

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## INTERIM ORDER MO-2683-I

Appeal MA09-225

City of Toronto

December 30, 2011

**Summary:** The appellant sought access to records relating to an identified project. The city granted access to many of the responsive records, and denied access to excerpts of the meeting minutes of ten meetings, and one identified report, on the basis of section 6(1)(b). The application of the exemption in section 6(1)(b) to these pages of records is upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, s. 6(1)(b); *City of Toronto Act, 2006*, S.O. 2006, s. 190(2)(a).

**Orders and Investigation Reports Considered:** MO-2468-F

**Cases Considered:** *St. Catharines (City) v. IPCO, 2011 ONSC 346*

### NATURE OF THE APPEAL:

[1] The City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* [MFIPPA or the Act] for the following records relating to an identified project (the project):

[A]ll communication[s], letters, electronic dispatch[es], minutes of meetings and agreements during [an identified time period].

[2] The appellant also provided a list of the specific types of records it was seeking.

[3] This request involves records held by the city as well as records of the City of Toronto Economic Development Corporation (TEDCO). In a 2008 decision of the Ontario Court of Appeal,<sup>1</sup> the court determined that TEDCO was deemed to be part of the city for the purpose of the *Act* on the basis of section 2(3) of the *Act*.

[4] In response to the request the city identified 499 pages of responsive records, and denied access to all of the records on the basis of a number of identified exemptions under the *Act*. The city also provided the appellant with a detailed index of the responsive records. The appellant appealed the city's decision.

[5] During the mediation stage of the appeal, the city located an additional 177 pages of records. It also issued a revised decision in which it indicated that, because certain negotiations were now complete, access was being granted to over 600 pages of records. It also stated that approximately 55 identified pages were not responsive to the request, and denied access to the remaining 21 pages of records (pages 454-462, 469-473 and 670-676) on the basis of the exemption in section 6(1)(b) (closed meeting) of the *Act*. The decision letter also indicated the fees payable for the records.

[6] The appellant subsequently paid the fee and obtained access to the records. The appellant also confirmed that the only issue remaining was the application of section 6(1)(b) to the identified 21 pages of records.

[7] A Notice of Inquiry was sent to the city, and the city provided representations in response. The non-confidential portions of these representations were then provided to the appellant, who also provided representations. In its representations, the appellant raised, for the first time, the issue of whether the city's search for responsive records was reasonable. The appellant also requested that this search issue be addressed in this appeal.

[8] The appellant's representations were shared with the city, and the city was invited to submit representations in reply, and also to address the search issue. In response, the city provided reply representations on the issues. In addition, the city conducted further searches and located 31 additional pages of records. It then issued a supplementary decision letter in which it granted access to a number of the newly-located records, and denied access to three of them (consisting of 10 pages) on the basis of the exemption in section 6(1)(b) of the *Act*.

[9] The appellant confirmed that it also wished to appeal the city's decision to deny access to these additional 10 pages of records, and they were added to the scope of this appeal. A Supplementary Notice of Inquiry was sent to the city, and the city provided representations in response. These representations, to a large extent, paralleled the earlier representations of the city.

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<sup>1</sup> City of Toronto Economic Development Corporation v. Information and Privacy Commissioner/Ontario (2008), 292 D.L.R. (4<sup>th</sup>) 706 (Ont.C.A).

[10] On my review of the records at issue in this appeal, including the "additional records," I note that one of these records (a seven-page "confidential report") is identical to one of the records already at issue in this appeal (pages 670-676). I will only review the application of the section 6(1)(b) exemption to the earlier copy of this record.

[11] With respect to the other two "additional" records, I note that these two records are similar to the record comprising pages 670-676. However, because of the discussion below and because the appellant has not had the opportunity to review the specific representations of the city on these three pages of records, I will not address them in this order, and will provide the appellant with the opportunity to provide representations on these three pages, if it wishes to do so.

## **RECORDS:**

[12] There are 11 records remaining at issue, totalling 21 pages or portions of pages. These records are:

- ten excerpts from the minutes of ten separate meetings of TEDCO's Board of Directors (portions of pages 454 to 462 and 469 to 473); and
- a 7-page report (pages 670 to 676).

## **DISCUSSION:**

### **CLOSED MEETING**

[13] The city relies on the exemption in section 6(1)(b) to deny access to the records at issue.

[14] 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.

