Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2700

Appeal MA09-315

City of Toronto

March 20, 2012

Summary: The requester sought records related to solid waste management by the city. The city denied access to some of the responsive records, citing the mandatory exemption in sections 10(1)(a) and (c) (third party information) and the discretionary exemptions in sections 6(1)(b) (closed meeting) and 11(c) and (d) (economic and other interests). This order partially upholds the city's decision under section 6(1)(b) and does not uphold the city's decision under sections 10(1)(a) and (c) and 11(c) and (d).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b), 10(1)(a) and (c), 11(c) and (d).

Orders and Investigation Reports Considered: Orders MO-1789, MO-2496-I, MO-2468-F, MO-2683-I, PO-1940, PO-2226, PO-2289, PO-2435.

OVERVIEW:

[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 information relating to "the Applications for Permits to Take Water made by [identified company], with respect to [a named mine site]". As there was some discrepancy between the submitted request form and its accompanying letter, the requester subsequently revised the request as follows:

> ...
> Any Studies/ Memorandums by the Ministry of Natural Resources and the [city] of what alternatives it had if the border closed in relation to permits

> to take water and waste management in relation to the [above-stated mine]. …

[2] On May 1, 2009, the city wrote to the requester advising that following a thorough search of its Water Division, no responsive records exist. With respect to the records located in its Solid Waste Management Division, the city located responsive records and issued a decision advising that access has been granted in part to the requested records. However, access was denied to portions of the records pursuant to sections 6(1)(b) (closed meeting), 9(1) (relations with other governments), 10(1) (third party information) and 11 (economic and other interests) of the *Act*.

[3] The requester (now the appellant) appealed the city's decision.

[4] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry.

[5] I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the city and to the consultant whose third party information may be contained in the records (the affected party), seeking their representations. I received representations from both the city and the affected party. In its representations, the affected party claimed that the mandatory third party exemption applied to Records 9, 13 and 18, in addition to those for which this exemption was claimed by the city.

[6] I then sent a Notice of Inquiry, along with a copy of the city's representations, to three municipal and one provincial institution that, according to the city, may have an interest in the information at issue in the records. Certain portions of the city's representations were withheld from the institutions due to confidentiality concerns.

[7] In response, I received representations from the Regional Municipality of Peel (Peel) objecting to disclosure of its information contained in the records. I also received representations from the Regional Municipality of Durham (Durham), which agreed with the city's position on the release of the records. The third institution, the Regional Municipality of York (York), took no position concerning disclosure of the records. The fourth institution, the Ministry of Environment (MOE), did not provide representations.

[8] I then sent the appellant a Notice of Inquiry, along with a copy of the representations of the city, the affected party and Peel. Certain portions of the city's representations were again withheld due to confidentiality concerns. I received representations from the appellant, who indicated that it had received copies of Records 2, 6, 7, 10, 11, 14, 15, 16 and 19 from other institutions. Accordingly, Records 2, 6, 7, 10, 11, 14, 15, 16 and 19, were no longer at issue in this appeal.

[9] During the inquiry process, the city withdrew its reliance on section 9(1) and issued a supplementary decision letter to the appellant disclosing three sets of pages, namely, pages 346 to 357,[1] 372 to 381, and 382 to 391 of the records. These pages all contain a copy of the same nine-page report entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan January 2005" (the disclosed report).

[10] As set out in the Index of Records provided to the appellant by the city and in the Notice of Inquiry sent to all of the parties in this appeal, Record 20 is also a nine-page report also entitled "GTA Municipalities Solid Waste Disposal Contingency Plan January 2005". The city applied sections 6(1)(b), 10(1)(a) and (c), and 11(c) and (d) to Record 20. I have decided not to adjudicate upon records which the appellant has already received. Accordingly, Record 20 is no longer at issue in this appeal.

[11] In its supplementary decision letter, the city also disclosed pages 392 to 397 of the records, which is a copy of a State of Michigan Bill.

[12] I provided a copy of the appellant's representations to the city, the affected party, Peel and Durham and sought reply representations. I also provided the city with a copy of the affected party's, Peel's and Durham's representations. I received reply representations from the city and the affected party. I then shared the non-confidential portions of the city's representations with the appellant and sought and received sur-reply representations. These sur-reply representations of the appellant were shared with the city, which provided representations in response.

[13] Subsequently, I again sought representations from the city, the affected party, Peel and Durham on information from the records relating to the Ministry of Environment's Landfill Inventory Management (LIMO) system. I received representations from the city and the affected party in response.

[14] In this order, I uphold the city's decision to deny access to Records 1 and 3 to 5 under section 6(1)(b). I do not uphold the remainder of the city's decision.

RECORDS:

[15] The records remaining at issue consist of city staff and third party reports, memorandums and correspondence as outlined in the following index:

Record #	City Page Numbers	Description	Exemptions
1	73-77	*In Camera* Staff Report June 15, 2004, a named contract - Adoption of Letter Agreement and Report on a named	6(1)(b)

[1] Pages 349 and 353 are blank pages.

Record #	City Page Numbers	Description	Exemptions
		arbitration	
3	190-194	*In Camera* Staff Report, October 3, 2005, Solid Waste Management Contractual Issues	6(1)(b)
4	196-206	*In Camera* Staff Report, December 5, 2005, Solid Waste Management Contractual Issues	6(1)(b)
5	211-248	*In Camera* Staff Report, January 31, 2006, Solid Waste Management Contractual Issues	6(1)(b)
8	398-465	Report: Preliminary Engineering Feasibility Assessment of Contingency Solid Waste Disposal Capacity, July 2006	6(1)(b) 10(1)(a) & (c) 11(c) & (d)
9	466-469	Confidential Memorandum, July 25, 2006: Contingency Waste Disposal Capacity	11(c) & (d) 10(1)(a) & (c) (claimed by affected party)
12	487-511	Report: City of Toronto Solid Waste Disposal Contingency Plan, Draft-November 23, 2004.	10(1)(a) & (c) 11(c) & (d)
13	512-516	Faxed Correspondence to Director, Policy and Planning, Solid Waste Management dated July 12, 2004 from affected party	11(c) & (d) 10(1)(a) & (c) (claimed by affected party)
17	570-577	Presentation Slides January 28, 2005: GTA (Greater Toronto Area) Municipalities Solid Waste Disposal Contingency Plan	6(1)(b) 10(1)(a) & (c) 11(c) & (d)
18	578-598	Report: City of Toronto Solid Waste Disposal Contingency Plan, October 28, 2004	11(c) & (d) 10(1)(a) & (c) (claimed by affected party)

[16] According to the city, the institutions listed below may have an interest in the following records:

	York	Durham	Peel	Ministry of Environment
Documents to which they have an interest	Records 8, 12, 17	Records 8, 12, 17	Records 8, 12, 17	Records 8, 12, 13, 17, 18

PRELIMINARY ISSUE:

[17] As stated above, I sought representations from the city, the affected party, Durham and Peel on the applicability of the information contained in the Ministry of the Environment's LIMO website to the issues in this appeal. This website contains information about landfills in Ontario.

[18] The affected party submits that this appeal be transferred to another adjudicator without the inclusion of information about the MOE's LIMO information, as I did not have the statutory authority to "conduct investigative work on behalf of or to the assistance of one party, and then to sit in judgment of that evidence". The affected party submits that the adjudication process contemplates an adversarial process with a neutral adjudicator and does not authorize an inquisitorial process in which an adjudicator becomes the collector and presenter of evidence which might favour one side's arguments.

[19] I am dismissing the affected party's request for a new adjudicator and find that the adjudication process under the *Act* contemplates an inquisitorial process. In making this finding, I agree with and adopt the following reasoning of Adjudicator Laurel Cropley in Order PO-1940, where she stated that:

> *In Brown & Evans, Judicial* Review of Administrative Action in Canada (Vol. 2), (Toronto: Canvasback Publishing, 1998) (looseleaf), the authors discuss the principle of "fairness" in the administrative decision-making process (at Chap. 12 – 1):
>
> > Traditionally, procedural fairness has been viewed to pertain to the parties' right to an effective opportunity to participate in the decision-making process through the presentation of evidence and argument, and through the requirement of impartiality in the decision-maker. In addition, there are other aspects of the law which are designed to prevent the conduct of the tribunal from undermining the participatory rights required by the duty of procedural fairness … These principles and rules relate to five related aspects of the

> decision-making process: [including] the gathering of information …

They also comment on the extent to which administrative adjudicators may make use of information not adduced by the parties to a proceeding (at Chap. 12 – 2 to 4):

> If adjudicative decision-makers are permitted to unilaterally conduct their own investigations, the ability of parties to participate in the decision-making process through the presentation of proofs and argument to neutral decision-makers may be impaired …
>
> As a result, when performing essentially adjudicative functions, administrative decision-makers, like judges, are generally precluded from *ex parte* fact-finding …
>
> The general rule proscribing *ex parte* evidence-gathering is qualified, however, to the extent that it is permissible for administrative adjudicators to make use of information that can be judicially noticed … And because tribunals have often been established in order to provide more specialized decision-making, and sometimes to escape the adversarial procedural model of the courts, it may be that their members may take notice of a wider range of information than that within the narrowly-circumscribed scope of judicial notice. As well, of course, tribunal members may draw on their experience to assist them in assessing the evidence that they have heard, including their awareness of relevant published material that may suggest principles to guide them in the exercise of their discretion.

