

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2866

Appeal MA11-325

City of Greater Sudbury

April 5, 2013

Summary: At issue in this appeal was the information severed from a slide presentation prepared by an accounting firm concerning the financial aspects of a proposed Biosolids Plant. The city denied access to the information citing the mandatory third party exemption in section 10(1) and the discretionary exemptions in sections 7 and 11. The appellant raised the application of the public interest override in section 16. This order upholds the city's application of the discretionary section 11(a) exemption to the information at issue in the record. This order also finds that there is no compelling public interest in the disclosure of the information.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, 10(1), 11(a), 16.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for access to the following information:

- The value for money audit conducted for the City of Greater Sudbury regarding the proposed Kelly Lake Biosolids operation
- Proponent documents related to the bid for the aforementioned proposed Biosolids operation including company submissions

- Any communication from the City of Greater Sudbury City Counsellors to the proponents

[2] After having notified certain third parties of the request under section 21 of the *Act*, the city issued a decision to the requester advising that access has been denied pursuant to the mandatory exemption at sections 10(1) (third party information) and the discretionary exemption at 11 (economic and other interests) of the *Act*.

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

[4] During mediation, the city issued a revised decision to the appellant, advising that it is claiming the additional discretionary exemption in section 7(1) (advice or recommendations) of the *Act* with respect to the record relating to the first part of the request. It also indicated to the appellant that there were no records responsive to the third part of the request.

[5] In a discussion with the mediator, the appellant subsequently narrowed the scope of the request to the record responsive to the first part of the request only.

[6] After having notified another third party (the financial project consultant), the city issued a second revised decision, advising that partial access had been granted to a portion of the record responsive to the first part of the request, which is entitled *City of Greater Sudbury Biosolids Project Determining Value-for-Money Final Results Presentation December 6th, 2010*.

[7] The city then issued another revised decision to the appellant granting partial access to other portions of the record. In its letter, the city specified the pages that have been either severed or withheld in their entirety, pursuant to the exemptions in sections 7(1), 10(1), and 11 of the *Act*. The appellant indicated that it wished to pursue access to the severed and withheld pages of the record responsive to the first part of the request, raising the application of the public interest override principle, in section 16 of the *Act*.

[8] No further mediation was possible and the file was referred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry, setting out the facts and issues in this appeal, to the city and the financial project consultant (the consultant) who prepared the record, seeking their representations.

[9] The city also advised that the engineering consultant on the project may have an interest in the information at issue in the record. As a result, I also sent a Notice of Inquiry to the engineering consultant, seeking their representations.

[10] I received representations from the city only, which were shared with the appellant. Portions of the accompanying affidavit that I determined to be confidential were not shared with the appellant. The appellant did not provide representations in response.

[11] In this order, I uphold the city's application of the discretionary section 11(a) exemption to the information at issue in the record. I also find that there is no compelling public interest in the disclosure of the information at issue in the record.

RECORD:

[12] The record at issue is a slide presentation entitled, *City of Greater Sudbury Biosolids Project Determining Value-for-Money Final Results Presentation December 6th, 2010* prepared by the financial project consultant.

[13] The city has denied access to all of pages 11, 13, 16, 17, 22 and 23 and portions of pages 6, 10, 14, 15 and 21 of the record. The city has claimed the application of sections 7(1), 10(1) and 11 to the withheld information.

ISSUES:

- A. Does the mandatory third party information exemption at sections 10(1)(a), (b) and (c) apply to the information at issue in the record?
- B. Does the discretionary economic and other interests exemption at section 11(a) apply to the information at issue in the record?
- C. Did the institution exercise its discretion under section 11(a)? If so, should this office uphold the exercise of discretion?
- D. Is there a compelling public interest in disclosure of the information at issue in the record that clearly outweighs the purpose of the section 11(a) exemption?

DISCUSSION:

A. Does the mandatory third party information exemption at section 10(1)(a), (b) or (c) apply to the information at issue in the record?

[14] The city raised the application of the mandatory exemption in sections 10(1)(a), (b) and (c) to the information at issue in the record. These sections state:

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

[15] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ 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.²

[16] 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

[17] The city’s representations concern only the application of section 10(1) to the methodology developed by the financial project consultant. The city states that it retained the consultant, which is an accounting firm, to provide financial advisory

¹ *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.).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

services in relation to the development of a Biosolids Plant for the city. The city concedes that the concept of doing a value for money analysis (VFM) of alternative procurement approaches is not in and of itself a trade secret. However, the city maintains that the methodology developed by the consultant to conduct the VFM analysis is a trade secret. It also states that:

...the information in the record pertains to procurement of a biosolids waste management facility and constitutes technical, financial and commercial information in addition to containing trade secrets. The information relates to the VFM to be obtained through the various procurement approaches available to the city for the Biosolids Project. That particular information is commercial information in so far as relates to the purchase of a Biosolids Plant.³

Because the information relates to the approach to be used in the procurement of the Biosolids Plant to achieve the city's best VFM, this information is also financial information because the VFM analysis was performed for the purpose of assessing the best use and distribution of the city's money.