[15] 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]

[16] 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**

[17] The city submits that the records, including those at issue and those disclosed to the appellant, contain notations which confirm that in-camera meetings were held and the dates on which they were held.

[18] With respect to the 10 excerpts from the minutes of the meetings of TEDCO's Board of Directors (pages 454 to 462 and 469 to 473), the city states:

The Confidential Minutes consist of excerpts from meeting minutes of TEDCO's Board of Directors describing the content of in camera discussions. The City submits that a review of the meeting minutes of TEDCO's Board of Directors - including both the Confidential Minutes and the documents previously disclosed to the Requester - confirm the dates of the in camera meetings of TEDCO's Board of Directors to which the Confidential Minutes relate. Previous orders of the IPC have, routinely and repeatedly, acknowledged that minutes of a meeting are sufficient evidence to satisfy the requirement to establish that a meeting was held and that the meeting was held in the absence of the public.

[19] The city itemizes the specific dates on which each of the in-camera meetings was held. It then states:

The City submits that the minutes for these meetings contain notations indicating that the portions of the meetings that considered the abovementioned items were held in the absence of the public. As a result, the City has satisfied the requirement that there be a meeting held in the absence of the public with respect to the Confidential Minutes.

[20] With respect to the 7-page report (pages 670-676) the city states that this record is a confidential attachment to an April 3, 2009 report, which was considered at an in-camera meeting of City Council. Although the bulk of the April 3 report was made

public, the city confirms that the confidential report has been consistently treated in a confidential manner. The city submits that the minutes of the April 6, 2009 meeting of City Council indicate that it went into closed session to consider and deliberate on the issues contained in the confidential report.

[21] The appellant acknowledges that an in-camera meeting was held on April 6, 2009 and that records disclosed to it confirm this. However, the appellant notes that it has not received the minutes of the TEDCO meetings that would confirm that those were in-camera meetings, and questions the city's position.

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

[22] The City asserts that in-camera meetings were held by both City Council and TEDCO's Board of Directors on the dates noted in its submissions. The appellant appears to acknowledge that the City Council meeting was held in-camera, but takes the position that other meetings (the TEDCO Board of Director's meetings) were not closed to the public and argues that it has not been provided with sufficient evidence to establish that those meetings were held in closed session.

[23] In determining this issue, in addition to the representations, I have also viewed the TEDCO meeting minutes at issue as they form an important part of the evidence before me. I find that a number of these records themselves provide corroborative evidence that a number of these meetings were, in fact, held in-camera (specifically, pages 457-462, 469-470 and 472-473). The other records at issue (pages 454, 455, 456 and 471) contain only the portions of the minutes directly responsive to the request, with the remaining portions of these records severed. Although these portions of these records do not themselves provide corroborative evidence that these four meetings were held in-camera, based on the nature of the subject matter discussed and on the representations of the city and the circumstances of this appeal, I am satisfied that I have been provided with sufficient evidence to establish that these meetings were also held in-camera.

[24] Therefore, based on the evidence before me, I am satisfied that the in-camera 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 meetings in the absence of the public**

[25] The city provides extensive representations in support of its position that a statute authorizes the holding of the in-camera meetings. The basis of its position is that it, and TEDCO, were authorized to hold meetings in the absence of the public based on section 190(2)(a) of the *City of Toronto Act, 2006* (COTA, 2006), which provides:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

the security of the property of the City or local board;

[26] The city confirms that the meetings at issue were held in-camera because of the operation of section 190(2)(a) of COTA, 2006.<sup>2</sup>

[27] Under the second part of the section 6(1)(b) test, I must determine whether the city was authorized to hold in-camera meetings to discuss the matters, and whether the matters at issue involve the "security of the property." In examining this issue, I have reference to Order MO-2468-F, in which Adjudicator Laurel Cropley reviewed in detail the phrase "security of the property" found in section 239(2)(a) of the *Municipal Act*, and I discuss this issue later in this order. I am also guided by the decision of the Divisional Court in *St. Catharines (City) v. IPCO*, 2011 ONSC 346. In that decision, the court reviewed Adjudicator Colin Battacharjee's findings in Order MO-2425 that the City of St. Catharines was only authorized to conduct part of a particular meeting in-camera. The court, in disagreeing with those findings, discussed the approach to take in determining whether an institution was authorized to hold a meeting in-camera. The court noted:

The error in the Adjudicator's analysis is underscored by a consideration of the practical implications of the decision made. The decision determined that only parts of the meeting could be closed. How is such a meeting to be conducted? Whenever a participant interrupts the consideration of the disposition of land to refer to any other option being considered or to review any part of the history or background, the meeting would have to adjourn to go into a public session and then close again when the discussion returned to consider the sale of property. It is not realistic to expect the members of a municipal council to parse their meetings in this way. At a minimum, it would distract from free, open and uninterrupted discussion. It could lead to meetings that dissolve into recurring, if not

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<sup>2</sup> This appeal involves the property interests of both the city and TEDCO. For ease of reference, I will refer to the city as representing both interests.

continuous, debate about when to close the meeting and when to invite the interested public to return.

***The city's representations***

[28] The city has made substantial representations on this issue. However, given my findings that the city has met the second part of the section 6(1)(b) test, I will only refer to those submissions specific to my decision.

[29] The city begins by identifying the authority under which the TEDCO Board of Directors held its in-camera meetings. It states:

As TEDCO is a corporation incorporated under the [*Ontario Business Corporations Act* (the OBCA)], the meetings of TEDCO's Board of Directors are regulated by the provisions of the OBCA, which contains provisions that expressly regulate the holding of meetings of the Board of Directors of OBCA corporations. The OBCA requires corporations to enact corporate by-laws and requires meetings to be held in accordance with the corporate by-laws enacted by the corporation. As such, TEDCO's authority to hold closed meetings is provided by the OBCA. However, TEDCO has enacted corporate by-laws under the provisions of the OBCA which require TEDCO to close meetings of its Board of Directors in a manner which is consistent with the City's policies and procedures with respect to meetings of the City Council and its committees.

For all time periods at issue in this appeal, TEDCO's corporate by-laws contained provisions authorizing the closing of meetings on grounds equivalent to those provided for authorizing closed meetings of City Council under the *City of Toronto Act, 2006* (COTA, 2006). Therefore, while TEDCO's ability to conduct closed meetings is ultimately authorized by the OBCA, TEDCO willingly adopted corporate by-laws which authorize TEDCO's Board of Directors to hold meetings in the absence of the public, on similar grounds as provided in subsection 190(2) of COTA, 2006 authorizing in camera meetings of City Council.

[30] The city also states that, in addition, city council was authorized to hold a meeting in the absence of the public on the basis of section 190(2) of COTA, 2006. The city identifies that this section of COTA, 2006 (which mirrors section 239(2) of the *Municipal Act, 2001*) provides as follows:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

- (a) the security of the property of the City or local board;

- (b) personal matters about an identifiable individual, including a city employee or a local board employee;
- (c) a proposed or pending acquisition or disposition of land by the City or local board;
- (d) labour relations or employee negotiations;
- (e) litigation or potential litigation, including matters before administrative tribunals, affecting the City or local board;
- (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose; or
- (g) a matter in respect of which the city council, board, committee or other body may hold a closed meeting under another Act.

[31] In addition, the City confirms that it takes the position that the in-camera meetings at issue dealt with "security of the property" in section 190(2)(a) of COTA, 2006. It also states that the portions of the relevant TEDCO meetings held in the absence of the public were also permissible under the corporation's by-laws as the subject matter under consideration at these portions of the meetings dealt with the "security of the property." It then states:

... Each of the in camera meetings ... involved discussions of the particular risks involved in the development of [the identified project] in [the land], and the methods to be taken to secure the City's property from potential adverse impacts arising from the various decisions required in the development of [the project]. ...

The in camera meetings included a substantive deliberation concerning the potential harms and risks to the City's property in relation to specific proposed transactions. Such deliberations constitute a consideration of the "security of the property" of the City or its local boards, for purposes of subsection 190(2)(a) of COTA, 2006. As a result, the City submits that the meetings were authorized by statute to be held in the absence of the public and that part 2 of the test has been satisfied with respect to the Confidential Minutes and the Confidential Report.



[32] The city takes the position that the phrase "security of the property" can include the prevention of financial harm to the city's financial and economic interests. The city states:

The phrase "security of the property of the City or local board" should be understood to include preventing any of the things owned by the City or a local board from being exposed to adverse impacts.