The authors note that authority to take official notice of facts may arise by statute or as a matter of common law. In either case, however, they indicate that (at Chap. 12 – 5):

> [A] tribunal should strive to inform the parties of its intention to take official notice of facts, and to provide them an opportunity to comment on the material, … as a matter of fairness.

As an administrative tribunal, the Information and Privacy Commissioner (the IPC) functions in a somewhat different capacity from other tribunals. While the majority of administrative tribunals operate under an

> "adversarial" model, the IPC has "inquisitorial" elements. Although the rules of natural justice and procedural fairness applicable to other tribunals similarly apply to IPC inquiry processes, the extent to which an adjudicator may "inquire", on his or her own initiative, into the issues on appeal is heightened under this model…
>
> As I indicated above, the appellant was put on notice that I intended to consider taking this approach to the issues in this appeal. He was provided with detailed information regarding the specific evidence I was contemplating considering and he was given sufficient time to address both the process and the evidence itself in his representations. In my view, neither the process nor its implementation is unfair to the appellant.

[20] I also do not agree with the affected party that seeking representations from the parties who opposed disclosure of the information at issue in the records as to their position concerning the publicly available information on MOE's website can be said to be advocating for one party. As indicated above, the affected party, along with the city, Peel and Durham were put on notice that I intended to consider the information on the MOE LIMO website in this appeal. These parties were provided with detailed information regarding the specific evidence I was contemplating considering and given sufficient opportunity to address both the process and the evidence itself in their representations. In my view, in this appeal neither the process nor its implementation is unfair to the affected party. Accordingly, I am dismissing the affected party's request to transfer this appeal to another adjudicator and will proceed with my decision.

ISSUES:

A. Do the mandatory third party exemptions at sections 10(1)(a) and (c) apply to Records 8, 9, 12, 13, 17 and 18?

B. Do the discretionary exemptions at sections 11(c) and (d) apply to Records 8, 9, 12, 13, 17 and 18?

C. Does the discretionary closed meeting exemption at section 6(1)(b) apply to Records 1, 3 to 6, 8, and 17?

D Did the city exercise its discretion? If so, should this office uphold the exercise of discretion?

DISCUSSION:

A. Do the mandatory third party exemptions at sections 10(1)(a) and (c) apply to Records 8, 9, 12, 13, 17 and 18?

[21] These records consist of:

Record #	Description
8	Report: Preliminary Engineering Feasibility Assessment of Contingency Solid Waste Disposal Capacity, July 2006
9	Confidential Memorandum, July 25, 2006: Contingency Waste Disposal Capacity
12	Report: City of Toronto Solid Waste Disposal Contingency Plan, Draft-November 23, 2004.
13	Faxed Correspondence to Director, Policy and Planning, Solid Waste Management dated July 12, 2004 from affected party
17	Presentation Slides January 28, 2005: GTA Municipalities Solid Waste Disposal Contingency Plan
18	Report: City of Toronto Solid Waste Disposal Contingency Plan, October 28, 2004

[22] Section 10(1) states in part:

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

[23] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be

exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, and MO-1706].

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

1. the record must reveal information that is a trade secret or scientific, technical, commercial, 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), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[25] The city submits that the information in Records 8, 12 and 17 constitutes "commercial information" as it relates to the commercial viability of landfill sites in the Greater Toronto Area (GTA). It argues that the disclosure of this information would reveal the available capacity and potential services that might be offered in terms of waste disposal for each site.

[26] The affected party submits that the information in the records at issue discusses issues such as landfill capacity at various locations in Ontario. It submits that this information constitutes commercial information. It also submits that this information consists of scientific and technical information. It states that:

> *Scientific and Technical Expertise*
>
> …The estimation of landfill capacity involves specialized knowledge of physical and chemical processes, and the ability to make complex scientific calculations to arrive at realistic estimates over defined time periods. Knowledge of issues such as waste density, landfill treatment and rates of decomposition was employed to produce the information contained in the records. The skills of scientists, engineers and other technicians were employed…
>
> *Commercial Considerations*
>
> …[T]he information is based partly on [the affected party's] trade experience, and relies upon information compiled over years of business in the environmental consulting industry.

[27] Peel did not provide representations on part 1 of the test.

[28] The appellant submits that that the information is general information as to the economics of the cross-border trade in waste and access of the city and the GTA municipalities to the U.S. market. There is no "formula, pattern, programme, method, technique" which falls into prior case law definitions as to what is a trade secret

Analysis/findings

[29] As stated above, the affected party submits that Records 8, 9, 12, 13, 17, and 18 contain "commercial information". The city submits that Records 8, 12, and 17 contain commercial information. This type of information has been defined in prior orders as consisting of 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].

[30] As well, the affected party submits that the records at issue contain technical and scientific information. These types of information have been discussed in prior orders as follows:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *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].

[31] Based upon my review of the records at issue, I find that they contain technical information about the operation and composition of various landfill sites and their capacity and other attributes. This information was prepared by the affected party, which is an environmental consulting firm.

[32] I also conclude that the information at issue consists of scientific information about various landfill sites because it pertains to ecological or environmental evaluations undertaken by the affected party.

[33] In addition, I also find that the records at issue contain financial information about the capital and operating costs of landfill sites.

[34] Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[35] Based upon my review of Records 8, 12, and 17, I find that these records do not contain commercial information as these records do not contain information that relates to the buying, selling or exchange of merchandise or services. However, I agree with the affected party that Records 9 and 13 contain commercial information about responses to the city's Request for Proposals (RFP) to develop contingency waste disposal plans. Included in these records is information about the selling of services by the affected party and other companies who submitted responses to the RFP. I also conclude that Record 18 also contains commercial information about the commercial use of private and public landfills capacities.

[36] Accordingly, Records 8, 9, 12, 13, 17, and 18 contain scientific, financial and technical information. Records 9 and 13 also contain commercial information. Therefore, I find that part 1 of the test under section 10(1) has been met with respect to these records.

Part 2: supplied in confidence

[37] I will now consider whether Records 8, 9, 12, 13, 17, and 18 were supplied in confidence to the city by the affected party.

Supplied

[38] 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].

[39] 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].

[40] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

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

In confidence

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

[43] 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 [Orders PO-2043, PO-2371, PO-2497]

[44] The city primarily relied on the representations of the affected party who submits that it supplied the city directly with the requested information in the records on the understanding that it would be kept confidential. It states that it was assured by the city that the information contained in the records would be kept confidential, which is why it revealed to the city explicit information gained from its years of experience in the industry. The affected party states that:

> …the information contained in the records was provided …on an expedited basis on the understanding that the information contained therein would be kept confidential. In order to meet the city's tight timeline, [the affected party] collected data from its clients, who are now fourth parties to the *MIFIPPA* request (the "Fourth Parties"). At no time were the Fourth Parties advised about the outcome of [the affected party's] research, an approach that honoured [its] primary client's directive for confidentiality.
>
> …Had [the affected party] known that the materials could be subject to an *MFIPPA* disclosure request, it would never have provided the information to the city, and would have followed a very different protocol with respect to the disclosure of information to the city.

[45] The affected party provided an affidavit from the Project Manager for the Disposal Contingency Planning project with the city. He states that there was an implied agreement of confidentiality from both public and private landfill owners who participated in the research that is the subject of the records. He deposes that their information was presented to the city on the understanding that the information would remain confidential and there would be no public disclosure.

[46] Neither the appellant nor Peel provided representations on part 2 of the test.

