diminished with time.

Analysis and Findings

On May 12, 2006, this office provided the City with a Confirmation of Appeal, which indicated that an appeal from the City's decision had been received. This Confirmation also indicated that, based on a policy adopted by this office, the City would have 35 days from the date of the confirmation (that is, until June 19, 2006) to raise any new discretionary exemptions not originally claimed in its decision letter. No additional exemptions were raised during this period.

Over the life of this appeal, the City has issued five decisions on access to the requested records (February 13, 2006, March 15, 2006, May 5, 2006, February 5, 2007 and June 6, 2007). The last two decisions were issued during the adjudication stage of the appeal, well after the 35 day window to do so. The City did not raise a new discretionary exemption in its February 5, 2007 decision (following its search for additional responsive records in response to Interim Order MO-2135-I). The City raised the application of section 15(a), for the first time with respect to Record 8 in its June 6, 2007 decision, issued while the appellant was preparing his sur-reply submissions.

In addition, the City claimed the application of the mandatory exemption in section 10(1) to Records 4 and 5 for the first time in its initial representations. As I noted above, because this is a mandatory exemption, the previous adjudicator indicated that she would consider its application,

although the appellant ultimately removed these two records from the scope of his appeal. It was only in its reply submissions that the City first claimed the application of the discretionary exemptions in section 6(1)(b) for Record 3 and section 12 for Record 7. At the time, the City did not explain its decision to claim these exemptions for Records 3 and 7 at this late stage in the appeal process.

I do not find the City's explanations for failing to raise the new discretionary exemptions earlier in the process to be reasonable. Mere inadvertence is simply not plausible in the circumstances of this appeal, taking into consideration the amount of activity undertaken to locate records and identify issues. It appears that the City had no intention of claiming the additional discretionary exemptions until the end of the process, after its legal counsel became involved. End of the day decision-making regarding the applicability of possible exemptions is contrary to the access provisions of the *Act*, which require that a decision be given within 30 days of receiving the request (or any time extension contemplated by the *Act*), and strains the bounds of the IPC policy regarding the late raising of new discretionary exemptions. The City does not explain any exceptional circumstances that would warrant consideration insofar as the late raising is concerned.

I accept that the appeal became complex over time, largely because of the way the City chose to deal with it (as discussed in the interim orders and orders issued in relation to this appeal and the other related appeals). However, it is apparent that, initially, there were relatively few records for the City to address and the City had numerous opportunities to turn its mind to the records at issue in this appeal.

In its initial representations, the City reconsidered its decision on access to the records originally located and added the mandatory exemption at section 10(1) to Records 4 and 5. The City did not raise any new discretionary exemptions at that time.

Following Interim Order MO-2135-I, the City conducted a further search for responsive records and located three additional records, initially. In its February 5, 2007 decision, the City claimed the application of section 12 for these newly located records. The City could have reviewed the records previously located to ensure consistency in its decision at that time.

I note that the City has changed its decision on Record 8 twice following the initial decision to withhold it under section 6(1)(b), first withholding it, then agreeing to release it and then claiming a completely different exemption while the appellant was making his final representations.

Contrary to the City's submissions regarding the late raising of new discretionary exemptions, I find that the appellant has been prejudiced by the delay caused by the City's actions throughout the processing of this appeal with respect to identifying records and its changed position regarding the claiming of exemptions. I come to this conclusion while recognizing that the appellant had a part to play in creating some of the complexities that subsequently arose.

On November 13, 2007, the previous adjudicator issued a "Deemed Refusal Order Letter" regarding issues that arose in Appeal MA-060119-2 after she issued Interim Order MO-2135-I. After setting out the history of these appeals, beginning with the current appeal, she stated:

> …in my view, the City would be hard pressed to provide an acceptable explanation for the considerable lapse of time between its receipt of the appellant's request in January 2006, and the searches ultimately conducted close to two years later – and a full nine months after I issued Interim Order MO-2135-I in an attempt to provide absolute clarity as to the scope of the appellant's request and the corresponding search parameters.
>
> In the particular circumstances of this appeal, I must conclude that the appellant has suffered prejudice in terms of the opportunity to evaluate any access decision the City may make as to disclosure of the nearly 12,100 pages of records now located. That the right to a timely appeal of any part of that decision and inquiry into the resulting appeal has been compromised also borders on a foregone conclusion.
>
> Although the remedies available to me to address this situation under the *Act* are admittedly limited, I will proceed by ordering the City to issue a new decision letter….

In my view, the observations made by the previous adjudicator almost two years ago are equally relevant today. Consequently, I find that permitting the City to raise new discretionary exemptions for Records 3, 7 and 8 would be highly prejudicial to the appellant and would compromise the integrity of the appeal process.

As a result of this decision, I will not consider the possible application of section 12 to Record 7, section 6(1)(b) to Record 3 or section 15(a) to Record 8. The City has claimed other exemptions for Records 3 and 7 and I will analyze these two records under those other exemptions. The City has withdrawn all other exemptions for Record 8. Accordingly, as no exemptions apply in the circumstances of this appeal, I will order the City to disclose Record 8 to the appellant.

LABOUR RELATIONS AND EMPLOYMENT RECORDS

In its representations, THESI raised the possible application of section 52(3)1 as the basis for its position that Record 3 is excluded from the operation of the *Act*. The City subsequently indicated in its Reply representations that it was relying on the application of section 52(3)3 to Record 3, in addition to section 52(3)1; however, its discussion focussed on section 52(3)2. Since section 52(3) of the *Act* pertains directly to the issue of whether the *Act* applies to records, I will review the possible application of all three provisions.

Section 52(3) states:

> Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> 1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

The term "in relation to" in section 52(3) means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern," and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2000), 55 O.R. (3d) 355 (C.A.), at para. 35].

For section 52(3)1 to apply, the City and/or THESI must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and

3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

For section 52(3)2 to apply, the City and/or THESI must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and

3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

   [OrdersM-861,PO-1648]

For section 52(3)3 to apply, the City and/or THESI must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;

2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and

3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

Representations

THESI claims that Record 3 relates solely to labour relations. THESI has requested that its representations, including an affidavit, on this issue be withheld as confidential, although in response to the appellant's queries regarding the lack of descriptive information about this record, it was identified as an Indemnity Agreement. The appellant makes certain assumptions about the nature of the Indemnity Agreement and the parties to the agreement in his representations, and acknowledges that "construction industry grievances and other proceedings

before the Ontario Labour Relations Board constitute the type of proceedings referred to in [section 52(3)1]." The appellant disputes, however, that the exclusion in section 52(3)1 applies to Record 3. In that regard, I note that Section 52(3)1 was the only section that had been claimed at that point in the appeal process.

The appellant contends that the Indemnity Agreement is not about a potential proceeding, but is in fact an agreement intended to prevent a proceeding or to otherwise resolve the proceedings. He submits that section 52(3)1 was not intended to be used in cases where a record is in relation to avoiding a proceeding.

In addition, the appellant argues that the purpose of section 52(3) is to "protect the confidentiality of an employer's deliberations and plans related to labour relations and employment, so that freedom of information requests could not be used to unfair advantage by adversaries in the labour/employment law context…" Although acknowledging that once an exclusion has been found for a record it does not end once the purpose for which the record was created ends, the appellant submits that there is a "dynamic quality" to the content of all three paragraphs of section 52(3), that is, "the exclusions apply to records of things that are happening, or about to happen, or anticipated to happen." In the circumstances, the appellant submits further that the exclusion was never meant to cover a final agreement.

Finally, the appellant notes that an agreement is the product that is jointly created by two parties. He submits that an agreement:

> … is not "collected" by an institution. It is not "prepared" by any one institution, since it is the joint creation of two parties. It is not "maintained" by [the] institution in the sense that the Legislature intended. And it is not "used" by the institution, at least not as the Legislature intended.

In response, THESI contends that there was an anticipated proceeding at the time the Indemnity Agreement was prepared, which "would thus constitute a dispute or complaint resolution process conducted by a tribunal or other entity…."

THESI submits further that, contrary to the appellant's views on section 52(3) and 52(4), a plain reading of these sections and the jurisprudence under the *Act* supports a finding that agreements are subject to section 52(3). THESI asserts that section 52(4) provides an exception for certain kinds of agreements, and points out that the agreement at issue in this appeal is not with the union, nor with one or more employees and therefore, the exceptions in sections 52(4)(a), (b) and (c) do not apply.

The City notes that it is bound by a province-wide agreement relating to electricians and electrical work, which dictates the terms and conditions of employment for electricians employed by the City and other labour relations issues that arise in respect of electrical work in the construction industry. According to the City, the transaction between it and THESI

"potentially" raises issues under the collective agreement, including grievances. The City continues:

> Consequently…this document was clearly "prepared" in relation to "anticipated" legal proceedings "related to" "labour relations matters"…
>
> …As is plain from the nature, date and purpose of the document, the Indemnity Agreement was drafted in relation to anticipated legal proceedings.

Accordingly, the City submits that Record 3 falls squarely within the exclusion in section 52(3)1.

With respect to the exclusion in section 52(3)2, the City states:

> As a result of the highly complex nature of the labour relations proceedings potentially arising from the transaction…and the fact that the rights of other employees and bargaining units would be affected by such proceedings, the City submits that complex negotiations would necessarily arise…The City submits that disclosing the Indemnity Agreement, which reveals strategic and legal interests on the part of both the City and [THESI], would be highly prejudicial to such "anticipated negotiations" and therefore falls squarely within section 52(3)2 of the Act.

Analysis and Findings

Record 3 is an Indemnity Agreement entered into between the City and THESI and pertains to the relationship between these two parties. The Courts have recently confirmed that the types of record excluded from the *Act* under section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue [*Ontario (Ministry of Correctional Services) v. Goodis* [2008] O.J. No. 289 (Div. Ct.)]. Given the nature of the record at issue, I find that section 52(3) is not available to exclude the record for the reasons that follow.

From my review of the record, I am prepared to accept that it was prepared, maintained or used by the City and THESI, and, therefore, that the first part of the test under sections 52(3)1, 2 and 3 has been met. I am not persuaded that a distinction can be drawn, as suggested by the appellant, between a document that is created by one institution as opposed to being jointly created by two. In either case, the agreement was prepared by the two institutions in question. Moreover, the Indemnity Agreement was signed and intended to be used by both institutions in relation to the transfer of assets from one to the other.

The second part of the test under sections 52(3)1, 2 and 3 requires me to decide whether the connection between the record and the proceedings, negotiations or the employment-related matter in which the City and/or THESI has "an interest" is sufficient to find that the preparation, maintenance or use of the record was "in relation to" those activities.

In Order MO-2024-I, Senior Adjudicator John Higgins reviewed the possible application of the three exclusion sections to the "total amount paid" to a specific law firm "with respect to" a former employee of the institution. The Senior Adjudicator stated:

> The consequence of a finding that section 52(3)1 applies is a serious one – the total exclusion of the record from the scope of the access and privacy provisions of the *Act*. In this case, as the appellant points out, the record relates to the expenditure of public funds to defend a legal action. This type of information has a strong connection to government accountability, which the Supreme Court of Canada refers to as an "overarching" purpose of access legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385 (S.C.C.)). In my view, this purpose, which relates to the right of public access to government-held records identified in sections 1 and 4 of the *Act*, must be kept in mind in assessing the proper meaning of "in relation to" in this case.
>
> Another relevant factor to consider in assessing the meaning of "in relation to" is the stated intent and goal of the *Labour Relations and Employment Statute Law Amendment Act*, which added section 52(3) to the *Act*. The long title of this Bill identified this goal as to "restore balance and stability to labour relations and to promote economic prosperity".
>
> As noted above, the term "in relation to" in section 52(3) has previously been defined as "for the purpose of, as a result of, or substantially connected to" [Order P-1223]. In my view, meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3)2 and 3, which require that the collection, preparation, maintenance and/or use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> In this case, I acknowledge that, but for the proceedings, this record would never have been created. However, in my view, the City's record of payments to a law firm, and particularly the total amount paid, is too remote to qualify as being "in relation" to proceedings for which the law firm was retained by the City. This record, which the City states was prepared by its Clerk, appears to be extracts from the City's accounting records, which were created and maintained for accounting reasons that have nothing to do with the proceedings. Based on my

> examination of the record, there is no obvious relationship between it and the actual conduct of the proceedings, nor is any such relationship explained by the City in its representations.

I agree with the reasons of Senior Adjudicator Higgins in Order MO-2024-I, and adopt them for the purposes of this appeal.

I have considered the record at issue in this appeal in the context of the discussion from Order MO-2024-I, referred to above, and I find that it does not meet the second requirement of the test for exclusion under sections 52(3)1, 52(3)2 or 52(3)3.

As I indicated above, Record 3 is an Indemnity Agreement entered into between the City and THESI, two institutions under the *Act*. Although the parties to the sale of the lighting assets might have turned their minds to the consequences of the sale *vis-à-vis* the workforce, I am not persuaded that there is any relationship between this record and the conduct of actual or anticipated proceedings (under 52(3)1), negotiations (section 52(3)2) or any labour relations or employment-related matters in which either institution has an interest (section 52(3)3), in the sense contemplated in *Ontario (Solicitor General)* referred to above. Although the decision of the two institutions to include an indemnity agreement may have arisen from a consideration of the workforce and the consequences that might flow from the asset sale, I find that it is too remote to qualify as being "in relation" to any of the situations contemplated by section 52(3). As well, similar to the situation in Order MO-2024-I, the type of information in Record 3 has a "strong connection to government accountability", which is "an 'overarching' purpose of access legislation."

In view of my finding that Record 3 is subject to the *Act*, and I will review the possible application of the specific exemptions claimed for it.

THIRD PARTY INFORMATION

The City has claimed the application of the mandatory exemption in section 10(1) for Records 1, 2 and 3.

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, PO-2371, PO-2384, MO-1706].

As I noted above, the City contacted THESI to obtain its views on the disclosure of a number of records, and after receiving THESI's comments, subsequently claimed that sections 10(1) and 11 apply to certain portions of them. The City and THESI are both institutions under the *Act*.

In Order MO-2186, Adjudicator Beverly Caddigan considered a situation where a municipality submitted a proposal to an institution under the provincial *Act* in response to a Request for Proposals issued by the provincial institution. She came to the following conclusions regarding the municipality's ability to rely on the mandatory exemption in section 10(1) of the *Act*:

> In my view, the exemption under section 10(1) is not applicable to the records at issue in this appeal. This office has long held that Section 10(1) is designed to protect the confidential "informational assets" of **businesses or other organizations** that provide information to institutions. This finding has been upheld in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In this case, the parties are two public bodies, not businesses or other non-public sector organizations.
>
> This view is supported by the ability an institution has to exempt records from disclosure under section 9. That section may be claimed to exempt information received in confidence by municipal institutions from government bodies, as opposed to business entities. I also note that where the objective of denying access is to protect the business interests of an institution such as the Municipality, the exemption found in section 11 of the *Act* (economic and other interests) exists for this purpose. [emphasis in the original]

Faced with a similar situation in Order MO-2377-F, which involved the City of Ottawa and the Municipal Property Assessment Corporation (MPAC), Adjudicator Frank DeVries stated:

> [In Order MO-2192-I] Adjudicator Faughnan reviewed the representations of the City on the application of section 11 to the records, and found that section 11 did not apply to the records, as the possible harms *to the City* were not made out. However, in response to the invitation to provided representations, MPAC has submitted that disclosure of the records would lead to economic harms to it. As identified above, as a result of the findings in Order MO-2192-I, MPAC was notified as an affected party and invited to provide representations on the possible application of section 10(1) to the records at issue. 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.)]. MPAC, however, is an institution under the *Act*, and section 11 of the *Act* is a section whose purpose is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions … 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.

Previous orders have established that possible harm to an institution ought to be addressed under section 11, not section 10. In Order P-218 former Assistant Commissioner Tom Wright stated as follows regarding sections 17 and 18 of the *Freedom of Information and Protection of Privacy Act* (similar to sections 10 and 11, respectively, at issue in this appeal):

> In my view, the scheme of the Act contemplates that harm to the competitive or financial position of an institution should be addressed by a claim for exemption pursuant to section 18 of the Act and not section 17. Accordingly, I have considered only the institution's representations regarding the impact that disclosure would have on the affected parties in my discussion of section 17. I will consider the institution's submission relating to harms to the institution under section 18.

I agree with the statement made by the former Assistant Commissioner, and adopt it for the purpose of this appeal. In this appeal, the City of Ottawa initially issued its access decision and denied access to the responsive records based on a number of exemptions, including section 11. [MPAC] provided representations on the possible harms under both section 10 and section 11. In the circumstances, since MPAC is an institution under the *Act*, in this appeal I will consider the possible application of section 11 to the records at issue, based on the possible harm to MPAC.

I agree with the previous decisions referred to above. In my view, the appropriate exemption to be considered for the type of information at issue in Records 2 and 3 is section 11. The absurdity created by taking a different approach is apparent from THESI's initial representations on this issue:

> The *Boeing* case specifically addresses requirements that the information must have been supplied to the institution in confidence, whether implicitly or explicitly. The *Boeing* case held that the contents of the contract involving an institution and a third party will not normally qualify as having been "supplied" but rather will be treated as being mutually generated even where the contract is preceded with little or no negotiation, or where the final agreement reflects information that originated from a single party.

> THESI submits that this jurisprudence has no application with respect to information supplied between two institutions subject to the Act; they are both institutions, and not third parties. This is particularly the case where, as here, the City of Toronto is 100% owner of Toronto Hydro, which in turn is 100% owner of THESI. Where one institution (the City) owns 100% of the shares of the other party (through the Toronto Hydro share ownership), expectations of confidentiality pertain between the parties. Therefore, information supplied to and from the City and THESI is by definition supplied in confidence, both implicitly and explicitly.

In its Reply submissions, however, THESI acknowledges that section 10(1) should not have been claimed for Records 2 and 3. It states:

> The nature, purpose and extent of protection of the information of private parties differs from that given to government institutions, reflecting the difference between sections 10 and 11…
>
> Thus, the assertions made by THESI with respect to section 10 are only alternative to the section 11 submissions. The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace, and this has been THESI's articulated concern through this proceeding…
>
> It is the s. 11 test, not the s.10 test, that should be applied to THESI's information. To treat an institution as a "third party" when a requester strategically directs its request to another institution undermines the protection of s.11. It is inappropriate to treat THESI as a third-party claiming the s. 10 exemption, rather than as an institution claiming the s. 11 exemption.

Based on the above discussion, and as acknowledged by THESI, I find that section 10(1) has no application with respect to Records 2 and 3 in the circumstances of this appeal. However, I will consider the application of section 11 to them, below.

The City has claimed the application of sections 10(1)(a) and (c) for a small portion of Record 1. This record is a receipt from a named company made out to the City for an agreed upon amount paid by the City of an assignment fee pursuant to an assignment agreement. The remaining portions of this record were disclosed to the appellant. The assignment agreement was also disclosed by the City in response to the current request.

Sections 10(1)(a) and (c) of the *Act* read:

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

> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
>
> (c) result in undue loss or gain to any person, group, committee financial institution or agency.

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

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

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

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

The City did not provide submissions on the application of section 10(1) to Record 1 in its initial representations. On Reply, it stated only that:

> Record 1 contains commercial information of [the named company], representing the fee they charged to consent to an assignment of certain rights of way necessary to maintain lighting on bridge owned by [the named company].

