Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2787-I

Appeal MA11-202

City of Dryden

September 7, 2012

Summary: The appellant made a request for various records relating to a sewage treatment plant construction project in the City of Dryden. The city issued a decision granting access in part to some records and denying access to other records, claiming the application of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11(a) (valuable government information), 11(c) and (d) (economic and other interests), 12 (solicitor client privilege) and 14 (personal privacy) of the *Act*. During the inquiry of the appeal, the city raised a new discretionary exemption with respect to some of the records. In this order, the adjudicator allows the late raising of a new discretionary exemption, upholds the city's decision in part, but finds that the city did not exercise its discretion, as is required. The city is ordered to release some records in whole or in part, and is ordered to exercise its discretion. The adjudicator remains seized of this appeal pending a review of the city's exercise of discretion.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1), 10(1)(a), 10(1)(c), 11 and 12.

Orders Considered: MO-2115, MO-2715, P-658, PO-1993, PO-2435, PO-2453 and PO-2755.

OVERVIEW:

[1] This order disposes of the issues raised as a result of an access decision made by the City of Dryden (the city) in response to a request made by the requester under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

1. Any and all Construction Site Meeting Minutes produced relating to the construction for [a named project], performed by [a named company];

2. Any and all correspondence and documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, exchanged between [a named company] and the City of Dryden relating to [a named project];

3. Any and all correspondence and documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, exchanged between the City of Dryden and [a second named company] relating to [a named project];

4. Copies of all progress billings and certificates of payment submitted by [a named company] to [a second named company] and/or the City of Dryden relating to [a named project];

5. Copies of all change orders, requests for information ("RFI") and site/field instructions submitted by [a named company] and/or exchange between [a named company] and [a second named company] and/or the City of Dryden relating to [a named project];

6. Any and all internal City of Dryden documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, relating to the tender for [a named project] (Tender 2010-14);

7. Any and all correspondence and documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, exchanged between the City of Dryden and [a second named company] relating to the tender for [a named project] (Tender 2010-14);

8. Any and all correspondence and documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, exchanged between the City of Dryden and [a named company], relating to the tender for [a named project] (Tender 2010-14);

9. The full tender submissions of all bidders, save and except for [a named organization], for [a named project] (Tender 2010-14);

10. All letters prepared by [a second named company] (copied or provided to the City) regarding pre-qualified/approved alternative vendors/suppliers for [a named project] (Tender 2010-14);

11. Any and all correspondence and documentation, including but not limited to memos, reports, email correspondence and/or other written correspondence, exchanged between [a second named company] and [a named company], that was copied to or a copy provided to the City of Dryden relating to the tender for [a named project] (Tender 2010-14);

12. Copies of any and all reports, documentation and/or correspondence relating in any way to [a named project] (Tender 2010-14), that was presented, reviewed and/or considered in the open session of the Committee of the Whole Meeting of Council on October 12, 2010;

13. Copies of any and all reports, documentation and/or correspondence prepared by City staff, including Staff Report PW-2010-14, that were presented, reviewed and/or considered in the closed session of the Committee of the Whole Meeting of Council on October 12, 2010;

14. Copies of any and all reports, documentation and/or correspondence prepared by third parties, including but not limited to all reports from [a second named company] that were presented, reviewed and/or considered in the closed session of the Committee of the Whole Meeting of Council on October 12, 2010; and

15. Copies of any and all reports, documentation and/or correspondence relating in any way to [a named project] (Tender 2010-14), that were presented, reviewed and/or considered by City Council or the Committee of the Whole Meeting of Council after the meeting on October 12, 2010.

[2] The city subsequently located responsive records and issued a decision letter, granting access, in part, to some records and denying access, in full, to other records. The city claimed the application of the exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations), 10(1) (third party information), 11(a) (valuable government information), 11(c) and (d) (economic and other interests), 12 (solicitor client privilege) and 14 (personal privacy) of the *Act*. The city produced an index of records noting the exemptions that apply to the records that were withheld in full or in part.

[3] The requester, now the appellant, appealed the city's decision to this office.

[4] During the mediation of the appeal, the appellant's representative clarified that the appellant was seeking access to the following records that were withheld in full or in part: 2.11, 4.5, 4.6, 4.7, 4.8, 6.1, 7.3, 7.5, 7.9, 7.10, 7.11, 7.12, 7.13, 7.14, 9.2, 13.1, 14.1 and 15.7, but that it was not seeking access to those portions of the records that were withheld pursuant to section 14 of the *Act*. Therefore, the information withheld under section 14 is no longer at issue and I will not refer to it again in this order.

[5] The appeal file then moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator sought representations from the city, the appellant and two affected parties. She received representations from the city, the appellant and one affected party. Representations were shared in accordance with this office's *Practice Direction 7*.

[6] In the city's representations, it raised new discretionary exemptions for the first time with respect to records 6.1 and 13.1. Whether the city can raise new discretionary exemptions at this stage was added as an issue in the appeal. The city also noted that it was no longer claiming exemptions with respect to record 7.14 and disclosed that record to the appellant.

[7] The file was then transferred to me for final disposition.

[8] For the reasons that follow I uphold the city's decision, in part. I order the city to disclose the records as set out in the order provisions below. I also find that the city did not exercise its discretion and order the city to do so. I remain seized of this appeal pending the city's exercise of discretion.

RECORDS:

Record Number	Description	Exemptions Claimed
2.11	Emails and attached draft progress claims, and invoices exchanged among affected parties and/or city and/or suppliers regarding progress claims, invoices requiring review and approvals.	Sections 10(1), 11(a)
4.5	Progress charts #1 and #2	Sections 10(1), 11(a)
4.6	Progress chart #3	Sections 10(1), 11(a)
4.7	Progress chart #4	Sections 10(1), 11(a)
4.8	Release of holdback #5	Sections 10(1), 11(a)
6.1	Emails exchanged between city staff and the city solicitor and affected party regarding legal advice re: evaluation, contract information and award.	Sections 6(1)(b), 7(1), 12
7.3	Email between city and affected party re: clarification on process for release of bidder's list.	Sections 7(1), 11(a)
7.5	Emails between affected parties re: clarifications pertaining to tender contract.	Section 11(a)
7.9	Email re: city contract evaluation.	Section 7(1)

7.10	Email to city solicitor re: feedback from legal advisors.	Sections 7(1), 12
7.11	Email between affected party and city re: revised draft contract tender evaluation letter.	Section 7(1)
7.12	Email between affected party and city re: wording change to contract tender evaluation.	Section 7(1)
7.13	Emails between affected party and city re: draft contract tender evaluation letter, reference checks and bid comparisons (6 records).	Sections 7(1), 11(c)
9.2	Tender submission of affected party	Sections 10(1), 11(a)
13.1	Closed draft staff report	Sections 6(1)(b), 7, 12
14.1	Confidential letter from affected party to city.	Sections 7(1), 11(c), (d)
15.7	Contract – specifications for city of Dryden sewage treatment plan replacement project.	Sections 10(1), 11(a)

ISSUES:

A: Can the city raise new discretionary exemptions during the inquiry?

B: Does the discretionary exemption at section 12 apply to the records?

C: Does the discretionary exemption at section 7(1) apply to the records?

D: Does the discretionary exemption at section 6(1)(b) apply to the records?

E: Does the mandatory exemption at section 10 apply to the records?

F: Does the discretionary exemption at section 11 apply to the records?

G: Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

DISCUSSION:

[9] In early 2010, the city initiated the process of replacing its existing sewage treatment plant. City council subsequently awarded a consulting contract to a consultant. Also in early 2010, the city issued the first of two tenders related to the new facility, relating to the foundation of the facility (Contract number 1) and to the

construction of the facility (Contract number 2). The affected party in this appeal was awarded Contract number 1 by city council. In mid-2010, the city issued the second tender, which was subsequently awarded (Contract number 2) to the affected party by city council.

Issue A: Can the city claim new discretionary exemptions during the inquiry?

[10] In its initial representations, the city raised for the first time the application of the discretionary exemption in section 6(1)(b) (closed meeting) to a staff report, the contents of which are duplicated in record 13.1,[1] as well as the application of the discretionary exemption in section 7(1) (advice and recommendations) to record 13.1, which is a closed staff report.

[11] The appellant submits that the city should not be able to claim these new discretionary exemptions for the following reasons:

- the city did not issue a new decision letter to the appellant, advising of the new discretionary exemptions being claimed and only learned of these new claims through the city's representations;

- the city did not provide any evidence that its circumstances have changed since its initial decision or that new information came to the city's attention which might have warranted the late claim;

- the city was given two extensions of one month each in which to submit representations, having had ample time to review the records and confirm the discretionary exemptions upon which it wished to rely; and

- allowing the city to raise these new discretionary exemptions would compromise the integrity of the appeals process, is inherently unfair and would cause the appellant's interests to be severely prejudiced.

[12] In reply, the city acknowledges that it first raised the exemption in section 6(1)(b) with respect to part of record 6.1 and section 7(1) with respect to record 13.1 only in its representations to this office.

[13] The city submits that section 2.04 of this office's *Code of Procedure* provides that this office may depart from any procedure in the *Code* where it is just and appropriate to do so. The city also states that discretionary exemptions shall be raised within 35 days of the date on which notice of an appeal is provided to an institution and that this deadline had passed before present legal counsel for the city was retained.

[1] Located in record 6.1.

