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

# ORDER MO-2627

## Appeal MA10-403-2

## City of Greater Sudbury

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## NATURE OF THE APPEAL:

The City of Greater Sudbury (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a specific storm water management report and plan.

After notifying two parties whose interests might be affected by this request (the affected parties), and hearing from them, the City issued a decision denying access to the record based on the application of the exemptions in sections 10(1)(a) and (c) (third party information) and 11(c) and (d) (economic and other interest) of the *Act*.

The appellant appealed the City's decision.

Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the process where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, identifying the facts and issues in this appeal, to the City and the two affected parties, initially. The City and one affected party (affected party A) provided representations to me. The second affected party (affected party B) responded by indicating that it did not consent to the release of the record.

I subsequently determined that another party may also have an interest in the record at issue, and decided to send a Supplementary Notice of Inquiry to this additional affected party (affected party C). Affected party C did not provide representations in response to the invitation to do so.

Because of the manner in which I dispose of the issues in this order, it was not necessary for me to hear from the appellant in this appeal.

I also note that a number of the arguments made by the City are similar to arguments made by the City for another record prepared by another affected party, and addressed by me in Order MO-2616. In that regard, I address some of the issues in the same manner I addressed them in that order.

## RECORD:

The record at issue is an identified "Stormwater Management Study Report." It includes a cover letter, a table of contents, a 19-page study report, and 10 attachments.

## DISCUSSION:

### PRELIMINARY MATTER

As a preliminary matter, I note that the City takes the position that there may be other affected parties who may have an interest in the disclosure of the record, and who ought to be notified and invited to provide representations in this matter. It refers to the parties who may now have an interest in the site identified in the report, as they have purchased homes on the site or have other interests in the land.

I do not accept the position of the City. The record at issue was prepared a number of years ago by affected party A, and then provided to the City. It consists of a site specific stormwater management study relating to a specific identified area. The report was provided to the City pursuant to a plan of subdivision to be built. Although I accept that the parties who now own properties in this subdivision, or have other interests in the land, may be interested in the subject matter of the report as it relates to their property, I am not satisfied that these parties have an interest sufficient to trigger notification of them for the purposes of sections 21(1) or 39(3) of the *Act*.

**THIRD PARTY INFORMATION**

As identified above, the City denied access to the responsive record on the basis of section 10(1) of the *Act*. Both the City and affected party A provide representations in support of the position that the record is exempt under sections 10(1)(a) and (c) of the *Act*. In addition, the City provides representations which raise the possible application of the mandatory exemption in section 10(1)(b). Those sections read:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency;

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 and MO-1706].

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

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

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

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

I will now review the record at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

**Part one: type of information**

Affected party A takes the position that the record contains scientific, technical and commercial information, thereby satisfying the first part of the three-part test. The City submits that the record contains technical information, and refers to Order MO-2182 in support. These terms have been discussed in prior orders as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].
>
> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

I adopt the definitions of these terms as set out in the prior orders.

The City states that the record contains technical information as it required the expertise of scientists and engineers to create the report. Affected party A states:

> The substance of the Report discusses specific applications of conventional drainage principles, and interpretation of associated hydraulic and hydrologic formulas.

> All of the aforementioned, as well as the detailed understanding of the project needs and work plan specifics set out in the Report involve specialized knowledge of hydrology, hydraulics, and drainage. The skills of scientists, engineers and other technicians were employed to develop and prepare the information.

On my review of the record, I am satisfied that much of the information contained in it constitutes technical information within the meaning of that term in section 10(1) of the *Act*. Some of the information also constitutes scientific information for the purposes of that section.

**Part 2: supplied in confidence**

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

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

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

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

Affected party A states that the record was supplied to the City with both an implicit and explicit expectation of confidentiality. It states that the report was supplied to the City in response to conditions for draft plan approval of a subdivision, and was not arrived at through a process of negotiations between affected party A and the City. It also states that the report was consistently treated in a manner that indicated a concern for its protection from disclosure prior to being supplied to the City. In addition, affected party A states that the report was prepared specifically to respond to a condition of draft plan approval, which does not entail disclosure to any party other than the affected party's private client and the City.

Affected party A also submits that the City considers the record to be confidential, and would not release it to any persons without the consent of the affected party.