I turn first to the second part of the three-part test set out above. In order to satisfy part 2 of the section 10(1) test, the City and/or third party must establish that the information was "supplied" to the City "in confidence", either implicitly or explicitly.

Supplied

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 10(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 preceded by 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)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be 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 not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

As I indicated above, Record 1 is a receipt issued by the named company for an amount paid by the City of an assignment fee pursuant to an assignment agreement. The assignment agreement was included as a responsive record to this request and was disclosed to the appellant in its entirety. Record 1 was disclosed in its entirety as well, with the exception of the dollar amount paid by the City. In my view, this amount is closely tied to the agreement reached between the parties to the assignment agreement and would have been the amount negotiated under this agreement. On this basis, I find that the information that has been severed from Record 1 was not "supplied" within the meaning of section 10(1) as it reflects a negotiated assignment fee. Moreover, there is nothing on the face of the record to indicate that there were any expectations of confidentiality with respect to this amount.

Accordingly, I find that the dollar amount that has been severed from Record 1 does not meet the definition of "supplied" for the purposes of this part of the part 2 test, and section 10(1) does not apply to this record.

ECONOMIC AND OTHER INTERESTS

The City claims that the discretionary exemptions in sections 11(d) and (e) apply to exempt Records 1, 2 and 3 from disclosure. THESI submits that sections 11(c) and (d) apply to exempt Record 2 from disclosure. These sections of the *Act* 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 report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

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

For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363].

Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

Sections 11(c) and (d)

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to

refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

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

Section 11(e)

In order for section 11(e) to apply, the City and/or THESI must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution. [Order PO-2064]

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034]. Background information that may have formed the basis for positions taken during negotiations are distinguishable from the positions themselves, and such background information is not exempt under section 11(e) [Order M-862].

Representations

Record 1

As I indicated above, Record 1 is a receipt issued by a named company for an amount paid by the City of an assignment fee pursuant to an assignment agreement. The assignment agreement was included as a responsive record to this request and was disclosed to the appellant in its entirety. Record 1 was disclosed in its entirety as well, with the exception of the dollar amount paid by the City.

In his sur-reply representations, the appellant notes that neither the City's original representations nor its reply representations make reference to the application of section 11 to the severed portion of Record 1. I agree. I also note that the record itself does not provide the evidence necessary to support the application of section 11. In the absence of "detailed and convincing" representations in support of the position that release of Record 1 would result in the harms under sections 11(d) or (e), I will order that the severed portion of this record be disclosed.

Record 2

Record 2 is a 61-page Service Agreement entered into between the City and THESI dated January 1, 2006. Access to portions of 26 pages was denied on the basis of the exemptions in sections 11 (c), (d) and (e), with the City claiming that sections 11(d) and (e) applied to its interest, and THESI taking the position that sections 11(c) and (d) applied. In the appellant's representations, he indicates that he is not seeking access to the City's banking information, which is found in section 6.3(b) of Record 2. Accordingly, this section of Record 2 is no longer at issue, and I will not address it further. In addition, both the City and THESI acknowledge that the information that had been withheld in section 2.7(g) was disclosed in another section. Accordingly, both parties agreed that this information could now be disclosed. As a result, I will order the City to disclose the withheld information in section 2.7(g) of Record 2 in the Order Provisions below.

I will review separately the representations made by the City and THESI regarding their respective section 11 claims.

The City's section 11 claims

The City's initial representations

In its initial representations, the City claims that sections 11(d) and (e) apply to the withheld portions of Record 2. It states that although the Service Agreement has been completed, there are still issues relating to the transaction and that disclosure of the withheld information could affect the City's underlying strategies with respect to future transactions. The City then provides confidential representations on how the disclosure of certain information, and in particular one specific section of the Service Agreement, could affect the City's financial interests or reveal the City's position on any negotiations.

The City also states that disclosure could reveal the City's strategy regarding potential lawsuits arising from the City's transactions, which would also affect the City's financial interests or reveal the City's position on any negotiations.

The appellant's representations

The appellant states that the harms identified by the City and THESI are simply "speculation and supposition". The bulk of the appellant's representations focus on how THESI would not be harmed by disclosure, and these are set out below. The appellant provides few representations regarding the possible section 11 harm to the City.

With respect to the exemption in section 11(e), the appellant notes:

> Clause 11(e) will only apply if the record contains positions, plans, procedures, criteria or instructions intended to be applied to negotiations that are being carried

> on currently, or will be carried on in the future, by or on behalf of the City: (Order PO-2064). Record 2 does not apply to any current or future negotiations and therefore is not subject to this exemption. [emphasis in original]

The City's reply representations

The City maintains that disclosure of the withheld information could reasonably be expected to result in the harms under sections 11(d) and (e) of the *Act*, and provides an item by item review of certain severances and the reasons why it believes that disclosure of each of the withheld parts would result in the identified harms. I have set out below, the City's specific arguments regarding disclosure of the withheld portions of various sections of Record 2.

Section 1.1(ss), (a) and (b): Interest rate

The City states that disclosure of the interest rate could reasonably be expected to affect the economic interest of the City as it will inform other service providers to the City of a rate the City has accepted.

Section 8.2(b): agreement as to what occurs if a new agreement is not entered into

The City submits that disclosure could reasonably be expected to prejudice the economic interests or be injurious to the financial interests of the City as it would reveal information that could be used by unions, developers or other street lighting service providers to the detriment of the City if this were known in advance.

Sections 9.1(b), 9.4, 9.6(a) and (i): termination in certain circumstances and price of a compulsory purchase by the City

According to the City, disclosure could reasonably be expected to prejudice the economic interests or be injurious to the financial interests of the City as it would reveal information that could be used to the detriment of the City if these possibilities and price were known in advance of the event.

Section 9.7(b) and (c): transfer of SEL System on termination

The City submits that disclosure could reasonably be expected to prejudice the economic interest or be injurious to the financial interests of the City as it would reveal information that could reasonably be expected to affect the value of the shares to be sold.

Section 9.8: Valuation principles

As I indicated above, in its initial representations the City provides confidential representations on how the disclosure of this information could reasonably be expected to affect the City's

financial interests or reveal the City's position on any negotiations. The City did not address this section in its reply submissions.

Section 9.9(c) and (d): terms identifying certain rights or obligations

The City states that disclosure could reasonably be expected to prejudice the economic interest or be injurious to the financial interests of the City as it would reveal information that could be used by unions, developers or other street lighting service providers to the detriment of the City if this were known in advance.

Section 14.1: indemnity provisions

The City states that the agreement was negotiated at arm's length and that the parties operate at arm's length. The City explains that the indemnity provisions address other arrangements between the parties in addition to the Service Agreement, but which are relevant to the services provided. Some of these other arrangements involve specific third parties or other users of the City's property. The City submits that disclosure could reasonably be expected to prejudice the economic interest or be injurious to the financial interests of the City.

Section 15.4: force majeure

The City claims that sections 11(c) and (d) apply to this portion of Record 2 and has made submissions relating to it. The appellant has also made submissions on this section of the record. However, the records sent to this office appear to indicate that section 15 was disclosed to the appellant in its entirety. As it is not clear whether or not section 15.4 has been disclosed, I will consider the City's arguments in favour of withholding it.

The City submits only that, "this clause cross-references another provision [a section referenced above] of the agreement which the City has severed."

Schedule A: City's estimated costs of the project

The City states that this schedule was developed and provided by the City as its estimate of the cost of this project. The City submits that disclosure of the cost of the project could reasonably be expected to prejudice its economic interests. The City states further:

> The cost is stated to be installed costs inclusive of labour and materials and is based on 2005 dollars. Presuming that the material costs could be determined from other sources, disclosure of the severed items would permit other parties to determine labour costs. This may also permit third party material providers to procure the relevant poles on strategic terms in advance of any tender calls for material or services. Disclosure could reasonably be expected to prejudice the economic interest or be injurious to the financial interests of … the City.

Schedule D: Service Response Standards

The City indicates that this schedule:

> does not describe the services purchased but rather adjusts a portion of the service fee depending on the performance of [THESI] in terms of response time in performing certain services.

However, the City does not explain how disclosure could reasonably be expected to result in any harm. Similarly, the City did not specifically address Schedules F or I in its representations.

The City also states that, with respect to section 11(d):

> … disclosing the severed information in sections 1.1(ss),(a) and (b), 8.2(b), 9.1(b), 9.4, 9.6(a)(i), 9.7(b) and (c), 9.9(c) and (d), 14.1 and Schedule A of Record 2 could reasonably be expected to be injurious to the financial interest of the City. The harm that could reasonably be expected is set forth with respect to the relevant sections of Record 2 in [its discussion of these sections under the section 10(1) heading].

Insofar as section 11(e) is concerned, the City explains that sections 5.4 and 5.5 relate to procedures and criteria to be applied to future negotiations between it and THESI. The City acknowledges, however, that the disclosure of these severed provisions will not prejudice the negotiating positions of the parties *inter se*.

The appellant does not specifically address the section 11 claims made by the City in his sur-reply representations.

THESI's section 11 claims

THESI's initial representations

THESI also takes the position that disclosure of the withheld portions of the Service Agreement could reasonably be expected to result in the harms under section 11 (c) and (d) to it, as it is an institution under the *Act*.

It begins by explaining that, although it is an institution, it operates in a highly competitive market for the provision of lighting services, and that it competes with private sector companies that "are not public companies and are not subject to freedom of information legislation." It then states:

> The redacted information contained in Record 2 is information that could be used by competitors to adjust their pricing and other financial elements of competitive bids for street lighting services. THESI has experience bidding against private

> sector competitors whose costs, profit margins and other financial metrics are private and confidential. It would put THESI at a competitive disadvantage if its competitors are provided with the information redacted in the document.

THESI also submits that the disclosure of the information could reasonably be expected to be injurious to its financial interest, and therefore qualifies for exemption under section 11(d), as it would provide competitors with an unfair advantage in competitive bids.

THESI states:

> Most of the RFPs to which THESI will respond involve a sealed bid process where the competing bidders' information is not disclosed to the other bidders nor is the winning bidders' detailed costing and financial information disclosed to the unsuccessful bidders. If THESI's capital planning, service fees, internal business plans, and other financial metrics for the street lighting services division are disclosed to entities which will bid against THESI in future RFPs, THESI will be unfairly disadvantaged in such RFPs. It will have no knowledge, and no way of obtaining such highly competitive commercial information about its competitors.

In addition, THESI provides an affidavit, sworn by its [Director of the Street Lighting Division], in which this individual reviews the competitive nature of THESI's business and explains how the disclosure would result in the identified harms. In an attachment to the affidavit the specific redactions to the Service Agreement are identified, as is the competitive nature of each of the redactions. This affidavit was not shared with the appellant due to confidentiality concerns. However, I note that with the exception of six sections and two schedules of Record 2, the affidavit provides a brief description of the section or schedule and states only that this is a "competitive factor". The additional information regarding the other six sections and two schedules provide only minimal commentary on a possible consequence of disclosure, but do not indicate how this could reasonably be expected to harm its economic and/or financial interests.

The appellant's representations

As I noted above, the appellant states that the harms identified by the City and THESI are simply "speculation and supposition". Although the appellant acknowledges that THESI is a party engaged in a competitive business, he states that this Service Agreement:

> was not an arm's length transaction. It was a transfer from the City to a company that the City owns and controls, together with a related servicing agreement. [THESI] was not competing against other bidders; in fact, the City made it clear that it would not consider entering into the transaction with anyone but [THESI]. Thus, we reject the suggestion that harm would befall [THESI] were details of the servicing agreement to be made public.

The appellant also states:

> … a non-arm's length transaction with the corporation's sole shareholder should not have the competitive implications that the company claims. Surely the market will appreciate and understand that the arrangements worked out between [the City] and [THESI] have no bearing on how the company treats arm's-length customers in competitive commercial transactions - including no bearing on fair market value and market pricing. Certainly [THESI] should be able to distinguish the City agreement from true arm's length, commercial agreements, and to explain that to the marketplace. Thus, disclosure of the Records should not prejudice the company's dealings with its customers.
>
> For the same reason, disclosure of the Records would not permit competitors to gain an unfair advantage. The records do not disclose how [THESI] prices its services in a competitive environment. Despite the claim [in THESI's representations], the Records do not disclose the "costs, profit margins [or] financial metrics" of [THESI] when it operates in a competitive environment, bidding on work with truly arm's length customers. The Records relate to a unique, special, non-arm's length, non-competitive arrangement with the controlling shareholder. Quite frankly, the Records were created in a competitive vacuum.
>
> [THESI's] fear that this information will be used against it in future RFPs is speculative and unfounded. This was not an RFP situation. There were no competitive bids; in fact, there were no bids at all. The City was interested in entering into this contract only with [THESI], not with anyone else. … the Records have nothing to do with RFPs and sealed bids. We respectfully submit that there is no reason for the Records to contain the same financial information that would appear in commercial contracts with [THESI's] non-arm's length customers.
>
> Nowhere in the edited representations does [THESI] claim that its untendered, uncompetitive arrangement with the City is identical to a commercial contract that the company would have negotiated with a non-arm's length customer. That alone should be sufficient to dispose of the argument that the content of the Records would have a bearing on what happens in the marketplace.
>
> Finally, we note that in evaluating this uncompetitive, non-arm's length deal, the sale cannot be separated from the service agreement. The two are aspects of a single transaction. The evidence is clear that without the sale there would be no service agreement, and without the service agreement there would be no sale. We make this observation in case anyone attempts to argue that while the sale was not at arm's length the service agreement was negotiated on an arm's length basis. It

> is impossible to separate the two agreements in that matter; both form part of the same uncompetitive transaction.

The appellant then reviews each of the redacted portions of the agreement in detail, reviewing the nature of the redacted information and, in some cases, speculating as to what the information that was redacted may contain, and arguing that it would not qualify for exemption under section 11. In some instances, the appellant identifies certain information which he claims is also available from other sources.

The appellant also states that the evidence "indicates that this was not an ordinary commercial transaction, that the sale negotiations were not subject to market forces and that the parties were not arm's length." The appellant then provides information about the background to the entering of this agreement, and a number of quotations from newspapers and other reports which the appellant states support his position that this was not an ordinary commercial transaction.

THESI's reply representations

THESI also provides detailed representations in reply. It reviews the information it had provided earlier, and then again reviews each portion of the record that was severed, as well as the appellant's response to those severed portions. In many instances, THESI speaks to the assumptions made by the appellant about the nature of the withheld information, and then provides additional, confidential information in which it argues that disclosure would result in the identified harms. THESI has provided some additional detail regarding what it believes could result from disclosure of each section of the Service Agreement that is at issue.

THESI also states:

> Generally, the severances to the Record were made to protect financial and commercial information as defined in Order P-47 and Order P-80, including information on cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

The City's reply representations on harm to THESI

The City also refers to the harms which could result to THESI if the withheld information is disclosed, and states:

> It is the City's understanding that [THESI] competes in the market place in providing street lighting and common space lighting services to commercial, institutional, municipal and industrial customers throughout Ontario. It designs, builds, operates and maintains street lighting systems for roadways, parks, and laneways and parking areas. Disclosure of the key commercial terms upon which the affected party provides the same or similar services to the City would

> undermine its competitive position in bidding or negotiating to provide such services to others in a competitive environment.
>
> The Appellant argues that the characterization of the street and expressway lighting system as a municipal capital facility under section 110 of the *Municipal Act* evidences that there are no economic or financial interests to protect.
>
> The by-law passed by Council pursuant to Record 8 sets out the various statutory authorities for this transaction. Notwithstanding section 106 (the municipal bonusing prohibition), a municipality can provide financial or other assistance at less than fair market value to any person who has entered into an agreement to provide facilities under that section, which assistance may include selling property, as an ancillary matter to the municipal capital facility. While every attempt was made to confirm that the purchase price reflected fair market value, given the limited market for this transaction, there is a possibility that this transaction could be deemed by a third party to be at less than fair market value. Thus ancillary sale under section 110 supported the City's designation of the operation and maintenance of the Street Lighting System as the provision of a municipal capital facility.
>
> The appellant's argument fails to recognize that while the transfer of the assets may or may not have been for fair market value, the financial or commercial terms for the services provided with those assets represent the financial interests of [THESI], could prejudicially affect the competitive position of [THESI] and the economic interests of the City. The protection of those interests does not necessarily require that commercial terms of the services agreement with the City be set after a competitive process. The fact that Toronto Hydro operates and maintains a municipal capital facility does not justify any conclusion that it does not do so on market terms and conditions or terms and conditions that would otherwise be competitive in the market place.

As I noted above, the City explains that sections 5.4 and 5.5 relate to procedures and criteria to be applied to future negotiations between it and THESI, and states:

> While the disclosure of these severed provisions will not prejudice the negotiating positions of the parties *inter se*, their disclosure could affect the competitive position of [THESI].

The City also refers to a number of specific sections of the agreement and identifies how disclosure could result in section 11 harms to THESI. Many of the City's specific arguments are similar to the ones it made for the harms to its own interest, set out above.

With respect to section 2.20, the City indicates that disclosure will affect the financial or economic interests of the TTC and THESI, but does not explain what the harm might be or how it could reasonably be expected to occur.

Regarding section 10 of the agreement, the City's confidential representations focus on the harms to THESI. However, it maintains that the agreement was negotiated at arm's length and the parties operate at arm's length.

The appellant's sur-reply representations

The appellant's sur-reply representations review a number of issues, and include further representations regarding the relationship between the parties in this Service Agreement, the nature of the information contained in the agreement, and the public interest in this information. He also states as follows regarding THESI's concerns and representations on pricing information:

> Some orders seem to have accepted the argument that revealing pricing information can prejudice third parties and institutions …. Most of these orders, however, are older. For example, the orders on which the [City and THESI] rely heavily (Orders P-47 and P-80 date back to 1989).
>
> These earlier orders seem to be making way for a new line of reasoning – reflected in the Commissioner's 2006 Report – which holds that the disclosure of price is not unfair and does not constitute prejudice. Disclosure of price is what competition is all about. …

Later in its submissions the appellant reviews THESI's focus on the competitive nature of the withheld information, and states:

> Competition is competitive. …. In and of itself, competition does not constitute prejudice to one's competitive position. …
>
> We note that [THESI] now has a 30-year service agreement with the largest municipality in Canada. It will not need to compete for the City of Toronto business for another quarter century. In other words, [THESI's] competitive position vis-à-vis the City will not be threatened for a long, long time.
>
> The work for which [THESI] competes over the next quarter century will involve other municipalities (each one smaller than Toronto). These potential customers will have their own positions concerning terms, conditions, standards, response times, and other elements of the agreement; presumably pricing will vary as these factors vary.

Analysis and Findings

General Findings

I have reviewed the extensive representations provided by the parties on the issue of the application of the section 11 exemption to the withheld portions of Record 2, as well as the record itself.

With one exception, I find that neither the City nor THESI has provided sufficiently detailed submissions to support a finding that disclosure of the withheld portions of Record 2 could reasonably be expected to result in the harms in section 11(c) and (d). Moreover, I am not persuaded that the withheld portions of sections 5.4 and 5.5 contain 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.

THESI and the City provide lengthy representations in support of the position that the disclosure of the withheld terms, which were negotiated and agreed to by the parties, will provide THESI's competitors with information which could reasonably be expected to prejudice THESI in future negotiations, or provide competitors with an unfair advantage over THESI. In my view, this argument is simply not made out. Both the City's and THESI's representations are, by and large, general in nature, referring to the "competitive" nature of the withheld information. The fact that THESI competes in the marketplace, and has agreed to certain identified terms in this agreement, does not, in and of itself, result in the harms set out in sections 11(c) and (d).