[33] The city examines the meaning to be given to the term "property," stating:

The term "property" in the phrase "security of the property" includes a wide breadth of items that do not have a physical or material existence, such as stock options, trade secrets, or business goodwill, as well as property which has a physical existence. The City notes that the New Shorter Oxford English Dictionary includes the following definitions for the term property – "that which one owns; a thing or things belonging to a person or persons..." and "the condition or fact of owning or being owned; the (exclusive) right to the possession, use, or disposal of a thing, ownership..." Black's Law Dictionary includes the following definitions for the term property – "the right to possess, use and enjoy a determinate thing" and "any external thing over which the rights of possession, use and enjoyment are exercised."

The term "property" extends beyond items which have a material existence and includes all items which can be considered to be "owned," even where the item does not have a physical presence. The City notes that Black's Law Dictionary includes both corporeal and incorporeal property in its larger definition of property. Black's Law Dictionary defines the term corporeal property as including:

- A. "The right of ownership in material things" and,
- B. "Property that can be perceived, as opposed to incorporeal property; tangible property"

Whereas Black's Law Dictionary defines the term incorporeal property as including:

- A. "An in rem proprietary right that is not classified as corporeal property [ ...] Incorporeal property is traditionally broken down into two classes: (1) *jura in re aliena* (encumbrances), whether over material or immaterial things, examples being leases, mortgages; and servitudes; and (2) *jura in re propria* (full ownership over immaterial things), examples being patents, copyrights, and trademarks;" and,

B. "A legal right in property having no physical existence."

It is the City's position that the meaning of the term "property" in the phrase "security of the property" should be understood as referring to all forms of property held by the City, including the City's intangible or incorporeal property. The City submits that the everyday meaning of the phrase "security of the property" includes not only protecting or preventing physical damage to the City's tangible property, but also includes protecting or preventing other forms of adverse impacts to the City's assets.

The City submits that preventing harm to the financial or economic value of the City's tangible and intangible property would commonly be understood to be contemplated within the scope of the phrase "security of the property." As a result, the authority granted under COTA, 2006 provides for the City to hold an in camera meeting to discuss the adverse impacts to any form of property owned by the City. For example, the authority to hold a closed meeting to consider "security of the property" would include the authority to engage in a meeting to consider the potential risks and impacts on a "lease" held by the City or a local board arising from a proposed transaction.

In the present appeal, the meetings to which the Confidential Report and the Confidential Minutes related were held in-camera since the subject matter of these meetings included a consideration of the potential harms to the City's tangible and intangible assets related to the proposed transactions. ...

***The appellant's representations***

[34] The appellant accepts the city's position that meetings may be closed to the public on the basis of section 190(2)(a) of COTA, 2006 if the matter being considered is the "security of the property;" however, the appellant argues that this phrase, within the context of freedom of information legislation, should be interpreted narrowly so that exemptions are "limited and specific." The appellant states:

The IPC favoured this approach in its decision in MO-2468-F dated October 27, 2009, where it held that "security of the property" should be interpreted in accordance with its plain meaning ie: the protection of property from physical loss or damage and the protection of public safety in relation to the property. Although previous IPC decisions have discussed the phrase, MO-2468-F is the most recent and comprehensive discussion on the subject.

[The city] does not allege that the information at issue deals with protection of property from physical loss or protection of public safety, and [the appellant] submits that [the city and/or TEDCO] therefore did not have the authority to hold these meetings in the absence of the public.

In its submissions, the [city] attempts to expand the definition of "property" to include "intangible property", "incorporeal property", and anything that can be "owned, even where the item does not have a physical presence." The [appellant] submits that this expansive and limitless interpretation of *MFIPPA's* exemptions is not consistent with the principles of freedom of information and should not be accepted.

[The city] summarizes its position by stating that the information, if disclosed, could reasonably be expected to injure the City's economic and financial interests because it "dealt with the issues relating to the City's interest in relation to agreements." The City of Toronto has, however, already disclosed the agreements themselves. The agreements have already been finalized precluding the possibility that the City could be financially "injured" as alleged.

### ***The city's reply representations***

[35] In its reply representations the city reiterates its position that it disagrees with the findings in Order MO-2468-F. Much of the city's submissions argue against those findings. Because of my findings in this case, which distinguish the circumstances of the current appeal with those in Order MO-2468-F, it is not necessary to replicate those arguments here. I note, however, that the city takes issue with the appellant's assertion that the city's interpretation of this exemption is "expansive and limitless."