Analysis/findings

[47] Record 17 consists of copies of 14 presentation slides and two handritten point form notes on pages 576 and 577. Record 17 is entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan", which is the same title as the disclosed report at pages 346 to 357, 372 to 381, and 382 to 391. The disclosed report is dated January 2005. Record 17 is dated January 28, 2005. Based upon my review of Record 17, I find that all of the information in the 14 slides in this record was derived from and is identical to the disclosed report. Accordingly, as the information in the presentation slides in Record 17 has already been disclosed to the appellant, I find that the presentation slides in this record do not meet the "in confidence" component of part 2 of the test under section 10(1).

[48] Two point form handwritten notes are found on pages 576 and 577 of Record 17. Page 577 is a blank page and contains a short note. Page 576 has an even shorter

note in the margin. I have not been provided with any information that these two notes were supplied by the third party to the city; nor can I ascertain from reviewing these notes that they were supplied by the affected party. In any event, these two brief point form notes are not contained within the slide presentation in this record nor are they responsive to the appellant's request. Therefore, I find that these two notes were not supplied under part 2 of the test under section 10(1) nor do they come within the scope of the request. Accordingly, I will not consider them further in this order.

[49] As part 2 of the test under section 10(1) has not been met for all of the information in Record 17, this exemption does not apply to it. I will consider below whether the discretionary exemption in sections 6(1)(b) or 11(c) and/or (d) apply to Record 17.

[50] Records 8 and 12 are two reports prepared by the affected party for the city. Based upon my review of these records, I agree that the affected party supplied this information to the city with a reasonable expectation of confidentiality. The information in these records was communicated to the city by the affected party on the basis that it was confidential and that it was to be kept confidential.

[51] Records 8 and 12 were treated consistently in a manner that indicates a concern for its protection from disclosure by the affected party prior to being communicated to the city. This information has not otherwise been disclosed nor is it available from sources to which the public has access, nor was it prepared for a purpose that would entail disclosure. Accordingly, I find that part 2 of the test under section 17(1) has been satisfied with respect to Records 8 and 12.

[52] All of the information in Record 18 (except for one word) is contained in Record 12. Accordingly, for the same reasons as set out above for Record 12, I find that Record 18 was also supplied by the affected party in confidence to the city.

[53] Record 9 is an internal city memorandum discussing proposals submitted to the city. This record is entitled, "Contingency Waste Disposal Capacity - RFP No. [#]" and primarily discusses general details of the successful bidder's proposal in response to the RFP. This record does not refer to the affected party. The city did not raise the application of section 10(1) to this record. I find that the information in this record was not supplied by the affected party to the city. Accordingly, part 2 of the test has not been met and section 10(1) does not apply to this record. I will consider below whether section 11(c) and/or (d) applies to this record.

[54] Record 13 is the affected party's proposal to assist the city in developing a contingency disposal plan for waste. Record 11, which is a record that is already in the appellant's possession, is another proposal submitted to the city by the affected party. Record 13 is dated prior to Record 11. I find that that Record 13 was supplied in confidence to the city.

[55] Accordingly, I find that part 2 of the test has been met for Records 8, 12, 13 and 18 and has not been met for Records 9 and 17.

Part 3: harms

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

[57] 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].

[58] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [Order PO-2435].

[59] Parties should not assume that harms under section 17(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order PO-2435].

[60] The city submits that disclosure could affect the competitive position of both the private and public owners of the landfills as a comparison of the details of their capacities could determine what volume of business would be best handled and by whom. It argues that disclosure of such information might persuade potential clients of landfill sites that they might be better off seeking an "in-house" solution to their waste disposal issues rather than engaging one of the landfill sites assessed in the report. This could reasonably result in an undue loss to certain owners and gain to others. It states that:

> This situation is now much more complicated by the fact that the city is now the owner of one of the landfills in question; the information was provided by third-parties to consultants retained for a collection of municipal and provincial institutions in response to studies relating to issues relating to trans-national waste shipments. Due to subsequent developments, the city now has confidential information relating to the commercial operations of its "competitors". To allow the public disclosure of this information would adversely affect third parties' commercial and financial interests, which is not in keeping with the on-going responsibility of the city as a governmental institution.

[61] The affected party submits that considerable time and effort was put into generating the records. Compelling disclosure of the records for free circulation in the public domain would be unfair to the affected party (who produced the records), and to the city (who paid the affected party for the production of the records). The environmental consulting industry is a highly competitive trade in which scientific information and advice is the principal commodity sold to clients. It states that if the source of the affected party's information and its advice is revealed to its competitors, business losses would flow from the pirating of its business product. Providing competitors with scientific and technical information on the capacity of landfills across Ontario would be useful to the affected party's competitors, and would enable them to produce similar reports to sell to other municipalities, to the affected party's competitive detriment.

[62] The affected party states that the records outline the approval and operating details of various landfill sites. The research relied on to produce the records was an internal database of information developed by it to complete the work in a timely and cost effective manner and that it continues to rely on this database of information for other clients today. It suggests that the disclosure of this database and the details therein would cause loss of proprietary information, and consequently, undue financial loss to the affected party, and conversely, an unfair gain for any party that is given access to this information without having to pay for it.

[63] Moreover, the affected party states that the research was conducted on a confidential basis. There was an implied agreement of confidentiality from both public and private landfill owners who participated in the research. Their information was presented to the city on the understanding that the information would remain confidential and there would be no public disclosure. If released and viewed out of context, disclosure would cause harm to innocent parties, including the third parties who are not even aware that they are named in the documents. Compensation would be an insufficient remedy for any damages caused due to disclosure. Any compensation would be an unfair penalty to the affected party, according to it.

[64] The affected party provided information about each individual record that it claims is subject to section 10(1) in a chart as follows.

Record #	**Representations**
8	Contains technical research and information of value to [affected party]. Supplied information in confidence as the information is sensitive in nature.
12	This document contains the results of [the affected party's] technical research which continues to have commercial value to [it] and potential clients. This information was understood to be provided in confidence as other parties are identified in the document that would have a concern about being so named and if confidentiality breached could result in legal

	repercussions.
13	This document includes [the affected party's] proposed work plan/approach along with [its] budget estimate and list of staff for the project. There is and continues to be an expectation of confidentiality with respect to the financial information and expectation of privacy for the staff named.
18	Contains the results of [the affected party's] technical research which continues to have commercial value to [it] and potential clients. This information was understood to be provided in confidence as other parties are identified in the document who would have a concern about being so named and if confidentiality breached could result in legal repercussions.

[65] Peel submits that the records reveal the considerations and factors to be assessed by a municipality in making a decision about how municipal waste management services could be best provided to municipalities within the GTA. Many of the municipal waste management services are provided by private contractors for municipalities. The release of this information would provide unfair advantage to such a private contractor and would compromise the competitive placement of these types of contracts.

[66] The appellant states that the records contain general information about the economics of the cross-border trade in waste and access of the city and the GTA municipalities to the U.S. market. In addition, it states that the affected party's project manager has published extensively in the waste market publications on the subject matter contained in the records.

[67] In reply, the city primarily relies on the information provided by the affected party in its initial representations. In reply, the affected party states that the information is based on its trade experience and on information compiled over years of business in the environmental consulting industry. Further, it states that its project manager's publicly accessible writings on the topic of the waste market are irrelevant to whether the specific documents in dispute in this appeal are required to be disclosed.

[68] In sur-reply, the appellant did not directly address the section 10 issue.

Analysis/findings

[69] In this appeal, I notified the Regional Municipalities of York, Durham and Peel, as well as the Ministry of Environment as these institutions, according to the city, have an interest in the information in the records.

[70] The affected party states that if the information in the records is disclosed and viewed out of context, disclosure would cause harm to innocent parties, including the third parties who are not even aware that they are named in the documents. I had asked the affected party to provide me with the contact details of any other parties

affected by disclosure of the information in the records. The affected party refused to provide this information.

[71] The affected party is also concerned that disclosure of the records for free circulation in the public domain would be unfair to it and the city. In response to this submission, I agree with and adopt the reasoning of Assistant Commissioner Brian Beamish in Order PO-2435 where he stated:

> The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditure of taxpayer money. This was most recently emphasized by the Commissioner, Dr. Ann Cavoukian, in Order MO-1947. In that order, Dr. Cavoukian ordered the City of Toronto to disclose information relating to the number of legal claims made against the city over a specific period of time, and the amount of money paid in relationship to those claims. In ordering disclosure, the Commissioner stated the following:
>
> > It is important, however, to point out that citizens cannot participate meaningfully in the democratic process, and hold politicians and bureaucrats accountable, unless they have access to information held by the government, subject only to necessary exemptions that are limited and specific. Ultimately, taxpayers are responsible for footing the bill for any lawsuits that the City settles with litigants or loses in the courts.
>
> The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1) [of the *Freedom of Information and Protection of Privacy Act* (the provincial *Act*), the equivalent to section 10(1) of the *Act*].