The City confirms that the record was supplied to it because the City required it to be prepared and provided as a condition for granting draft plan approval of a plan of subdivision. The City identifies that this requirement to submit stormwater reports is authorized by the *Planning Act* and is a standard requirement when a developer is seeking draft plan approval of a subdivision. The City states that, although it required that a stormwater report be provided to it, the City "had no part in the commissioning or preparation of the documents." Only after the report was prepared was it "supplied" to the City.

With respect to whether the report was supplied "in confidence," the City reviews the requirements established by previous orders (set out above), and then states:

> The City, including the Planning Committee, frequently considers information provided by a third party in open meetings and in so doing guarantees no reasonable expectation of privacy.
>
> However, City Council expressly required that the [stormwater report] be submitted directly to the particular City officials for their consideration. At no time, [was the report] publically considered by Council or the Planning Committee.
>
> The City received [the report] with the knowledge that it contained certain methods and approaches to the observation, modelling and analysis that are proprietary to [affected party A].
>
> The City continues to treat [the report] in a manner consistent with the protection of [the record]. The [report is] kept at the City and made accessible to staff only in the discharge of their duties relating to this development. The City has refused to release the [report] to persons requesting the record through informal, routine disclosure processes and will continue to do so. As such, [the report was] supplied in implicit confidence.

*Findings*

On my review of the record at issue, including the actual report and the cover letters, I note that the report was prepared by affected party A for affected party B, who then provided the report to the City. Based on the representations of the parties, I accept the position of the City that the record was supplied to the City by affected party A, in this case through affected party B.

With respect to whether the record was supplied to the City "in confidence," I have carefully reviewed the representations of the parties. In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

To begin, I do not accept the position of affected party A that the record was explicitly supplied to the City in confidence. There is no reference in either the cover letter to the record, the record itself, or any other documents provided to me that there was an explicit understanding that the record was supplied in confidence. The only evidence I have is the statement by affected party A that the report was prepared "specifically to respond to a condition of draft plan approval, which does not entail disclosure to any party other than the affected party's private client and the City." In my view, this statement does not support a finding that the report was supplied with an explicit expectation of confidentiality.

With respect to whether there existed an implicit expectation of confidentiality, as set out above, this expectation must have an objective basis and be based on reasonable grounds. I must also consider all the circumstances, including the ones listed above.

On the one hand, I have the evidence provided by affected party A and the City that the report was communicated to the City on a confidential basis, that it was not disclosed or made available to the public, that it was kept confidential, and that it was prepared for the purpose of responding to a condition of draft plan approval, and not for public disclosure.

On the other hand, I have the information from the City that reports of this nature provided by third parties are "frequently" considered in open meetings, and there is ordinarily no guarantee of confidentiality. The City does state, however, that this report was required to be submitted directly to particular City officials.

I have reviewed the evidence provided, including the information in the record and the supporting evidence provided by the City and affected party A. I find that I have not been provided with sufficient evidence to satisfy me that there existed an implicit, reasonable expectation of confidentiality at the time the information was provided to the City. I make this finding for a number of reasons.

Firstly, the evidence of the City indicates that reports of this nature are "frequently" discussed in public. Although this report was apparently not discussed in public, the parties have not provided sufficient evidence to support a finding that there was a reasonable expectation that this report was to be treated differently. In addition, I have been provided with the cover letters to the report, including the cover letter from affected party A providing the report to affected party B, and the cover page document prepared by affected party B when it provided the report to the City. None of these letters or documents suggest in any way that the report at issue was to be treated in a confidential manner, or in any way outside of the ordinary. One would expect at least some reference to any concerns regarding confidentiality if, in fact, reports of this nature are often made public.

Furthermore, although the report itself does not state it will be made public, it does refer to possible review by parties other than the City.

Finally, notwithstanding the invitation to the parties to provide objective evidence in support of their position that the report was supplied with an expectation of confidentiality, other than the bald statements made by affected party A and the City, I have not been provided with any

additional corroborating objective evidence supporting the position that affected party A had a reasonable expectation that this record was provided in confidence. Evidence of this nature could have included references to other instances where reports of this nature were kept confidential, or references to such practices in other situations.

As a result, I find that the parties resisting disclosure have failed to satisfy the requirements of part 2 of the section 10(1) test.