Finally, because the cost estimates for the build and design of the Biosolids Plant are information prepared with the expertise of an engineering consultant, [name], this information constitutes technical information.

Analysis/Findings re: part 1

[18] The particular types of information listed in section 10(1) reviewed by the city in its representations have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
 - (ii) is not generally known in that trade or business,
 - (iii) has economic value from not being generally known,
- and

³ The city relies on Orders MO-2179-F and MO-2115.

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.⁴

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.⁵

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.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

[19] The record was prepared by an accounting firm. The information in the record reveals financial information, as it addresses cost accounting methods and refers to specific data about the financial aspects of the Biosolids Plant.

[20] I also find that the record contains commercial information as it contains information that relates to the purchase of services to finance the building of the Biosolids Plant by the city.

[21] I disagree with the city that the record contains technical information. The record was prepared by an accounting firm and contains accounting information. I do not agree with the city that the cost estimates in the record can be considered technical information of the engineer. The record does not describe the construction, operation or maintenance of the Biosolids Plant.

[22] Without representations from the financial project consultant that prepared the record, and considering the representations of the city, I find that I do not have

⁴ Order PO-2010.

⁵ Order PO-2010.

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

sufficient information to find that the record contains a trade secret within the meaning set out above. In particular, I do not have sufficient evidence to find that the particular VFM analysis in the record is not generally known in the accounting field.

[23] In conclusion, I find that the record contains financial and commercial information and part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

[24] 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.⁹

[25] 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.¹⁰

[26] 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.¹¹

[27] There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The “immutability” exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.¹²

[28] The city states that it decided to retain the financial project consultant to:

⁹ Order MO-1706.

¹⁰ Orders PO-2020 and PO-2043.

¹¹ 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.).

¹² Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

- confirm the financial assumptions and analysis undertaken in the environmental assessment study,
- facilitate final financial evaluations of the proposals by city staff, and
- confirm the business case for the design/build/operate model and to counsel city staff with respect to potential negotiations with the private sector proponent.

[29] To obtain the services of the consultant, the city issued a Request for Proposals (RFP). The city entered into an agreement with the successful proponent (the consultant). One of the stated objectives of the consultant was, "To review and advise on the Biosolids Master Plan Environmental Assessment preferred alternatives or yet unidentified alternative from a financial perspective".

[30] The city states that the procurement approach which the consultant ultimately decided to recommend was provided to the public. However, the city states that the particulars of the approach and the consultant's methodology in arriving at its recommendation were not released to the public and are redacted in the record.

[31] The city states the record was presented directly to its Technical Working Group (TWG), which was responsible for developing, reviewing and recommending a procurement approach for the construction, design, operation, maintenance and financing of the Biosolids Plant. It states that the information at issue is displayed in such a way that one could infer, by flipping page by page through the record, how the consultant's methodology is used to conduct the VFM analysis.

[32] It submits that the consultant's methodology was not subject to negotiation, as the city accepted that the consultant would use its methodology to perform the VFM analysis.

Analysis/Findings

[33] The record is a slide presentation prepared by the financial project consultant for the city. The record is not a contract, nor does it reproduce the terms of the contract. The record was prepared by this consultant and was presented to the city to provide certain financial information on the financial aspects of the proposed Biosolids Plant. Based on my review of the record and the city's representations, I find that the information at issue in the record was supplied by this consultant to the city.

[34] I also find that the record does not contain information supplied by the engineering consultant. This consultant is not mentioned in the record by name nor does the city provide representations on any information being supplied by the engineering consultant, other than stating that the cost estimates for the build and

design of the Biosolids Plant are information prepared with the expertise of an engineering consultant. The engineering consultant did not provide representations. The city has not indicated what information of the engineering consultant was used to prepare the cost estimates or how disclosure of the cost estimates would reveal or permit the drawing of accurate inferences with respect to information supplied by this party.

[35] I will now consider whether the record was supplied in confidence.