[72] In this appeal, I find that the fact that the city paid the affected party to produce the records does not in of itself meet the test of "detailed and convincing" evidence of a reasonable expectation of harm, under section 10(1) of the *Act*.

[73] I will now consider the specific records at issue.

Records 8, 12 and 18

[74] Record 8 is entitled, "City of Toronto, Preliminary Engineering Feasibility Assessment of Contingency Solid Waste Disposal Capacity" and is dated July 2006. There are two handwritten notes on pages 422 and 434 of this record. These two brief

notes are written in the margin on these pages of this record and are not responsive to the appellant's request.

[75] Record 12 is entitled, "City of Toronto Solid Waste Disposal Contingency Plan" and is dated November 23, 2004.

[76] Record 18 is entitled, "City of Toronto Solid Waste Disposal Contingency Plan" and is dated October 28, 2004. All of the information in Record 18 (except for one word) is contained in Record 12.

[77] Although the affected party refers to an "an internal database of information", I cannot ascertain from my review of Records 8, 12 and 18 information that could be said to reveal any information that may be included in such a database.

[78] The information in Records 8, 12 and 18 dates back to on or before July 2006. I have not been provided with detailed and convincing evidence as to how disclosure of landfill capacity related details dated July 2006 or earlier could reasonably be expected to cause harm under sections 10(1)(a) or (c).

[79] Records 8, 12 and 18 outline the capacity of various landfills in Ontario and also contain information about the feasibility of operating or obtaining the approval to operate these landfills. Similar or identical information has been disclosed by the city in the disclosed pages 346 to 357, 372 to 381, and 382 to 391 of the records. These disclosed pages are entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan January 2005" and also contain detailed capacity information for both public and private landfill owners.

[80] As well, the Ministry of Environment (MOE) provides on its website extensive up-to-date details concerning landfill capacity and location in Ontario, approval of landfill sites and engineering details for each landfill. I provided the city, the affected party, Peel and Durham with the following details from the MOE website:[2]

> **Landfill Inventory Management Ontario (LIMO)**
>
> ***What is LIMO***
>
> The ministry created LIMO to store key information on Ontario's largest landfills and the LIMO dataset was created to make landfill information available to the public.
>
> ***How you can search for landfill information***
>
> Currently, you can view information for approximately 2400 landfill sites in two tables.

[2] http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/index.htm.

- The first table[3] shows you the following information for the larger landfills in the province:
    - landfill capacity
    - fill rates
    - estimated remaining capacity
    - engineering designs
    - reporting and monitoring details

  You can also view a map of these large landfills[4]
- The second table[5] shows you the following information for the smaller landfills:
    - open/closed status
    - site owner
    - site location
    - Certificate of Approval number

  Many landfills produce Annual Reports each year that outline how the landfill has been operating. To view a copy of the Annual Report, please contact the landfill operator or your local MOE District office[6]

[81] I also advised these parties that:

> On its website, the ministry publishes information as to how it regulates both public and private landfills in Ontario. [7] The ministry also updates the Landfill Inventory Management Ontario (LIMO) database every year. The website states that the ministry requests operators of the larger landfills to complete a landfill data collection form that will include the following information from the previous operating year:
>
> - Estimated amount of total waste received
> - Estimated total remaining landfill capacity
> - Methodology used to determine the remaining capacity[8]

[82] As stated above, I sought representations from the city, the affected party, Durham and Peel on the impact of the availability of this type of information on LIMO. Only the city and the affected party responded. The city provided both confidential and

3 http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/STD01_078377.html.
4 http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/landfills/report.
5 http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/landfills/index.htm.
6 http://www.ene.gov.on.ca/environment/en/about/regional_district_offices/index.htm.
7 http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/STDPROD_077977.html.
8 http://www.ene.gov.on.ca/environment/en/monitoring_and_reporting/limo/STDPROD_077976.html.

non-confidential representations on LIMO. In its non-confidential representations, it indicated that because the LIMO system was not in place at the time of the records' creation, or at the time the access decision was made, that it is not relevant to this appeal.

[83] The city submits that some of the information contained in the LIMO system, is similar, or identical to information which is contained in certain records. The city submits that the LIMO information does not provide a sufficient basis to conclude that the city did not properly apply the exemptions in question. Therefore, the city states that the information in the LIMO system is quite irrelevant to the decision before me on whether the city's access decision was correct at the time the access decision was made.

[84] The city states that this appeal could be dismissed as "moot" with respect to any information which is also contained within the LIMO system. The city states that the appellant should file a new request for the records or that I order the city to issue a new access decision, after which the city will decide whether to exercise its discretion to release the publicly available information in the records after giving notice to the affected parties in the records.

[85] The city also states that:

> It is likely that an assiduous inquirer would be able to deduce from the publicly available information (both on the LIMO system, and documents previously disclosed by the city, or other parties) sufficient information to determine the content of portions of the Outstanding Records for which an exemption under *MFIPPA* has been applied. (As all that would be required is to know the names of some or all of the landfills contained in the Outstanding Records).

[86] In response to the LIMO website information, the affected party states that:

> …accepting that the evidence is properly before you, that there was evidence that the information or records in issue have already been made public, in whole or in part, by disclosure on a web site, then to that extent, the dispute before you has become moot. As a result, both the complaint is moot and any response to the complaint is moot. It would then follow that you would have no jurisdiction to adjudicate a moot issue, hence there cannot be any need for further submissions. Accordingly, you would have to dismiss the complaint as moot, as the information/records would be obtainable by anyone from the web site…

[87] I do not agree with the city or the affected party that the appellant should be required to file a new request or that the appellant's appeal is moot. The public

availability of similar information as to that found in the records relates directly to the harms test in sections 10(1)(a) and (c) of the *Act*. The information on the LIMO website is quite detailed and appears to me to be both very comprehensive and similar in many ways to the type of information at issue in this appeal.

[88] The appellant's request and appeal date back to 2009. It appears that the LIMO website was set up in 2010 by the MOE. The appellant seeks disclosure of the information in the records. It would be unfair to the appellant to require it to now file a new request for the same information that is at issue in this appeal.

[89] Regardless of the similarity between the information in the records at issue and the LIMO system, as Records 8, 12 and 18 dates back to on or before July 2006 and as similar or identical information has been disclosed by the city in the disclosed report, I cannot ascertain how disclosure of any particular information in Records 8, 12 and 18 could "cause loss of proprietary information and, consequently, undue financial loss to the affected party, and conversely, an unfair gain for any party that is given access to this information without having to pay for it" as submitted by the affected party. I do not find that I have been provided with detailed and convincing evidence to establish a reasonable expectation of harm under sections 10(1)(a) or (c).

[90] Therefore, I find that disclosure of Records 8, 12 and 18 would not reasonably be expected to result in the harms set out in sections 10(1)(a) and (c). Accordingly, part 3 of the test under section 10(1) has not been met for Records 8, 12 and 18. I will consider below whether sections 11(c) or (d) apply to these records. I will also consider whether section 6(1)(b) applies to Record 8.

Record 13

[91] Record 13 is dated July 12, 2004 and is the affected party's proposal to assist the city in developing a contingency disposal plan for waste. Record 11 is dated August 25, 2004 and is another proposal submitted by the affected party to the city. The city did not raise the application of section 10(1) to Record 11.

[92] Record 13 contains the affected party's work plan, pricing and staff information. Concerning the staff information, the affected party is claiming that this information is personal information. It has indicated that there is an "expectation of privacy for the staff named" in Record 13. In this record, staff are identified only by name and designation. Their names are listed in this record in their business capacity. I find that the names of the affected party's staff in the record is not personal information, but rather is business identity information in accordance with section 2(2.1) of the *Act*, which reads:

> Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[93] The affected party's states that its work plan is based on its know-how and proprietary information and that release of the work plan and the pricing information would negate any ability for the affected party to maintain its competitive position and would prejudice its economic interests. Concerning this information, as the record is dated July 2004 and the affected party was awarded the contract with the city, I find that disclosure of the pricing information or the work plan could not reasonably be expected to either prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party or result in undue loss or gain to it under sections 10(1)(a) or (c).