[14] The *Code* sets out basic procedural guidelines for parties involved in an appeal. Section 11 of the *Code* sets out the procedure for institutions wanting to raise new discretionary exemption claims after an appeal has been filed. Section 11.01 of the *Code* is relevant to this issue and reads:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[15] These guidelines for the late raising of discretionary exemptions were found to be reasonable by the Divisional Court in the judicial review of Order P-883.[2]

[16] Sections 6 and 7 are discretionary exemptions and, subject to the guidelines in section 11.01 of the *Code*, must be raised within 35 days of the issuance of the confirmation of appeal by this office.

[17] In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[18] The objective of the 35-day policy established by this office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

---

[2] *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 220/89, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

[19] With respect to the city's new section 6(1)(b) claim, the record for which it is being claimed is a staff report in record 6.1 that contains the same content as record 13.1 for which section 6(1)(b) was claimed prior to the commencement of the appeal. In my view, given that the information in record 6.1 is duplicated in record 13.1, it would appear that the failure to include reference to it in the decision was simply an oversight in this case. Accordingly, I will consider the application of section 6(1)(b) to the staff report in record 6.1.

[20] Similarly, prior to the commencement of the inquiry, the city had claimed the application of section 7(1) with respect to record 6.1, which includes a staff report, the contents of which are also included in record 13.1. As was the case above, in my view, given that the record for which section 7(1) is now being claimed contains the same content as part of record 6.1 for which section 7(1) has already been claimed, it would appear that the failure to include reference to it in the decision was simply an oversight.

[21] In the specific circumstances of this appeal, while the titles of the two records differ, the content is identical. I find that the integrity of the process would not be compromised and the interests of the appellant would not be prejudiced if I were to allow the city to claim the application of section 6(1)(b) to the staff report and section 7 to record 13.1. In addition, the appellant has had an opportunity to provide representations on the application of both sections to both records and has done so. Accordingly, I will permit the city to claim these exemptions.

Issue B: Does the discretionary exemption at section 12 apply to the records?

[22] The city is claiming the application of section 12 to portions of record 6.1,[3] and to records 7.10, 7.11 and 13.1. Section 12 states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[23] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

[24] The city submits that the records are exempt from disclosure under the common law and under section 12 of the *Act*, as these records are subject to solicitor client privilege or were prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation or use in litigation.

[3] The city provided a table, setting out the documents contained in record 6.1 for which the city is claiming section 12.

[25] In particular, the city states that the records consist of correspondence between representatives of the city and its legal counsel for the specific purpose of seeking and receiving legal advice. Privilege, the city argues, was maintained at all times, as the records were kept within the control of the city's employees, as well as a consultant, who was retained by the city and was acting "in his capacity as a [c]ity employee."

[26] The city notes that solicitor client privilege extends to protect legal advice communicated between a solicitor and client, or their agents or employees.[4] Further, the city submits that the courts have recognized that to remain subject to solicitor client privilege, it is not necessary that the communication specifically request or offer advice, as long as it can be placed within the continuum of communications in which the solicitor provides advice.[5] The city states that even if some of the records do not explicitly contain legal advice, they remain exempt as they were made "within the continuum of communications" between legal counsel and representatives of the city.

[27] The appellant submits that although the city initially claimed that the exemption in section 12 applied to record 7.11, it did not make any representations in that regard and, therefore, the appellant concludes that the city has abandoned its claim that this exemption applies to record 7.11. In addition, the appellant submits that only branch 1, solicitor client privilege, is at issue in the appeal.

[28] The appellant also submits that the consultant is not a city employee, but rather an independent contractor who was hired to provide an independent and arms-length evaluation of the tender bids for Contract number 2. The appellant's position is that the consultant's role is analogous to that of the investigator in the case of *David v. Information and Privacy Commissioner Ontario (David)*.[6] In that case, the appellant submits, the Divisional Court held that an independent contractor retained to conduct an arms-length investigation into the selection process for bidders for the contract for the renovation and future operation of Union Station was not in the "control" of the city[7] and was not found to be an employee or officer of the city with binding authority.

[29] Further, the appellant submits that the following records are not subject to the exemption in section 12:

- emails between city staff which are not subject to solicitor client privilege;[8]

- an email from the consultant to the city's outside counsel, since no solicitor client relationship exists between them;[9] and

---

[4] *Descoteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[5] *Currie v. Symcor Inc.* (2008), 244 O.A.C. 3 at para. 46.
[6] 2006 CanLII 36618 (Ont. Div. Ct.).
[7] City of Toronto.
[8] Records 6.1(l), (q), (r) and (x).

- emails where the city has waived any solicitor client privilege.[10]

[30] With respect to waiver, the appellant states that waiver is ordinarily established where it is shown that the holder of the privilege knows of its existence and voluntarily evinces an intention to waive it,[11] and that generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[12]

[31] In reply, the city states that it is not abandoning any claims raised in its original representations, unless otherwise specified. The city then clarified that it is claiming the application of the exemption in section 12 for records 6.1, 7.10 and 13.1.

[32] The city submits that solicitor client privilege extends to a third party where:

- the third party serves as a channel of communication between client and solicitor;[13]
- the third party's expertise is employed to assemble information provided by the client to the solicitor;[14] or
- where the third party's function is necessary to the solicitor client relationship such as whenever the client directs the third party to seek or receive legal advice on the client's behalf.[15]

[33] It follows, the city argues, that communications between the city's outside counsel and the consultant on behalf of the city, or between the city, its counsel and the consultant are subject to solicitor client privilege, if the consultant played a functional role in the solicitor client relationship between the city and its counsel.

[34] The city states that the consultant was retained on its behalf to conduct the solicitation leading up to the award of Contract number 2. The city states that the consultant played a functional role in the solicitor client relationship because it was acting on behalf of the city, had relevant information about the solicitation to convey to the city's solicitor and, therefore, was required to be privy to legal advice provided to the city regarding the conduct of the solicitation.

---

[9] Record 6.1(j).
[10] Record 7.10 and any emails in record 6.1 where the consultant is either carbon copied or blind copied on the email between the city and its outside counsel.
[11] *S. & K. Processors Ltd. V. Campbell Avenue Herring Producers Ltd*. 1983 CanLII 407 (BCSC).
[12] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).
[13] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (ONCA) (QL0 at paras. 104 and 120 (*Chrusz*).
[14] *Supra* at para. 106.
[15] *Supra* at para. 111.

[35] The city also submits that the consultant's relationship with it was fundamentally different than that of the city of Toronto and independent investigator in *David*. In that case the investigator was hired to conduct an arms-length investigation of the city's conduct. The Divisional Court noted that the investigator was not performing contract procurement on behalf of the city, but was conducting an external review of how the city had proceeded in a particular case.[16] In this situation, the city submits, the consultant was hired to run the procurement and provide technical advice.

[36] With respect to records 6.1(l), (q), (r) and (x), the city submits that they are communications between city employees that distribute internally certain privileged communications received from legal counsel or that direct what legal advice is to be sought from counsel and the logistics of who would communicate with counsel. The city states:

> It is the communication that is privileged, not the relationship between [legal counsel] and a particular designate for the City. For the solicitor client relationship to function it is essential that privilege extend beyond the direct communication between a solicitor and a single employee or director of a corporation who receives the communication as there is often more than one employee who needs to be aware of the legal advice.
>
> For example, it would defeat the purpose of solicitor client privilege if the City's manager were to receive legal advice from a solicitor about a roadway and then waive that privilege by conveying the legal advice to the City's employees responsible for implementing that advice.

[37] Consequently, the city submits that solicitor client privilege applies to records 6.1 and 7.10, as the communications between the consultant and legal counsel were authorized by and on behalf of the city, and the communications between city employees distributed privileged communications.

[38] The city states that it is also claiming litigation privilege over records 6.1, 7.10 and 13.1. In particular, the city submits that litigation privilege applies to advice given and documents created in anticipation of litigation. Litigation privilege, the city argues, is not restricted to communications between a solicitor and client, and its object is to ensure the efficacy of the adversarial process without fear of premature disclosure.

[39] Also in reply, the city states that records 6.1, 7.10 and 13.1 are subject to litigation privilege because:

> Litigation initiated by unsuccessful bidders occurs quite frequently at the conclusion of procurement processes. Consequently, a party that issues a

[16] See note 5 at para. 30.

> call for tenders proceeds through the procurement process conscious of the fact that litigation is a reasonably likely outcome.

[40] The city goes on to state that legal advice provided by the city's counsel to the city and the consultant with respect to bidder selection and contract award was obtained in the context of potential litigation and is, consequently, protected by litigation privilege.

[41] In sur-reply, the appellant submits that the city's initial representations focused on the protection of solicitor client communications and did not set out any arguments on the issue of litigation privilege. The appellant submits that it would be inherently unfair to allow the city to raise a new issue at the reply stage of the inquiry and, consequently, the city ought not to be able to raise litigation privilege at this stage of the inquiry.

[42] The appellant also submits that, in any event, litigation privilege does not apply to the records. Under the common law, the appellant states, litigation privilege protects records created for the dominant purpose of litigation.[17] The appellant also submits that statutory litigation privilege under section 12 applies to records that were prepared by or for counsel employed or retained by the city "in contemplation of or for use in litigation."

[43] The appellant argues that the city's position is essentially that whenever a call for tenders proceeds through the procurement process, it will likely result in litigation and records relating to same should be protected by litigation privilege. For this privilege to apply, the appellant submits, there must be more than a vague or general apprehension of litigation.[18] Further, the appellant states that the records were not created for the dominant purpose of contemplated litigation or by or for its lawyers in contemplation of or for use in litigation. The records, the appellant submits, were prepared for the purpose of making a decision to award the contract.