For section 10(1) to apply, the parties resisting disclosure must satisfy each part of the three-part test. Given that I have found that the City and affected party A have failed to satisfy part 2 of the section 10(1) test, it is not necessary for me to consider whether they have also met part 3. However, in the interests of completeness, I will consider whether the last part of the section 10(1) test has been satisfied.

**Part 3: harms**

***General principles***

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

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

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

Affected party A takes the position that the record is exempt under section 10(1)(a) and (c), as its disclosure could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization. Affected party A specifically states that disclosure of the report would reveal scientific, technical and commercial information that belongs to it, and that this information could be exploited by competitors in the marketplace. It states:

> The Report deals with stormwater management, hydraulic and hydrologic principles related to the drainage of lands associated with [the development]. The processes, applications and interpretations, which result in the end product, all belong to [the affected party].
>
> While a stormwater management study requires an understanding of common and well published engineering principles, the application of those principles is unique among engineering firms. Further, there are a number of engineering firms that

> have the required skills to perform engineering services related to land development, but not necessarily the depth of skills required to perform the more complex activities associated with stormwater management.
>
> [Affected party A's] approach to any given study follows well accepted principles common to all drainage studies, but the generic principles would not allow any engineering firm to address any specific project in the same manner. Each study therefore could be managed in a number of different ways, and [affected party A's] approach is its competitive advantage. In other words, [affected party A's] approach defines the economic benefit to its clients. [Affected party A] can only sell the inherent knowledge and its methodology, which ultimately establishes the economic framework for the development.
>
> Another aspect of hydrologic and hydraulic studies is the application of commonly accepted engineering formulas. All formulas require interpretation of variable parameters, and [affected party A's] experience allows it to interpret the variables efficiently and utilize these common formulas in a cost-effective manner. Should another firm gain access to [affected party A's] study, they could use [affected party A's] interpretation for their studies, and [affected party A] would lose its competitive advantage because the competition would gain knowledge and know-how of [affected party A's] work methodologies …
>
> The compiled information in the Report is proprietary in nature, as it took significant scientific and technical expertise to develop the techniques and methodology, and the information is the property of [affected party A]. The substance of the Report discusses specific applications of conventional drainage principles, and interpretation of associated hydraulic and hydrologic formulas.
>
> All of the aforementioned, as well as the detailed understanding of the project needs and work plan specifics set out in the Report involve specialized knowledge of hydrology, hydraulics, and drainage. The skills of scientists, engineers and other technicians were employed to develop and prepare the information. Considerable time and effort was put into preparation of the Report. Compelling disclosure of the Report for free circulation in the public domain would be unfair to [affected party A] (who produced the Report) as it would provide a free education to [affected party A's] competitors of [affected party A's] approach to similar studies. …

Affected party A then states that the information contained in the report has commercial value to it, and that the information is based on affected party A's trade experience and "relies upon information compiled over years of business." It identifies that reports and studies of this nature are sold to clients and that, if the information is revealed to its competitors, business losses would flow from the pirating of affected party A's knowledge and processes. It also states that, once released, affected party A would lose the value of its business property. Affected party A then states:

> [Affected party A] submits that if its Report was released to the requestor, its competitors would not only receive a free education, but it would also permit the competitors to learn [affected party A's] competitive approach, to the detriment of [affected party A]. This would result in interference with [affected party A's] future proposals and negotiations, to its competitors' commercial benefit, but to [affected party A's] expense.
>
> [Affected party A] further submits that the information in the Report remains current, rather than historical. …

The affected party then refers to Order PO-2020, which cited the following quotation from the Federal Court decision of *Canada (Information Commissioner) v. Canada (Prime Minister)* [1993] 1 F.C. 427:

> While no general rules as to the sufficiency of evidence in s. 14 [harm to federal-provincial affairs] case can be laid down, what the Court is looking for is support for the honestly but perhaps subjective opinions of the Government witnesses based on general references to the record.
>
> Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between disclosure of specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information. If it is self-evident as to how and why harm would result from disclosure, little explanation need be given. Where inferences must be drawn, or it is not clear, more explanation would be required. The more specific and substantiated the evidence, the stronger the case for confidentiality. The more general the evidence, the more difficult it would be for a court to be satisfied as to the linkage between disclosure of particular documents and the harm alleged.