I also note that the agreement at issue is an agreement between two institutions. Many of the arguments put forward by the City and THESI refer to the prejudice that may result from the release of information to other parties who may in the future negotiate contracts with these institutions. THESI, in particular, appears to believe that disclosure would put it at a disadvantage vis-à-vis other private sector companies as it would have no way to obtain similar information about their competitive commercial information. However, these arguments fall down on a number of grounds.

In the first place, although there is no requirement in section 11 that the information in the record be "supplied" by one of the parties (as is required for the exemption in section 10(1) to apply), the concern identified by THESI, that its position as an institution places it in a uniquely vulnerable position, is simply not supported. If anything, THESI does not need to establish that the information was "supplied" by it, and only needs to provide sufficient evidence of harms, to qualify for exemption, which places THESI in a preferred position over other companies that enter contracts with institutions, and who must fit within the requirements of section 10(1) to qualify for exemption.

Secondly, as argued by the appellant on a number of occasions, the terms of this Service Agreement between two parties who are clearly connected are unique, and although the City and THESI argue that this agreement was negotiated at arm's length between them, the parties are

not at arm's length. In my view this undermines their concern that the terms of this agreement, if disclosed, would result in prejudice to future agreements with other unrelated parties. Given the uniqueness of the relationship and nature of the agreement between the City and THESI, I am not persuaded that knowledge of the terms agreed to in this situation could reasonably be expected to prejudice THESI's ability to negotiate with other entities in the future.

Thirdly, the agreement at issue is a 30-year agreement between THESI and the largest municipality in Canada. The suggestion that the terms of this agreement will in some manner bind the parties in future negotiations with other, smaller, municipalities, or any other third party, is difficult to comprehend, and the representations submitted by the City and THESI fail to provide detailed and convincing evidence that such a result could reasonably be expected to occur if the withheld portions of the record are disclosed.

Lastly, many contracts between institutions and other third parties have been disclosed or ordered disclosed by this office in the past, on the basis that information of this nature is not exempt from disclosure under section 10(1), and that negotiated terms of an agreement are generally to be disclosed (see, for example, orders MO-2403 and PO-2453). This reflects the importance of taxpayers knowing the terms of the agreements entered into by institutions (see: Order PO-2435), and is consistent with the comments made by the Commissioner in her 2005 and 2006 Annual Reports. Speaking about third party contracts and the application of section 10(1) of the *Act* (section 17(1) of the provincial *Act*), the Commissioner stated in her 2006 Annual Report:

> Disclosure of the final contracts entered into by governments goes only part way in ensuring meaningful public scrutiny of public expenditures. The signing of a contract for goods or services is generally the culmination of the procurement process established by a particular government institution. Ensuring the integrity and effectiveness of that procurement process is also an essential element of government accountability for the expenditure of public funds.
>
> In recent years, the issue of transparency and accountability in government procurement has come to the forefront. This was particularly highlighted at the federal level with the release of the report of the Gomery Commission, which inquired into the federal Sponsorship Program and advertising activities. Disputes regarding the awarding of contracts have also arisen on a regular basis at both the municipal and provincial government levels.
>
> Elected officials will readily agree that citizens should get the best value for their dollar. Recent experiences have demonstrated that it is transparency and accountability that ensure that the public procurement process is not only fair, but that successful bids are reasonable and in the best interests of the public.

In my view, these comments apply equally in situations where the contracting parties are both institutions and the analysis is conducted pursuant to section 11 of the *Act*.

Notwithstanding the above, clearly the parties are entitled to rely on the section 11 harms to exempt the information from disclosure if the specific harms are established. However, in my view the City and THESI have failed to provide sufficient evidence to establish the section 11 harms for any of the severances made to Record 2, with the exception of the withheld portions of the information contained in section 10 of the agreement. The particulars of my findings for each institution are set out separately below.

Analysis and findings for the City's section 11 claims

Sections 11(c) and/or (d)

The majority of the City's representations contain only bald assertions that disclosure of the information contained in specific portions of the record could reasonably be expected to result in the harms under sections 11(c) and (d). In the absence of any explanation, detailed or otherwise as to how such a harm could reasonably be expected to come to pass, the City's vague and generalized submissions are insufficient to establish the application of either of these sections to the following portions of Record 2:

- Section 9.1(b): permits termination in certain circumstances
- Section 9.4: permits termination in certain circumstances
- Section 9.6(a)(i): reveals the price of a compulsory purchase by the City
- Section 9.7(b) and (c): transfer of SEL System on Termination
- Section 9.9(c) and (d): terms identifying certain rights or obligations
- Section 14.1: indemnity provisions
- Section 15.4: force majeure
- Schedule D: Service Response Standards
- Schedule F: Service Credits
- Schedule I: Capital Expenditures

With respect to the City's arguments concerning Section 1.1(ss), (a) and (b) (Interest rates), I find that the City has provided insufficient evidence that the harms in sections 11(c) or (d) could reasonably be expected to occur on disclosure This is not a standard agreement, nor was it negotiated at arm's length. Rather, it is a multi-million dollar unique contract between two linked parties. The City has not explained how any specific harm could reasonably be expected to result from disclosure of the interest rates, particularly in circumstances where the City stands in a different relationship to other service providers.

Insofar as the information contained in Section 8.2(b) (what occurs if a new agreement is not entered into) is concerned, although the City has indicated who might be able to avail themselves of the information, it does not explain how this could reasonably be expected to result in a

detriment to the City. I again find the City's representations insufficient in establishing the application of the section 11(c) and (d) harms.

Similarly, the City's confidential explanations regarding Section 9.8 (Valuation principles) suggest a possible result should this information be disclosed, but are not sufficiently detailed in establishing that such a result could reasonably be expected to occur. My review of this portion of the record does not support the City's contention that disclosure could reasonably be expected to result in the harms in sections 11(c) or (d).

I also find the City's arguments regarding Schedule A (City's estimated costs of the project) to be entirely speculative. The City has provided no evidence to support its suggestion that disclosure of the cost of the project could reasonably be expected to prejudice its economic interests or be injurious to its financial interests. The City postulates that third parties might act in a certain manner, but has not indicated, for example, that it has had past experience with this happening or that there is a reasonable basis to expect that such might happen. Accordingly, I find that the City has failed to establish the application of the exemptions in sections 11(c) or (d) to this information.

Section 11(e)

I am not persuaded that disclosure of the information contained in sections 5.4 and 5.5 contain or would reveal 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. I accept that these sections set out a plan or procedure to be followed in the event that adjustments are required during the term of the agreement. Although the City, in its representations, indicates that the parties are to "negotiate" in arriving at a mutually agreeable adjustment, that is not the language of the agreement. Rather, these two sections set out an already negotiated method by which adjustments in this regard are to be determined as between the two parties to the agreement, failing which, the matter is to be resolved under the dispute resolution mechanism, also set out in the agreement. Accordingly, I find that section 11(e) does not apply to the withheld portions of sections 5.4 and 5.5.

Analysis and findings for THESI's section 11 claims

Sections 11(c) and/or (d)

I reject the arguments made by THESI, and supported by the City, that the disclosure of certain portions of Record 2 could reasonably be expected to result in the identified harms.

I find that I have not been provided with sufficient evidence to establish the section 11(c) or (d) harms for the information contained in certain sections of the agreement, which includes negotiated amounts, percentages, rates, prices and other similarly negotiated terms or information. Neither THESI nor the City has provided detailed or convincing information that disclosure of those provisions could reasonably be expected to benefit other parties and/or how

that could translate to harm to THESI's economic, financial or competitive interests. This information is found in the following sections of Record 2:

- section ss – portion of the definition of "interest rate"
- section cccc - an amount in the definition of "Spot Improvements Cap Amount"
- section 2.4(a) - an identified amount relating to service response standards
- section 2.7(f)(ii) - an identified percentage relating to Greenfield Expansion
- section 2.8(a) - an identified percentage relating to construction
- section 2.20 - the consideration for decommissioned poles
- section 5.1(a) – and amount of money, and the timing of the payment
- section 5.2(a) – annual adjustment (formula)
- section 5.2(b) – annual adjustment amount
- section 5.3(b) - maintenance costs (and formula)
- section 5.5(b) – extraordinary adjustments
- section 6.1(a) – invoicing information
- section 8.2(b) – new agreement information
- section 9.1(b) – termination clause
- section 9.4(a) – termination item
- section 9.7(b)-(c) – transfer on termination
- section 9.9(a)(ii)-(iii) – transfer to City
- section 9.9(c)-(d) – transfer to City
- section 14.1(a)-(b) – indemnities
- section 15.4 – termination
- Schedule A - City's estimated costs of the project
- Schedule F – Service Credits

THESI also argues that the information in the sections set out below would reveal information which would impact its competitive position. Although previous orders have found that the disclosure of information such as financial statements and profit/loss information may result in competitive or financial harm, the nature of the withheld information at issue in this appeal relates directly and specifically to the agreed upon terms of this agreement, and not to THESI's financial information generally. Accordingly, I am not persuaded, based on the minimal argument made by THESI and the City, that disclosure of the following information could reasonably be expected to result in the harms in sections 11(c) or (d):

- section 9.6(a)(i) and (ii) – transfer of SEL system
- section 9.8(a) – valuation principles
- section 14.3 – insurance
- Schedule D - Service Response Standards
- Schedule I - Capital Expenditure

I have not received specific representations for the following portions of Record 2, other than the bald assertions that some of this information is a "competitive factor". In the absence of such representations, I find that the following sections of Record 2 do not qualify under the section 11(c) or (d) exemption:

- section vv – definition of "Labour Index"
- section 5.3(a) – review of service fees
- section 5.4(a)-(g) – capital expenditures
- section 5.5(a) – extraordinary adjustments
- section 9.5 – suspension of services
- section 9.8(b) and (d) – valuation principles

However, the confidential representations made by the City and THESI collectively regarding section 10 of the Service Agreement do provide sufficiently detailed and convincing evidence, when considered in conjunction with the information contained in this section of the Service Agreement to satisfy me that disclosure could reasonably by expected to prejudice the economic interests and be injurious to the financial interests of THESI. Although the appellant correctly notes that the title of this section, "Right of First Refusal" has already been disclosed, the particular terms of this event have not been disclosed. In my view, disclosure of the information contained in section 10 of the Service Agreement, along with other information that will be made available, could reasonably be expected to result in the anticipated harm in sections 11(c) and (d). Subject to my discussion under the heading "Exercise of Discretion", I find that section 10 of the Service Agreement qualifies for exemption under sections 11(c) and (d).

Section 11(e)

The only portions of the record that the City claims to be within the exemption in section 11(e) are sections 5.4 and 5.5. My findings above, regarding the City's interest in the records, is equally applicable to any interest THESI might have in this regard. Accordingly, I find that section 11(e) is not applicable to withhold sections 5.4 and 5.5 of Record 2 from disclosure.

Record 3

As I indicated above, Record 3 is an Indemnity Agreement entered into between the City and THESI.

The City states, in its initial representations, that the knowledge of the terms of this agreement could reasonably be expected to interfere significantly with any labour relations negotiations, and also that this could possibly harm the financial interests of the City. The City also provides confidential representations which provide slightly more detail regarding the possible effect of the disclosure of Record 3.

The appellant states:

> … Record 3… does not contain positions, plans, procedures, criteria or instructions *intended to be applied to negotiations*. Record 3 may become relevant if there is a failure of negotiations, but it does not satisfy the criterion of containing positions, plans, procedures, criteria or instructions intended to be applied to negotiations. [emphasis in original]

In its sur-reply representations, the City restates its position that the disclosure of Record 3 could reasonably be expected to result in harms under sections 11(c), (d) and (e), and provides confidential representations in support.

Analysis and Finding

As I indicated in my earlier discussion under section 52(3), the Indemnity Agreement entered into between the City and THESI pertains to the relationship between these two parties. It was prepared by these two institutions, signed and intended to be used by both institutions in relation to the transfer of assets from one to the other.

I accept that the decision of the City and THESI to include an indemnity agreement may have arisen from a consideration of the workforce and the consequences that might flow from the asset sale. However, I am not persuaded that its disclosure could reasonably be expected to result in the harms in either section 11(c) or (d). Having reviewed the content of the record and the City's representations, I find that they fall short in explaining how disclosure could reasonably be expected to prejudice its (or THESI's) economic interests or be injurious to its financial interests. Due to the confidentiality of the representations and the contents of the record, it is not possible to elaborate on this finding, other than to say that the City has failed to provide sufficient evidence that disclosure of Record 3 could reasonably be expected to interfere significantly with any negotiations it may enter into in the labour relations context. Nor do its representations sufficiently explain how disclosure of the record could reasonably be expected to reveal its strategy regarding any potential lawsuits arising from the transaction.

I am also not persuaded that the information in Record 3 contains or would reveal 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. As its title indicates, Record 3 is an agreement reached between the City and THESI relating to indemnification between themselves in the event that certain consequences flow from the asset sale. The City does not explain how this record would be used in negotiations and the record does not support this contention. Accordingly, I find that section 11(e) does not apply to exempt Record 3 from disclosure.

Summary

In summary, I accept that the harms in sections 11(c) and (d) could reasonably be expected to occur should section 10 of the Service Agreement (Record 2) be disclosed. However, I find that the City and THESI have failed to provide detailed and convincing evidence that disclosure of

Record 1 and 3 and the remaining portions of Record 2 could reasonably be expected to result in the harms set out in sections 11(c) and/or (d). Moreover, I find that section 11(e) does not apply in the circumstances. As no other exemptions apply to Records 1, 3 and the remaining portions of Record 2, these records and parts of records should be disclosed to the appellant.

CLOSED MEETING

The City relies on the exemption in section 6(1)(b) to deny access to Records 6, 7 and 9.

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 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

In support of its position that Part 1 of the test has been met for the three records for which the section 6(1)(b) exemption is claimed, the City states:

> … the Policy and Finance Committee met on February 15, 2005 to discuss [Record 9] staff report and attachments dated February 14, 2005, "2005 Operating Budget Funding- Hydro Proceeds".

> The Policy and Finance Committee also met on November 22, 2005 to discuss [Record 6] staff report and attachments dated November 10, 2005, "Confidential Communication from Toronto Hydro Corporation".
>
> … City Council met on September 28, 29 and 30, 2005 to discuss the "Street and Expressway Lighting Asset Sale" of Report 8 of the Policy and Finance Committee…
>
> City Council also met on December 14 and 16, 2005 to discuss [Record 7], report dated December 9, 2005, "Finalization of Agreements, Street and Expressway Lighting Asset Sale".

The appellant acknowledges that the Policy and Finance Committee met *in camera* on February 15 and September 22, 2005, and that City Council met *in camera* on September 30, 2005. He states that he makes no argument concerning the first branch of the three-part test in respect of those three meetings.

However, with respect to the December 14, 2005 City Council meeting, the appellant takes the position that, although City Council met *in camera* on that date, and Record 7 was flagged as confidential, it did not consider Record 7 during the *in camera* session. The appellant states that, instead, the "entire discussion of Record 7, and the only discussion related to Record 7, occurred during the public portion of the meeting." In support of this position, the appellant refers to a videotape of the afternoon session of the December 14 Council meeting, posted by the City Clerk on the Toronto website and the meeting minutes, which are also posted on the City's website. The appellant noted that the minute of the decision to go *in camera*, indicates that Record 7 and the street light sale were not discussed in camera.

In its reply representations regarding Record 7, the City addresses this argument by the appellant, and states:

> Record 7, a report dated December 9, 2005, was submitted directly to City Council for its meeting on December 14 and 16, 2005 together with Record 6. Since it was considered together with Record 6, Council's adoption of the report (ie. Record 7) as amended also appears as part of report 10, clause 8 of the Policy and Finance committee. The report itself is marked confidential and the decision document for the December 14 and 16, 2005 Council meeting indicates that, with the exception of recommendation (2) which became public, this report remains confidential in its entirety…

Findings on part 1 of the section 6(1)(b) test

The City asserts that *in camera* meetings were held by Council on the dates referred to above. Although he takes issue with the City's position that Record 7 was considered at the December 14, 2005 *in camera* meeting, the appellant does not dispute that the *in camera* meetings referred

to by the City were held. Based on the representations submitted by the City and the appellant, I am satisfied that the meetings did take place, and that Part 1 of the three part test under section 6(1)(b) has been met.

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

The City's representations

In support of its position that part two of the three-part test is established, the City states that it was entitled to hold a closed meeting under section 239 of the *Municipal Act, 2001*. It states:

> The City further submits that both the Policy and Finance Committee and City Council considered the above noted reports in the in-camera portions of their meetings in accordance with section 239(2)(a) of the *Municipal Act* and subsection 27-10 of the Toronto Municipal Code-Council procedures. [Record 7 was] considered in camera in accordance with section 239(2)(d) of the *Municipal Act*.
>
> Sections 239(2)(a)- security of the property and 239(2)(d) - labour relations of the *Municipal Act* provides that:
>
> (2) 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 municipality or local board;
>
> (d) labour relations or employee negotiations
>
> As previously submitted on Appeal MA-050410-1, the City is of the view that the "security of the property" includes the security or protection of the financial and economic interests and assets of a municipality. Authors Michael O'Connor and Michael J. Smither, in chapter 3-3 of their book, "Open Local Government" [St. Thomas, ON: Municipal World, c.1995a], provide guidance to municipalities as to the appropriate times to invoke section 55(5)(a), now section 239(2)(a) [of the *Municipal Act*]. They state that many of the instances can be drawn from the *Municipal Freedom of Information and Protection of Privacy Act*. The examples given by the authors for invoking section 55(5)(a)/239(2)(a) refer to the provisions of sections 11(c)(d) and (g) of the *Act*:
>
> 1. The security of the property of the municipality or local board. For example
>
> - Information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of the council or local board,

- Information whose disclosure could reasonably be expected to be injurious to the financial interests of the council or local board;
- Information including the proposed plans, policies or projects of the council or local board if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit of loss to a person.

The City submits that in the present case, the disclosure of the [records] could reasonably be expected to prejudice the economic/competitive positions of the City or be injurious to its financial interests.

The [records] speak to the proposed plans and negotiations with respect to the City's sale of street and expressway lighting assets to TH Street Lighting or refers to other reports that do so and includes financial implications. Notwithstanding that the sale has since been finalized, there are some matters that are still outstanding and the [records] could reveal the City's underlying strategies with respect to [certain matters identified in the confidential portion of the City's representations].

The City indicates further that the records also speak specifically on other matters and recommendations, and identifies in its confidential representations why the City believes that section 239(2)(d) also applies. The City goes on to state that the disclosure of the records "would have an adverse effect on the City's commercial, financial and economic interests and could reasonably jeopardize its ongoing labour relations negotiations and any litigation arising from its transactions."

The City refers to Order M-1145, in which I applied section 6(1)(b) to an agreement between the former City of North York and a named company, on the basis that the record contained financial information, and thus fell within the matters identified in section 55(5)(a) (now section 239(2)(a)) of the *Municipal Act*.

The City takes the position that the records at issue were appropriately discussed in the *in camera* portions of the meetings noted above pursuant to section 239(2)(a) or 239(2)(d) of the *Municipal Act* since the subject matter of the confidential report relates to the "security of the property" and/or to "labour relations".