[36] The city submits that it has never advanced that any exemption under the *Act* should be interpreted in an "expansive and limitless" fashion. It submits that it has merely advanced that section 190(2)(a) of COTA, 2006 is to be interpreted as harmonious with the overall scheme of COTA, 2006 and the intention of the legislature in enacting COTA, 2006.

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

[37] As noted above, both the city and the appellant refer extensively to Order MO-2468-F, as this order examines in considerable detail the interpretation of the phrase "security of the property" in the context of negotiations regarding the purchase and sale of assets other than land. In the context of the negotiations surrounding the sale of street and expressway lights, the adjudicator in that order found that "security of the property of the municipality" concerns 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 examining this issue, the adjudicator noted that other 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 loss or damage to it."

[38] In reviewing Order MO-2468-F in the context of the current appeal, it must be noted that the adjudicator in Order MO-2468-F was only considering whether the negotiations in a commercial transaction pertain to "security of the property" as she clearly stated (on page 57):

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.* [emphasis added]

[39] Broadly speaking, the adjudicator's findings in Order MO-2468-F do not recognize "security of the property" as including the "protection of the financial and economic interests and assets of a municipality" [page 59] made in the context of the specific factual circumstances, that is, the city's financial interests *vis a vis* its negotiation strategy, the type of records at issue in that appeal and the arguments that had been made. I agree with the findings in Order MO-2468-F in principle as a starting point for applying the exemption in section 6(1)(b) to other types of records and fact situations.

[40] However, I also agree with the city that "property" includes both "corporeal" and "incorporeal" property. These are clearly defined concepts and recognized at law as "property interests." In that respect, the use of the word "property" in section 190(2)(a) of COTA, 2006 can refer to both corporeal and incorporeal property owned by the city. Accordingly, if the subject matter being considered in a meeting is the "security" (in the sense of taking measures to prevent loss or damage to it) of the property of the city or local board, COTA, 2006 authorizes holding the meeting in-camera.

[41] As a result, applying the analysis in Order MO-2468-F, previous decisions, and the discussion above, I find that, in order to establish that the requirements of COTA, 2006 apply, the city must establish that:

- it owns identified property (corporeal or incorporeal); and
- the subject matter being considered in the meeting is the security (in the sense of taking measures to prevent loss or damage to it) of that property.

## **The records at issue**

### ***The 7-page report (Pages 670-676)***

[42] The city states that the in-camera meeting at which this report was discussed involved discussions of “the particular risks involved in the development of [the project]” and “the methods to be taken to secure the City’s property from potential adverse impacts arising from the various decisions required.” The city also provides confidential representations in which it specifically identifies the risks and impacts to the city’s property discussed at the meeting.

[43] On my review of the 7-page report, I am satisfied that it pertains to a class of incorporeal property (in the sense of a *jura in re aliena* class of property, referred to above). In that regard, it specifically refers to property owned by the city.

[44] I am also satisfied, based on my review of the contents of the report, that among other things, it addresses the taking of measures to prevent loss or damage to the property. Although the report relates to a commercial transaction, it also specifically pertains to the preservation of the property, in the sense of identifying specific risks to it and taking measures to prevent loss or damage to it. I note that this protection issue identified in the record is distinguishable from a mere financial interest in negotiating strategies.

[45] Finally, I am satisfied that the subject matter of the in-camera meetings at which this report was discussed included a discussion of the security of the property identified above. Although not all of the information contained in the report could be said to be on this topic, the Divisional Court has made it clear that once it is determined that the statute authorizes going into closed meeting to discuss a particular topic, the second part of the test would be met for all aspects of that closed meeting.

[46] Accordingly, I find that the second part of the section 6(1)(b) test has been met for the identified 7-page report.

### ***The ten separate excerpts from the minutes of ten in-camera meetings of TEDCO’s Board of Directors (portions of pages 454 to 462 and 469 to 473)***

[47] Regarding the excerpts from the minutes of ten in-camera meetings of TEDCO’s Board of Directors, the city states:

In particular, each of the above mentioned in camera meetings addressed the particulars of developing [the project]. Each of the in camera meetings of TEDCO’s Board of Directors ... involved discussions of the particular risks involved in the development of [the project], and the methods to be taken to secure the City’s property from potential adverse

impacts arising from the various decisions required in the development of [the project].

[48] The city also provides confidential representations in which it provides an example of the specific risks to the city's property discussed at one of the identified meetings.