[44] With respect to waiver of privilege, the appellant submits that:

- much of the city's reply representations on the issue of waiver are based on the dissenting opinion (in part) of Doherty J.A. in *Chrusz*;[19]

- in *Chrusz*, Doherty J.A. also recognized and cited with approval the case of *Wheeler v. Le Machant*[20] in which a client retained a solicitor for advice concerning a property and the solicitor in turn retained a surveyor to

---

[17] *Chrusz*, see note 12.
[18] Ronald D. Manes and Michael P. Silver, *Solicitor-Client Privilege in Canadian Law* (Butterworths: Toronto, 1993) at pages 93-94.
[19] See note 12.
[20] (1881), 17 Ch. D. 675 (C.A.).

provide him with information concerning the property. In subsequent litigation, the client asserted that information passed from the surveyor to the lawyer was protected by solicitor client privilege. No litigation was contemplated at the time the surveyor provided the information to the solicitor. On appeal, the court held that the communications between the surveyor and solicitor were not protected by solicitor client privilege;

- the consultant is independent from the city and the city has not substantiated that the consultant was a city employee;

- the city has provided no evidence that the consultant was retained to perform a function that was essential to the existence or operation of the solicitor client relationship between the city and its counsel. As such, the relationship is no different than that of the surveyor in *Wheeler*; and

- any communications that are found to be subject to solicitor client privilege have been waived.

Branch 1: common law privilege

[45] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue.[21]

Solicitor-client communication privilege

[46] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[22]

[47] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation.[23]

[48] The privilege applies to "a continuum of communications" between a solicitor and client:

---

[21] Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39 (*Blank*).
[22] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[23] Orders PO-2441, MO-2166 and MO-1925.

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach.[24]

[49] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[25]

Record 6.1

[50] The portions of this record for which the city is claiming section 12 consist of a number of email exchanges,[26] a letter, and two reports. At the outset, I note that some of the email exchanges, either in whole or in part, are between the city and the appellant. These portions of the email exchanges are clearly within the knowledge of the appellant, as the appellant participated in them and are, therefore, not subject to solicitor client privilege and not exempt under section 12 as any privilege which may have existed in them was waived when they were shared with the appellant. I will order those portions between the appellant and the city to be disclosed to the appellant. In addition, there are two emails in record 6.1 for which no exemptions have been claimed. Therefore, I will order the city to disclose these emails to the appellant in their entirety.

[51] The remaining email exchanges represented in the pages comprising record 6.1 are between:

- city staff and outside legal counsel;
- city staff and the consultant;
- various members of the city's staff; or
- between city staff, legal counsel and the consultant.

[52] On my review of the emails and the representations of the city, I am satisfied that the consultant who was retained by the city to conduct the solicitation leading up to the award of Contract number 2 was acting as the city's agent. I am also satisfied that the remaining emails meet requirements of the solicitor-client communication privilege, as they consist of email communications between the city (through its agent, the consultant, or its employees) and its legal counsel, made for the purpose of seeking, formulating and/or giving legal advice with respect to the identified project. Accordingly, I am satisfied that the emails contained in record 6.1 for which the city is claiming section 12, constitute direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.

---

[24] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[25] *Chrusz*, see note 12.
[26] Many of them are email chains.

[53] Further, although not all of the portions of the email exchanges contain the specific legal advice or request, I find that these communications fall within the ambit of the solicitor-client communication privilege on the basis that they form part of the "continuum of communications" passing between the city and its legal counsel, as the emails address the subject matter for which counsel had been consulted.

[54] The letter that forms part of this record was written by the city's legal counsel and is clearly marked as being subject to solicitor client privilege. The letter consists of a legal opinion provided by outside counsel to the city in relation to the project. Consequently, I find that this letter is exempt under section 12 as it represents a confidential communication from solicitor to client.

[55] One of the two reports for which this exemption is claimed was written by city staff. The report contains background information about the construction project, and a recommendation to city council about who the contract should be awarded to. In my view, this record is not subject to solicitor client privilege. It was not prepared by legal counsel, it does not contain legal advice, and was prepared solely for city council's use. I find therefore, that this report is not subject to solicitor client privilege.

[56] The second report was prepared by the consultant and sent to the city to be presented to city council. As was the case with the city staff's report, the consultant's report contains background information about the construction project, and a recommendation to the city regarding to whom the contract should be awarded. In my view, this record is not subject to solicitor client privilege. It was not prepared by legal counsel, it does not contain legal advice, and was prepared for the city's use. I find therefore, that this report is not subject to solicitor client privilege.

[57] In summary, I have found that the emails and the letter written by legal counsel are subject to Branch 1 solicitor client communication privilege, with the exception of those portions of emails where the communication is between the city and the appellant. Conversely, I find that the emails for which no exemptions were claimed and the two reports are not subject to solicitor client privilege.

Record 7.10

[58] This record consists of an email passing between city staff and legal counsel, which was then forwarded on to another city staff member. The content of the email is identical to one of the emails in record 6.1, which I found to be exempt from disclosure under section 12, as it subject to solicitor client privilege. I find that the privilege extends to this email as well, as it contains legal advice communicated from legal counsel to a city staff member and then forwarded to another city staff member.

Record 13.1

[59] Although the title of this record is different, its content is duplicated in one of the reports in record 6.1 that had been authored by city staff containing background information and a recommendation to city council setting out who the contract should be awarded to. In keeping with my finding for the report contained in record 6.1, this report does not contain legal advice, was not prepared by legal counsel and was prepared for city council's use. I find therefore, that it is not subject to solicitor client privilege.

Litigation privilege

[60] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[27]

[61] In *Solicitor-Client Privilege in Canadian Law*[28] the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[62] As noted above, the litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation. As set out in Order MO-1337-I, to meet the dominant purpose test, there must be more than a vague or general apprehension of litigation.

---

[27] Order MO-1337-I; *Chrusz*, see note 12 and *Blank,* see note 20.
[28] See note 17.

[63] The city argues that legal advice provided by the city's counsel to it and the consultant with respect to bidder selection and contract award was obtained in the context of potential litigation and is, consequently, protected by litigation privilege. In my view, none of the records for which this exemption was claimed were created for the dominant purpose of litigation. The records were created during a tender process, in which legal advice was sought and recommendations made. There was no litigation either underway or contemplated at the time the records were created and the city's representations, which refer only to "potential litigation," are too speculative to lead me to conclude that these records are subject to litigation privilege.

Loss of privilege

[64] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.[29] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege:

- knows of the existence of the privilege; and
- voluntarily evinces an intention to waive the privilege.[30]

[65] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[31] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.

[66] As previously set out, the appellant submits that solicitor client privilege has been waived with respect to record 7.10 and any emails in record 6.1 where the consultant is either carbon copied or blind copied on an email between the city and its outside counsel.

[67] Previous orders of this office have found that e-mail communications passing between non-legal institutional staff that refer directly to legal advice originally provided by legal counsel to other staff would reveal privileged communications and were, therefore, exempt from disclosure.[32] That is precisely the case in the current appeal. As I noted above, portions of the record consist of email chains. While some of the emails in the chains were not directly sent to legal counsel, they clearly address the subject matter for which legal counsel had been consulted, often refer to the need for the communications to be sent to legal and/or reveal the legal advice provided by counsel. In the end, these e-mails form part of the chain that was ultimately sent to legal counsel. In this context, these e-mails form part of the "continuum of

---

[29] Orders PO-2483, PO-2484.
[30] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[31] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.).
[32] Orders PO-2087, 2223, 2370 and 2624.

communications" recognized in *Balabel* as falling within the solicitor-client communication privilege.

[68] With respect to emails that were sent to the consultant, I find that there is no evidence to support a finding that privilege has been waived, as I have found that the consultant was acting as the city's agent. Given the subject matter and the context in which the records were created, it is reasonable to assume that communications between city staff, legal counsel and the consultant were intended to be treated confidentially.

[69] Accordingly, subject to my findings regarding the city's exercise of discretion, I find that some of record 6.1 and all of record 7.10 qualify for exemption under the solicitor-client communication privilege aspect of branch 1 of section 12.

Issue C: Does the discretionary exemption at section 7(1) apply to the records?

[70] The city is claiming the application of section 7(1) to portions of record 6.1[33] and all of records 7.3, 7.9, 7.11, 7.12, 7.13, 13.1 and 14.1. Section 7(1) states:

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

[71] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure.[34]

[72] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information.[35]

[73] To qualify as "advice or recommendations", the information in the record must reveal a suggested course of action that will ultimately be accepted or rejected by its recipient during the deliberative process of government policy-making and decision-making.[36]

---

[33] In its representations, the city provided a table of the documents in record 6.1 for which it is claiming section 7(1).

[34] Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.).

[35] Order PO-2681.

[36] Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005]

[74] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations; or
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given.[37]

[75] "Advice" and "recommendations" have a similar, though distinct, meaning. A "recommendation" may be understood to "relate to a suggested course of action" more explicitly and pointedly than "advice". "Advice" may be construed more broadly than "recommendation" to encompass material that permits the drawing of inferences with respect to a suggested course of action, but which does not itself make a specific recommendation.[38]

[76] The exemption does not extend to information generated in the process leading up to the giving of advice or recommendations. Consideration must be given to the context in which the record at issue was created and communicated to the person being advised in the decision-making process.[39]

[77] Examples of the types of information that have been found *not* to qualify as advice or recommendations include:

- factual or background information;
- analytical information;
- evaluative information;
- notifications or cautions;
- views;
- draft documents; or
- a supervisor's direction to staff on how to conduct an investigation.[40]

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

[37] Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[38] *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above).