The appellant's representations

The appellant argues that the City was not authorized to consider any of the records at issue in a closed meeting. The appellant states:

The section 6 exemption only applies if the in camera discussion is permitted by the *Municipal Act*. If a municipal council or committee meets in private but the

Municipal Act did not allow this, then section 6 of the *Act* does not apply. Section 6 only comes into play when a lawful, proper in camera meeting is held.

The City's representations refer to subsection 27-10 of the Toronto Municipal Code. The Toronto Municipal Code is not relevant to section 6 of [the *Act*]. Only the *Municipal Act* is relevant to the exemption being claimed here.

… we submit that the *Municipal Act* does not provide authority to consider any of these records at a closed meeting.

Clause 239(2)(a) refers to "the security of the property of the municipality or local board." While we accept that the street lights were City property, we submit that the sale of those street lights does not fit within any reasonable interpretation of the expression "security of the property."

"Security of the property" refers to protecting civic property against danger or risk. To suggest that a sale transaction is about "security of the property" is to distort the plain meaning of the words.

The City relies on the very different interpretation of O'Connor and Smither in *Open Local Government*. In our respectful submission, the authors' opinion is inconsistent with the language of the *Municipal Act* and ought to be ignored. Further, to the best of our knowledge, no judge has ever adopted or endorsed the extreme interpretation argued by O'Connor and Smither.

O'Connor and Smither effectively interpret section 6 of [the *Act*] the same as section 11 of [the *Act*]. As a principle of statutory interpretation, the Legislature is presumed not to have enacted redundant provisions. If the other statutes (principally the *Municipal Act*) referred to by section 6 have the same effect as section 11, then there would have been no need to enact section 6.

Further, there is no indication that the Legislature intended clause 239(2)(a) of the *Municipal Act*, formerly clause 55(5)(a), which pre-dates [the *Act*], to be interpreted the same as a section of [the *Act*] that did not exist when clause 55(5)(a) was first enacted.

We also note that the Legislature has used clear language, in clause 239(2)(c) of the *Municipal Act*, to permit in camera consideration of "a proposed or pending acquisition or disposition of land by the municipality or local board"…

(We note further that clause 239(2)(c) refers to real property. If the Legislature wanted to refer to other assets then it could easily have done so.)

The City's reply representations

In its reply representations the City reiterates that, when Council and committee met to consider Records 6, 7 and 9, the *Municipal Act, 2001* applied to the City of Toronto and provided authority under section 239 to hold a meeting in private under certain circumstances. It stresses that all three records state that their contents are confidential, and that all three records were *in camera* reports authorized by section 239(2)(a) and/or section 239(2)(d) of the *Municipal Act, 2001*.

The City states:

> These reports, in some respect, relate to the negotiations between the City and Toronto Hydro to sell street and expressway lighting assets to [THESI] and the issues that arose in the course of those negotiations.

The City also provides additional information about the nature of the information contained in each report. Along with confidential representations relating to the information contained in each of the reports, the City states that Record 9 "was an *in camera* report as it deals with matters related to the security of the property as contemplated in section 239(2)(a) of the *Municipal Act, 2001*." Concerning Record 7, the City states:

> This item was an in camera item as it deals with matters related to the security of the property and labour relations matters as contemplated under sections 239(2)(a) and (d) of the *Municipal Act, 2001*. …
>
> A review of Record 7 reveals that it relates to confidential labour relations matters. This issue has been canvassed in the City's earlier representations.

Regarding Record 9, the City states:

> This report was submitted as an in camera report since disclosure of this information could potentially harm the City's financial and economic interests by jeopardizing its ability to obtain favourable, or reasonable, terms and conditions in its future negotiations with Toronto Hydro. In order to protect the security of its property as set out in section 239(2)(a) of the *Municipal Act, 2001* the City submitted the report in camera.

The City then makes further representations on the interpretation to be given to section 239(2)(a) of the *Municipal Act, 2001*. The City states:

> It is the City's position that section 239(2)(a) of the *Municipal Act, 2001* provides authority to hold Council meetings closed to the public where the subject matter pertains to negotiations with a third party for the sale of an asset. While there is little jurisprudence to guide one in interpreting the phrase "security of the

property" under section 239(2)(a), the City submits that this term should not be interpreted to preclude security of financial or economic benefits to be derived from property of the municipality.

Toronto Hydro issued a press release, dated February 28, 2005, confirming that it is in discussions with the City of Toronto, regarding the purchase of the City's street lighting assets at *fair market value*. The press release advises that Toronto Hydro "is currently performing the due diligence necessary to assess the merits of such a purchase. No decision has been made with respect to proceeding with the purchase." This press release clearly demonstrates that in negotiating with Toronto Hydro there was no certainty as to whether the agreement would be signed or what terms and conditions would be included in the agreement. However, the press release advises that negotiations will be for fair market value. Therefore, all of the City's concerns, issues and plans in proceeding with the negotiations reasonably had to be conducted with some secrecy in order for the City to ensure that it could get favourable, or reasonable, terms and conditions. For this reason, reports that contained information related to the negotiations were submitted to Council for in camera deliberations to ensure that the City's plans, positions and strategies for negotiations as well as the issues the City identified as critical would not be released, or prematurely released, in the negotiating process.

When the City negotiates a commercial transaction, such as the sale of its assets to a third party, and disclosure of the City's positions, plans and strategies for the negotiations could jeopardize the City's ability to properly negotiate a favourable arrangement, then such information is clearly the security of the property of the municipality. As stated in the City's earlier representations, "security of the property" includes security or protection of financial and economic interest and assets of the municipality and this position is supported by examples provided by M. Rick O'Connor in his book *Open Local Government 2* (St. Thomas, ON: Municipal World, c. 2004 at p. 31).

The appellant notes that no judge has ever adopted or endorsed the "extreme interpretation" also found in the earlier edition of this book. Rather, the appellant takes the position that "security of the property" refers to protecting "civic property against danger or risk". The appellant does not provide any authority to support this interpretation.

In a recent decision of the Ontario Superior Court of Justice, *Farber v. Kingston (City)*, [2006] O.J. No. 236, the court's *in obiter* observations suggest that "security of the property" does in fact encompass security or protection of financial and economic interests and assets. In that case, the court considered the validity of a by-law that was partly considered in camera that pertained to the revitalization of a public square. Although the court ultimately upheld the by-law for other reasons, it did observe that substantive matters discussed in the in

> camera meetings (including renaming the square and an agreement with the person(s) donating money for the revitalization of the square) would properly have been considered under sections 239(2)(a) and (f) of the *Municipal Act, 2001*. Similar to the facts in this case, the City of Toronto was also negotiating an agreement with Toronto Hydro and during the negotiating process, the City also maintained confidentiality relating to the details of the agreement by submitting reports for in camera deliberations pursuant to section 239(2)(a) of the *Municipal Act, 2001*.

Very late in the representations process, the City raises for the first time, and provides extensive representations on an issue relating to the *Securities Act* to support its argument relating to section 239(2)(a) of the *Municipal Act, 2001*. The City states:

> In addition to the above concerns, the City submitted reports, identified in this appeal as Records 6 and 9, to in camera Council and committee meetings pursuant to section 239(2)(a) because it was of the view that disclosure of the report could likely be a contravention of Ontario's *Securities Act* (OSA).
>
> Section 76(2) of the OSA provides that no reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or change has been generally disclosed. Toronto Hydro is considered a reporting issuer under the OSA. Since the City owns 100% of the voting securities of Toronto Hydro, the City is an insider of Toronto Hydro and is therefore a person or company in a special relationship with Toronto Hydro. While section 76(2) allows disclosure in the "necessary course of business" this exception exists so as not to unduly interfere with a company's ordinary business activities, rather than to permit a government to disclose a potential transaction on a Web site prior to the reporting issuer generally disclosing this material fact pursuant to their own disclosure policies. In any case, as noted in the National Policy 51-201 (Disclosure Standards), disclosure on a public Web site likely does not satisfy the "general disclosure" requirements of reporting issuers under the OSA.

In further confidential and non-confidential representations, the City provides detailed information regarding how the disclosure of Records 6 and 9 would result in various possible violations of the *Securities Act*. The City then states:

> As a result of the reasonable concern that disclosure of the information in Records 6 and 9 would result in a likely contravention of the OSA, these records were submitted as in camera reports pursuant to the City's authority under section 239(2)(a) of the *Municipal Act, 2001*. If a person or company is found to be in contravention of Ontario securities law and guilty of an offence, that person or

> company could be subject to severe sanctions, such as those found under sections 122 and 122.1 of the OSA.

Finally, the City provides additional confidential representations identifying other possible harms to the City's financial and economic interests in the event the records are disclosed, and that these are also reasons why the reports were submitted *in camera* under section 239(2)(a) of the *Municipal Act, 2001*.

The appellant's sur-reply representations

In his sur-reply representations, the appellant addresses the City's position on the impact and relevance of the *Securities Act*, and states that no provision of the *Act* refers to the *Securities Act*, and that there is no exemption under the *Act* for information caught by the *Securities Act*. The appellant also states that section 76(2) of the *Securities Act* does not create a "free-standing exemption" from disclosure.

The appellant takes the position that even if the *Securities Act* were to apply to the records, it does not prohibit disclosure in the circumstances. In this regard, the appellant discusses at some length, the distinction between "material change" and "material fact", and other terms found in section 76(2) of the *Securities Act*.

The appellant also points out that the transaction has already been announced to the public and submits that the "prohibition against advance tipping in section 76 of the *Securities Act* is no longer relevant."

Analysis and Findings on Part 2 of the Section 6(1)(b) test

As I indicated above, the appellant has requested the City to provide access to records relating to its sale of street and expressway lights to THESI and the negotiations that led up to this sale. According to the City, the records at issue pursuant to section 6(1)(b) relate to discussions by the City council or committees in closed meetings.

I have carefully considered the extensive representations of the parties regarding the issue of whether part two of the test set out above has been established – namely – whether a statute authorizes the holding of the meeting in the absence of the public. In the circumstances of this appeal, I am not satisfied that the City has established that a statute authorized the holding of the meetings in the absence of the public.

The City claims that sections 239(2)(a) and (d) of the *Municipal Act, 2001* are statutory provisions that "authorize holding that meeting in the absence of the public."

Section 239 of the *Municipal Act, 2001* provides:

> (1) Except as provided in this section, all meetings shall be open to the public.

> (2) 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 municipality or local board;**
> > (b) personal matters about an identifiable individual, including municipal or local board employees;
> > (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
> > **(d) labour relations or employee negotiations**;
> > (e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
> > (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
> > (g) a matter in respect of which a council, board, committee or other body may hold a closed meeting under another Act.
>
> (3) A meeting shall be closed to the public if the subject matter relates to the consideration of a request under the Municipal Freedom of Information and Protection of Privacy Act if the council, board, commission or other body is the head of an institution for the purposes of that Act. [emphasis added]

I will first address the City's claim that section 239(2)(a) authorizes the meetings referred to above to be held *in camera*.

Section 239(2)(a) – security of the property of the City

The City takes the position that a closed meeting that deals with the financial matters pertaining to the sale of street and expressway lights is a meeting authorized by section 239(2)(a), as this subject matter can be characterized as "the security of the property of the City". The City also argues that disclosure of the records would harm its financial and economic interest and that such a harm "falls squarely within the intent and meaning of 'security of the property' as contemplated in section 239(2)(a)."

Conclusion

After considering the arguments put forward by the City and the appellant, I conclude that the plain meaning of the phrase "security of the property of the municipality", when used in the context in which it is employed in section 239(2) of the *Municipal Act, 2001*, is very different from the meanings the City wishes to give this phrase. I agree with the appellant that to give the phrase the meanings that the City urges is to distort its meaning. In my view, "security of the property of the municipality" should be interpreted in accordance with its plain meaning, which is the protection of property from physical loss or damage (such as vandalism or theft) and the protection of public safety in relation to this property.

In coming to this conclusion, I recognize that this interpretation fails to prevent a harm which one might expect the Legislature to have addressed; premature disclosure of a municipality's bargaining strategy when attempting to buy or sell assets other than land. The result of this "plain meaning" interpretation is that section 239(2) protects the confidentiality of negotiations for the purchase or sale of municipally-owned land (under section 239(2)(c)), but not of other municipally-owned assets.

An interpretation of section 239(2)(a) that prevents that harm may be desirable if such an interpretation were available that is plausible as well as consistent with the purpose and context of the legislative scheme. However, an expanded interpretation of "security of the property of the municipality" to include protection of negotiations regarding purchase and sale of assets other than land is not a viable option for the reasons set out below. Such an interpretation, while expanding the protections provided to municipalities by the *Municipal Act, 2001*, has the concurrent effect of significantly reducing the access rights of individuals under the *Act*. In this particular case, taking the broad interpretation suggested by the City results in information being withheld from public access even after negotiations are completed, when the risk of the particular harm which section 239(2) is intended to prevent no longer exists. Moreover, it appears to be somewhat inconsistent with the "open government" approach taken by the legislature in amending the *Municipal Act*.

More importantly, as discussed below, accepting an interpretation of section 239(2)(a) that would include any steps that can be taken to prevent any and all forms of harm to the City's economic and financial interests is incompatible with the apparent and logical meaning of "security" in this context. In addition, such a broadening of the meaning of "security" would result in a *de facto* narrowing of the access rights provided in the *Act* and would result in vagueness as to the limits of the term "security", which could then encompass anything and everything relating to the economic and financial interests of a municipality and possibly of its agencies, boards and commissions.

Moreover, giving this section a broad interpretation may lead to an absurd result. In contrast to section 239(2)(c) of the *Municipal Act, 2001*, which is time limited, to interpret section 239(2)(a) as referring to financial negotiations relating to other property would result in this type of information being unavailable to the public even after the sale has been completed. Such a result is inconsistent with the intention in section 239(2)(c).

Discussion

"Security of property" is not defined in the *Municipal Act, 2001*. In approaching this issue, I have reviewed other statutory contexts in which the word "security" is used. The word "security" appears to be used in Ontario statutes in three different ways.

First, security is the term used in certain statutes, including the *Securities Act*, *Business Corporations Act*, and *Securities Transfer Act, 2006* to describe a share of a corporation or a debt

instrument such as a bond or debenture. Several of these statutes contain a definition of this kind of security.

The most lengthy statutory definition of this meaning of security is found in the *Securities Act*, although more succinct definitions to the same effect are found in other statutes such as the *Business Corporations Act*:

> "security" means a share of any class or series of shares or a debt obligation of a body corporate".

Clearly, this is not the type of security referred to in section 239 of the *Municipal Act, 2001*. Although the City's representations mention section 239(2)(a) in relation to its *Securities Act* argument, the City does not appear to intend to make an argument that "security of the property" means "security" as defined in the *Securities Act*. Rather the City appears to accept implicitly that "security of the property" does not have such a strained meaning. The City's argument appears to be that as drafted, section 239 results in a conflict with section 76(2) of the *Securities Act* in the circumstances, because section 239 requires the City to disclose to the public the same information that section 76(2) of the *Securities Act* prohibits the City from disclosing. I find that this argument is qualitatively different from the other submissions that the City makes regarding this issue and I will address the impact of the *Securities Act* in respect of Records 6 and 9 separately, below. The remaining discussion under section 6(1)(b) of the *Act* will only address the City's arguments relating to its interpretation of section 239(2)(a) as encompassing economic interests and negotiations relating to property other than land.

The second use of the term "security" in Ontario statutes is in relation to pledging property as collateral to be used to recover money owed if the debt is not repaid. "Security" is used in this sense, for example, in section 223(1) of the *Business Corporations Act*, which provides that a liquidator of an insolvent corporation may "raise upon the security of the property (of the corporation) any requisite money". The *Credit Unions and Caisses Populaires Act* contains a similar provision relating to paying the debts of insolvent credit unions. Similarly, section 48(1) of the *Gaming Control Act* authorizes the Lieutenant Governor in Council to make regulations "requiring registrants to provide security in such form and on such terms as are prescribed, and providing for the forfeiture of the security and the disposition of the proceeds". Similarly, section 27 of the *Civil Remedies Act* authorizes a court under certain circumstances to make an order giving the Ontario Government a lien on property "in order to secure performance of an obligation".

There do not appear to be any definitions of this type of "security" in Ontario statutes. The *Shorter Oxford Dictionary* definition is "something given, deposited or pledged to make certain the fulfillment of an obligation (as the payment of a debt)."

In my view, if the Legislature intended this term to mean "pledging" or a "lien" for the fulfillment of an obligation, it would have used the more specific language available to indicate this interpretation. Clearly, this also is not the type of security referred to in section 239 of the *Municipal Act, 2001*.

Finally, Ontario statutes use the word "security" in relation to individuals in the sense of keeping them safe from harm, and in relation to property in the sense of taking measures to prevent its loss or damage to it.

"Security" is used in this sense of preventing harm to property or harm to individuals in relation to property in several statutes. For example, the *Environmental Protection Act*, the *Ontario Water Resources Act*, and the *Pesticides Act* all give the Ministry authority to make several different kinds of orders to prevent or rectify harm to the environment. Several of these order-making powers permit the Ministry to include in the orders "measures to secure the land, place or thing to which the order relates". Similarly, the *Elections Act* provides that ballots must be "manufactured to contain a security feature". The *Gaming and Control Act* prohibits a registered lottery equipment supplier from installing any lottery equipment unless "the supplier has submitted to the Registrar a security plan to ensure the security of the equipment or the system, as the case may be, and the integrity of the lottery". [section 16].

I note that the term "security" and the related verb and adjective "secure" are not defined in relation to this particular meaning of these words in any Ontario statutes.

Nevertheless, in my view, it is most likely that this third use of the term is the sense in which "security of the property" is found in section 239 of the *Municipal Act, 2001*.

I have not been provided with, nor have I found any usage or definition in Ontario statutes that would correspond to the interpretation suggested by the City. This alone is not to say, however, that such an interpretation could not be given to the term.

In the absence of statutory definitions of this term, I have turned to other indicators of its meaning to interpret it. The accepted approach to statutory interpretation is that the words of an Act are to be read in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament. This approach can involve considering the purpose of the enactment, the context in which a word, phrase or provision is found, and the harm that the provision intends to address.

In examining this issue, I have considered an interpretation of "security" that is limited and specific, to exclude matters such as the sale of property, and one that favours giving "security" an extended meaning which includes measures to facilitate the sale of property. In order to fully canvass this issue, in the following discussion, I have reviewed dictionary meanings, legal texts, jurisprudence and Orders of this office that have interpreted section 239(2)(a), other Ontario statutory language as well as similar statutes from other provinces and some general principals

and presumptions in statutory interpretation as well as legislative history regarding the enactment of the open meeting provisions in the *Municipal Act*.

Plain meaning of "security" - dictionary meanings

In the absence of any statutory definitions, I have considered the plain or ordinary meaning of the terms "security" and "secure" as an aid to interpretation, as found in dictionary definitions.

The *Shorter Oxford Dictionary* defines "secure" as an adjective as "1.a. rightly free from apprehension, protected from or not exposed to danger; safe; b. of actions or conditions: Involving no danger; safe"; as a verb as "2. to make secure or safe; 3. to make secure or certain; 'to place beyond hazard', to ensure". Secure as a verb is defined as "2.a. to relieve from exposure to danger: make safe; b. to shield or make secure (as a military position or movement) from capture, destruction, or hostile interference (for the time being, the beach was secured)."