[49] On my review of the excerpts of the in-camera meeting minutes at issue, I am satisfied that they pertain to a class of incorporeal property owned by the city. Furthermore, although I have not been provided with supporting evidence as detailed as that which relates to the confidential report addressed earlier, I am also satisfied, based largely on the city's representations set out above in combination with my finding that the confidential report contains information relating to risk, that the in-camera meetings of TEDCO's Board of Directors involved discussions of particular risks to the property, and the methods to be taken to secure the property from potential adverse impacts.

[50] Accordingly, I am satisfied that the subject matter of the identified in-camera meetings of TEDCO's Board of Directors included discussions of the security of the property identified above. Again, the Divisional Court has made it clear that once it is determined that the statute authorizes going into closed meeting, the second part of the test would be met for all aspects of that closed meeting.

[51] Accordingly, I find that the second part of the section 6(1)(b) test has been met for the excerpts from the minutes of the ten in-camera meetings of TEDCO's Board of Directors.

### ***Summary***

[52] In summary, I am satisfied, based on my review of the contents of the records and the city's representations, that the in-camera meetings concerned the "protection" or "security" of the city's property, and that this protection issue is distinguishable from a mere financial interest in negotiating strategies. Although the overall factual context related to a commercial transaction, the discussions at issue pertained to the protection from harm of a recognized property interest of the city. In my view, this interpretation is consistent with the interpretation of "security" in Order MO-2468-F.

[53] As identified above, the city made substantial representations on the application of section 190(2)(a) of COTA, 2006. This included arguments in support of its position that section 190(2)(a) could apply to circumstances where disclosure could reasonably be expected to injure the City's economic and financial interests because it "dealt with the issues relating to the City's interest in relation to agreements." I found above that the records at issue pertain to a class of incorporeal property and, in making that finding, it was not necessary for me to consider the city's arguments that would extend

this definition of property to other types of situations. However, I agree with the adjudicator's decision in MO-2468-F that found that the wording of the statute would not apply to "protecting the City's bargaining power when it negotiates the sale of its property." In that regard, I do not agree with the city's argument that the application of this exemption could extend to the city's "informational assets" (the positions, plans and strategies that the city would apply to its negotiations),<sup>3</sup> nor do I agree with the city's position that this section applies in all circumstances where disclosure could impact the value of the property. Section 190(2)(a) of COTA, 2006 is not contingent on a possible "harm" to the city or board; rather, this section allows the city or board to proceed in-camera in the event that a particular subject matter is being discussed. Whether or not disclosure will cause financial or other "harm" is not the definitive issue.

### **Part 3 - disclosure of the record would reveal the actual substance of the deliberations of the meeting**

[54] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

[55] Under part 3 of the test

- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344 and MO-2337]
- "deliberations" refer to discussions conducted with a view towards making a decision [Orders M-184, MO-2337, MO-2368, and MO-2389]

[56] The city submits that the records at issue contain "specific detailed content which would disclose the actual content of, or permit the drawing of accurate inferences of, the substance of the deliberations" at the in-camera meetings. The city submits further that a finding that the third part of the section 6(1)(b) test has been met for the types of records at issue is consistent with many previous orders of this office (Orders MO-2335, MO-2087, MO-2483, MO-2444 and MO-2386).

[57] The appellant takes the position that, under this part of the test, "deliberations" refer to discussions conducted with a view towards making a decision. It refers to previous orders of this office which have also established that it is not sufficient that the record itself was the subject of deliberations at the meeting in question.

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<sup>3</sup> Which, in some instances, may be exempt under section 11(e) of the *Act*.

[58] The appellant then submits that disclosure of the 7-page report would not reveal the "substance of deliberations" as the document was created prior to the April 6, 2009 in-camera meeting. It states that "[t]he Confidential Attachment cannot possibly contain information on deliberations that had not yet been conducted at the time the report was created." The appellant also states that the meeting minutes from that in-camera meeting, which were disclosed to the appellant, indicate that the 7-page report included only one set of recommendations that were adopted in full. It then states:

As such it is not possible that any "deliberations" regarding various options would be revealed by the production of this document as there was only one set of recommendations contained within the document. The recommended lease amendments were adopted and the amended lease was subsequently produced in response to this access request.

[59] With respect to the excerpts of the minutes of the in-camera meetings of TEDCO, the appellant submits that minutes of meetings usually simply summarise decisions that were made at the meeting. It notes that the city has produced meeting minutes in full from City Council, even minutes that refer to in-camera discussions by City Council, and submits that the TEDCO meeting minutes should be produced in full.