Affected party A then states that part of its business is to obtain consulting work such as that used to prepare the report, and that it is likely that similar services will be required in the future. It states that disclosure would provide competitors with information that could be used to the detriment of affected party A in the request for proposal process, both for the City and any other municipalities, as well as other private clients who require similar services. Affected party A reiterates that the information in the record has proprietary value, and that disclosure would cause affected party A to lose business. It then states that disclosure will have the following effect:

- the time, money and expertise invested in the development of the Report will be lost;
- it will interfere with future proposals and negotiations with respect to opportunities to provide similar services which would result in undue loss to [affected party A] and undue gain to its competitors;
- disclosure of the Report would allow access to scientific, technical and financial information that is proprietary to [affected party A].

Affected party A also states that the report has commercial value because it took considerable scientific and technical skill to develop certain technologies and methodologies which produce cost effective reports and studies. It then states that disclosure would "seriously affect" its ability to earn money in the marketplace. Finally, affected party A states that release of the report would "negate [affected party A's] ability to maintain its competitive position and would prejudice [affected party A's] economic interest and competitive position in the market."

The City also provides representations in support of the position that the harms in sections 10(1)(a) and (c) would result from disclosure. It identifies some of the specific information contained in the record and then states:

> Access to this information would allow competing … engineers to model their own such reports after that of [affected party A] without the benefit of [affected party A] having access to the same from competitors. …
>
> This would result in financial injury to [affected party A] because it would limit the opportunities for which they could market their services and also give their competition access to commercially valuable methods and approaches to stormwater … analysis.

The City also argues that harm would result to the developer (the purchaser of the reports) as the information in the reports relates to property owned by the developer, and may be of interest and benefit current or future owners of nearby properties.

The City also provides representations in support of its position that disclosure would result in undue loss to the public. As I interpret these arguments, I regard them as raising the possible application of the mandatory exemption in section 10(1)(b), and will discuss them in that context.

***Findings***

I have carefully reviewed the record at issue in this appeal, as well as the representations of the parties. Despite the lengthy and detailed representations received from affected party A, and the supporting representations received from the City, for the reasons that follow, I find that I have not been provided with sufficient evidence to satisfy me that the harms in sections 10(1)(a) or (c) would result from disclosure of the record.

The City and affected party A take the position that their representations on harms apply to the complete record, which includes a table of contents, a 19-page study report, and 10 attachments. I have carefully reviewed the study report and the attachments, which relate to the specific property. I note that substantial portions of the report and the attachments provide a review of existing conditions on the property as they relate to stormwater management. Although I accept that preparation of this report, including the review of the existing conditions, involve "specialized knowledge of hydrology, hydraulics, and drainage," I am not satisfied that the application of any such expertise to the existing conditions at the specific site is information

which, if disclosed, would result in the *significant* prejudice or interference, or the *undue* loss or gain required for sections 10(1)(a) and (c) to apply. Although competitors might have a professional interest in the manner in which this review is conducted, I have not been provided with sufficient evidence to satisfy me that the harms in sections 10(1)(a) or (c) would result from disclosure of this information.

With this in mind, I have reviewed the remaining portions of the record. Again, all of the record relates specifically to the identified site. Although other parts of the report do more than simply review existing conditions, the report focuses on the specific site in question, and applies its analysis to that site alone. Although the parties provide general representations on the anticipated harms from disclosure of the whole record, there is no specific identification of any particular formula, application or analysis which, if disclosed, would result in the identified harm.

If I had been provided with specifics about particular proprietary information contained in the report, I may have determined that such information qualified for exemption. For example, in Order MO-2164 I had to determine whether a successful proposal submitted to the City of Kingston in response to a Request for Proposal (RFP) qualified for exemption under sections 10(1)(a) or (c). I reviewed the proposal in detail, as well as the representations of the parties, which addressed specific portions of the proposal. I found that certain small portions of the proposal qualified for exemption, but that much of the remaining portions did not. As part of my analysis in that order, I stated:

> I make this finding on the basis of the level of detail contained in those portions of the proposal that identify specific information relating to the affected party's proposed work program, quality control and pricing information. In my view, the unique information contained in those portions of the proposal discloses a particular approach to the project taken by the affected party. In addition, I find that the disclosure of the specific information contained in Appendices A and B could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific templates of those types of documents. This information includes specific samples of the types of reporting records used by the affected party in carrying out projects, and the specific manner in which this information is recorded. Accordingly, I am satisfied that these portions of the record qualify for exemption under section 10(1)(a). …
>
> However, I am not satisfied that the other portions of the record qualify for exemption under section 10(1)(a).