Webster's Dictionary defines "security" as free from care, safe, secure 1: the quality or state of being secure: as a: freedom from danger.

Black's Law Dictionary contains no definition of "secure" but the following definition of "security": "the state of being secure, especially from danger or attack".

Clearly, therefore, the most apparent meaning of "security of the property" as gleaned from ordinary dictionary definitions of "security" in the sense this word is used in section 239 of the *Municipal Act, 2001* does not support the kind of extended definition of "security" that would include keeping secret the details of a business transaction which the City argues for.

Use of term "security" in other Ontario statutes

The meaning of a word or phrase can also be construed from how the same word or phrase is used in a similar context in other statutes.

Although no Ontario statute contains a definition of "security" in relation to protecting property from harm, several statutes contain extended explanations or examples of what security includes in this context. In my view, these provisions are very strong evidence of what the Ontario legislature intends to include when it uses the word security in the context of protecting property.

For example, as mentioned earlier, the *EPA*, *OWRA* and *Pesticides Act* all contain similar provisions for orders to secure property. They provide:

> The order may require the person to whom it is directed to comply with any directions set out in the order within the time specified relating to,
>
> > (c) securing, whether through locks, gates, fences, security guards or other means, any land, place or thing.

These provisions indicate the types of activities that the legislature considered, in this context, to be included in the securing of property. According to a rule of statutory interpretation, the "limited class" or *ejusdem generis* rule, the phrase "or other means" would generally be interpreted to mean other means of securing that are similar to those that are listed, i.e., locks, gates, fences and security guards, rather than other means that are substantially different from the listed means, such as keeping secret any negotiations in regard to the possible sale of such property.

Sections 19.7 of the *Pesticides Act* and 15.7 of the *OWRA* provide even greater clarification, as they not only delineate the actions that are included in the securing of property, but also the kinds of harm to property that securing property is intended to prevent, for example:

> 19.7 Where an order … is in effect, a provincial officer may take measures to secure the land place or thing to which the order relates by means of locks, gates, fences, security guards or such other means as the provincial officer deems necessary to prevent entry into the land or place or to prevent the use of, interference with, disruption of, or destruction of the thing.

None of these enumerated harms are similar to harm to a municipality's negotiating position during proposed dispositions of property, which the City argues is covered by the term "security of the property".

These provisions suggest that neither the means used to secure property nor the purposes of doing so extend to the meaning that the City wishes to extend to "security of the property".

Section 5(5.4) of the *Proceedings Against the Crown Act* deals with the powers of the Crown when it becomes the owner of property independent of its own actions or intentions, for example, where property vests in the Crown as a result of the bankruptcy of a corporation (another example might be where a person dies intestate).

Section 5(5.4) provides, in part:

> (5.4) The Crown is not liable in tort by reason of any activity conducted either by the Crown or anyone acting on its behalf or with its approval to investigate any aspect of property that vests in the Crown in the manner described in subsection (5), to restore that property to productive use or to respond to complaints or to preserve public health and safety, or similar actions for similar purposes, including, without being limited to, the following:
>
> …
>
> 2. Any action taken for the purpose of **securing**, managing or maintaining the property, including action to,

> i. ensure or end the supply of water, sewage services, electricity, artificial or natural gas, steam, hot water, heat or maintenance,
>
> ii. **secure the property** by means of locks, gates, fences, security guards, cameras or other means, or
>
> iii. repair, demolish or remove anything that is or might create a safety risk or a hazard.
>
> …

The fact that "secure" is part of a list of activities that also includes managing and maintaining property suggests that these three terms are similar to each other. What these three terms mean collectively is set out in the list of activities that follows – none of which relates to keeping secret the contents of negotiations about the sale of assets. In addition, the list of actions that are considered by the legislature to secure property in the *Proceedings Against the Crown Act* is similar to the list found in the *EPA*, *OWRA* and *Pesticides Act*, and does not include keeping secret the contents of negotiations about the sale of assets, nor could they reasonably be construed as extending to such an activity.

In my view, the elaborations of the meaning of "secure", "security" and "security of property" in the above provisions strongly suggest that these terms, when used in an Ontario statute, in the absence of any indication to the contrary, are intended to encompass the kinds of actions and purposes set out in the above provisions, and not actions and purposes of a very different nature proposed by the City, i.e., protecting the City's bargaining power when it negotiates the sale of its property.

Legal Texts

None of the primary legal texts on municipal law, including *The Ontario Municipal Act: A User's Manual – 2009*, the *Annotated Municipal Act*, or Rogers, *The Law of Canadian Municipal Corporations* comment on the meaning of subsections (a) and (c) of section 239.

However, the first edition of O'Connor and Smither, *Open Local Government*, referred to by the City, gives the following examples of "security of the property of the municipality or local board" in subsection (a):

- Information whose disclosure could reasonably be expected to prejudice the economic interests or the competitive position of the council or local board;
- Information whose disclosure could reasonably be expected to be injurious to the financial interests of the council or local board;

- Information including the proposed plans, policies or projects of the council or local board if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

- Negotiations surrounding the purchase price.

O'Connor and Smither also give an example of "a proposed or pending acquisition of land for municipal or local board purposes", currently found in subsection (c). However, I note that disposition of land was not included in section 55 (now section 239) at the time the first edition of this book was written, and was added later.

As authority for the proposition that "security of the property" includes the matters listed as examples, O'Connor and Smither cite the *Act* and a 1986 private member's bill that died on the order paper, Bill 16, an Act to amend the *Municipal Act*. Bill 16 was an open meetings law.

It is important to point out that neither the *Act* nor Bill 16 state that security of the property includes the examples cited. What O'Connor and Smither appear to be arguing is that the exemptions from disclosure in the *Act* cited above, which were also exemptions from the open meeting requirement in Bill 16, should be read concurrently with the criteria for closing a municipal meeting set out in section 239(2) of the *Municipal Act, 2001* (which was section 55 of the *Municipal Act RSO 1990* when the O'Connor and Smither book was published).

I have difficulty accepting this premise, as there appears to be no authority in case law or in the legislative history of open meetings legislation stating that the exemptions in the *Act* and the grounds for holding a closed meeting in the *Municipal Act* are intended to have the same reach or scope, especially since they use different language.

Moreover, in the second edition of this book, called *Open Local Government 2*, (St. Thomas, ON, Municipal World Inc., 2004), O'Connor (now the sole author) at p. 33-34 tacitly recognizes the weaknesses in this argument:

> Despite the guidance that can be derived from the above-noted comparisons, these seven discretionary exemptions in the Municipal Act, 2001 do not correspond directly to the confidential exemptions found in the privacy legislation. This can lead to some curious situations. For example, can a municipal council meet in closed session to consider a public-private partnership proposal that includes sensitive, technical information owned by the business? It would appear that, *absent an extremely broad interpretation of the "security of the property of the municipality" provision*, the council could not discuss the matter *in camera*. [Emphasis added].

O'Connor goes on to state:

> Interestingly, the *logical approach* of cross-referencing closed meeting matters with the exempt provisions found in a local government's privacy legislation was recently adopted in Saskatchewan. Pursuant to subsection 94(2) of the Cities Act, "councils and council committees may close all or part of their meetings to the public if the matter to be discussed is within one of the exemptions in Part III of the Local Authority Freedom of Information and Protection of Privacy Act." Part III of the latter statute sets out 10 exemptions for refusing a municipal access to information request. [Emphasis added].

In effect, O'Connor is admitting here that it is illogical to try to extend the meaning of section 239(2)(a) to matters that clearly do not come within it, but do come within the disclosure exemptions in the *Act*, when this can be done straightforwardly by simply cross-referencing the exemptions in section 239 to the exemptions under the *Act*.

An additional problem with attempting to interpret closed meeting legislation as co-extensive with freedom of information legislation is that the two serve different purposes. While it may be desirable to close a meeting held to discuss strategy for negotiating the purchase or sale of assets which has not yet taken place to provide the municipality with flexibility in the bargaining process, the *Act's* purpose is not achieved by continuing to refuse access to the information discussed at the closed meeting after the purchase or sale has been completed.

Consequently, I am not persuaded, based on the legal authority referred to by the City, that "security of the property" includes the security or protection of the financial and economic interests and assets of a municipality.

Jurisprudence and IPC Orders

With respect to jurisprudence addressing this issue, I have not been provided with any cases that clearly make a finding necessary to the court's decision as to the scope of section 239(2)(a). However, there are cases, including *Farber*, referred to by the City, that contain some *obiter dicta* which suggest that a court might find, if required to decide the point, that "security of the property of the municipality" includes matters that extend beyond "safety" or protection from harm or damage.

In *Funk v. Wellington County Roman Catholic Separate School Board* (1994) 71 OAC 321, the Divisional Court considered an open meetings provision in the *Education Act* that is similar in wording to section 239 of the *Municipal Act, 2001*. Section 207 of the *Education Act* provides that school board meetings may be closed, among other circumstances, where the meeting deals with the security of the property of the board (subsection (a)) and where the meeting deals with the acquisition or disposal of a school site (subsection (e)).

In this case, the school board meeting dealt with a proposal by the board to close a school. The court stated, "The closure of a school is not one of the subject matters listed in sub-paragraphs (a) to (e), although it might involve those listed in sub-paragraphs (a) and (c), namely, the security of the property of the board (a), and the acquisition or disposal of a school site (c). It might have been lawful for the public to have been excluded when, and if, those two aspects of the closure were under consideration, but we can see no justification for excluding the public from the entire meeting".

This case suggests that a matter such as a school closing might have different aspects, some of which involve security of property and some of which relate to the disposition of property. However, this was not determined, as the case was decided on other grounds. Moreover, it is not clear whether the information at issue pertained to security in the sense of "safety" or security in the sense of "financial considerations". Given the contentious nature of school closings within targeted communities, I would suggest that the former meaning was likely the basis for the court's comments.

In *Uukkivi v. Lake of Bays (Township)* [2004] OJ No. 4479, the Ontario Superior Court of Justice considered whether a by-law requiring removal of a structure built on a municipal road allowance was properly passed as it was passed at an *in camera* meeting. The court ruled that the meeting could be closed because the exception under s. 239(2)(e) was engaged (litigation or potential litigation) as the municipality was contemplating legal action against the owner of the structure at the time of the meeting. In *obiter*, the court added that, "The exception under section 239(a) [security of the property] was also arguably engaged", without providing any explanation of why the illegal placement of a structure on municipal land might affect the security of the municipality's property. Nevertheless, this *obiter* suggests that courts might be willing to give an expanded meaning to "security of the property" should they be required to seriously consider what it means.

In *Farber v. Kingston (City)* [2006] OJ No. 236, the Superior Court of Justice considered whether a by-law renaming a City-owned facility, Market Square, to name it after a donor could be made in a closed meeting. The Court ruled that because the by-law was passed as a result of a subsequent public meeting of Council on May 17, it was unnecessary to decide the legality of closed meetings that discussed the subject matter on April 5 and earlier in the day on May 17.

Despite stating that there was no need to decide the legality of these earlier meetings, the court stated, "I find that the substantive matters discussed in those meetings would have properly been considered under section 239(a) [security of property] and (f) [solicitor-client privilege]."

At paragraph 9 of the decision, the court indicates that the subject matter of the April 5 meeting was approval in principle of the acceptance of the gift and the renaming of Market Square for the donor, including attaching the following conditions to the approval: 1. an agreement being negotiated between the City and the donor; 2. the draft agreement being brought back to council for its final approval; and (3) a final decision being reported out in public session of council. The two meetings also dealt with legal advice about this proposed deal.

It is not clear from the decision why the court considered the negotiation of "naming rights" to municipal property to be a matter relating to "security of the property of the municipality". Nevertheless, the decision suggests that courts may be prepared to give this phrase a more extended meaning than one would expect from its plain meaning.

Nevertheless, in my view, the limited jurisprudence touching on the scope of section 239(2)(a), although somewhat supportive of an extended interpretation is found only in *obiter dicta,* offers no discussion or analysis with respect to such an interpretation and is therefore, a weak and inconclusive authority for taking such an approach.

I am similarly disinclined to view Order M-1145 as authority for taking such an approach. In Order M-1145, the only order of this office that the City refers to in support of its position, the parties both agreed that the meeting regarding financial information contained in an agreement was properly held *in camera* pursuant to section 55(5)(a) (now section 239(2)(a)). The Order simply affirms that agreement, without discussion or analysis. I am not persuaded that it stands as authority for the City's position, particularly in the face of other orders of this Office, which appear to have come to different conclusions.

I have reviewed the previous decisions of this office relating to section 239(2)(a) of the *Municipal Act,* 2001, or its equivalent. Due to the confidential nature of the access scheme, it is often difficult to tell from reading an order what caused an adjudicator to include or exclude a meeting from the types of meetings covered by s. 239(2)(a). However, to the extent that it is possible to glean this, it does not appear that previous orders have given section 239(2)(a) the extended meaning urged by the City (see Orders MO-2392 and MO-2177.)

However, in Order MO-2335, which dealt with a meeting related to an agreement between the City and a private sector third party for the third party to manage a City-owned recreational complex, the City argued that "…the in camera report clearly speaks to both City property and the security of the property, in terms of both the City and the third party's ability to continue to provide the level of service that is mandated by the Agreement, directly addressing the subsection 239(2)(a) authority of the [Municipal] Act." In accepting the City's arguments, the adjudicator found:

> …the City relies on section 239(2)(a), (d) and (f) of the *Municipal Act* as its authority to hold the meeting in the absence of the public. The subject matter of the report (Record 2) at issue is the Ray Friel Complex. The records provide a summarized assessment of the performance of the third party service provider's management and operations of the Complex in the first few years of the management agreement. The records also relate to specific courses of actions to be taken by the City with respect to the third party service provider. The records present the options recommended by the City's legal department and have labour relation as well as legal implications for the City.

> From my review of the record and the City's representations, I find that the City was authorized by sections 239(2)(a), (d) and (f) of the *Municipal Act* to hold a closed meeting to consider the report and its recommendations.

At the outset, I should point out that I am not bound by previous decisions of this office, although consistency in decision-making is an important goal. Due to the limited information in Order MO-2335 regarding the adjudicator's rationale for accepting an interpretation that is arguably broader in effect, I am not persuaded that it is sufficient to support the City's position that negotiations for the sale of City property would likely fall under section 239(2)(a) of the *Municipal Act, 2001*.

Principles and presumptions in statutory interpretation - harmonious interpretation of statutes

One of the rules of statutory interpretation is that provisions are to be interpreted harmoniously with each other, both internally within a statute and in relation to a legislature's body of statutes as a whole. This principle is referred to in *Sullivan and Driedger on the Construction of Statutes*, 4th ed. (Sullivan, Ruth., Markham, Ont.: Butterworths, 2002.) (Sullivan) as the "presumption of coherence".

A further rule is that wherever possible statutes should be interpreted in a manner that avoids interference with rights: "It is presumed that the legislature does not intend to abolish, limit or otherwise interfere with the rights of subjects. Legislation designed to curtail the rights that may be enjoyed by citizens or residents is strictly construed" (Sullivan, P. 399.)

The purpose of the *Act*, as set out in section 1 is to provide the public with a right of access to government information. The fact that this right is intended to be a broad one is underlined by the fact that the *Act* states the following principles: that information should be available to the public, that exemptions are to be limited to those that are necessary and should be limited and specific, and that there should be independent review of institution's decisions to refuse access.

The importance of this right of access is further underlined by the Supreme Court of Canada in *Dagg v. Canada (Minister of Finance)* [1997] 2 SCR 403 per La Forest J. at 432-434, paras. 61-63:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry…Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable.

What flows from this right of access and the importance of preserving it is that exemptions from the right should be construed in a manner that is harmonious with the access rights in the *Act* and impairs these rights as little as possible. The legislature accomplishes this by stating that exemptions from the right of access are to be "limited and specific".

While the actual exemption in the *Act* is for closed meetings authorized by a statute, how broad or narrow this exemption will be in any case where section 6(1)(b) is invoked will depend on how broadly or narrowly the wording of the statute that allegedly authorizes the closed meeting is construed. In this case, the breadth or narrowness of the section 6(1)(b) exemption is determined by how broadly or narrowly one construes the phase "security of the property" in section 239 of the *Municipal Act, 2001*. As the entire body of provincial legislation is, in a sense, a single organism, in interpreting section 239 of the *Municipal Act, 2001*, it is appropriate to consider whether an interpretation widens or narrows the scope of section 6(1)(b) of the *Act*, which is to be "limited and specific". Construing "security of the property" to include constraints on access to information about negotiations relating to the sale of property is a great broadening of the meaning of this phrase which in turn has the effect of broadening the exemption in section 6(1)(b) of the *Act* rather than keeping this exemption limited and specific.

Consistent interpretation of section 239(2)(a) with the purposes of the *Municipal Act, 2001*

In my view, an interpretation of section 239(2)(a) that is consistent with the access and transparency purpose of the *Act*, is also arguably more consistent with the purpose of the *Municipal Act, 2001* than the broad interpretation supported by the City.

In their text, *The Ontario Municipal Act: A User's Manual – 2009*, George Rust-D'Eye and Ophir Bar Moshe discuss section 239 at p. 300:

> The democratic legitimacy of municipal decisions does not spring solely from periodic elections, but also from a decision-making process that is transparent, accessible to the public, and mandated by law. When a municipal government improperly acts with secrecy, this undermines the democratic legitimacy of its decision, and such decisions, even when *intra vires*, are less worthy of deference.
> …
> *This open meeting requirement [in section 239] reflects a clear legislative choice for increased transparency and accountability* in the decision-making process of local governments. [Emphasis added].

Similarly, the authors of the *Annotated Municipal Act*, second edition, state at MA6-45:

> The underlying purpose of the open meeting requirement in s. 239 is to foster democratic values, to enhance the responsiveness of government, to enhance public confidence, and to increase transparency.

This relationship between section 239 and the overall purpose of the *Municipal Act, 2001* and the consequent requirement to interpret the exceptions to openness in section 239(2) in a manner consistent with increased transparency and accountability, have been strongly affirmed by the Supreme Court of Canada recently in *London (City) v. RSI Holdings Inc.*[2007] 2 SCR 588. On behalf of a unanimous Court, Charron J. stated, at para. 4:

> The open meeting requirement [under section 239] reflects a clear legislative choice for increased transparency and accountability in the decision-making process of local governments.

Citing the 1984 Ontario Report of the Provincial/Municipal Working Committee on Open Meetings and Access to Information, the Williams Commission Report, and the Ontario Ministry of Municipal Affairs white paper, *Open Local Government* (1992), Charron J. went on to say at paras. 18 and 19:

> In the hope of thereby fostering democratic values, and responding to the public's demand for more accountable municipal government, these reports recommended compulsory open meetings of municipal councils and committees, subject to *narrow exceptions*. [Emphasis added].
>
> These recommendations were acted upon by the Government of Ontario in the early 1990s (Ontario, Ministry of Municipal Affairs, Open Local Government (1992) at pp. 2-3 and 31) and Bill 163 (the Planning and Municipal Statute Law Amendment Act, 1994, S.O. 1994, c. 23) adopted the open meeting requirement that is now contained in s. 239 of the Municipal Act, 2001. The open meeting requirement was intended to increase public confidence in the integrity of local government, *by ensuring the open and transparent exercise of municipal power* (Legislative Assembly of Ontario, Official Report of Debates (Hansard), No. 162, November 28, 1994 at p. 7978 (Pat Hayes). [Emphasis added].