[94] The appellant has already received disclosure of Record 11 from another institution. Both Records 11 and 13 are described by the city as correspondence addressed to the city's Director, Policy & Planning, Solid Waste Management from the affected party. Record 13 is dated July 12, 2004 and Record 11 is dated August 25, 2004. Both records are proposals from the affected party concerning the development of contingency waste disposal plans for the city. Record 11 concerns the city and other GTA municipalities, whereas Record 13 concerns only the city. Other than the estimated budget amount, the information in Record 13 is also in Record 11.

[95] I find that the affected party has failed to demonstrate how the disclosure of information in Record 13 that is already several years old and where the affected party has already won the contract results in a reasonable expectation of any of the identified harms. In circumstances such as these, it is incumbent on the parties resisting disclosure to squarely address the issues and provide persuasive evidence.[9] Accordingly, I find that part 3 of the test under section 10(1) has not been met for Record 13. I will consider below whether sections 11(c) and/or (d) apply to this record.

Conclusion

[96] In conclusion, I find that for Records 8, 12, 13 and 18, I have not been provided the requisite "detailed and convincing evidence" needed to establish the harms in sections 10(1)(a) or (c) of the *Act*. I will consider below whether these records are exempt by reason of sections 6(1)(b) and 11(c) and/or (d).

B. Do the discretionary exemptions at sections 11(c) and (d) apply to Records 8, 9, 12, 13, 17 and 18?

[97] Section 11 states in part:

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[9] Order MO-1789.

> 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;

[98] 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.

[99] 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].

[100] Section 11(c) does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

[101] 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.)].

[102] 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].

[103] 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].

[104] 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].

[105] The city provided both confidential and non-confidential representations on this issue. In its non-confidential representations, the city submits that:

> … the documents in question contain information concerning the suitable sites for the its contingency strategies/plans for waste management to deal with disasters which would interrupt the minimum standards required to ensure the public does not experience the health and safety risks from insufficient waste management services. If these factors were known to others, this would expose the city to financial and economic harm, from profiteers who would utilize this information to personally profit from the hardships of the public at large…
>
> In the future, the city will have to rely upon other waste disposal options or consider other sites... Should this happen, the disclosure of the records could have a negative impact on the city's ability to compete with others in negotiating services with other sites, or in finding an in-house solution in the incredibly short time frame required to prevent the harm to the public which would result from insufficient waste management systems…
>
> The Report and the other information exchanged between the Ministry and Group Members are part of a contingency plan which by its very nature must remain largely confidential to avoid the unscrupulous use of information by private entities to capitalize on public hardship for private gain…

[106] The affected party relies upon the submissions of the city and adds that the records have commercial value because they required considerable scientific and technical skill to assemble. It submits that as the city paid for the creation of the records, it should not be required to disclose the information for use by its competitors. It states that there is nothing in the *City of Toronto Act* or the *Municipal Act* that would mandate such a subsidy to the city's competitors, namely other municipalities that are also seeking to implement an Emergency Plan in the event of a border closure.

[107] Peel submits that the records were prepared at the request of the city and Regional Municipalities and at their cost. The records were reviewed by the municipalities to determine the viability of landfill sites for the benefit of all the local GTA municipalities. Peel states that the harm in disclosing these documents is that it shows the considerations and factors to be assessed by a municipality making a decision in this industry. Many of the waste management services are provided by private contractors on behalf of municipalities. The release of this information would provide an unfair advantage to such a private contractor and would compromise the competitive placement of these types of contracts.

[108] The appellant submits that the city has not established that it is protecting its own commercially valuable information, the disclosure of which would be injurious to the city. The appellant states that the records are general documents only, similar to other documents that are already available to the public either directly online or indirectly through freedom of information requests to other government entities.

[109] In reply, the city repeats its initial representations and denies that the records are general documents. It also submits that disclosure of the information contained in the records would reveal the factors (including costs) considered by the city in developing the various waste management options. The city states that in the future, it will have to rely upon other waste disposal options or consider other sites, as detailed in the records.

[110] In sur-reply, the appellant relies upon its previous submissions and points out that both York and the Ministry of the Environment did not submit representations, even though they were intimately involved in the circumstances surrounding the records creation.

[111] In its response to the appellant's sur-reply representions, the city again provided both confidential and non-confidential representations. In its non-confidential representations, the city submits that if the current site can no longer sustain the amount of waste, due to unforeseen events, or if transportation issues temporarily close access to the landfill site, disclosure of the records could have a negative impact on the city's ability to compete with others in negotiating services with other sites, or in finding an in-house solution in the incredibly short time frame required to prevent the harm to the public that would result from insufficient waste management systems.

[112] The city states that the records contain detailed descriptions of the particulars of several potential landfill sites, and considerations for the city in undertaking specific actions relating to various waste management options.

[113] In its response, the affected party states that although these documents are written to be comprehensible to the non-scientist decision-maker, there was a lot of proprietary scientific knowledge and research that went into their preparation, which

would greatly benefit a competitor of the affected party. This would not have been supplied to the city, and will not be in future (except perhaps at a much higher price to the city), if its confidentiality cannot be preserved.

Analysis/findings

[114] As stated above, the city has claimed that Records 8, 9, 12, 13, 17 and 18. are exempt under sections 11(c) and (d).

Records 8, 12 and 18

[115] Record 8 is entitled, "City of Toronto, Preliminary Engineering Feasibility Assessment of Contingency Solid Waste Disposal Capacity" and is dated July 2006.

[116] Record 12 is entitled, "City of Toronto Solid Waste Disposal Contingency Plan" and is dated November 23, 2004.

[117] Record 18 is entitled, "City of Toronto Solid Waste Disposal Contingency Plan" and is dated October 28, 2004. All of the information in Record 18 (except for one word) is contained in Record 12.

[118] As stated above, Records 8, 12 and 18 outline the capacity of various landfills in Ontario and also contain information about the feasibility of operating or obtaining the approval to operate these landfills. Similar information concerning contingency disposal requirements and options has been disclosed by the city in the disclosed pages 346 to 357, 372 to 381, and 382 to 391 of the records (the disclosed report). These disclosed pages are entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan January 2005" and also contain detailed capacity information for both public and private landfill owners. Although the information in Records 8, 12 and 18 is more detailed than the information in the disclosed report, I have not been provided with "detailed and convincing" evidence to establish a "reasonable expectation of harm" under sections 11(c) and (d) concerning the disclosure of the more detailed information in Records 8, 12 and 18.

[119] The city submits that other organizations would utilize the information to profit from disclosure of the information at issue in these records. It also argues that the city will have to compete with other organizations to negotiate landfill use by it. The information in the records dates back to 2006 or earlier and more up-to-date and comprehensive information concerning landfills is available on the MOE LIMO website. Based upon the availability of similar information in the disclosed report and more up-to-date and comprehensive information on the MOE LIMO website, I do not accept these arguments of the city. I find that the city has not provided me with "detailed and convincing" evidence to establish a "reasonable expectation of harm" under section 11(c) and (d) with respect to Records 8, 12 and 18.

[120] I also do not agree with the affected party that under sections 11(c) and (d) it is relevant that disclosure would greatly benefit a competitor of the affected party. As stated above, 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.[10]

[121] Both Peel and the city are concerned about private contractors who provide waste management services for municipalities obtaining an unfair advantage in the competitive placement of waste management contracts. Records 8, 12 and 18 contain details about landfill capacities in 2004 and 2006. I do not agree with Peel that the information at issue in these records could be used by private contractors to prejudice the competitive position of Peel, the city or any other institution in obtaining waste management services.

[122] Accordingly, I find that disclosure of Records 8, 12 and 18 could not reasonably be expected to prejudice the economic interests or the competitive position of the city, nor could disclosure reasonably be expected to be injurious to the financial interests of the city.[11] As such, Records 8, 12 and 18 are not exempt by reason of sections 11(c) and (d). I will consider below whether section 6(1)(b) applies to Record 8. As no other exemptions have been claimed for Records 12 and 18, I will order them disclosed.

Record 9

[123] Record 9 is an internal city memorandum discussing proposals submitted to the city. This record is entitled, "Contingency Waste Disposal Capacity- RFP No. [#]" and is dated July 25, 2006. This record primarily discusses general details of the successful bidder's proposal in response to the RFP. The affected party is not referred to in this record, nor did the affected party prepare Record 9.