I found that the remaining portions of that proposal did not qualify for exemption, as I had not been provided with sufficient evidence to satisfy me that the identified harms would result from disclosure of the remaining portions. I also found that the arguments made by the parties for the remaining portions reflected a concern with the disclosure of the "form and structure" of the proposal, which previous orders have consistently found does not meet the harms in section 10(1)(a) or (c).

I apply the same analysis in the circumstances of this appeal. Although the representations of the parties, in particular affected party A, are lengthy and identify general concerns about the use competitors might make of the information in the report, there is very little specific reference to particular information in this report, the disclosure of which would result in significant prejudice or interference, or undue loss or gain. In the absence of specifics, on my review of the representations, it appears the concerns relate more to very general information about affected party A's processes. In my view, this concern relates more to the form and structure of the report, as opposed to any specific information contained in it. I apply the same approach to this type of information as I did in MO-2616 and other orders. As a result, I am not satisfied that the disclosure of general information contained in the record which discloses the "form and structure" of the report could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization.

In addition, most of affected party A's arguments in support of the application of section 10(1)(a) and (c) identify concerns that affected party A may "lose its competitive advantage" or that disclosure would provide competitors with a "free education" about affected party A's approach. In Order PO-2435, Assistant Commissioner Beamish addressed similar arguments regarding the possibility that disclosure of a proposal would result in the identified harms. In Order PO-2435, Assistant Commissioner Beamish made the following statement:

> The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

I agree with the statement made by Assistant Commissioner Beamish. I find, based on the evidence before me, that even if disclosure may provide competitors with some information which they may use in their reports in the future (of which I am not convinced), this would not, in and of itself, significantly prejudice affected party A's competitive position or result in undue loss or gain.

Additional reasons supporting my finding that disclosure would not result in the identified harms in section 10(1)(a) or (c) include the fact that the City has indicated that information provided by third parties is frequently considered in open meetings; the fact that the report at issue is site specific and relates solely to the particular land at issue, and the fact that I have not been provided with sufficient evidence to satisfy me that the report differs significantly from other stormwater management reports required by municipalities when land is considered for development.

With respect to the other possible harms identified by the City, I find that these harms are not substantiated. They are, at best, speculative, and I have not been provided with sufficient evidence to support a finding that disclosure of the record could reasonably be expected to result in the harms identified in sections 10(1)(a) and/or (c).

Accordingly I find that the record does not qualify for exemption under sections 10(1)(a) or (c).

***Section 10(1)(b)***

The City also provides representations in support of its position that disclosure would result in undue loss to the public. As I interpret these arguments (which are similar to the ones I addressed in Order MO-2616), I regard them as raising the possible application of the mandatory exemption in section 10(1)(b), and will discuss them in that context.

The City states:

> The City needs to know that consultants are willing to utilize proprietary methods to analyze the effects of development in order for the City to be an effective regulator. However, the threat of the City disclosing such information is likely to have a chilling effect on the consultants' willingness to provide such information to the City. Alternatively, consultants will be motivated to dilute their information so as not to reveal proprietary information when providing reports … to the City.
>
> A lack of reporting or diluted reporting by consultants will have an impact on the City's ability to ensure that a developer has properly turned its mind to developing the appropriate infrastructure for the management of stormwater …. The public, as the party that stands to gain or lose from such regulation for their own safety and security of property, will lose if full and comprehensive information is not provided to the City. As such, the public will suffer an undue loss if the [record is] disclosed.
>
> The release of [the record] will have the effect of resulting in a less competitive market when, on future projects, the City or developers seek similar reports from [the affected party or its competitors]. Where companies know that their proprietary materials will be accessible, by their competitors and the public, they are unlikely to bid on doing such jobs with the City or developers. This will have the detrimental effect of limiting the pool of experts from which developers and the City can draw to gain the expertise needed to regulate for the benefit of the public.