In *Freedom of Information in Local Government in Ontario*, a background paper prepared in 1979 for the Williams Commission, the authors discuss and recommend an open meetings law for municipalities, subject to exceptions. At page 65, they identify three types of matters – personnel, legal and property – as the ones which many municipalities considered to be legitimate topics for *in camera* discussions. The opinion of the authors was that, "These exemptions are valid if they are *narrowly construed* exceptions to a general right to information". [Emphasis added].

As indicated by the Supreme Court decision cited above, further evidence that the exemptions from the open meeting requirement in the *Municipal Act, 2001* are intended to be limited and specific is found in Ontario Ministry of Municipal Affairs, *Open Local Government*, 1992. This discussion paper proposed to amend municipal legislation "to enhance accountability and openness of local government by:

> …2) establishing clear principles of openness for all municipal council and committee meetings, and for meetings of local boards, with *exceptions which are limited and specific*;" [Emphasis added].

In my view, therefore, the argument that section 239(2)(a) should be interpreted in a manner that is limited and specific in order to foster openness, both in relation to municipal meetings and access to information that was generated by such meetings, which has been explicitly accepted by the Supreme Court of Canada, is a very strong argument against giving the phrase "security of the property of the municipality" in that subsection an artificially extended meaning.

Purposive approach to interpretation

However, in examining this issue, I have also considered the purpose of creating exceptions to the open meeting requirement, and accept that a purposive analysis might support widening the scope of section 239(2)(a) to include matters that the legislature has not clearly addressed. Sullivan states at page 127, that the jurisdiction to adopt a "strained interpretation" of a provision (one that departs from the ordinary meaning to a noticeable extent, but is nonetheless judged to be plausible) in order to promote the purpose of the legislation or avoid absurdity is well established and frequently exercised.

Looking at the legislative history of section 239 and its predecessor, section 55, there is some explanation of the purpose of having closed-meeting exceptions to the open meeting requirement. Clearly, it is necessary to have exceptions to an open-meeting requirement to avoid a variety of harms to the municipality itself or to individuals or organizations affected by municipal decisions. These harms can be financial or reputational. To fulfill this purpose it is necessary that the exceptions be broad enough to encompass the kinds of situations that may give rise to these harms.

One of the earliest discussions of the purpose of having exceptions to openness in municipal government is found in the 1979 research publication commissioned by the Williams Commission. In *Freedom of Information in Local Government in Ontario*, Makuch and Jackson looked at both the question of access to municipal records and the question of open meetings. In regard to both, they stated:

> Democracy may be served by openness but sometimes the public has a great interest to be served in deliberations being made free from public knowledge or the pressure of public opinion. …

In regard to open meetings, they stated:

> Another area where a strong argument can be made for closed meetings or restrictions on information is one where premature publicity would be detrimental to the interests of the community. The most common example of this occurs where a body is contemplating a land acquisition and does not wish disclosure to

> affect the price of the property. Another example is the negotiating of a collective agreement with employees where undue public pressure affects the local decision-makers; public discussion also allows the employees to discover the negotiating strategy of the authority.
>
> The need can also arise where a developer may wish to explain to a council, planning board or the executive of those bodies his proposal for a possible development. He does not wish the proposal to be public because of fear of competition from other developers or because he may still need to purchase more property.
>
> …
>
> The problems of electing leaders, preventing premature disclosure, damaging reputations, settling litigation, protecting the plans and drawings of individuals and protecting public safety all require restrictions on the rights of the public to openness and full information. The difficulty is ascertaining how to balance the competing concerns. (pp. 12-21)

At pages 64-65, Makuch and Jackson explain the need for municipal councils to use closed sessions to discuss "the purchase of property by the municipality and the sale of municipally-owned property":

> The advantage of the prior meeting or meetings of council in private to discuss land acquisitions is that an offer to purchase can be made by the council without the effect of increasing the market value of the property because of the knowledge that local government is purchasing the property. *With respect to both purchases and sales of property, there is an added benefit that negotiations can proceed without the other party knowing the ultimate amount at which the municipality is willing to buy and sell.* The municipality is, therefore, in a better bargaining position. [Emphasis added].

If the rationale set out in the paragraph above is accepted, two things are clear about the purpose of section 239(2): First, when a municipality is selling property, a purpose for closing the meeting at the time of negotiations - whether the sale is of land, fixtures, or other chattels - is to avoid the other party knowing what the municipality is prepared to accept. Since 239(2)(c) only deals with land, an interpretation of 239(2)(a) that excludes negotiations for the sale of fixtures or chattels does not fulfill this purpose since it leaves a legislative gap. Put another way, an extended meaning of "the security of the property of the municipality" fulfills the purpose of having exemptions that allow closed meetings, while the usual, narrower, meaning of this phrase does not serve this purpose.

I recognize that an argument could be made that section 239(2)(a) must be interpreted differently from its ordinary meaning to fill that legislative gap or fix that legislative mistake. However, as stated by Sullivan, this can only be done if the new meaning to be given to subsection (a) is a plausible one. If the proposed expanded meaning is strained but plausible, a tribunal or court can give a provision this meaning. On the other hand, if the strained meaning is not plausible, the problem must be left for the legislature to fix.

At this juncture, it is important to note that the interest in keeping this type of information from the public is time-limited. Although it may be argued that it is necessary to close the meeting at which the matter is discussed for the purpose of protecting negotiations, after the transaction is completed, there is no similar interest to be protected by keeping the records of the closed meeting from the public. Thus, even if discussions of purchase and sale were found to be matters of "security of the property" at the time of the meeting, they no longer serve a security purpose after the transaction is completed.

Moreover, a broad interpretation of 239(2)(a) in the context of its impact on the scope of the *Act's* closed meeting records exemption does not further the purpose of the exemption under the *Act* or the purposes of the *Act* more generally, which, as I indicated above, are, in part:

> To provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
> (ii) necessary exemptions from the right of access should be limited and specific…

A further consideration is whether a purposive approach to interpretation can correct the Legislature's "error" in failing to expand the scope of section 239(2)(c). Indeed, it is arguable that the presence of section 239(2)(c) as worded, in itself, favours an interpretation that excludes chattels from the exemptions to the open meetings provisions of the *Municipal Act, 2001*.

Given the recognition, as articulated by Makuch and Jackson, that closed meetings are required to protect the municipality's interests when buying or selling property, whether land, chattels or fixtures, it is a mystery why the Legislature initially passed section 55, the predecessor of section 239, in 1994 without any reference to selling land, only to purchase, or why the Legislature restricted its provision regarding the purchase of property to land and did not include fixtures or chattels, or why the Legislature did not correct that omission when it amended the section to include disposition as well as acquisition of land in section 239.

There is a presumption that the legislature says what it means and means what it says: *Minister of Transport for Ontario v. Phoenix Assurance Ltd.* (1973), 39 DLR (3d) 481 at 486. Because legislatures have ample resources to properly draft legislation and correct errors, the courts will often assume that the legislature meant what it said, and if it made a mistake, could and would

have corrected it. The courts are therefore often reluctant to assume the legislature has made a mistake and attempt to correct what may have been a deliberate omission.

Moreover, Sullivan draws a distinction (which she acknowledges is artificial) between mistakes and gaps. She states that courts are willing to correct drafting errors, but are reluctant to fill gaps in legislation. The reluctance is grounded in two factors. First, unlike mistakes, which are always inadvertent, a gap in legislation may be deliberate. Gaps may result from faulty drafting, but equally they may result from factual misconceptions, poor planning or even a considered policy choice. For this reason, gaps are taken to embody the actual intentions of the legislature, which the courts are bound to respect. (p. 136).

Sullivan goes on to state that although courts are reluctant to fill gaps, sometimes they are forced to do so. An example is where a gap leads to an absurd result. In the circumstances, I am not persuaded that the result of giving 239(2)(a) a limited and specific interpretation is absurd, given that there are differences between land and other property that might justify different treatment, and therefore different treatment of land might have been intended by the legislature.

Presumption against redundancy

Sullivan also discusses the presumption against redundancy, and states at page 150, "[C]ourts should avoid, as much as possible, adopting interpretations that would render any portion of a statute meaningless or pointless or redundant."

She describes the governing principle of this presumption as follows:

> It is presumed that the legislature avoids superfluous or meaningless words, that it does not pointlessly repeat itself or speak in vain. Every word in a statute is presumed to make sense and to have a specific role to play in advancing the legislative purpose. [p. 158].

If "security of the property of the municipality" in subsection (a) has the extended meaning proposed by the City, which includes keeping secret the negotiation of purchase and sale of property, which would include both real and personal, then there is no need for subsection (c) "a proposed or pending acquisition or disposition of land by the municipality or local board", as this would be included in subsection (a). The City's interpretation of subsection (a) renders subsection (c) redundant.

I acknowledge that Sullivan considers the presumption to be easily rebutted in various ways, but my review of the legislative history of this provision and other similar provisions in other Ontario statutes (as discussed above) has found no evidence to support an argument that this particular redundancy was deliberate. The legislative history of s. 239 of the *Municipal Act, 2001* is discussed in greater detail below.

Sullivan also discusses the presumption of straightforward expression (at p. 156):

> It is presumed that in so far as possible legislatures will adopt a simple, straightforward and concise way of expressing themselves. As Monnin J.A. wrote in *Re Medical Centre Apartments Ltd. and City of Winnipeg*:
>
> > The Legislature is assumed to have used the clearest way of expressing its intention.

The fact that there are clear, straightforward ways to address the issue of purchase and sale of property in municipal open meetings statutes without resorting to vague phrases such as "security of property" is demonstrated by provisions in similar laws in other provinces and in section 239(2)(c) of the *Municipal Act, 2001*. For example, British Columbia's *Community Charter*, SBC 2003, c. 26 provides, in part:

> 90(1) A part of a council meeting may be closed to the public if the subject matter being considered relates to or is one or more of the following:
>
> …
>
> (d) the security of the property of the municipality;
>
> (e) the acquisition, *disposition* or expropriation of land or *improvements*, if the council considers that disclosure could reasonably be expected to harm the interests of the municipality; [Emphasis added].

"Improvement" is defined in *Black's Law Dictionary* as "An addition to real property, whether permanent of not; esp. one that increases its value or utility or that enhances its appearance." The term is similar, if not identical, to "fixture". Under this statute, street lighting would likely come within the term "improvements".

Similarly, the Northwest Territories' *Cities, Towns and Villages Act*, SNWT 2003, c. 22 provides in part:

> 23(3) Council or a committee of council may…authorize its meeting to be closed to the public if it decides to discuss any of the following:
>
> (a) commercial information that, if disclosed, would likely be prejudicial to the municipal corporation or the persons involved;
>
> …
>
> (f) the acquisition or disposition of *property* by or on behalf of the municipal corporation;

…

(k) the security of documents or premises. [Emphasis added].

I note that subsection (f) refers to all property, and does not restrict itself to land, as does section 239(2)(c) of Ontario's *Municipal Act, 2001*.

Manitoba's *Municipal Act*, CCSM c. M225 provides in part:

152(2) ….a council or council committee may close a meeting to the public

(a) if

…

(iii) a matter that is in its preliminary stages and respecting which discussion in public could prejudice a municipality's ability to carry out its activities or negotiations,

(vi) the security of documents or premises,…

If the legislature had intended to provide for closed meetings dealing with the negotiation of the sale of its street lighting, it could hardly have found "a more convoluted and sibylline way of stating something that could be so easily expressed in clear and direct terms", to use the language of the Supreme Court of Canada in *Mitchell v. Peguis Indian Band* [1990] 2 SCR 85, than explicitly addressing the disposition of land in one subsection and addressing the purchase and sale of fixtures and chattels in a separate subsection of the same provision by calling this "security of the property of the municipality". Moreover, the above examples support the argument that section 239(2)(a) is not intended to encompass any and all kinds of economic harm. Had the legislature intended to allow municipalities to close their meetings whenever economic interests, competitive position or financial interests are involved, it could easily have used similar wording to section 11 of the *Act* in drafting section 239(2).

Legislative history of open meetings provisions in Ontario

Finally, I have reviewed the legislative history of section 239 of the *Municipal Act, 2001* and its predecessor, section 55 of the *Municipal Act*, RSO 1990. Although this legislative history mentions the general proposition recognized by the Supreme Court of Canada, and as discussed above, that the overall purpose of such legislation is to foster democracy and accountability, it does not shed much light on the specific meaning of s. 239(2)(a). Nevertheless, a few comments on the legislative history of the open meetings discussions relating to the *Municipal Act* are helpful in understanding the context and circumstances that led to the inclusion of section 239(2) in the *Municipal Act, 2001*.

As mentioned earlier, one of the earliest proposals to restrict the power of municipalities to close meetings was found in the research publication prepared in 1979 by Makuch and Jackson for the Williams Commission. Makuch and Jackson considered whether "security" needed to be specified as a reason for closing meetings, but concluded that the area of security "only affects police commissions". Although meetings of police commissions were separately addressed in what was then the *Police Act* (now the *Police Services Act*), Makuch and Jackson nevertheless recommended that where "security issues", in the sense of operations of police services, that might be discussed by a police commission are discussed by a municipal council or committee, a closed meeting should be available.

In the end result, Makuch and Jackson recommended legislation that would require open meetings with the following exceptions:

(a) personnel matters where a named employee or possible employee is involved, unless the individual has requested that the matter be discussed in a meeting open to the public;
(b) election of the chairperson or head of the body;
(c) election of the executive committee of the body;
(d) contractual negotiations with the employees;
(e) *property acquisition and sales*;
(f) discussions of possible litigation settlements;
(g) *matters that if a police commission were to discuss in person would be injurious to security or investigation procedures*;
(h) matters that are specifically restricted by other legislation which may result from the [Williams] Commission's ultimate recommendations with respect to problems of privacy protection.

Thus, Makuch and Jackson clearly considered property acquisition and sales to be different matters from "security" and saw no reason to limit the exclusion for property acquisition and sales to land, although they did not squarely address security of municipal property in the sense of safety and harm prevention.

Although the Williams Commission dealt primarily with freedom of information and privacy law, in its 1980 report, the Commission also recommended "open meetings" or "sunshine" legislation that would allow meetings to be closed for discussion of the matters that Makuch and Jackson had recommended, with minor wording changes.

In 1983, the Minister of Municipal Affairs and Housing formed the Provincial/Municipal Working Committee on Open Meetings and Access to Information. At that time, section 55 of the *Municipal Act*, RSO 1980 provided for open meetings of municipal councils and local boards (except commissioners of police and school boards, which were dealt with by the *Police Act* and the *Education Act*). However, the Working Committee identified the fact that there was no open meeting requirement for council committees as a problem to be addressed. The Working Committee also identified the problem that while regular meetings of council were open to the public, there was no similar requirement for special meetings of council.

As mentioned earlier, the current open meetings provision in the *Education Act* was inserted in 1982. In its 1984 report, the Working Committee stated that, "The amended Section 183 of the *Education Act* provides a basis upon which to develop legislation for municipal councils."

The Working Committee recommended open meetings legislation, but including the following exceptions:

- Personnel matters involving one or more identifiable employees or prospective employees;
- Matters affecting labour relations and contract negotiations with employees;
- *The acquisition or disposal of municipal **real** property*;
- Exploratory discussions respecting a future development within the municipality, except where such development has been discussed at an open meeting of council;
- Litigation or potential litigation affecting the municipality, including matters before administrative tribunals;
- Discussions in relation to the Municipal Boundary Negotiations Act, 1981;
- Any matter required by any provincial or federal statute or regulation therefto to be discussed at a meeting closed to the public;
- *Any matter involving the security of the property of the municipality*;
- Any matter respecting the investigation of a possible contravention of a municipal by-law, or provincial statute or regulation;
- *Discussions concerning bids, quotations or tenders submitted to or by the municipality for any contracted works, services or equipment. Nothing herein precludes any requirement to disclose the total price of all bids, quotations or tenders.* [Emphasis added]

This recommendation is interesting because the committee recommended language that would cover negotiating the sale of street lighting (which would be fixtures, and therefore possibly considered "real property") without having to resort to a strained interpretation of "the security of the property of the municipality". However, this language was rejected by the Legislature in favour of narrower language "acquisition of land". I have not been provided with, nor have I found any discussion that would shed light on whether this omission was inadvertent or deliberate.

In 1992, the Minister of Municipal Affairs issued a "white paper" entitled "Open Local Government" dealing with rules for disposal of surplus municipal land, municipal conflict of interest legislation, and open meetings. The draft open meetings legislation found in this publication was intended to repeal section 55 of the *Municipal Act* and replace it, in part, with the following:

(2) Subject to this section, all meetings shall be open to the public.

…

(4) A meeting or part of a meeting may be closed to the public if the subject matter being considered relates to,

(a) *the security of the property of the municipality or local board*;
(b) personal matters about an identifiable individual, including municipal or local board employees;
*(c) a proposed or pending acquisition of **real** property for municipal or local board purposes;*
(d) labour relations or employee negotiations;
(e) litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;
(f) matters under the Municipal Boundary Negotiations Act or annexation of unorganized territory;
(g) a matter in respect of which a council, board, committee or other body has authorized a meeting to be closed under an Act of the Legislature or an Act of Parliament.

The white paper contains no discussion of why the Ministry used narrower language in relation to acquisition and sale of property than what was proposed by the Williams Commission or the Provincial/Municipal Working Group.

On May 18, 1994, the Ministry introduced Bill 163, an omnibus bill that rewrote the *Planning Act* and included municipal conflict of interest legislation as well as open meetings amendments to the *Municipal Act*. Bill 163, as passed by the Legislature on November 28, 1994, contained exceptions to the requirement that meetings be open using language which is identical to the current sections 239(2) and (3) of the *Municipal Act, 2001* with two exceptions:

- the words "or disposal" have subsequently been added to subsection (c) so that it now reads "a proposed or pending acquisition or disposition of land by the municipality or local board"

- the words "the receiving of" are omitted from subsection (f), so that it reads "advice that is subject to solicitor-client privilege, including communications necessary for that purpose".

The debates in the Legislature, the debates in committee, and the Compendium provided to MPPs do not provide any insight into what is meant by the phrase "the security of the property of the municipality", or why subsection (c) was restricted to acquisition and omitted disposition (it was subsequently amended to include disposition), or why subsection (c) was and remains limited to land, and does not cover "property" generally or even "real property" which might include fixtures such as street lights. Nor does there appear to be any indication of why the

language of the 1994 enactment departed from the earlier, and broader formulations of exceptions by the Williams Committee, the Provincial/Municipal Working Group, and the White Paper.

It is clear that the version of what was then section 55(5) of the *Municipal Act* RSO 1990 passed by the Legislature in 1994 is identical to what was introduced for first reading; however, it is not clear whether any concerns would have been raised in committee about the language of the provision, had the matter been so considered, since the Government invoked closure of the debate, preventing any debate that might have taken place about these provisions that would indicate concerns.