[124] The city must demonstrate that disclosure could reasonably be expected to lead to the harms outlined in sections 11(c) and (d). The city did not provide specific representations as to how the information in Record 9 is subject to these exemptions. In my view, providing the appellant and the public with insight into the city's evaluation process could not reasonably be expected to cause the harms outlined in these exemptions.[12] Therefore, I find that these exemptions do not apply to Record 9. As no other exemptions have been claimed for this record, I will order it disclosed.

[10] Orders MO-2363 and PO-2758.
[11] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[12] Order MO-2496-I.

Record 13

[125] Record 13 is the affected party's proposal to assist the city in developing a contingency disposal plan for waste and is dated July 12, 2004.

[126] Concerning section 11(c), I am not persuaded that disclosing the information at issue could reasonably be expected to prejudice the city's economic interests or competitive position. The city has not provided the "detailed and convincing" evidence required to demonstrate that the harms it alleges are not merely speculative. The affected party has already entered into a contract with the city and completed the contingency. The proposal is not the subject of any ongoing negotiations. In addition, the age of the record, which is dated July 2004 tends to refute any claims of prejudice to any future negotiations or renegotiations.[13]

[127] With respect to section 11(d), I find that disclosure of this record could not reasonably be expected to be injurious to the financial interests of the city. The contract has been signed and the work outlined in the record undertaken. The city did not provide specific representations as to how disclosure of this record from July 2004 could reasonable be expected to be injurious to the city's financial interests. Accordingly, I find that section 11(d) does not apply to Record 13. As no other exemptions have been claimed for this record, I will order it disclosed.

Record 17

[128] Record 17 consists of copies of 14 presentation slides. Record 17 is entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan", which is the same title as the disclosed report at pages 346 to 357, 372 to 381, and 382 to 391. The disclosed report is dated January 2005. Record 17 is dated January 28, 2005. Concerning this record, I found above that all of the information in the 14 slides in this record was derived from the disclosed report. As this information has been provided to the appellant, I do not find that disclosure could reasonably be expected to cause harm to the economic interests of the city. Therefore, I find that this record is not exempt by reason of sections 11(c) and (d). I will consider below whether section 6(1)(b) applies to this record.

C. Does the discretionary closed meeting exemption at section 6(1)(b) apply to Records 1, 3 to 5, 8 and 17?

[129] Section 6(1)(b) reads:

> A head may refuse to disclose a record,

[13] Orders PO-2226 and PO-2289.

> 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.

[130] For this exemption to apply, the institution 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, and MO-1248]

[131] 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]

[132] 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].

[133] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera* (Order M-102).

[134] In order for a record which has never been placed before a council, board, commission or other body, or a committee of one of them, to qualify for exemption under section 6(1)(b), the institution must establish that disclosure of the record would permit the drawing of accurate inferences about the substance of the deliberations [Orders M-184, M-196, MO-1558-I, MO-1590-F and MO-1558-I].

[135] The city states that Records 1 and 3 to 5 consist of a variety of staff reports prepared and maintained in confidence and submitted to city council and committees thereof for consideration. The city denied access to these records as they contain the

subject matter of the *in camera* deliberation of city council and its committees that were closed to the public.

[136] The city states that Records 8 and 17 are documents which describe the substance of *in camera* discussions at the meetings of the Waste Study Group, as well as being the substance of *in camera* discussions at city council and its committees thereof. The city denied access to these records as they contain the subject matter of *in camera* deliberations of the Waste Study Group as well as city council and various committees.

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

[137] Concerning part 1 of the test, the city submits that Records 1 and 3 to 5 contain the substance of *in camera* discussions of city council and its Works Committee. The city submits that a review of the meeting minutes of city council and its Works Committee confirm the dates of the *in camera* meetings concerning these records.

[138] The city submits that Records 8 and 17 were considered at *in camera* meetings of city council, and its committees and were utilized at *in camera* meetings of the Waste Study Group. Due to potential trade issues arising from the trans-national shipments of solid waste, in July 2003, the Minister of the Environment under certain statutory authority instructed the City of Toronto and the Regions of York, Durham, and Peel to form a senior level working group (the Waste Study Group) to work on matters of waste diversion. The city submits that the Waste Study Group for the purposes of its mandate constitute an "other body" associated with the city's Works Committee. According to the city, the Waste Study Group held a number of meetings in private, including those on January 17, 2005 and on February 8, 2005.

[139] The affected party did not provide direct representations concerning part 1 of the test.

[140] Peel has an interest in Records 8 and 17 and states that the municipal waste management services issues contained in these records were considered by Regional Council in confidence and *in camera* on January 20, 2005 and their disclosure would reveal the substance of that deliberation.

[141] The appellant states that that Waste Study Group is not the City of Toronto Council or a Committee of the City of Toronto Council.

[142] In reply, concerning Records 8 and 17, the city states that the Works Committee of the City of Toronto Council held a meeting on January 11, January 12, and January 16, 2006. The records were considered at the *in camera* meeting of the Work's Committee of city council and were also records that were utilized at *in camera*

meetings of the Waste Study Group. The city states that it did not submit that the Waste Study Group was city council or a committee thereof, but rather that the Waste Study Group constituted an "other body" for purposes of section 6(1)(b) of *MFIPPA*.

Analysis/findings re: part 1

[143] I find that the Waste Study Group, which is associated with the city's Works Committee, for the purposes of this appeal, constitutes an "other body" under section 6(1)(b) of *MFIPPA*. I have not been provided with any minutes of the Waste Study Group, however.

[144] Based upon my review of the minutes of the open meeting of city council or its committees and also upon my review of the city's representations, I accept the city's evidence that city council or one of its committee held a meeting with respect to Records 1, 3 to 5 and 17, but not Record 8.

[145] Record 8 is dated July 2006. It is entitled: "City of Toronto, Preliminary Engineering Feasibility Assessment of Contingency Solid Waste Disposal Capacity" and was prepared for the city by the affected party. The latest date of an *in camera* meeting where the records were deliberated upon referred to by either the city or Peel in their representations is January 16, 2006. Record 8 is the only record at issue in this appeal that is dated after January 31, 2006.

[146] Although the city submits that the Waste Study Group held meetings between 2003 and 2007, neither the city nor Peel, which is also a member of the Waste Study Group, identified any specific meeting dates which occurred where Record 8 was deliberated upon. In fact, Peel only refers to one meeting held on January 20, 2005, which was held well before the July 2006 date of Record 8.

[147] Based upon a review of the city's and Peel's representations, I find that I have not been provided with sufficiently detailed evidence that an *in camera* meeting concerning the information in Record 8 took place. This record is 67 pages and is a preliminary engineering feasibility report. The other records at issue in this appeal are significantly shorter and principally relate to other issues surrounding solid waste disposal or landfill capacity, such as contractual issues or the availability or size of landfills.

[148] Therefore, I find that the information in Record 8 could not have been deliberated upon in an *in camera* meeting of city council or the Waste Study Group. Part 1 of the test has not been met with respect to Record 8. As no other exemptions apply to this record, I will order it disclosed.

Conclusion

[149] Part 1 of the test has been met with respect to Records 1, 3, 4, 5, and 17. Part 1 of the test has not been met with respect to Record 8. I will now consider whether part 2 of the test has been met with respect to Records 1, 3, 4, 5, and 17.

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

[150] The city submits that section 239(2) of the *Municipal Act, 2001* (the *Municipal Act*), which in the case of the city was superseded by section 190(2)(a) of the *City of Toronto Act, 2006* (*COTA, 2006*), provides authorization for the *in camera* meetings of city council, its committees and the Waste Study Group since the subject matter under consideration at the meetings dealt with the "security of the property".