[39] *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above).

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

[78] The city submits that the documents in record 6.1 for which section 7(1) is claimed include correspondence exchanged between city employees, as well as between city employees and the consultant retained by the city to advise on the procurement issues. The records, the city argues, contain both advice and recommendations regarding the evaluation of the bids submitted in response to the city's call for tenders. In particular, the city states, the documents provide recommendations from the consultant on how the city ought to proceed with the evaluation and awarding of tenders. In addition, the city submits that in several instances the city relied on the consultant's advice and recommendations in order to determine a course of action.

[79] The city states:

> The correspondence referenced above does indeed contain a series of suggested courses of action from the consultant retained by the City, regarding the evaluation of tenders and awarding of the contract for the Project. Moreover, these recommendations were ultimately accepted or rejected by the City, as the institution being advised. Any disclosure of this information would reveal the actual advice given . . .

[80] With respect to records 7.3, 7.9, 7.11, 7.12, 7.13 and 14.1, the city relies on its representations relating to record 6.1, above, and also submits that these records, which consist of emails and letters exchanged between city employees and the consultant, discuss specific courses of action that were recommended by the consultant.

[81] Lastly, the city submits that record 13.1 is exempt under section 7(1), as it is a closed staff report that was prepared by a city employee, in which the employee recommends a specific course of action to members of city council. The city relies on its representations relating to record 6.1, above, and submits that the purpose of section 7(1) is to ensure that city employees may freely and frankly provide advice and recommendations. This ability, the city argues, would be severely compromised were the city not able to exercise its discretion to exempt from disclosure the advice and recommendations of its employees relating to the evaluation and awarding of a tender to unsuccessful bidders.

[82] The appellant submits that it received a severed copy of record 7.3 and that it consists of email exchanges between city staff and the consultant regarding the release of the bidders list in relation to Contract number 2. The information that was severed, the appellant argues, appears to be a name of a supplier and an email address and contact information for a third party making a request to the city for the bidders list.

Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner), (cited above).

[83] With respect to record 13.1, the appellant submits that the city is too late to claim the discretionary exemption in section 7(1). In addition, the appellant indicates that the city has provided no evidence that this record was considered at a city council meeting.

[84] Regarding the remaining records for which this exemption was claimed, the appellant submits that these records appear to relate to the evaluation of the tender bids for Contract number 2. The appellant argues that there is no basis upon which the city can rely on this exemption, as both this office and the Courts have been clear in determining that scores evaluating tender bids consist of primarily factual or background information and do not qualify for the advice or recommendations exemption. The appellant cites the case of *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*[41] in which the ministry and an affected party sought to set aside this office's finding that components of scores awarded by ministry staff to consulting engineering firms bidding on highway construction projects were not exempt under the advice or recommendations exemption in the *Act*. The Divisional Court stated the following:

> In the present case, the Commissioner found that the project supervisor scores were primarily of a factual or background nature. She did not accept the Ministry's argument that the scores represented the judgment of the scorer for the purpose of making a recommendation to senior staff. She found that the evaluators, in applying the pre-set criteria to the information contained in the RFPs, are essentially providing the factual basis upon which any advice or recommendation would be developed.
>
> As argued by counsel for the Commissioner, to the extent that the factual information is to be translated, it involves an element of judgment; however, it is not advice, because it represents an objective assessment of factual information.
>
> The reasoning of the Commissioner is consistent with the fundamental purpose of an access to information regime, which is to ensure that the public has the information it requires to permit it to assess the factual and analytical basis upon which decisions affecting the public interest have been or are to be made, to participate in that process and to hold government accountable.[42]

[85] In reply, the city submits that record 7.3 consists of advice and recommendations as to how the city should conduct its procurement process and the

---

[41] Order PO-1993, upheld on appeal [2004] O.J. No. 224 (Div. Ct.); aff'd [2005] O.J. No. 4047 (C.A.); leave to appeal refused [2005] S.C.C.A. No. 563.
[42] *Ibid* at paras. 75-77 (Div. Ct.).

record is exempt, as it involves the solicitation and advice and the making of recommendation.

[86] With respect to the remaining records, the city submits that they contain advice and recommendations from an employee or consultant to the city and not merely numerical scores from which advice or recommendations could not be distilled.

Record 6.1

[87] The city is claiming this exemption with respect to five emails and one letter which comprise part of record 6.1. The first email for which section 7(1) is claimed sets out advice and recommendations made by the consultant to the city, suggesting a course of action for the city to take. It also contains factual information, and by the manner in which the factual information is presented, one could infer the advice and recommendations made. Therefore, I find that this email is exempt, in its entirety.

[88] The second email is from the consultant to the city's director of engineering and public works, and was then forwarded to two other city staff members. This email, in my view, does not contain advice or recommendations and consists of strictly factual information, which cannot be used to infer advice or recommendations. Therefore, I find that this email is not exempt under section 7(1), as it falls within the ambit of the exception in section 7(2)(a). As no other exemptions have been claimed by the city, I will order the city to disclose this email to the appellant in its entirety.

[89] The third email is from the consultant to the city's director of engineering and public works, which was also forwarded on to another city staff member. This email clearly contains advice and recommendations made to the city by the consultant, suggesting a course of action for the city to take. In my view, it is exempt under section 7(1).

[90] The fourth email consists of both the body of the email and an attachment. The city claims the application of section 7(1) to both. I find that the email itself, which was sent by the consultant to the city's director of engineering and public works contains factual information only, which cannot be used to infer any advice or recommendations. As no other exemptions have been claimed by the city in regard to this email, I will order the city to disclose it to the appellant. The attachment to the email is a report prepared by the consultant for the city. There are also two identical copies of this report contained in record 6.1. I find that the report is exempt, in part, under section 7(1). Most of the report contains recommendations and advice to the city on what course of action to take with respect to the procurement of the project. This information is clearly exempt under section 7(1). However, other portions of the report contain factual and background information, and would not permit an individual to infer the advice or recommendations given.

[91] The final email, which is from one city staff member to two other staff members, has three attachments. The first attachment is a duplicate of the consultant's report, referred to above which I have found to be exempt, in part. The second is a legal opinion from the city's legal counsel, which I have already found exempt under section 12. The third attachment is the report written by city staff, the content of which was to be presented to city council at an *in camera* meeting. The body of the email, in my view, does not disclose advice or recommendations and simply consists of factual information from which one could not infer advice or recommendations. Therefore, I will order the city to disclose the email to the appellant. The report prepared by city staff contains information that consists of advice and recommendations given to city council, suggesting a course of action to take. Therefore, I find that information to be exempt under section 7(1). However, portions of the report contain background and factual material only, and would not permit an individual to infer the advice or recommendations given and are, consequently, not exempt under section 7(1). The city has also claimed section 6(1)(b) with respect to this report, will I which consider below.

Record 7.3

[92] The majority of this record, which is an email chain, has already been disclosed to the appellant. I have reviewed the severed portions that were withheld, and I agree with the appellant that the withheld information does not contain any advice or recommendations. Therefore, the withheld portions of this record are not exempt under section 7(1). As no other exemptions have been claimed with respect to this record either by the city or the affected party, I will order the city to disclose the withheld portions of record 7.3 to the appellant.

Record 7.9

[93] This record is a copy of an email from the consultant to the city that also formed part of record 6.1. The email from the consultant was then forwarded on to another city staff without further comment. The email sets out advice and recommendations made by the consultant to the city, suggesting a course of action for the city to take. It also contains factual information, and by the manner in which the factual information is presented, one could infer the advice and recommendations made. Therefore, I find that this email is exempt in its entirety under section 7(1).

Record 7.11

[94] This record consists of an email from the consultant addressed to the city with an earlier version of the consultant's report to the city attached. As was in the case of record 6.1, most of the report contains recommendations and advice to the city on what course of action to take with respect to the procurement. This information is clearly exempt under section 7(1). However, other portions of the report contain factual or

background information only, and would not permit an individual to infer the advice or recommendations given. I will order the city to disclose those portions of the record to the appellant. Turning to the email, I find it contains advice and recommendations made by the consultant to the city, suggesting a course of action. It is, therefore exempt under section 7(1).

Record 7.12

[95] This record is an email from the consultant to the city. It contains advice and recommendations made by the consultant to the city regarding the wording of the contract tender evaluation, and provides a suggested course of action for the city to take. I find, therefore, that this email is exempt under section 7(1).

Record 7.13

[96] This record consists of six emails, some of which are email chains, and five attachments. The first email is from the consultant to the city's director of engineering and public works and contains advice and recommendations, suggesting a course of action for the city to take in regard to the procurement. I find that section 7(1) applies to this email and it is exempt from disclosure in its entirety. There are three attachments to it. The first is the consultant's report, which is duplicated in record 6.1. As previously stated, I find that this report is exempt, in part, under section 7(1). Most of the report contains recommendations and advice to the city on what course of action to take with respect to the procurement of the project. This information is clearly exempt under section 7(1). However, other portions of the report contain factual and background information only, and would not permit an individual to infer the advice or recommendations given.

[97] The second attachment to the email is a table, in which each of the bidder's cost breakdown of the project is compared to the other. In Order PO-1993,[43] Adjudicator Laurel Cropley had to decide whether records used by the Ministry of Transportation as part of a consultant evaluation process, in which staff evaluated and assigned scores for each consultant, qualified for exemption under the provincial equivalent of section 7(1). She found that they did not, and stated:

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

[43] Upheld on judicial review in *Ontario (Minister of Transportation) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 224 (Div. Ct.).

> sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue.
>
> As I noted above, the purpose of the exemption in section 13(1) is to protect the free flow of advice or recommendations **within the deliberative process**. The importance of protecting this type of information is to ensure that employees do not feel constrained by outside pressures in exploring all possible issues and approaches to an issue in the context of making recommendations or providing advice within the deliberative process of government decision-making and policy-making. Ultimately, it is the recipient of the advice or recommendations who will make the decision and thus be held accountable for it.
>
> . . .
>
> According to the Ministry, its evaluators are "Ministry staff with the requisite education and knowledge of the construction industry needed to evaluate the consultants' proposals". In conducting their review of the proposals submitted to the Ministry pursuant to RFP's, these individuals are, as I noted above, establishing the factual basis upon which advice and/or recommendations may ultimately be made. Moreover, in this case, the entire exercise may be even further removed from the deliberative process through its very design.

[98] I adopt the approach taken by Adjudicator Cropley in PO-1993, which was upheld by the Divisional Court.

[99] In my view, the bid comparison document does not contain information which suggests a course of action that will ultimately be accepted or rejected by the person being advised. Rather, it contains the factual basis upon which advice and/or recommendations may ultimately be made. Accordingly, the bid comparison document does not qualify as "advice or recommendations" for the purpose of section 7(1) of the *Act*.

[100] The third attachment to the email is a list of references contacted in regard to the appellant and the affected party along with the actual comments provided by the references. In my view, this information does not convey advice or recommendations or provide information from which one could infer advice or recommendations. This information is evaluative in nature, which is not the type of information contemplated by the section 7(1) exemption.

[101] Four of the remaining emails and the remaining attachments consist of the city and/or the consultant either seeking or receiving information about some of the bidders. In reviewing these emails, there is nothing contained in them that qualifies as

being advice or recommendations or that could permit one to infer advice or recommendations. Therefore, I find that these emails and attachments are not exempt under section 7(1).

[102] The remaining email consists of a brief summary of the *in camera* meeting sent by the city to the consultant. As with the previous four emails, there is no information contained in it that could be seen as being advice or recommendations or that could permit one to infer advice or recommendations, with the exception of a portion of the email, which does set out a recommendation. Therefore, I find that this email is partially exempt under section 7(1).

[103] I will consider the city's section 11 claim with respect to the remaining information I have not found to be exempt under section 7(1) below.

Record 13.1

[104] The content of this record is a duplication of a report in record 6.1. The report, which was prepared by city staff, contains advice and recommendations given to city council and that information is exempt under section 7(1). However, portions of the report contain background and factual material only, and would not permit an individual to infer the advice or recommendations given and are, consequently, not exempt under section 7(1). The city has also claimed the application of the exemption in section 6(1)(b), which I will consider below.

Record 14.1

[105] This record is a duplicate of the consultant's report contained in record 6.1. I find that the report is exempt, in part, under section 7(1). Most of the report contains recommendations and advice to the city on what course of action to take with respect to the procurement. This information is clearly exempt under section 7(1). However, other portions of the report contain factual information only, and would not permit an individual to infer the advice or recommendations given.

[106] In sum, subject to my findings in regard to the city's exercise of discretion, I uphold the application of the exemption in section 7(1), to some, but not all, of the records for which it was claimed.

Issue D: Does the discretionary exemption at section 6(1)(b) apply to the records?

[107] The city is claiming the application of the discretionary exemption in section 6(1)(b) to record 13.1 and one document in record 6.1. Although the two records have different titles, their content is identical. I have already found that portions of the records that consist of advice and recommendations made to city council are exempt

under section 7(1) of the *Act*. The remaining information is background information and factual information. However, if I uphold the section 6(1)(b) exemption, it will apply to exempt the entire record from disclosure.

[108] Section 6(1)(b) states:

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

[109] 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.[44]

[110] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and

- "substance" generally means more than just the subject of the meeting.[45]

[111] 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*.[46]

[112] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the purpose of the meeting must deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.[47]

---

[44] Orders M-64, M-102 and MO-1248.
[45] Orders M-703 and MO-1344.
[46] Order M-102.
[47] *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

[113] With respect to the third requirement set out above, 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.[48]

[114] The city submits that record 13.1 is a confidential staff report prepared by city staff for an *in camera* session of city council. The closed meeting was held, the city states, in accordance with its by-laws, pursuant to section 239(2)(f) of the *Municipal Act* on the basis that:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> . . .
>
> advice that is subject to solicitor-client privilege, including communications necessary for that purpose;

[115] The city states:

> [T]he document was prepared as a basis for deliberations during the closed meeting regarding the awarding of the contract for the Project. In particular, these deliberations included a discussion of advice that is subject to solicitor client privilege. Moreover, both the report and the subsequent deliberations of council contained information and discussions regarding potential litigation. Therefore, disclosing the document would reveal the basis of those deliberations, and as a consequence the actual substance of those deliberations could be readily inferred.

[116] The city provided a copy of an agenda of a meeting of city council, which sets out that the staff report at issue was to be considered at a closed session. The city also provided further confidential representations describing the record in more detail.

[117] The appellant submits that the city has failed to meet the three branches of the test under section 6(1)(b) because:

- The city has provided no evidence to substantiate its claim that the record was considered at a meeting of city council, thereby failing to meet the first part of the test;

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

- The city cannot claim the application of the *Municipal Act* unless it can establish that the subject matter of the meeting included the substance of the privileged advice. Where only a general description is made that advice is given and no discussion of the substance of the advice takes place, the city cannot rely on section 239(f) of the *Municipal Act* to hold a meeting *in camera*;[49] and

- Although the record may reveal the subject of the discussions to be held at the meeting, it is hard to imagine that the disclosure of the record would reveal the substance of the actual deliberations that took place four days later.

[118] In reply, the city submits that the information in record 13.1 provides sufficient evidence to support its position that the record was prepared for and considered at a closed meeting of city council.

[119] On my review of record 13.1, it appears to be a closed staff report, not in draft form. The report number is the same as that listed on the agenda provided by the city. I accept the city's position that this report was prepared by city staff and was subsequently presented to city council in a closed meeting. Therefore, the first part of the test under section 6(1)(b) has been met.

[120] With respect to the second part of the section 6(1)(b) test, the city states that the record formed the basis of council's deliberations which included a discussion of advice that is subject to solicitor client privilege. In addition, the city claims that both the report and subsequent deliberations of council included information and discussions regarding potential litigation.

[121] I have already found that some of the information contained in this record is exempt under section 7(1), as it contains advice and recommendations suggesting a course of action made by city staff to city council on the procurement process. However, I have also found that this report is not subject to solicitor client privilege under section 12 of the *Act*. In addition, I have carefully reviewed the record and I find that there is no reference to potential litigation in it. While it may be the case that potential litigation was discussed during the deliberations that took place during the meeting, the record does not reflect this.

[122] The city argues that the record itself provides sufficient information to support its position that the record was prepared for and considered at a closed meeting of city council. I have found that the city has not provided sufficient evidence that the information contained in the record and discussed in the meeting was subject to solicitor client privilege. Consequently, the city cannot rely on section 239(f) of the

[49] Order MO-2337.

Municipal Act to hold the meeting *in camera*. The second part of the section 6(1)(b) test has not been met because the record does not contain information that is subject to solicitor client privilege. Consequently, record 13.1 is not exempt under section 6(1)(b). My reasoning also applies to the report in record 6.1, which duplicates the content of record 13.1.

[123] However, as previously stated, I have already exempted portions of these records under section 7(1). As no other exemptions have been claimed for these records and not mandatory exemptions apply, I will order the city to disclose those portions of the record that are not exempt.

Issue E: Does the mandatory exemption at section 10 apply to the records?

[124] The city is claiming the application of the mandatory exemption in section 10(1) in relation to records 2.11, 4.5, 4.6, 4.7, 4.8, 9.2 and 15.7. The affected party is claiming the application of section 10(1) in relation to records 2.11, 4.5, 4.6, 4.7, 4.8 and 9.2. I note that the city is no longer relying on section 10(1) with respect to records 7.3, 7.5, 7.13 and 14.1. I have already made findings with respect to records 7.3, 7.13 and 14.1 under section 7(1) but will also consider the city's section 11 claim in due course. Similarly, the city is also claiming the application of section 11 to record 7.5 which I will consider below.

[125] 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[126] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[50] 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.[51]

[127] 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

[128] The types of information listed in section 10(1) have been discussed in prior orders:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[52] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[53]
>
> *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.[54]

---

[50] *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.).[50]
[51] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[52] Order PO-2010.
[53] Order P-1621.
[54] Order PO-2010.

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[55]

[129] The city submits that the information for which section 10(1) has been claimed consists of commercial and financial information. In particular, the city states that the records include invoices, progress claims, pricing lists, data regarding a third party's pricing practices, banking information, billing practices, and information about technical capabilities, and that this information all relates to the selling of merchandise and services to the city.

[130] The affected party submits that the records contain technical, commercial and financial information and provided a description of the type of information contained in each record as follows:

- Record 2.11 contains correspondence of draft progress claims and invoices exchanged between the affected party and the city that describe the construction and operation of the structure, as well as the process of building the structure. In addition, the invoices exchanged among the affected party, the city and/or suppliers contain specific data on pricing practices, profit and loss data, overhead and operating costs, which qualifies as commercial and financial information relating to the buying, selling or exchange of equipment and services.

- Records 4.5, 4.6, 4.7 and 4.8 include draft progress claims and invoices which contain technical information, as they describe the construction and operation of the structure, as well as the process of building the structure. In addition, the records contain progress charts and release of holdbacks containing breakdowns of the contract value of the contract between the affected party and the city. These records include commercial and financial information as they relate to the buying, selling or exchange of equipment and services.