However, although I recognize that an argument can be made that in drafting section 239(2), the legislature inadvertently omitted to cover the sale of fixtures and chattels, which is a mistake that could be corrected by giving an expansive meaning to 239(2)(a), there is evidence that this omission must have been a deliberate gap, and therefore it should not be filled by this office or a court. This evidence consists of, among other things, (1) the fact that the plain meaning of "the security of the property" is clearly inconsistent with the meaning urged by the City; (2) the fact that it is obvious that some of the harms that can be caused by premature disclosure of the negotiating strategy for sale of land also apply to fixtures and chattels and the legislature was presumably aware of this when it drafted section 239, and if not then, it would have become apparent by now; (3) the fact that clear, straightforward alternative language is available and has been employed by other provinces in similar legislation, without the Ontario legislature taking any steps to clarify its provision.

Moreover, the above discussion reveals that there was ample opportunity for the government to consider the harms to be addressed in relation to open and closed meetings. In my view, it appears that a deliberate legislative choice was made not to include language similar to section 11 of the *Act*. Given the stated purpose of amendments to the *Municipal Act, 2001* to provide greater openness with narrow exceptions, there appears to have been a clear legislative choice not to include a broad "basket clause" in section 239 and similar provisions in other Ontario statutes, in the interest of maximizing openness. Rather, the legislative choice was to have a broad openness requirement and to keep exceptions narrow. In my view, that legislative choice should not be circumvented by stretching the meaning of other parts of section 239(2) to cover what the legislature excluded.

Therefore, I am not persuaded by the City's arguments that the Legislature intended the phrase "security of the property" in section 239(2)(a) of the *Municipal Act, 2001* to encompass all forms of harm to the City's economic interests generally, or more specifically, to the City's negotiations and bargaining strategy regarding the buying and selling of property other than land.

On this basis, I conclude that the City was not permitted, under section 239(2)(a), to hold a meeting closed to the public in order to discuss the sale of street and expressway lighting to THESI. As I indicated above, the City has claimed that the *in camera* meetings were held on this basis with respect to Records 6, 7 and 9. I will address the additional arguments made by the

City regarding the *Securities Act* as it pertains to Records 6 and 9. However, my finding based on the above discussion applies to all three records.

Additional section 239(2)(a) issue: Possible application of sections 75 and 76 of the Securities Act to Records 6 and 9

As I indicated above, in its reply representations the City, for the first time, refers to an issue which it describes as the "*Securities Act* issue". The City takes the position that Records 6 and 9 were discussed *in camera* due to section 76(2) of the *Securities Act*, in conjunction with section 239(2)(a) of the *Municipal Act, 2001*. Sections 75 and 76 of the *Securities Act* state, in part:

> 75. (1) Subject to subsection (3), where a material change occurs in the affairs of a reporting issuer, it shall forthwith issue and file a news release authorized by a senior officer disclosing the nature and substance of the change.
>
> (2) Subject to subsection (3), the reporting issuer shall file a report of such material change in accordance with the regulations as soon as practicable and in any event within ten days of the date on which the change occurs.
>
> (3) Where,
>
> > (a) in the opinion of the reporting issuer, and if that opinion is arrived at in a reasonable manner, the disclosure required by subsections (1) and (2) would be unduly detrimental to the interests of the reporting issuer; or
> >
> > (b) the material change consists of a decision to implement a change made by senior management of the issuer who believe that confirmation of the decision by the board of directors is probable and senior management of the issuer has no reason to believe that persons with knowledge of the material change have made use of that knowledge in purchasing or selling securities of the issuer,
>
> the reporting issuer may, in lieu of compliance with subsection (1), forthwith file with the Commission the report required under subsection (2) marked so as to indicate that it is confidential, together with written reasons for non-disclosure.
>
> (4) Where a report has been filed with the Commission under subsection (3), the reporting issuer shall advise the Commission in writing where it believes the report should continue to remain confidential within ten days of the date of filing of the initial report and every ten days thereafter until the material change is generally disclosed in the manner referred to in subsection (1) or, if the material change consists of a decision of the type referred to in clause (3) (b), until that decision has been rejected by the board of directors of the issuer.

> (5) Although a report has been filed with the Commission under subsection (3), the reporting issuer shall promptly generally disclose the material change in the manner referred to in subsection (1) upon the reporting issuer becoming aware, or having reasonable grounds to believe, that persons or companies are purchasing or selling securities of the reporting issuer with knowledge of the material change that has not been generally disclosed.
>
> 76. (1) No person or company in a special relationship with a reporting issuer shall purchase or sell securities of the reporting issuer with the knowledge of a material fact or material change with respect to the reporting issuer that has not been generally disclosed.
>
> (2) No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.

The City's representations:

The City states:

> In addition to the above concerns [relating to the application of the exemption at section 6 to the records], the City submitted reports, identified in this appeal as Records 6 and 9, to the in camera Council and committee meetings pursuant to section 239(2)(a) because it was of the view that disclosure of the report could likely be a contravention of Ontario's *Securities Act* (*OSA*).
>
> Section 76(2) of the *OSA* provides that no reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or change with respect to the reporting issuer before the material fact or change has been generally disclosed. Toronto Hydro is considered a reporting issuer under the *OSA*. Since the City owns 100% of the voting securities of Toronto Hydro, the City is an insider of Toronto Hydro and is therefore a person or company in a special relationship with Toronto Hydro. While subsection 76(2) allows disclosure in the "necessary course of business" this exception exists so as not to unduly interfere with a company's ordinary business activities, rather than to permit a government to disclose a potential transaction on a Web site prior to the reporting issuer generally disclosing this material fact pursuant to their own disclosure policies. In any case, as noted in the National Policy 51-201 (Disclosure Standards), disclosure on a public Web site likely does not satisfy the "general disclosure" requirements of reporting issuers under the *OSA*.

(Note: With respect to the City's reference to "disclosure on a public website", I understand this to refer to the City's practice of posting the minutes of open council meetings on its website, which is available to the public.)

In a confidential portion of its representations the City then refers to specific information contained in Record 6, and states that section 4.3 of the National Policy 51-201 (Disclosure Standards) published by the Canadian Securities Administrators provides that "proposed significant acquisitions of assets or a development that affects a company's resources" (which the City argues the information in Record 6 is) can be considered material facts or changes.

The City then states:

> In making materiality judgments, it is necessary to take into account a number of factors that cannot be captured in a simple bright-line standard or test. These include the nature of the information itself, the volatility of the company's securities and prevailing market conditions. The materiality of a particular event or piece of information may vary between companies according to many factors. Considerations regarding materiality should not be reconsidered in hindsight in the context of other proceedings such as an information request to reassess whether the decision was justified. The fact that a good faith decision was made that Council's deliberations were sufficiently material to potentially affect the market price or value of Toronto Hydro's debt securities should be sufficient to demonstrate that holding the meeting in camera was justified in order to preserve the security of the City's property by avoiding the sanctions related to non-compliance with securities legislation.
>
> Staff in the Finance Division at the City considered the information in Record 6 and concluded that disclosure of that information could reasonably be expected to have a significant effect on the market price or value of securities Toronto Hydro had on the market. Therefore, the report was submitted to Council for in camera deliberations on the view that the information contained therein likely included material facts that should only be disclosed by Toronto Hydro pursuant to its own disclosure policies.

The City also refers specifically to the nature of the information contained in Record 9, and states:

> As noted above, section 76(2) of the *OSA* requires that the City not disclose to another person or company a material fact or material change with respect to Toronto Hydro before the material fact or material change has been generally disclosed other than in the necessary course of business. A material fact is defined in the *OSA* as a fact that would reasonably be expected to have a

> significant effect on the market price or value of securities. A "material change" is defined in the *OSA* as (i) a change in the business, operations or capital of the issuer that would reasonably be expected to have a significant effect on the market price or value of securities or (ii) a decision to implement a change referred to in subclause (i) made by the board of directors or other persons acting in a similar capacity or by senior management of the issuer who believe that confirmation of the decision by the board of directors or such other persons acting in a similar capacity is, probable.

The City again refers to section 4.3 of the National Policy 51-201 (Disclosure Standards), and argues that the information contained in Record 9 constituted a material fact or change.

The City concludes by stating:

> As a result of the reasonable concern that disclosure of the information in Records 6 and 9 would result in a likely contravention of the *OSA*, these records were submitted as in camera reports pursuant to the City's authority under subs. 239(2)(a) of the *Municipal Act, 2001*. If a person or company is found to be in contravention of Ontario securities law and guilty of an offence, that person or company could be subject to severe sanctions, such as those found under s. 122, and 122.1 of the *OSA*.

The appellant's representations

The appellant takes issue with the City's raising of the *Securities Act* on a number of grounds.

In his sur-reply representations, the appellant argues that section 75 of the *Securities Act* requires a reporting issuer to put out a news release and disclose to the public the "nature and substance of" a material change. The appellant states:

> We discuss below … the fact that Council's deliberations over the transaction was not a material change. However, we accept that once the sale agreement and service agreement were concluded, these did constitute a material change.
>
> Thus, once the transaction was approved and took effect, section 75 of the *Securities Act* required public disclosure by Toronto Hydro.
>
> The City argues that section 76 prohibited disclosure before the change took effect. We disagree. What is clear, however, is that section 75 mandated disclosure once the change occurred.
>
> The other parties have argued how important this transaction was to the markets. We agree that, once the transaction occurred, the information was extremely relevant. This is a 30-year service contract, meaning that the parties enjoy 30

> years of rights and must bear 30 years of risks, exposure and liabilities. Bond holders (ie: debt holders) have a right to that information. Bond rating agencies will also want to review it. Details of this long-term contract should be generally disclosed.
>
> …
>
> If, as we submit, Toronto Hydro was required to make disclosure under the *Securities Act*, then the claim of section 11 harm (or section 10 harm, for that matter) is further undermined. Toronto Hydro cannot claim that it would suffer prejudice from disclosure of information that the *Securities Act* requires be disclosed in any event.

The appellant also makes the following arguments relating to the relevance of the *Securities Act*, and the raising of this issue in this appeal:

1) The Securities Act *is not an exemption under the* Act

The appellant states:

> No provision of [the *Act*] expressly or by implication refers to the *Securities Act*.
>
> Therefore, there is no exemption under [the *Act*] for information caught by the *Securities Act*.
>
> Subsection 76(2) of the *Securities Act* does not create a free-standing exemption from disclosure.
>
> The only way that the *Securities Act* might possibly be relevant is if could be proved to apply, on a specific-case, fact-specific basis, to the application of an … exemption. We note that the only argument advanced by the City is that the *Securities Act* is relevant to the application of clause 239(2)(a) of the *Municipal Act, 2001*, which in turn is relevant to clause 6(1)(b) of [the *Act*]. As this is the only claim that is made concerning the *Securities Act*, it is the only argument that we will address.
>
> If the other parties advance other arguments or claims concerning the *Securities Act* then we respectfully request notice and an opportunity to respond.

2) The City ought not to be able to raise this issue at the reply representations stage

The appellant takes issue with the raising and identification of the *Securities Act* at this stage in the process. He states;

> We submit that the manner in which the City has raised the issue of the *Securities Act* is unfair, prejudicial and in bad faith.
>
> It was the City that invoked section 6 in order to deny access. It is the City that bears the onus of justifying the exemption. It is the City that has had more than a year to mention the *Securities Act*, if it thought it relevant.
>
> Were the *Securities Act* truly important, and were it truly relevant to the closed-meeting exemption, then the City would not and should not have waited until April 2, 2007, to mention it.
>
> After all, since it is the City's exemption, and the City's burden of proof, why is the *Securities Act* being raised for the first time in reply?
>
> According to the City's reply representations, the "staff in the Finance Division" was thinking about the effect of the *Securities Act* on record 6 and record 9 prior to the relevant committee and Council meetings - i.e., November and December 2005. If the *Securities Act* was a consideration in late 2005, [then] surely the City could have mentioned the Act in its October 2006 representations.

3) The Securities Act *Does Not Say What the City Claims it does*

The appellant argues that the City is incorrect in its interpretation of the requirements of the *Securities Act* as they relate to the information in the records. The appellant states:

> Subsection 76(2) of the *Securities Act* provides as follows:
>
> > No reporting issuer and no person or company in a special relationship with a reporting issuer shall inform, other than in the necessary course of business, another person or company of a material fact or material change with respect to the reporting issuer before the material fact or material change has been generally disclosed.
>
> We agree that Toronto Hydro is a reporting issuer. It acquired this status May 1, 2003, through its initial public offering of $225 million worth of senior unsecured debentures due 2013.
>
> The City refers to the transaction and deliberation on the transaction as "a material fact or change." The equivocation is unhelpful, because the terms have different meanings and implications.

A key difference is that a material change must be communicated by news release. There is no such requirement for a material fact: *Securities Act*, subs. 75(1).

According to the definition in subsection 1(1) of the *Securities Act*, "material change" means either a change or a decision to implement a change. According to a leading text on the subject [*Securities Law and Practice*, 3d ed., (Thomson Carswell, 2006)]:

> The first part of the definition of material change concentrates on a change that is a *fait accompli*, or what is referred to as an actual or concrete change. ...
>
> The second part of the definition of material change deals with proposed changes, or what might be referred to as decisions to undertake material changes. ... Under this part of the definition, a proposed change can only become a material change when the board of directors decides to implement it, or, at the earliest, when senior management decides to implement it and believes that confirmation by the board of directors is probable. The mere intention, however, to implement a material change, unless it is fully within the power of the issuer to do so, would not likely be reportable until a later time. [emphasis added]

Even after Toronto Hydro's board decided to approve the transaction, City Council approval was required to give effect. Thus, the date of the material change (if any) would not have been until City Council gave final approval. According to the Ontario Securities Commission in *Re Burnett*:

> An intention by a person or company to do something, which once implemented would constitute a material change in the affairs of a reporting issuer, but which at the time the intention is formed, for reasons beyond the control of the person or company, is still not capable of achievement, is not ordinarily a material change in the affairs of the issuer.

In this case then, assuming that the transaction constituted a "material change", the material change only occurred at the point the transaction took effect (December 31, 2005), or at the earliest when the decision to approve the transaction was made by City Council (December 14-15, 2005).

The City asserts (p. 25) that "the fact that Council was deliberating such a change constitutes [sic] a material fact or change ..." [emphasis added]. This is at least

partly incorrect. The fact that City Council was deliberating did not constitute a material change. At most it constituted a material fact.

Council's deliberation was not a material change. Was it a material fact? Was the subject matter under consideration a material fact? We submit not.

Subsection 1(1) of the *Securities Act* defines "material fact" as "a fact that would reasonably be expected to have a significant effect on the market price or value of the securities."

Even if Council's deliberation or the subject matter was a material fact, we do not believe that subsection 76(2) of the *Securities Act* would have applied to the situation.

The key exceptions to the subsection 76(2) prohibition are "in the necessary course of business" and "generally disclosed." Public consideration by a municipal council would fall under both exceptions.

The Act defines neither "necessary course of business" nor "generally disclosed," except that, when it occurs, a material change must be disclosed by news release.

As explained [above], Council's deliberation and the subject matter were not a material change; at most they were a material fact.

According to section 239 of the *Municipal Act, 2001*, a municipal council and its committees must hold meetings open to the public, subject to discretionary exceptions in subsection (2).

(This was the provision that applied to Toronto at the time of the meetings in question. As of January 1, 2007, the *Municipal Act, 2001*, no longer applies to the City of Toronto …. The parallel provision is section 190 of the *City of Toronto Act, 2006*.)

By virtue of section 239, an open meeting of Council or a committee is necessary in the ordinary course of business. By statute, that is how a municipal corporation must conduct its business.

The City clouds the issue by talking about Web posting. The law does not require municipalities to post their proceedings on the Internet, though this is a salutary practice. What the law requires is that, subject to narrow exceptions, councils and committees must meet and transact business at meetings open to the public. For municipalities this is what "is necessary in the ordinary course of business."

There is no inconsistency between subsection 76(2) of the *Securities Act* and section 239 of the *Municipal Act, 2001*. The two provisions co-exist and can be interpreted harmoniously.

National Policy 51-201, relied on by the City, provides no guidance. It gives examples of what is and what is not "necessary in the ordinary course of business," and none of the examples have any relevance (either way) to municipal governments.

The other exception is for information that is generally disclosed.

In this case, consideration at an open meeting of Council or a committee would have met the obligation of general disclosure.

Much of the case law, the examples cited by the City, and the examples in National Policy 51-201 do not address what sort of communication meets the test of "generally disclosed." Instead, they tend to focus on examples that fall short of "generally disclosed." As such they are of limited use to a municipal government and to this appeal. No example provided by the City states that an open proceeding of a government body that transacts business in public, as it is required by law, fails to meet the standard of "generally disclosed."

Perhaps the most useful interpretation of "generally disclosed" is provided by its antonym. National Policy 51-201 indicates that the alternative to generally disclosing is "selectively disclosing" …. That puts into context the conduct of a municipal government at an open public meeting: the actions of open local government cannot, by any reasonable standard, be characterized as selective disclosure. When a municipal government deliberates in an open, public and democratic fashion, it is generally disclosing its activity.

According to National Policy 51-201:

> Securities legislation does not define the term "generally disclosed." Insider trading court decisions state that information has been generally disclosed if: (a) the information has been disseminated in a manner calculated to effectively reach the marketplace: and (b) public investors have been given a reasonable amount of time to analyze the information.
>
> Except for 'material changes,' which must be disclosed by news release, securities legislation does not generally require a particular method of disclosure to satisfy the 'generally disclosed' requirement. In determining whether material information has been generally disclosed, we will consider all of the relevant facts

> and circumstances, including the company's traditional practices for publicly disclosing information and how broadly investors and the investment community follow the company. We recognize that the effectiveness of disclosure methods varies between companies. Whatever disclosure method is used to release information, we encourage consistency in a company's disclosure practices."

This passage, which the City did not quote in its reply representations, indicates that there is no consistent definition of generally disclosed, and that it is important for a corporation to be consistent in its public disclosure practices. Public deliberation at open meetings is the consistent practice to Toronto City Council.

In the United States, the Securities and Exchange Commission imposes a similar requirement through Regulation FD (Fair Disclosure), Rule 10b5-1 and Rule 10b5-2. The U.S. rules employ the term "public disclosure" as opposed to "generally disclosed."

The SEC's guidance about meetings includes the following discussion of what type of meeting would not satisfy the public disclosure test. The SEC does not explicitly state that an open meeting would meet the standard, but implies that this would be the case:

> [Q] Can an issuer satisfy Regulation FD's public disclosure requirement by disclosing material nonpublic information at a shareholder meeting that is open to all shareholders, but not to the public?
>
> [A] No. If a shareholder meeting is not accessible by the public; an issuer's selective disclosure of material nonpublic information at the meeting would not satisfy Regulation FD's public disclosure requirement.

4) The Transaction Has Become Public

The appellant states:

> The transaction was long ago announced to the public, and the prohibition against advance tipping in section 76 of the *Securities Act* is no longer relevant.

5) The Securities Act *Now Requires Disclosure*

The appellant states:

> … now that the transaction has been approved and taken effect, section 75 of the *Securities Act* would require public disclosure by Toronto Hydro.
>
> The City argues that section 76 prohibited disclosure before the change took effect. What is clear is that section 75 mandated disclosure once the change occurred.
>
> Toronto Hydro has entered into a 30-year service contract. For the very reasons identified by the City in its reply representations, the risks and liabilities associated with that long-term deal should be generally disclosed so that the public debt holders will have equal access to that information. Bond holders have an interest in knowing the extent of Toronto Hydro's exposure under that long-term contract. Bond rating agencies would also want to see it.
>
> As explained above … this analysis is relevant to section 11. Since Toronto Hydro is already required by section 75 of the *Securities Act* to disclose this information, it cannot claim that disclosure would cause harm within the meaning of section 11 of [the *Act*]

The appellant's sur-reply representations were shared with the City, and the City chose not to respond to them.