[151] The city provided both confidential and non-confidential representations on part 2 of the test under section 6(1)(b). In its non-confidential representations, the city states that the substance of the matters discussed at each of the meetings was the consideration and negotiation of various aspects relating to the development, management and utilization of property and the development of waste management solutions. It submits that:

> The city provides waste management services which ensure the safety and security of the public. Waste management is a complex series of services which the city provides to ensure that city owned property is not harmed or that there no harms to others due to the improper storage or treatment of solid waste (at that property). The health and safety risks to property and the public from improper storage or treatment of solid waste (i.e. garbage) are well known, and are so basic as to not require any further comment. Suitable waste management systems ensure that harms to members of the public do not occur due to the unsafe storage of materials which carry health and environmental impacts…
>
> Waste remediation/disposal includes operation of recycling programs as well as landfills for the storage of solid waste. All of these steps are required to remove waste from areas of the city where it may cause harm to the public to locations where it may be stored or processed in a safe manner. …In particular, each of the abovementioned *in camera* meetings addressed the particular options available to the city with respect to various waste management options and the economic and other considerations to be addressed in undertaking the development of such alternatives…

Each of the above mentioned *in camera* meetings involved discussions of the particular risks involved in the development of various options to ensure that the public would not be exposed to the risks of excess untreated solid waste within the City's boundaries…

Additionally, the meetings of City Council and Work Committee to consider Records 3 [and 17] were also permitted to be held *in camera*, under subsections [239(2)(c) and (f) of the *Municipal Act*], as the subject matter of the deliberations also included solicitor-client advice and a proposed or pending acquisition of land by the city…

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 section [239(2)(a) of the *Municipal Act*]…

The meaning of the phrase "security of the property" would encompass all issues relating to preventing potential harm to the assets of the city, including intangible matters such as the city's positions in negotiations or its financial or economic interests generally…

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 [the *Municipal Act*], 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 to the city arising from a proposed transaction…

[T]he 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. When the city negotiates a commercial transaction, it will develop "informational assets" - consisting of the positions, plans and strategies that the city will apply to the negotiation to attempt to obtain the most favourable arrangement possible for the city and thereby the public. These "informational assets" may consist of tangible and intangible property of the city reflecting the economic or financial interests of the city related to the negotiations.

> As public discussion of these "informational assets" could adversely affect both the value of the informational assets themselves, as well as adversely affecting the value of the property directly involved in the negotiations to which they relate, section [239(2)(a) of the *Municipal Act*], permits the city to hold an *in camera* meeting to consider the content of these "informational assets". It is the city's position that "security of the property" includes not only matters concerning the protection of the city's tangible assets, such as chattels, or fixtures installed on property, but also matters concerning other forms of city property, such as the city's financial or informational asset.

[152] The affected party submits that disclosure of the records would violate the intention of section 190 of the *City of Toronto Act* and section 239 of the *Municipal Act,* which specifically authorize the City to hold *in camera* meetings when such meetings discuss a proposed or pending acquisition of land by the city or local board (i.e. section 190(2)(c) of *City of Toronto Act* and section 239(2)(c) of the *Municipal Act*), and where the subject matter being considered is potential litigation before an administrative tribunal such as the Ontario Municipal Board, the Environmental Assessment Board, or the Environmental Appeal Board (i.e. section 190(2)(e) of *City of Toronto Act* and section 239(2)(e) of the *Municipal Act*). The affected party states that:

> In the event of a border closure to the city's garbage, the city would be forced, immediately, to secure acceptable alternative landfill options within the vicinity. Failure to do so would result in large garbage pile-ups within the city, which would pose a risk to public health. The city is a deep pocketed purchaser of property and landfill space. If an owner of a potential landfill site were to learn of the city's interest in purchasing his or her property or using his or her property in an emergency situation, it is likely that the owner would greatly increase the purchase price. Disclosure of potential land acquisition sites by the city would also encourage land speculation, since options on landfill sites can be easily obtained.
>
> The deliberations at the City's *in camera* meetings pertained to an analysis of the availability, costs and benefits of various potential alternative sites for large volumes of waste if the U.S. border was closed to Toronto's waste…
>
> Disclosing the requested information would undermine the City's ability to purchase outright or acquire rights to deposit waste in the shortlisted real estate sites at the lowest possible cost, which would needlessly increase waste disposal costs to the City's taxpayers.

> With respect to section 190(2)(e) of the *City of Toronto Act* and section 239(2)(e) of the *Municipal Act* (potential litigation), the discussion of exporting Toronto's waste to any landfill site would almost certainly result in the mobilization of local citizen action groups to oppose any such efforts. Landfill sites almost always give rise to "Not-In-My-Backyard"-related ("NIMBY-related") protests, which often result in applications to the Ontario Municipal Board, the Environmental Assessment Board, or to the Courts (i.e. through injunction applications). Sections 190(2)(e) and 239(2)(e) exempt the City from disclosing any records containing subject matter, likely to give rise to such potential litigation.

[153] Neither Peel nor the appellant provided representations as to whether a statute authorized the holding of a meeting to consider the records in the absence of the public.

Analysis/findings

[154] Records 1, 3 to 5, and 17 remain at issue. The dates of these records are as follows:

Record #	Date
1	June 15, 2004
3	October 3, 2005
4	December 5, 2005
5	January 31, 2006
17	January 28, 2005

[155] The city refers in its representations to the minutes of the meetings of city council and its Works Committee in which it submits that the records at issue were considered. The specific dates of all of these minutes referred to by the city are between 2004 and 2006. The city relies on *COTA, 2006*. This statute did not come into force until January 1, 2007.[14] Therefore, *COTA, 2006* is not relevant in this appeal. In this order, I will be considering whether section 239(2) of the *Municipal Act* authorized the holding of the meeting in the absence of the public.

[156] The city relies on section 239(2)(a) of the *Municipal Act* as authorization for the meetings with respect to the records at issue to be held *in camera*. The affected party relies on sections 239(2)(a), (c) and (e) of the *Municipal Act* for all of the records at issue. The city provided me with copies of the minutes of the open meetings where it submits that Council or a Committee decided to meet *in camera*. All of these minutes refer to "security of property", even the minutes related to Record 3. Although the city relies on sections 239(2)(c) and (f) of the *Municipal Act* for Record 3, I do not have

[14] http://www.mah.gov.on.ca/Page343.aspx.

evidence that these sections were utilized by the city for the authorization to conduct the meeting *in camera*. Section 239(2)(a) reads:

> 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 municipality or local board;

[157] The other sections of the *Municipal Act* referred to above read:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
> >
> > (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;

[158] Adjudicator Laurel Cropley in Order MO-2468-F 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."

[159] In that order, she stated:[15]

> 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]

[15] Order MO-2468-F at page 57.

[160] Adjudicator's Cropley'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"[16] made in the context of the specific factual circumstances, that is, the city's financial interests *vis a vis* its negotiation strategy.

[161] The city does not agree with this interpretation of "security of the property" by Adjudicator Cropley in Order MO-2468-F. It submits that by limiting this phrase to only physical harm to tangible property or harm caused by tangible property to individuals, this order fails to prevent a harm "to the public resulting from "the premature disclosure of a municipality's bargaining strategy" which "one might expect the Legislature to have addressed".

[162] Based upon a careful review of Order MO-2468-F, I find that Adjudicator Cropley thoroughly considered and rejected the city's argument that "security of property" encompasses "the premature disclosure of a municipality's bargaining strategy". Adjudicator Cropley stated:[17]

> 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.

[163] I agree with Adjudicator Cropley's findings in Order MO-2468-F that "security of property" in section 239(2)(a) of the *Municipal Act* is limited to situations where 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."

[164] In Order MO-2683-I, Adjudicator Frank DeVries reviewed and expanded upon Adjudicator Cropley's findings in Order MO-2468-F. In that order, the record at issue was a report related to an identified project. The *in camera* meeting discussed the particular risks involved in the development of this 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, in that appeal, as it has done in this appeal, provided confidential representations in which it specifically identified the risks and impacts to the city's property discussed at the meeting.

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[16] Order MO-2468-F at page 59.
[17] Order MO-2468-F at page 52.

[165] In Order MO-2683-I, Adjudicator DeVries found that "property" includes both "corporeal" and "incorporeal" property. 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 municipality or local board, section 239(2)(a) authorizes holding the meeting *in camera*.

[166] In Order MO-2683-I, Adjudicator DeVries applied the analysis in Order MO-2468-F and found that in order to establish that the requirements of section 239(2)(a) of the *Municipal Act* or its equivalent section, section 190(2)(a) of *COTA, 2006*, 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.[18]

[167] In finding that the second part of the section 6(1)(b) test has been met, Adjudicator DeVries determined that the record at issue in Order MO-2683-I:

> ...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.
>
> 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[19] 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.

[168] I agree with this analysis of Adjudicator DeVries in Order MO-2683-I. In accordance with the findings in both Orders MO-2468-F and MO-2683-I, will now consider whether section 239(2)(a) of the *Municipal Act* authorized the holding of a meeting in the absence of the public with respect to each record at issue.

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[18] Order MO-2683-I.
[19] *St. Catharines (City) v. IPCO*, 2011 ONSC 346.

Record 1

[169] This record is described by the city as a confidential report from the city's Commissioner of Works and Emergency Services dated June 15, 2004, concerning "[Name] Contract - Adoption of Letter Agreement and Report on [Name] Arbitration".