[60] In reply, the city disputes the appellant's position that a document prepared prior to an in-camera meeting cannot qualify for exemption under section 6(1)(b), and states that this interpretation would result in municipalities being unable to provide any documents to municipal council for use at an in-camera discussion. It also identifies that previous orders have drawn a distinction between documents which describe the "subject" of the discussion, and ones that describe the "subject matter" of the discussion. The city then states that the April 6, 2009 meeting was held to discuss the particulars of the 7-page report, and refers to previous orders where a report was found exempt under section 6(1)(b). In addition, the city refers to its previous submissions where it states that the 7-page report contains information concerning the project which, if disclosed, would reveal the substance of the issues deliberated by council. It also states that whether or not council adopted the recommendations in the report does not mean that the contents of the report would not reveal the content of the in-camera council deliberations.

[61] With respect to the excerpts of the in-camera meeting minutes of TEDCO's board of directors, the city states that the content of these minutes do reveal the in-camera deliberations of the Board of Directors. The city then provides confidential representations in which it reviews each of the meeting minutes in some detail, and identifies information which reveals the specific discussions at those meetings.

[62] Based on my review of the 7-page report, the minutes of the April 6, 2006 meeting, and the city's representations, I am satisfied that the disclosure of the 7-page report would reveal the substance of the issues deliberated by council. I am satisfied



that, in adopting the recommendations in the report, council would have also considered the specifics identified in the 7-page report.

[63] In addition, based on my review of the in-camera meeting minutes of TEDCO's board of directors, as well as the confidential representations of the city, I am satisfied that disclosure of the excerpts of the minutes would reveal the substance of the deliberations at these closed meetings.

[64] Accordingly, I find that the third requirement for the three-part test for section 6(1)(b) has been met for the records at issue in this appeal.

### **Exercise of discretion**

[65] The section 6(1)(b) 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.

[66] 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.

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

[68] The city states:

There is a need to balance the interests intended to be protected in subsection 6(1)(b), and the public interest in disclosure of information concerning the operation of their municipal institutions. The City has disclosed considerable amounts of information relating to [the project], including public reports and other documents that are readily available on the City's website, which would permit the public to make informed decisions about the City's operations with respect to [the project]. However, the City has chosen to deny access to the specific and limited information contained in the [records at issue] in this appeal to prevent

exposing the City, and – as a result – the public, to the risk of loss or harm to the City’s public assets.

[69] The city also outlines the specific factors it took into consideration in exercising its discretion not to disclose the records at issue, including the purposes and principles of the *Act*, the wording of section 6(1)(b) and the harms that the city believes would result from disclosure of information it considers to be “highly sensitive” and may have a negative effect on competitive relationships.

[70] In response to the city’s submissions on this issue, the appellant points out that it is a private company with an interest in the project. It indicates that it is seeking information about the extent that its competitors are being directly or indirectly funded by taxpayers, and also believes that its business interests may be harmed by the city’s activities. The appellant does not believe that the city’s assets will be harmed by disclosure of the information at issue.

[71] The primary focus of the appellant’s submissions is that as a competitor of the company with which the city is involved, it believes that the city should be “open and honest about public monies given to private companies, particularly where only one of several companies is being given public funds.” The appellant also believes that disclosure of the records would increase public confidence in the operations of the city and “the manner in which it oversees and leases out [the lands].” The appellant points out that funding issues have been of considerable concern within a particular industry and refers to its own litigation history with the city relating to the manner in which it has treated its access requests.

### ***Findings***

[72] Having considered the submissions made by both parties, I am not persuaded that the city erred in its exercise of discretion. I am satisfied that it has taken into account relevant considerations, including the competitive relationships involved, the amount of information that is already publicly available and the small amount of information remaining, as well as the harms it believes would result from disclosure and its limited reliance on the exemption in section 6(1)(b) to prevent those anticipated harms. Accordingly, I find that the city has properly exercised its discretion to withhold the information at issue.

### **ORDER:**

- 1) I uphold the city’s decision to deny access to the 21 pages of records at issue on the basis of the exemption in section 6(1)(b) of the *Act*.

- 2) I remain seized of this appeal in order to deal with the three pages of newly-located records.

Original signed by: \_\_\_\_\_  
Frank DeVries  
Adjudicator

\_\_\_\_\_ December 30, 2011