- Record 9.2 is the affected party's tender submission. It contains technical information relating to the construction methodologies used by the affected party on the project and details the process of building the structure. The record also contains commercial and financial information

[55] Order PO-2010.

> as it contains specific data on pricing practices, profit and loss data and operating costs.

[131] The appellant does not dispute that the records may contain the financial or commercial information of the affected party. However, the appellant submits that the city has not stated which particular subsection(s) in section 10(1) it is claiming. The appellant argues that the city has failed to issue a proper decision with respect to this exemption and, consequently, the appellant has been prejudiced in its ability to respond. Therefore, the appellant submits, the city's claim in regard to section 10(1) must fail in its entirety.

[132] In reply, the city submits that in its representations, it argues that the disclosure of the records would prejudice the affected party's competitive position and would cause the affected party undue financial loss. Therefore, the city submits, the representations clearly and unequivocally identify to the reader that the city is relying upon sections 10(1)(a) and (c) of the *Act*. The city also states that, consequently, the appellant was made aware of which sub-paragraphs of section 10(1) of the *Act* the city was relying on and was not prejudiced.

[133] Similarly, the affected party submits in reply that even if the city failed to state the sub-sections of the *Act* it relies on, the affected party specifically states in its representations that it is relying on sub-sections 10(1)(a) and (c), and that, consequently, the appellant was not prejudiced in its ability to respond.

[134] Having reviewed the representations of all the parties on this exemption, I find that the appellant was not prejudiced in its ability to respond to the representations provided by the city and the affected party. The affected party explicitly stated that it was relying on sections 10(1)(a) and (c), and the city used the language found in those sections in its representations. In addition, section 10(1) is a mandatory exemption which I am required to consider.

[135] Turning to the type of information contained in the records, I find that record 2.11 contains technical, financial and commercial information and that the remaining records contain financial and commercial information. The technical information in record 2.11 describes the construction, operation or maintenance of a structure and process. The records also contain information that relates solely to the buying, selling or exchange of merchandise or services, which qualifies as commercial information. In addition, the records contain financial information, as they include pricing practices and operating costs.

[136] Therefore, I find that part 1 of the three part test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[137] 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.[56]

[138] 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.[57]

[139] 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.[58]

[140] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible to change, such as the operating philosophy of a business, or a sample of its products.[59]

[141] The city submits that the records were supplied directly to the city and/or to the consultant hired by the city to administer the project by the affected party, who prepared the records. In addition, the city argues that the information in the records was entirely within the power and control of the affected party and that the commercial and financial information continues to be informational assets in the affected party's possession, which the affected party chose to make available to the city in the context of the project.

---

[56] Order MO-1706.
[57] Orders PO-2020 and PO-2043.
[58] 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.).
[59] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

[142] The affected party states that records 2.11, 4.5, 4.6, 4.7, 4.8 and 9.2 were directly supplied to the city by it and that disclosure of the information in these records would permit accurate inferences to be made with respect to underlying non-negotiated confidential information, such as the construction methodologies of the affected party.

[143] The appellant submits that records 2.11, 4.5, 4.6, 4.7 and 4.8 were not supplied to the city, but are the product of negotiation, as they consist of progress report claims and invoices relating to Contract number 1 after the contract had already been executed. Progress reports, the appellant states, are typically provided to an owner to show the status of the project and whether it is progressing satisfactorily pursuant to the contract. In this case, the appellant argues, the affected party provided the city with regular progress reports and these reports would reveal whether the affected party was on schedule and within the agreed upon budget. The appellant states:

> As these progress reports and invoices reflect what was negotiated between the City and [the affected party] in Contract #1, they cannot be considered "supplied" as that term has been interpreted in section 10(1).

[144] With respect to record 9.2, which is the affected party's tender submission, the appellant argues that it is not "supplied" within the meaning of section 10(1), as the actual contract that was entered into between the city and the affected party, Contract number 2, duplicates the terms of the affected party's tender. Therefore, the appellant argues, the tender is a product of negotiation and does not meet the supplied test.

[145] In regard to record 15.7, the appellant submits that the withheld portions of this record consist of five pages which contain the schedule of prices. The appellant states that the affected party has not provided representations or evidence as to why this information should not be disclosed. The appellant states that the pricing information in record 15.7 forms part of Contract number 2, which was negotiated and not "supplied" by the affected party.

[146] In reply, the city submits that records 2.11, 4.5, 4.6, 4.7 and 4.8 are not the product of the negotiation of a contract and that these records exist on their own and not as contractual provisions. The city states:

> While a contract itself may be the product of a negotiation, documents related to a contract are not. A document created and furnished by a third party, over which the city has no input cannot be said to be the product of negotiation.

[147] In its reply representations, the affected party submits that records 2.11, 4.5, 4.6, 4.7 4.8 and 9.2 were sent directly to the city by the affected party and that disclosure of these records would permit the drawing of accurate inferences about the financial and commercial information, including, but not limited to, the construction

methodologies used by the affected party, which are non-negotiated confidential information.

Record 2.11

[148] This record contains progress claims, invoices and emails in relation to Contract number 1. One email chain, one stand-alone email and an attachment discuss details contained in the affected party's tender to the city. In many previous orders, this office has found tender information submitted in response to an RFP to be "supplied" for the purpose of section 10(1), and not the product of negotiation. In my view, this reasoning ought to be applied to some of the information at issue in record 2.11, specifically the emails and attachment that refer to information that was contained in the tender.

[149] It is generally accepted that the purpose of section 10(1) is to protect the "informational assets" of a third party. In my view, some of the information withheld constitutes the informational assets of the affected party in that they represent portions of the bid which it submitted in response to the tender. I am satisfied that this information was submitted by the affected party to the city, and I find that it meets the definition of "supplied" for the purposes of section 10(1).

[150] The remaining documents in record 2.11 are progress claims, invoices and emails, including discussions about how to resolve a specific cost issue. The progress claims set out a description of the work, the amount completed for the specified time period and to date, and the balance to complete. The claim then requests a particular payment be made to the affected party.

[151] As previously stated, the city argues that a document created and furnished by a third party, over which the city has no input cannot be said to be the product of negotiation. The affected party submits that record 2.11 was directly supplied to the city by it and that disclosure of the information in these records would permit accurate inferences to be made with respect to underlying non-negotiated confidential information, such as the construction methodologies of the affected party.

[152] In Order MO-2115, Adjudicator Diane Smith considered whether invoices submitted by an affected party to the City of Windsor in relation to the disposal and treatment of the City of Windsor's sewage sludge were "supplied" within the meaning of section 10(1). During her review of the invoices, Adjudicator Smith stated:

> Record 2 is comprised of invoices from the affected party to the City with the rate charged per metric tonne of sludge cake and the amount charged severed. The number of metric tonnes of sludge cake has been disclosed. Therefore, by revealing the rate, the amount charged can be calculated and vice versa. Schedule "E" provides the formula for the calculation of

> the rate as it lists unit pricing, including adjustment details. I found above that the information in Schedule "E" has not been supplied for the purposes of section 10(1). For the same reasons, I conclude that the severed items in Record 2, the invoice amounts and rate charged per metric tonne, as calculated by the formula set out in Schedule "E", has not been supplied, as well.[60]

[153] In Order MO-2715, the appellant had made a request to the City of Hamilton for records relating to the city's Red Light Camera Program. At issue in that appeal were the unit costs, estimated costs and item costs in two schedules of the contract between the city and the affected party, and the invoices seeking payment from the affected party to the city. Assistant Commissioner Brian Beamish found that neither the pricing information nor the invoices were supplied to the city by the affected party for the purposes of section 10(1), as they were the products of negotiation between the city and the affected party.

[154] Applying the reasoning taken by Assistant Commissioner Beamish and Adjudicator Smith, I find that the progress claims, invoices and emails are a product of negotiation between the city (and its agent, the consultant) and the affected party. I do not agree with the city that these records were simply supplied by the affected party to the city without any input from the city, especially given the fact that the city is paying the affected party to complete the project in accordance with the terms of a negotiated construction contract. Further, it is evident from some of the email communications that negotiation was ongoing between the city and the affected party in relation to cost issues as they arose. I also do not agree with the affected party that these records would permit accurate inferences to be made with respect to underlying non-negotiated confidential information, such as its construction methodologies.

[155] Consequently, I find that these records were not supplied to the city within the meaning of section 10(1).

[156] In addition, I find that the invoices fail to meet part two of the section 10(1) test as the affected party has not provided sufficient evidence that would reasonably lead it to consider that the invoices was provided in confidence, either implicitly or explicitly. There is no notation on the invoices that indicate that they are to be kept confidential. While the lack of such a notation is not necessarily fatal to a claim of confidentiality, in the circumstances of this appeal, despite the assertions of the affected party, it leads me to the conclusion that the invoices were not submitted to the city on the basis that they were confidential and to be kept confidential. Even without a confidentiality notation, the affected party has not established that the invoices were supplied in confidence, either explicitly or implicitly.[61]

---

[60] Order MO-2011, page 14.
[61] Order PO-2384, pages 9-10.

[157] In summary, I find that most of the documents contained in record 2.11 do not meet part two of the test in section 10(1) and are, therefore, not exempt under section 10(1). The city has also claimed the application of the exemption in section 11, which I will consider below.