Analysis and findings

The purposes of the *Securities Act* as set out at s. 1.1 of that Act are to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets. These purposes ensure a fair and efficient marketplace for the purchase and sale of a variety of financial instruments such as stocks and bonds, which have economic value in and of themselves, and to preserve the value of these instruments from improper dealings. The purpose of the *Municipal Act* is quite different. As set out in s. 2, the purpose of this statute is to give municipalities the powers and duties they need to be responsible and accountable governments with respect to matters within their jurisdiction "for the purpose of providing good government with respect to those matters", not to regulate the market in securities. While I accept the principle of coherence, requiring a harmonious reading of the enactments of a single legislature, I conclude that compliance with the *Securities Act* is quite separate from *Municipal Act* considerations or considerations under the *Act*, except as regards the meaning of section 239(2)(a). In a general sense, I am not persuaded that the *Securities Act* has any impact on the disclosure scheme in the *Act*.

As well, however, based on a review of the *Securities Act* and the representations of the parties, I am not persuaded, for the reasons that follow, that disclosure of the information in Records 6 and 9 would result in contravention of the *Securities Act*. These reasons arise from considering the impact of the information becoming public at two different times: (1) when the closed meeting was held; and (2) at the present time.

The City takes the position that, at the time of the closed meeting, it correctly went *in camera* pursuant to section 239(2)(a) because of the implications of disclosure with respect to the *Securities Act*. In this regard, the City states that a "good faith" decision was made that disclosure of the information could violate the *Securities Act* and that "holding the meeting in camera was justified in order to preserve the security of the City's property by avoiding the sanctions related to non-compliance with securities legislation."

In my discussion of the definition of "security" above, I addressed the issue of whether the wording "security of the property" in section 239(2)(a) of the *Municipal Act* can be taken to include "securities" under the *Securities Act*, and I found that it does not. Moreover, it does not appear that the City is taking the position that "security of property" in section 239(2)(a) could be interpreted as including "securities" within the meaning of the *Securities Act*. Accordingly, I rejected the City's position that Records 6 and 9 are exempt under section 6(1)(b) of the *Act* based on its arguments relating to harm to its economic interests and bargaining strategies, discussed above, as the matters referred to in the records are not reasons to go in camera under 239(2)(a).

Based on my discussion of section 239(2)(a) above, I also find that the "harms" alleged by the City relating to the *Securities Act* similarly do not support applying a strained interpretation of section 239(2)(a). Moreover, I agree with much of the appellant's submissions regarding this issue. As I indicated above, in my view, compliance with the *Securities Act* is quite separate from considerations under the *Municipal Act* or the *Act*, except as regards the meaning of section 239(2)(a). Absent an applicable exemption, I am not persuaded that compliance with the *Act* in the circumstances of this case, could reasonably be seen as a violation of the *Securities Act*. I have found that section 239(2)(a) is not applicable, and as the appellant notes, there is no other provision in the *Act* that expressly or by implication refers to the *Securities Act*.

In addition, having found that the City was not authorized to go *in camera* under section 239(2)(a), the discussion of the securities and the information contained in Records 6 and 9 would have been in an open meeting of Council or a committee, and would have met the obligation of "general disclosure" (regardless of whether it would have been posted on a website or not.) I agree with the appellant that public consideration by a municipal council would address the key exceptions in section 76(2) of the *Securities Act* as the information would be "generally disclosed" "in the necessary course of business". As the appellant notes, "[w]hen a municipal government deliberates in an open, public and democratic fashion, it is generally disclosing its activity."

I am, moreover, not persuaded that section 76 of the *Securities Act* was a motivating factor when the decision was made by the City to hold the *in camera* meetings which discussed Records 6 and 9. The City's initial representations on its decision to go *in camera* specifically refer to its decision to do so under section 239(2)(a) and (d) of the *Municipal Act* based on other considerations. No mention is made of the *Securities Act*. It is only in its reply representations, after receiving the appellant's representations arguing that the City was not authorized to go *in camera* for the subject meetings, that the City provided representations stating that it went *in camera* on the basis of the *Securities Act*. Furthermore, the City chose not to respond to the appellant's sur-reply representations, which questioned why the City had raised this issue at such a late stage in this appeal. In the absence of any additional information supporting the City's position that staff determined, at the time of the *in camera* meetings, that the *Securities Act* was the reason for going *in camera* (such as a legal opinion to that effect made at that time, or affidavit evidence from the staff members, etc.), I have significant credibility concerns regarding the City's assertion made late in the appeals process, that any concerns had been raised at the time Records 6 and 9 were being discussed that doing so in public might result in contravention of the *Securities Act*.

As regards disclosure at the present time, I agree with the appellant's submission to the effect that the transaction has now been approved, and the City and Toronto Hydro have entered into a 30-year service contract. It would appear that any concerns about "advance tipping" are no longer relevant with respect to this transaction.

For all these reasons, I am not persuaded that the City's submissions to the effect that the *Securities Act*, in and of itself, provides a basis for withholding the records from disclosure.

Section 239(2)(d) – labour relations or employee negotiations

I now turn to the City's argument that the *in camera* meeting was properly convened pursuant to section 239(2)(d) of the *Municipal Act, 2001*. As I noted above, section 239(2)(d) of the *Municipal Act, 2001* reads:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > labour relations or employee negotiations;

The City states that Record 7 "speaks to" a labour relations matter. The City notes that the report went before Council in September and discloses "the underlying strategies which formed the staff's recommendations…" The City has provided confidential representations relating to the development of Record 7 and submits that disclosure of the information contained in the record "would have an adverse effect on the City's commercial, financial and economic interests and could reasonably jeopardize its ongoing labour relations negotiations and any litigation arising from its transactions."

In its reply representations, the City discusses the legal advice contained in the record (which formed the basis for the late raising of section 12). As discussed above, I have disallowed the City's claim that section 12 applies as it was raised late in the adjudication process. The City then reiterates that "[a] review of Record 7 reveals that it relates to confidential labour relations matters."

In Order MO-2337, Assistant Commissioner Brian Beamish made the following comments in finding that there was insufficient evidence to support a finding that section 6(1)(b) applied to the records on the basis of section 239(2)(d) of the *Municipal Act, 2001*:

> While I accept that section 239(2)(d) of the *Municipal Act* supports the holding of an in camera meeting where the subject matter of the meeting being considered is labour relations or employee negotiations, the City cannot claim the application of section 239(2)(d) unless it can establish that the subject matter of the meeting included the substance of the labour relations or employee negotiations. The City cannot rely on section 239(2)(d) to claim that a meeting was held in camera if it had no intention of discussing the substance of the labour relations or employee negotiations at that meeting. In this appeal, the in camera reports include only a general description of the labour relations matter and a reference to confidentiality. The purpose of section 239(2)(d) is to protect the in camera discussions. If those present at the "in camera meeting" have no intention of discussing or reviewing the substance of the issues, they cannot properly rely on the application of section 239(2)(d) to hold a meeting in camera.

As I indicated above, Record 3 is the Indemnity Agreement entered into between the City and THESI, two institutions under the *Act*. Record 7 contains the staff report in which references are made to the Indemnity Agreement. In my discussion above under the heading "Labour Relations and Employment Records", I came to the following conclusions regarding Record 3:

> Although the parties to the sale of the lighting assets might have turned their minds to the consequences of the sale *vis-à-vis* the workforce, I am not persuaded that there is any relationship between this record and the conduct of actual or anticipated proceedings (under 52(3)1), negotiations (section 52(3)2) or any labour relations or employment-related matters in which either institution has an interest (section 52(3)3), in the sense contemplated in *Ontario (Solicitor General)* referred to above. Similar to the situation in Order MO-2024-I, the type of information in Record 3 has a "strong connection to government accountability", which is "an 'overarching' purpose of access legislation." Although the decision of the two institutions to include an indemnity agreement may have arisen from a consideration of the workforce and the consequences that might flow from the asset sale, I find that it is too remote to qualify as being "in relation" to any of the situations contemplated by section 52(3).

In reviewing Record 7, I find that the comments made by the Assistant Commissioner in Order MO-2337 are relevant to the circumstances in the current appeal. Similar to the finding he made, I am not persuaded that the subject matter being considered at the meetings was, in substance, labour relations or employee negotiations. Rather, the meetings regarding Record 7 were held for the "Finalization of Agreements,[relating to the] Street and Expressway Lighting Asset Sale" as noted by the City in its representations. Accordingly, I find that section 239(2)(d) cannot be relied on by the City to justify entering into closed discussions.

As, I have found that Records 6, 7 and 9 do not meet part 2 of the test, they do not qualify for exemption under section 6(1)(b). It is, therefore, not necessary for me to consider part 3 of the section 6(1)(b) test. Since no exemptions apply to exempt Records 6, 7 and 9 from disclosure, I will order the City to disclose these records to the appellant.

EXERCISE OF DISCRETION

I found above that sections 11(c) and (d) applied to withhold section 10 of Record 2 from disclosure. The section 11 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

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

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

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

Relevant considerations may include those listed below. However, not all 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 of the Parties

In its initial representations, the City submits that in exercising its discretion to withhold information under section 11, it took into account all relevant factors, including:

- the purposes and principles of the *Act*, including that the information should be available to the public and exemptions should be specific and limited
- the purposes of the section 11 exemption
- whether disclosure will increase public confidence in the operation of the City
- whether the requester has a sympathetic or compelling need to receive the information.

The City notes that general information regarding the sale of its street lighting assets is available to the public on its website and in the Consolidated Financial Statements issued by Toronto Hydro. Also, in exercising its discretion to withhold the information, the City notes that the requester is not seeking his own personal information, but is, rather, a member of a law firm representing an interested organization as opposed to a private individual. The City also considered that the information "is of particular importance and significance to the City's operation of providing street lighting and expressway service to the public and to the labour

relations and [other] matters. The disclosure…could reasonably result in the harms to the City under section 11." The City notes that THESI also objects to disclosure of this information.

The appellant argues that the City is acting in bad faith in exercising its discretion to withhold section 10 of the Service Agreement from disclosure under sections 11 (c) and (d). In taking this position, the appellant revisits the manner in which the City conducted itself throughout the processing of his request and the subsequent appeals, which I touched on briefly earlier in this order.

In reply the City reiterates its earlier submissions, and adds that a number of documents have been made public, including many *in camera* reports. The City notes further that it has released a number of records related to the sale of its street and expressway lighting and has granted partial access to a number of other records.

In sur-reply, the appellant states:

> [T]he City's conduct continues to be inconsistent with the spirit, intent and letter of [the *Act*] and, in fact, is disrespectful of the IPC [Office of the Information and Privacy Commissioner] and the appeals process. This context is relevant in considering whether the City has exercised its discretion properly, or at all.
>
> The proper exercise of discretion [requires] that an institution turns its mind, sincerely and in good faith, to the question of whether a discretionary exemption should be applied. Commissioner Cavoukian has spoken publicly about how institutions should approach this exercise of discretion:
>
> > I urge all municipalities, police services, school boards and other municipal organizations to also adopt the key premise that **discretionary exemptions should be claimed only where there is a clear and compelling reason to do so.** I am not urging you to ignore exemptions. I am challenging you to go beyond the existence of a discretionary exemption, that may be technically available, to determine if there is **a clear and compelling reason why access to a record should, in fact, be denied.**
>
> There is no indication that the [City] sincerely considered the exercise of its discretion, let alone considered the Commissioner's invitation to act only in the case of a "clear and compelling reason." [emphasis in the original submission]

Analysis and Findings

I have some concern that the City has taken certain considerations favouring non-disclosure, listed above, and applied them too broadly in the circumstances of this appeal. As I noted, not all those listed will necessarily be relevant, and additional unlisted considerations may be

relevant [Orders P-344, MO-1573]. In this case, the City notes that the requester was not seeking his own personal information, but is, rather, a member of a law firm representing an interested organization as opposed to a private individual. In my view, since the request and records were clearly about a multi-million dollar municipal business arrangement, the fact that the requester was not seeking his own personal information should not have factored into the City's consideration in exercising its discretion to withhold information.

Similarly, I find that it was inappropriate, in the circumstances of this request, for the City to identify the requester as a lawyer representing an interested organization as opposed to being a private individual, as a consideration in the exercise of discretion to withhold information. As the appellant notes, Commissioner Cavoukian commented on the importance of freedom of information to the democratic process in Order MO-1947:

> 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…

The purposes of the *Act* referred to by the Commissioner are fundamental principles underlying the *Act* as an access to information statute. In the circumstances of this appeal, the appellant has made it clear throughout that he is interested in obtaining the requested information to hold the City and Toronto Hydro accountable in respect of the sale of these assets. Thus, in the circumstances of this particular access request, I find that the identity of the requester was not a factor that should have been considered in support of the City's exercise of discretion to withhold the information.

Having said that, and balancing all of the factors considered, I am not persuaded that the City's exercise of discretion was improper in the circumstances.

In this order, I have found that the majority of information exempted by the City is not exempt under the exemptions claimed. In the end, I have upheld the City's and THESI's claim that sections 11(c) and (d) apply to one portion of the Service Agreement between them: section 10 relating to the right of first refusal. I also note that, while I have not upheld most of the severances made by the City, it did make the effort at first instance to review Record 2 and selectively withhold information and disclose the rest. I find this factor to be relevant in determining whether the City has made its decision in bad faith as argued by the appellant. Although the City's actions throughout this request and appeal have been questioned in previous decisions and in this decision, its position on this particular section of the Service Agreement has not wavered and has been consistently argued throughout the appeal. I am not persuaded that the City, when deciding whether or not to disclose Record 2, acted in bad faith in claiming that disclosure of section 10 of the Service Agreement could reasonably be expected to result in the section 11 harms.

As I noted above, sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. Prior orders have stated that section 11(c), or its provincial equivalent, serve the purpose of protecting 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. [see Order P-1190] In my view, section 11(d) operates in a similar manner.

The City and THESI have expressed serious concern about the financial impact on THESI that disclosure of section 10 of the Service Agreement could reasonably be expected to cause, and this is a relevant and important factor to take into consideration in the exercise of discretion.

Accordingly, in balancing the inappropriate considerations taken into account by the City and those that are both relevant and significant, I am satisfied that the City has properly exercised its discretion to withhold section 10 of Record 2 under sections 11(c) and (d).

PUBLIC INTEREST OVERRIDE

The appellant takes the position that there is a compelling public interest in the disclosure of the withheld portions of the records, and that section 16 of the *Act* applies. That section states:

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

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

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

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

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

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

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

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

Representations

The appellant has provided extensive representations in support of his position that the records at issue ought to be disclosed, and that there is a public interest in these records. In this order I have found that the exemption claims do not apply to the majority of the records at issue, and I have ordered that they be disclosed. However, as noted above, I have found that sections 11(c) and (d) applied to withhold section 10 of Record 2 from disclosure. Accordingly, my review of the issue of whether the public interest override applies to the records is restricted to this exemption claim for this portion of Record 2.

The appellant's extensive representations on the public interest override issue are contained in his initial representations and his sur-reply representations. Many of his representations relate to information which I have ordered disclosed; however, the relevant portions of his representations that relate to the portion of the record at issue can be summarized as follows:

- In 2005, the City sold its street lights, expressway lights and poles for $60 million. As an essential component of the deal, the City entered into a 30-year service contract.
- The public knows the price of the lights, but does not know the full story (how much the 30-year service agreement will cost the City, and what the terms of the agreement are).
- Without the information, the public has no way to evaluate the merits of the deal or to hold its local government accountable.
- This transaction was an untendered, non-competitive arrangement between two related parties, Had this agreement proceeded by way of an RFP or other competitive process, much of the information would be available to the public.
- Record 2 is a 30-year agreement between the City and a corporation for the servicing of street lights, and the appellant questions whether it would "ever" be appropriate for a government to purchase 30 years of service but refuse to tell the public what it is paying or what it is getting.
- The main issue is government accountability (how much the City is paying for a 30-year service contract and what it gets in return).
- Government contracts and government spending are matters of public concern.

- The amount of information disclosed is insufficient to answer the public interest in the details of the service agreement.
- There is a public interest in how taxpayers' money is spent.
- Although the City focuses on the fact that the appellant is interested in this information for private reasons, the appellant states that he intends to place the information in the public domain.
- There continues to be media interest in the transaction (and the appellant provides newspaper articles evidencing such interest).
- Openness in contracting with government institutions is of great importance (and the appellant refers to this office's *2006 Annual Report*, referred to above).

Both THESI and the City provide representations in which they argue that the public interest override does not apply to the information remaining at issue. The City also takes the position that, given the nature and amount of information already disclosed, sufficient information has already been disclosed to address any public interest concerns, and that any pubic interest that does exist for the information would not override the purpose of the exemption claims. In addition, THESI maintains that there exists a public interest in the protection of the information remaining at issue.

Findings

As indicated above, in this order, I have found that the majority of information withheld in the records by the City is not exempt under the exemptions claimed. I have upheld the City's and THESI's claim that sections 11(c) and (d) apply to one portion of the agreement between them: section 10 relating to the right of first refusal.

The appellant's representations on the issue of the public interest in the withheld portions of the records raise broad public accountability issues, and also raise issues regarding access to contracts entered into by publically-funded institutions. With respect to Record 2, the appellant focuses particularly on how much the 30-year service agreement will cost the City, and what the terms of the agreement are. The appellant focuses on the importance of the public knowing what it is paying and what it is getting in return. However, in the circumstances, I am not satisfied that the public interest override applies to the withheld portion of the records (that is – section 10 of Record 2).

Although I accept that, generally, there is a public interest in agreements entered into by institutions, I am not satisfied that there exists a compelling public interest in disclosure of section 10 of the Service Agreement. The information at issue is one specific term of the agreement, which relates to the right of first refusal, and I am not persuaded that the disclosure of this remaining section of Record 2 would provide the public with the type of information the appellant claims ought to be disclosed.

In addition, as indicated, the other portions of this record have been disclosed either by the City or by virtue of my findings in this order. In my view the public information already available informs the public with respect to many of the specifics of the Service Agreement, and provides the public with the means of expressing public opinion and/or making political choices. In my view, the disclosure of section 10 will not add significantly to this discussion.

Furthermore, I am not persuaded that any public interest that may exist in the disclosure of the information would outweigh the purpose of the section 11 exemption. As identified above, sections 11(c) and (d) serve the purpose of protecting the ability of institutions to earn money in the marketplace. These exemptions recognize that institutions sometimes have economic interests and compete for business with other public or private sector entities, and provide discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions. The discrete term of the agreement remaining at issue relates to the right of first refusal, and I have found that the disclosure of this section would result in the section 11(c) and (d) harms. I am not satisfied that there exists a public interest in the disclosure of section 10 of this agreement to override the section 11 exemption claim for this section.

Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the information that I have found to be exempt.

ORDER:

1. I uphold the City's decision to withhold section 10 of Record 2 from disclosure.

2. I order the City to disclose Records 1, 3, 6, 7, 8, 9 and the remaining portions of Record 2 (except section 6.3(b), which is not at issue) to the appellant by **December 1, 2009** but not earlier than **November 25, 2009**.

3. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records that are disclosed to the appellant pursuant to Provision 2, upon request.

Original Signed By: October 27, 2009
Laurel Cropley
Adjudicator