In confidence

[36] 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.¹³

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.¹⁴

[38] The city states that certain information in the record relating to the methodology employed by the consultant in the preparation of its end product for the city was discussed only in private meetings involving the TWG and the city's Project Team who were the intended recipients of the information. It states that when the VFM analysis was presented publicly to the Policy Committee, the presentation was prepared in such a way as to avoid revealing the methodology.

[39] In the city's affidavit that accompanied its representations, it quotes the contract it entered into with the consultant, which reads:

¹³ Order PO-2020.

¹⁴ Orders PO-2043, PO-2371 and PO-2497.

The Manager of Supplies & Services/Purchasing Agent will consider all proposals as confidential, subject to the provisions set out in the Municipal Freedom of Information and Protection of Privacy Act. Information pertaining to pricing or any content of the proposals will remain confidential as the city reserves the right to negotiate with all Proponents.

Proponents shall not at any time before, during or after completion of the project, divulge any confidential information communicated to or acquired by the Proponent or disclosed by the city in the course of carrying out this project.

The successful Proponent further acknowledges that all reports, data, documents, materials and information of any kind whatsoever prepared in the course of carrying out this project are the sole and exclusive property of the city and shall not be disclosed or released to any person or organization without the prior written consent of the city.

Analysis/Findings

[40] Based on my review of the city's representations, including the confidential and non-confidential information contained in the city's affidavit, I find that the information at issue in the record was supplied in confidence to the city. As referred to above, this information was:

- communicated by the consultant to the city 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 consultant prior to being communicated to the city
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure

[41] Accordingly, I find that part 2 of the test under section 10(1) has been met.

Part 3: harms

[42] 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.¹⁵

[43] 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.¹⁶

[44] 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).¹⁷

[45] 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*.¹⁸

[46] The city’s representations focus on the harm to the consultant should the methodology set out in in the record be disclosed. Concerning sections 10(1)(a) and (c), the city states that it sought the specific expertise of a financial project consultant to provide the VFM analysis to it because it is sophisticated work which was beyond the city’s internal expertise. The city states that there were five bids for the financial project consultant contract and that to lay the consultant’s proprietary information open to public scrutiny to the very competitors who lost the bid for this contract, would be an unfair penalty for providing consulting services to the city. The city states that the other four competitors for the financial services contract would be keen to see what distinguished their bids from that of the consultant who was ultimately successful.

[47] The city submits that should the consultant’s methodology be made publicly available, it would allow competitors the advantage of knowing or inferring what the consultant’s methodology for VFM analysis is, thereby giving competitors the opportunity to gain expertise by unfair means when the consultant had to develop the methodology on its own through practical application, research and development.

[48] The city states that disclosure of the consultant’s methodology would likely result in undue loss of the consultant’s competitive position in being marketable to institutions

¹⁵ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹⁶ Order PO-2020.

¹⁷ Order PO-2435.

¹⁸ Order PO-2435.

because it has honed its specific expertise in the field of public-private sector partnerships.

[49] Concerning section 10(1)(b), the city states that the TWG required an understanding of the methodology in order to understand how the consultant arrived at its recommendation in order to decide whether the TWG would proceed with making that same recommendation to the city's Policy Committee. The city submits that releasing this information could, in the future, result in one of three things occurring, as follows:

First, consultants may have greater reluctance to provide such detailed information. Secondly, consultants may be inclined to share such information in a manner less easily disclosed, perhaps orally instead of by providing written reports or slides. This would be of little long term value for institutions who may want to refer to the information in the future. Furthermore, the corresponding effect to the chill put on the disclosure of methodology would be that institutions needing this information would be forced to pay higher prices for the information in order for consultants to be compensated by the disclosure of such information to competitors. These circumstances would be detrimental to institutions requiring such services of consultants.

Analysis/Findings

[50] I received no representations from the consultant in this appeal. I must rely on the information in the record and the city's representations to determine whether disclosure of the information at issue in the record could reasonably be expected to cause the harms to the consultant as outlined in sections 10(1)(a) to (c).

[51] As stated above, to meet part 3 of the test, the city, the only party providing representations in this appeal, must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. In my view, the city has not provided evidence to support a finding that part 3 of the test has been met.

[52] The city's representations focus on the harm that may result to the consultant from disclosure of the consultant's methodology for the VFM analysis. However, it is not clear to me from a review of the information at issue in the record or the city's representations what this methodology is or where it is located in the record.