Records 4.5, 4.6, 4.7 and 4.8

[158] These records are progress charts and a release of holdback in relation to Contract number 1. For the same reasons as set out above, I find that these records are the product of negotiation between the city (and its agent, the consultant) and the affected party. The records were signed off by the city, the consultant and the affected party and, in some instances, were revised. In addition, I do not find that these records reveal non-negotiated confidential information. For these reasons, I find that these records were not supplied by the affected party to the city. Because they do not meet the second part of the test in section 10(1) they are, therefore, not exempt under section 10(1). The city has also claimed the application of the exemption in section 11, which I will consider below.

Record 9.2

[159] This record is the affected party's tender submission in relation to Contract number 2. As previously stated, in many previous orders, this office has found tender information submitted in response to an RFP to be "supplied" for the purpose of section 10(1), and not the product of negotiation. For example, in Order PO-2755, Adjudicator Smith dealt with the issue of whether a proposal submitted in response to a call for tenders was considered to have been supplied for the purposes of the equivalent provision to section 10(1) in the provincial *Act*. She found that a proposal containing only the contractual terms proposed by a bidder, and not the subject of negotiation, could not be characterized as having mutually generated terms. She found, therefore, that the proposal was "supplied" by the affected party to the institution for the purpose of the third party information exemption. I adopt Adjudicator Smith's approach for the purpose of this appeal.

[160] Given that record 9.2 is the tender provided by the affected party to the city, I am satisfied that this information was submitted by the affected party to the city, and I find that it meets the definition of "supplied" for the purposes of section 10(1) and has met the second part of the test in section 10(1).

Record 15.7

[161] This record comprises part of Contract number 2, which was entered into between the city and the affected party. The affected party did not provide representations on this record. As previously stated, the city submits that the records were supplied directly to the city and/or to the consultant hired by the city to administer

the project by the affected party, who prepared the records. In addition, the city argues that the information in the records was entirely within the power and control of the affected party and that the commercial and financial information continues to be informational assets in the affected party's possession, which the affected party chose to make available to the city in the context of the project.

[162] The appellant states that the pricing information in record 15.7 forms part of Contract number 2, which was negotiated and not "supplied" by the affected party.

[163] I find that this record comprises a portion of Contract number 2 and is, therefore, the product of negotiation between the affected party and the city, and was not supplied by the affected party to the city for the purposes of the section 10(1) exemption. In Order PO-2453, Adjudicator Catherine Corban addressed the application of the "supplied" component of part 2 of the section 10(1) test to bid information prepared by a successful bidder in response to a request for quotation issued by an institution. Among other items, the record at issue contained the successful bidder's pricing for various components of the services to be delivered, as well as the total price of its quotation bid. In concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the institution, and were not "supplied" pursuant to part 2 of the test under the equivalent to section 10(1) in the provincial *Act*, Adjudicator Corban stated:

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services, the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.
>
> Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact, in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.[62]

[62] Order PO-2453, page 7.

[164] The excerpt, above, emphasizes that the exemption in section 10(1) is intended to protect information belonging to an affected party that *cannot* change through negotiation, not that which could, but was not, changed.[63] The contract was negotiated by the city and the affected party and was not, therefore, supplied by the affected party to the city for the purposes of the section 10(1) test. The city is also claiming the application of the exemption in section 11, which I will consider below.

[165] However, I also find that portions of this record fall within the "immutability" exception, as it consists of information that is not susceptible to change and, therefore, was supplied by the affected party to the city for the purposes of section 10(1). These portions of the record relate to the affected party's supervisory staff, equipment, work experience and insurance.

In confidence

[166] With respect to the information that I have found to have been supplied by the affected party to the city,[64] 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.[65]

[167] 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; and
- prepared for a purpose that would not entail disclosure.[66]

[168] The city submits that the information in the records meets the criteria described above, as it was supplied to the city with the expectation of strict confidentiality and

[63] See *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.); Orders PO-2371, PO-2433 and PO-2435.
[64] Part of record 2.11, record 9.2 and part of record 15.7.
[65] Order PO-2020.
[66] Orders PO-2043, PO-2371 and PO-2497.

was consistently treated by the city and the affected party in a confidential manner in the following ways:

- the pricing and financial data was prepared specifically for the affected party's bid and was not disseminated or communicated to any outside parties and is not otherwise available in the public domain;

- the tendering process is inherently confidential and to disclose the information at issue would not only greatly reduce a bidder's prospects for success, but also undermine the entire purpose of the competitive tendering process;

- the appellant also expected that the information it supplied to the city would be treated in strict confidence and not disclosed without the appellant's explicit consent;

- the city's by-laws relating to procurement state that the disclosure of information received relevant to the issue of bids or the awards of contracts emanating from bids shall be in accordance with the *Act*, specifically the mandatory exemption in section 10(1); and

- all of the above factors would lead the affected party to reasonably expect that its information would be held in confidence.

[169] The affected party submits that the information supplied by it in records 2.11, 4.5, 4.6, 4.7, 4.8 and 9.2 was sent with the implicit understanding that matters relating to its work on the project that were discussed in the correspondence, progress reports, hold back and tender submission would remain confidential. This information, the affected party states, is not otherwise disclosed or available from sources to which the public has access. Businesses, the affected party argues, must have some level of confidence that their dealings with institutions and other businesses will remain confidential.

[170] The appellant submits that, while the affected party has claimed it had an "implicit understanding" that the information in the records would remain confidential, it has not provided any evidence to support its claim. In addition, the appellant submits that the affected party was given notice in the invitation to tender that tenders submitted to the city become the property of the city and are subject to the *Act*. Further, the appellant submits that the application of the *Act* to records is not a promise of confidentiality and that simply because an affected party claims that certain information is provided "in confidence" does not mean that it will not be disclosed.

[171] With respect to whether the records that I have found were supplied were done so "in confidence," by the affected party to the city, I have considered the

representations of all of the parties. In the circumstances of this appeal, I accept the position of the city and the affected party that portions of record 2.11, all of record 9.2 and portions of record 15.7 were supplied to it with a reasonably-held expectation of confidentiality for the purposes of section 10(1) of the *Act* and that part 2 of the test has been met with respect to them.

Part 3: harms

[172] 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.[67]

[173] 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.[68]

[174] 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 10(1).[69]

[175] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[70]

[176] The city submits that disclosure of the information prepared in accordance with a bid or tender would "undoubtedly" cause harm to the affected party and that this principle has been previously recognized by this office. The city also submits that the appellant, who is a competitor of the affected party, is attempting to obtain the confidential information of a competitor which it would not otherwise have access to.

[177] The city goes on to state that private sector companies could use the information to determine the specific prices that the third party charges for specified services and products. That information, the city argues, could then be used in future procurement processes or other commercial transactions to gain an unfair competitive advantage over the affected party, resulting in significant prejudice to the affected party's competitive position and undue financial loss to it.

---

[67] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[68] Order PO-2020.
[69] Order PO-2435.
[70] *Ibid*.

[178] The affected party submits that disclosure of the records, detailing its construction methodologies and procedures, especially to a competitor, would be significantly prejudicial to its competitive position, as it would allow others to gain insight into the affected party's pricing, invoicing methods and bidding techniques.

[179] Further, the affected party submits that disclosure of the records could allow a competitor an unfair advantage in future tenders in which they are competing for work and could result in the affected party losing bids that it might have otherwise obtained. In addition, the affected party argues that disclosure of the information that describes its construction methodologies and procedures, particularly to a competitor, could result in undue loss to it and undue gain to any competitor who received the information. The affected party goes on to state that it would be at a disadvantage in future bids and the competitor would gain a significant advantage and insight into the affected party's construction methodologies and procedures.

[180] The appellant submits that the arguments made by the city and the affected party are speculative, general in nature and lacking in the necessary particulars to establish that disclosure of the information could reasonably be expected to result in the harms set out in section 10(1). The appellant relies on Order PO-2435 in which Assistant Commissioner Beamish found that section 10(1) did not apply to the disclosure of specific pricing information or per diem rates paid by a government institution to a consultant. In that order, Assistant Commissioner Beamish commented on the need for "detailed and convincing evidence" under section 19(1). He stated:

> 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 [the third party exemption].
>
> . . .
>
> Consultants, and other contractors with government institutions, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

[181] The appellant states that both the city and the affected party have argued that disclosure of the records would be significantly prejudicial to the affected party as it:

- "could" allow a competitor to gain an unfair advantage in future tenders;
- "could" result in the affected party losing bids in might have otherwise obtained; and

- "could" result in undue loss to the affected party and undue gain to any competitor that received the information.

[182] The appellant then submits that this office has found that using highly speculative language to describe the harms that "could" accrue to the affected party has resulted in findings that the representations are vague and lacking the necessary specificity to meet the harms test.[71]

[183] The appellant also submits that this office has also held that the fact that a third party may be subject to a more competitive bidding process for future contracts, does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.[72]

[184] Lastly, the appellant submits that it is only in very limited circumstances that an institution or affected party can demonstrate that disclosure of information relating to a public procurement process could reasonably be expected to result in any of the harms set out in section 10(1).

[185] In reply, the affected party submits that it has satisfied the test for harm in its representations, and relies on Order P-367 where this office found that the harm component of the test was satisfied as there was sufficient evidence to support the argument that disclosure of the records might reasonably be expected to prejudice the competitive position of the third parties. In Order P-367, the Inquiry Officer took the following into consideration:

- Disclosure of the bid pricing would provide exact details of the pricing structure to a potential competitor who could, in turn, adjust its price accordingly of future bids, thereby gaining a significant competitive advantage and placing five other companies at a competitive disadvantage;

- Disclosure of the pricing structures to the appellant, who could be a competitor, would significantly prejudice their competitive position in future tenders, prejudice their contractual negotiations with customers and result in undue financial loss to the companies and undue financial gain to the appellant; and

- One of the records at issue was, essentially, a "how-to" manual for the design and successful implementation of a contract. It contained full descriptions of structure, systems and procedures in enough detail so that they could be duplicated, which would cause the company to lose its competitive advantage.