Record 3

[170] This record is described by the city as a confidential joint report from the Acting General Manager, Solid Waste Management Services and the city's solicitor concerning "Solid Waste Management Contractual Issues".

Record 4

[171] This record is described by the city as a confidential joint report from the Acting General Manager, Solid Waste Management Services and the city's solicitor concerning "Solid Waste Management Contractual Issues".

Record 5

[172] This record is described by the city as a confidential joint report from the Acting General Manager, Solid Waste Management Services and the city's solicitor concerning "Solid Waste Management Contractual Issues".

[173] Records 1, 3, 4 and 5 are similar records. In its non-confidential representations, the city submits that these records concern waste management and that:

> Waste management is a complex series of services which the city provides to ensure that city owned property is not harmed or that there no harms to others due to the improper storage or treatment of solid waste (at that property). The health and safety risks to property and the public from improper storage or treatment of solid waste (i.e. garbage) are well known, and are so basic as to not require any further comment. Suitable waste management systems ensure that harms to members of the public do not occur due to the unsafe storage of materials which carry health and environmental impacts…
>
> Waste management is the preservation of the security of property within the boundaries of the City of Toronto.
>
> In particular, the *in camera* meetings addressed the particular options available to the city with respect to various waste management options and the economic and other considerations to be addressed in undertaking the development of such alternatives…

> The *in camera* meetings included a substantive deliberation concerning the potential harms and risks to the city's tangible and intangible property (including economic assets and bargaining strategy) in relation to specific proposed transactions. The subject matter of the meetings at issue was authorized to be discussed *in camera,* as public deliberation of the issues relating to the city's waste management systems would result in harm to the city's financial and economic interests. It is the city's position that such deliberations constitute a consideration of the "security of the property" of the city or its local boards, for purposes of section 239(2)(a) of the *Municipal Act, 2001*.

Analysis/findings regarding: Records 1, 3, 4 and 5

[174] The city relies on section 239(2)(a) of the *Municipal Act* as the statutory basis for holding a meeting in the absence of the public to deliberate upon these records. Based upon my review of these records, I find that they do concern the security, in the sense of taking measures to prevent loss or damage, of city property. Although the records relate to commercial transactions, it also specifically pertains to the preservation of property, in the sense of identifying specific risks to it and taking measures to prevent loss or damage to it. The protection issue identified in these records is distinguishable from a mere financial interest in negotiating strategies.

[175] Accordingly, part 2 of the test has been met with respect to Records 1, 3, 4, and 5. I will consider below whether part 3 of the test has been met with respect to these records.

Record 17

[176] Record 17 consists of copies of 14 presentation slides. Record 17 is entitled, "GTA Municipalities Solid Waste Disposal Contingency Plan", which is the same title as the disclosed report at pages 346 to 357, 372 to 381, and 382 to 391. This disclosed report is dated January 2005. Record 17 is dated January 28, 2005. As stated above, all of the information in the 14 slides in this record was derived from the disclosed report.

[177] The city submits that the subject matter of Record 17 deals with issues of the "security of the property of the city" in relation to the waste management services provided to ensure that city owned property is not harmed or that there no harms to the property or persons of others due to the improper storage or treatment of solid waste. As well, the city states that the substance of the matters discussed at the Works Committee meeting was the consideration and negotiation of various aspects relating to the development, management and utilization of property and the development of waste management solutions.

[178] Based upon my review of this record, I find that section 239(2)(a) did not authorize the holding of a meeting in the absence of the public to deliberate upon this record. Based upon my review of this record, I find that it does not concern the security, in the sense of taking measures to prevent loss or damage, of city property. This record is about available landfill capacity. It does not contain information about measures to prevent loss or damage to landfills or other city property.

[179] The affected party's representations focus on records that contain information about potential land acquisition sites for landfills. Record 17 is about landfill capacity, however, and it does not have information in it to indicate that the city was proposing to purchase these landfills. This record was considered by the city's Works Committee No. 1 on January 11, 12 and 16, 2006. The minutes of the open meeting of this committee indicate that the reason for going *in camera* was section 239(2)(a) of the *Municipal Act*. These minutes state that:

> Councilor Altobello moved that, in accordance with the *Municipal Act*, the Works Committee meet privately to receive an update on the city's garbage contingency options, in that the subject matter relates to the security of property of the municipality.

[180] Therefore, the affected party's submission concerning the application of sections 239(2)(c) and (e) with respect to the acquisition of landfill locations is not applicable as these sections were not relied upon as the legislative authorization to conduct the meeting *in camera*.

[181] Accordingly, part 2 of the test has not been met with respect to Record 17 and section 6(1)(b) does not apply to it. As no other exemptions have been claimed for this record, I will order it disclosed.

<u>Conclusion</u>

[182] Part 2 of the test has been met with respect to Records 1, 3, 4, and 5. Part 2 of the test has not been met with respect to Record 17. I will now consider whether part 3 of the test has been met with respect to Records 1 and 3 to 5.

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

[183] The wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual

substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[20]

[184] The city provided both confidential and non-confidential representations on part 3 of the test under section 6(1)(b). None of the records contain information about the affected party or its reports about landfills. Neither Peel nor the appellant provided representations concerning the application of part 3 of the test to the records at issue.

[185] Records 1, 3, 4 and 5 are all records concerning solid waste management contractual issues.

[186] Based upon my review of the city's representations and the contents of these records, I find that part 3 of the test has been met as disclosure of these records would reveal the actual substance of deliberations which took place at the city's *in camera* meetings, not merely the subject of the deliberations.

[187] As none of the exceptions in section 6(2)(b) apply, I find that section 6(1)(b) applies to Records 1 and 3 to 5.

D. Did the city exercise its discretion under sections 6(1)(b) with respect to Records 1 and 3 to 5? If so, should this office uphold the exercise of discretion?

[188] 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.

[189] 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.

[190] 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)].

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[20] Orders MO-1344, MO-2389 and MO-2499-I.

[191] 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.

[192] The city submits that it took into account only relevant considerations in considering the application of section 6(1)(b) to the information at issue in the records, including:

- The purposes and principles of *MFIPPA* including the principles that the information should be available to the public and exemptions to access

should reflect the specific and limited circumstances where non-disclosure is necessary for the proper operation of municipal institutions;

- The wording of the relevant exemption in subsection 6(1)(b), and the public interest in the orderly operation of municipal government sought to be protected by this exemption;
- The fact that the appellant has not stated a sympathetic or compelling need to receive the information;
- The competitive relationships which may be affected by the disclosure of this information;
- The fact that the city has provided the public with considerable information concerning the agreements relating to trans-national waste shipments;
- The fact that the city has provided the public with considerable information concerning the agreements relating to a named landfill;
- The disclosure will not increase public confidence in the operation o£ the city, and will by exposing the financial interests of the city to increased risks of loss or other harm, likely diminish public confidence in the operation of the city;
- The fact that the requested information is of a highly sensitive nature and sensitive to the city, but not of particular importance to the requester;
- The city's historic practice of not disclosing information which would reveal *in camera* considerations which would expose the property of the city and its local boards to an increased risk of loss or other harm.

[193] The city states that:

[The] purpose of the Closed Meeting Exemption is to allow city council and local boards of the city the ability to deliberate in confidence on sensitive matters which will affect the interests of the city and its local boards. The city has attempted to balance the public interest in protecting the city's financial interests, and interests in the security of the public infrastructure required by conducting some business *in camera* while at the same time recognizing the public's right to know how local government operates. In its exercise of discretion, the head considered all of these factors and determined that the disclosure of the information at issue would not further advance public confidence in the operation of the

city, while exposing the city, and as a result the public at large, to potential harm.

[194] The affected party submits that the city exercised its discretion in a proper manner. Neither Peel nor the appellant provided representations on this issue.

Analysis/findings

[195] Based upon my review of the information at issue in Records 1 and 3 to 5, I find that the city exercised its discretion in a proper manner taking into account relevant considerations and not taking into account irrelevant considerations. Accordingly, I am upholding the city's exercise of discretion with respect to Records 1 and 3 and 5, and find that these records are exempt under section 6(1)(b).

ORDER:

1. I order the city to disclose to the appellant Records 8, 9, 12, 13, 17 and 18 **by April 26, 2012 but not before April 23, 2012.**

2. I uphold the city's decision to withhold Records 1, 3, 4 and 5.

3. In order to verify compliance with this order, I reserve the right to require a copy of the records disclosed by the city pursuant to order provision 1 to be provided to me.

Original Signed by: March 20, 2012
Diane Smith
Adjudicator