On my review of this issue, which I also addressed in Order MO-2616, I am not satisfied that the harms in section 10(1)(b) have been met.

First, one of the City's identified concerns is that if the proprietary information in the report is disclosed, companies preparing reports of that nature will either be reluctant to provide the information in the future, or will provide "diluted" reports which may impact the City's ability to ensure proper oversight of future developments. The basis of this argument is that authors of reports such as the one at issue would be concerned about disclosure of proprietary information. However, notwithstanding affected party A's arguments set out above, I have found above that there is insufficient evidence to support a finding that significant prejudice or undue loss or gain will result from disclosure of the record. I also note that affected party A at no time suggests that it will no longer provide reports of this nature if the record is ordered disclosed.

Secondly, the report at issue is a stormwater management study report. In my view, a report of this nature would need to include basic information relating to stormwater management of the identified site. I do not accept the argument that disclosure would result in future reports of this nature containing "diluted" information, particularly as the City has indicated that the report was provided to it under the requirements of the *Planning Act*.

As a result, I am not persuaded that disclosing the information could reasonably be expected to result in similar information no longer being supplied to the City in the future, as contemplated by section 10(1)(b). In my view companies like affected party A that do business with public institutions such as the City understand that certain information regarding proposed developments, including stormwater management reports, will be made public. I find a number of the arguments put forward by the City speculative, and not sufficiently "detailed and convincing". Furthermore, I do not accept that the prospect of the release of the record at issue in this appeal could reasonably be expected to result in reluctance on the part of companies such as affected party A to participate in future projects.

Accordingly, I find that the requirements for section 10(1)(b) have not been met.

**ECONOMIC AND OTHER INTERESTS**

As it did in the appeal resulting in Order MO-2616, the City has also claimed that sections 11(c) and (d) apply to the record at issue in this appeal. These sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

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

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

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

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

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

With respect to the application of sections 11(c) and (d), the City states:

> As discussed above …, the release of the [Report] will have the effect of resulting in a less competitive market when, on future projects, the City or developers seek similar reports from [the affected parties] or their competitors. Where the consultants know that their proprietary materials will be made accessible to their competitors, they are unlikely to bid on doing other reports for the City or developers where the developers will be required to submit the reports to the City.
>
> This will have the detrimental effect of limiting the pool of experts from which developers and the City can draw to gain the expertise needed. This would be unfortunate because the City is a frequent user of such consulting services, as are developers ….

The City then argues that, with a limited field of experts willing to provide reports such as the one at issue to the City, the City would be forced to look further afield or select from a limited field of experts. The City argues that this may have the effect of raising the prices for the City or developers paying for such services, resulting in additional costs to the City. It also argues that limiting the pool of experts will limit the pool of expertise available to the public.

***Findings***

In the circumstances, I am not satisfied that disclosure of the record at issue would result in the harms identified in sections 11(c) and/or (d).

I have addressed some of the arguments put forward by the City under my discussion of section 10(1)(b), above. There I found that there was insufficient evidence to satisfy me that the harms in section 10(1)(b) applied. I also noted that the City acknowledges that third party information is often made available to the public. The suggestion that disclosure of the report at issue in this appeal would result in companies such as affected party A no longer providing such information,

and thereby limiting the fields of experts who could provide such reports is, in my view, not supported by the evidence.

Furthermore, it is not clear to me how disclosure could reasonably be expected to prejudice the economic interests of the City, the competitive position of the City, or be injurious to the financial interests of the City. The report at issue was prepared by affected party A for affected party B, and was then supplied to the City as a requirement of the *Planning Act*. Even if I were to accept the City's position that companies would in the future be reluctant to prepare and provide such reports (which I do not accept), the City could still require that these reports be provided to it in order to meet the requirements of the *Planning Act*.

In summary, I find that I have not been provided with sufficiently detailed and convincing evidence to satisfy me that the disclosure of the record could reasonably be expected to lead to the harms set out in sections 11(c) or (d) of the *Act*.

## ORDER:

1. I order the City to disclose the record to the appellant by **July 12, 2011** but not before **July 7, 2011**.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the City to provide me with a copy of the record that it discloses to the appellant.

Original signed by: June 7, 2011
Frank DeVries
Adjudicator