[71] Order MO-2496-I.
[72] Order PO-2435.

[186] The affected party also reiterated its earlier argument that disclosure of the records, detailing its construction methodologies and procedures to a competitor would be significantly prejudicial to its competitive position by enabling competitors to duplicate its methodologies and procedures, thereby damaging the affected party's ability to negotiate for business post-disclosure. Lastly, the affected party submits that disclosure of the records would allow others to gain insight into its pricing, invoicing methods and bidding techniques, allowing competitors to adjust prices and bidding techniques on bids for future tenders, placing the affected party at a serious competitive advantage.

[187] As previously stated and for ease of reference, I will be considering the application of part 3 of the harms test in relation to portions of record 2.11, all of record 9.2 and portions of record 15.7.

[188] The portions of record 2.11 reproduce portions of the affected party's bid to the city. Record 9.2 is the affected party's bid and portions of record 15.7 form part of Contract number 2.

Section 10(1)(a) and (c): prejudice to competitive position, undue loss or gain

[189] I have carefully considered the representations of the parties and the records at issue in this appeal. In my view, the evidence presented by the city and the affected party is too general in nature and, in some circumstances, highly speculative, and therefore, does not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal.

[190] The comments of Assistant Commissioner Beamish in Order PO-2435 are instructive in understanding this office's approach to the harms issue, particularly with regard to government contracts in which the expenditure of public funds is at issue. He states:

> Both the Ministry and SSHA [Smart Systems for Health Agency] make very general submissions about the section 17(1) harms and provide no explanation, let alone one that is "detailed and convincing", of how disclosure of the withheld information could reasonably be expected to lead to these harms. For example, nothing in the records or the representations indicates to me how disclosing the withheld information could provide a competitor with the means "to determine the vendor's profit margins and mark-ups".
>
> Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of

proving that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4th) 385.) Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific." In Public Government for Private People, the report that led to the drafting and passage of the *Act* by the Ontario Legislature, the Williams Commission stated as follows with respect to the proposed "business information" exemption:

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

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

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

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 17(1). This principle, enunciated by the Commissioner in Order MO-1947, is equally applicable to this appeal. Without access to the financial details contained in contracts related to the ePP [Ontario's e-Physician Project], there would be no meaningful way to subject the operations of the project to effective public scrutiny. Further, there would be insufficient information to assess the effectiveness of the project and whether taxpayer money was being appropriately spent and accounted for. The various commercial and financial details described in each SLA [Service Level Agreement] and summarized in records 1 and 2 are a reflection of what one would anticipate in any public consultation process. Consultants, and other contractors with government agencies, whether companies or individuals, must be prepared to have their contractual arrangement scrutinized by the public. Otherwise, public accountability for the expenditure of public funds is, at best, incomplete.

While I can accept the Ministry's and SSHA's general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1) (a),(b) and (c), this is not such a case. Simply put, I find that the appellant has not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a),(b) or (c) harms,

> and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[191] In my view, the analysis and findings of Assistant Commissioner Beamish in Order PO-2435 are applicable in the current appeal. The representations of the city and the affected party are general in nature and lack particularity in describing how the harms identified in sections 10(1)(a) or 10(1)(c) could reasonably be expected to result from disclosure in this case. As stated by Assistant Commissioner Beamish, the need for public accountability in the expenditure of taxpayer money is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1) of the *Act*.

[192] The city submits that private sector companies could use the information to determine the specific prices that the third party charges for specified services and products. That information, the city argues, could then be used in future procurement processes or other commercial transactions to gain an unfair competitive advantage over the affected party, resulting in significant prejudice to the affected party's competitive position and undue financial loss to it.

[193] The affected party submits that disclosure of the records, detailing its construction methodologies and procedures, especially to a competitor, would be significantly prejudicial to its competitive position, as it would allow other to gain insight into the affected party's pricing, invoicing methods and bidding techniques.

[194] Further, the affected party submits that disclosure of the records could allow a competitor an unfair advantage in future tenders in which they are competing for work and could result in the affected party losing bids that it might have otherwise obtained. In addition, the affected party argues that disclosure of the information that details its construction methodologies and procedures, particularly to a competitor, could result in undue loss to it and undue gain to any competitor who received the information. The affected party goes on to state that it would be at a disadvantage in future bids and the competitor would gain a significant advantage and insight into the affected party's construction methodologies and procedures.

[195] In my view, this is an entirely speculative argument. In the circumstances of this appeal, the city and the affected party have not provided any detailed or convincing evidence to demonstrate *how* in the future price unit details from today could reasonably be expected to cause either of the harms contemplated in sections 10(1)(a) or (c) of the *Act*.

[196] Further, Assistant Commissioner Beamish stated in Order PO-2435:

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

[197] In keeping with the reasoning expressed in Order PO-2435, I do not accept the arguments made by the city and the affected party that disclosure of the price details and/or methodologies contained in the records submitted by the affected party could then be used in future procurement processes or other commercial transactions to gain an unfair competitive advantage over it amounts to the requisite detailed and convincing evidence of harm required to outweigh the need for public accountability and transparency with respect to the spending of public funds. Accordingly, I do not accept that the city and the affected party has established that disclosure of the information at issue could reasonably be expected to result in the harms contemplated by sections 10(1)(a) and (c) of the *Act*.

[198] In sum, I have found that neither the city nor the affected party have provided the kind of detailed and convincing evidence required to support non-disclosure under these circumstances. For the reasons set out above, I find that part 3 of the section 10(1) test, the harms component, has not been met with regard to the information at issue in the records and the exemption does not apply. The city is also claiming the application of the exemption in section 11, which I will consider below.

Issue F: Does the discretionary exemption at section 11 apply to the records?

[199] In its decision letter, the city claimed the application of the discretionary exemption in sections 11(a), (c) or (d) in relation to records 2.11, 4.5, 4.6, 4.7, 4.8, 7.3, 7.5, 7.13, 9.2, 14.1 and 15.7. However, during the inquiry, the city did not provide any representations on the application of the discretionary exemption in section 11 of the *Act*, despite being given the opportunity to provide representations on that issue, as set out in the Notice of Inquiry.

[200] Sections 11(a), (c) and (d) of the *Act* state:

> A head may refuse to disclose a record that contains,

> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (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;

[201] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;

2. belongs to an institution; and

3. has monetary value or potential monetary value.

[202] 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.[73]

[203] 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.[74]

[204] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

[205] With respect to this exemption, not only has the city not provided "detailed and convincing" evidence that disclosure of these records may reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution, or reasonably be expected to be injurious to the financial interests of an institution, they have not provided any evidence at all. In addition, the city has not provided any evidence that the three part test under section 11(a) has been met.

---

[73] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[74] Orders MO-1947 and MO-2363.

[206] I find that the city has not met the burden of proof with respect to the records for which they have claimed section 11. Therefore, I do not uphold this exemption and will order the records disclosed either in whole or in part[75] as set out in order provisions 2 and 3.

Issue G: Did the institution exercise its discretion under sections 7(1) and 12? If so, should this office uphold the exercise of discretion?

[207] The sections 7(1) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[208] 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.

[209] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[76] This office may not, however, substitute its own discretion for that of the institution.[77]

[210] The city did not provide any representations on whether it properly exercised its discretion under sections 7(1) and 12 of the *Act*.

[211] As stated above, an institution must exercise its discretion. Unfortunately, I am unable to determine whether the city exercised its discretion properly, as I have not been provided with any evidence from the city on this issue even though it was given an opportunity to provide representations on this issue, as set out in the Notice of Inquiry.

[212] The exemptions listed above are discretionary and, as such, the city must turn its mind to whether or not to disclose information and must articulate this to the appellant and this office, explaining the factors used in exercising its discretion, so that this office can be sure the city considered relevant factors and did not consider unfair or irrelevant factors.

---

[75] Portions found exempt under other exemptions claimed by the city.
[76] Order MO-1573.
[77] Section 43(2).

[213] I will, therefore, order the city to exercise its discretion, and provide the appellant and this office with written representations on how it exercised their discretion. I remain seized of this matter pending the resolution of the issue outlined in order provision 4.

ORDER:

1. I uphold the city's decision with respect to records 7.9, 7.10, and 7.12.

2. I order the city to disclose records 2.11, 4.5, 4.6, 4.7, 4.8, 7.3, 7.5, 9.2 and 15.7 in their entirety to the appellant **by October 15, 2012 but not before October 9, 2012**.

3. I order the city to disclose portions records 6.1, 7.11, 7.13, 13.1 and 14.1. I have enclosed copies of the records and highlighted the portions that are to be disclosed to the appellant **by October 15, 2012 but not before October 9, 2012**.

4. I order the city to exercise its discretion under sections 7 and 12 in accordance with the analysis set out above and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the city continues to withhold all or part of the records, I also order it to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The city is required to send the results of its exercise, and its explanation to the appellant, with the copy to this office no later than **October 15, 2012**. If the appellant wishes to respond to the city's exercise of discretion, and/or its explanation for exercising its discretion to withhold information, it must do so within **21 days** of the date of the city's correspondence by providing me with written representations.

5. I remain seized of this matter pending the resolution of the issue outlined in provision 4.

Original Signed by: September 7, 2012
Cathy Hamilton
Adjudicator