[53] The record is a slide presentation made in support of the consultant's bid to provide services to the city. Much of the record has been disclosed, as well as other related information as detailed in the exhibits attached to the city's affidavit. The information severed from the record includes information other than about the VFM

analysis and includes information about several scenarios, details of projects with other institutions, another institution's methodology, and information specific to the project.¹⁹

[54] The city has not indicated where in the record the consultant's VFM methodology is located, nor is it apparent to me how this methodology, which is specific to the city's Biosolids Project, could be used by other financial consultants to the detriment of the consultant. In the absence of representations from the consultant, I cannot ascertain how the information at issue is unique to the consultant in such a way that it is otherwise unknown to other financial consultants.

[55] Even if the VFM methodology in the record is unknown to other consultants, I do not have sufficient information to find that disclosure of the information at issue could reasonably be expected to result in institutions being forced to pay higher prices for information in order for consultants to be compensated to cover the costs that the disclosure of such information to competitors would entail. The consultant is in the business in providing services related for public-private sector partnerships. Therefore, its income, as is other consultants' in the same field, is based on providing services to government institutions.

[56] Accordingly, I find that disclosure of the information at issue in the record could not reasonably be expected to significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of the consultant under section 10(1)(a). Nor do I find that disclosure could reasonably be expected to result in similar information no longer being supplied to the city where it is in the public interest to do so under section 10(1)(b). Similarly, I find that disclosure could not reasonably be expected to result in undue loss or gain to any person, group, committee or financial institution or agency under section 10(1)(c).

[57] In conclusion, I find that part 3 of the test under section 10(1) has not been met and the information at issue in the record is not exempt by reason of this mandatory exemption.

[58] I will now consider whether the information at issue in the record is exempt by reason on the discretionary exemptions in section 11(a).

B. Does the discretionary economic and other interests exemption at section 11(a) apply to the information at issue in the record?

[59] Section 11(a) states:

A head may refuse to disclose a record that contains,

¹⁹ Information already disclosed at pages 6, 10, 14, 15 and 21 of the record.

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

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

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

[61] 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 11.²⁰

[62] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.²¹

[63] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.²²

[64] 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.

²⁰ Orders MO-1947 and MO-2363.

²¹ Order MO-2363.

²² See Orders MO-2363 and PO-2758.

Part 1: type of information

[65] The city submits that the information at issue constitutes commercial, technical and financial information. These types of information listed in section 11(a) have been discussed above. Based on my analysis set out above for section 10(1), I find part 1 of the test under section 11(a) has been met as the information at issue constitutes financial and commercial information.

Part 2: belongs to

[66] The term “belongs to” refers to “ownership” by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[67] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,²³ customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.²⁴

[68] The city takes the position that it owns the information because it commissioned and paid the financial project consultant and engineering consultant for the information. Furthermore, the city states that it has an inherent interest in the information as it alone has the right to use the cost estimates and VFM results contained in the record. In addition, the city submits that it has expended resources to engage the expertise of two different consultants to develop the information contained in the record and provided its own staff and resources to assist with the development of that information. The city goes on to state that as the information is about achieving value for the city’s money, it has an inherent proprietary interest in it because the information speaks to use of the city’s own resources.

²³ Order P-636.

²⁴ Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.). See also Orders PO-1805, PO-2226 and PO-2632.

[69] Finally, the city states that the information at issue has been communicated and maintained in a confidential manner, as is described above in its section 10(1) representations.

Analysis/Findings

[70] Based on my review of the city's representations and the record, I agree with the city that the information at issue in the record belongs to the city within the meaning of part 2 of the test under section 11(a). The city expended money in paying the consultant to develop the information for the city. As well, city staff applied skill and effort to assist in the development of the information.

[71] Furthermore, as set out in my analysis concerning part 2 of the test under section 10(1), the information was consistently treated in a confidential manner by the city and the consultant. In addition, the information also derives value to the city from not being generally known. The financing information in the record is valuable to the city in the decision-making process to award the contract for the construction of the Biosolids Plant.

[72] Therefore, I find that part 2 of the test under section 11(a) has been met.

Part 3: monetary value

[73] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.²⁵

[74] The fact that there has been a cost to the institution to create the record does not mean that it has monetary value for the purposes of this section.²⁶ In addition, the fact that the information has been kept confidential does not, on its own, establish this exemption.²⁷

[75] The city states that value exists in the consultant's analysis in the record because this information is unknown to the consortia negotiating with the city for the construction of the Biosolids Plant. It states that it is possible that there could be a direct cost to the city from disclosure of the information at issue as the consortia could amend their bid after ascertaining the city's cost estimates and risk valuations of developing the Biosolids Plant. The city adds that this could also result in delays in the development of the Biosolids Plant, thus forcing the city to seek alternative and possibly costly solutions for disposal of its sludge in the interim.

²⁵ Orders M-654 and PO-2226.

²⁶ Orders P-1281 and PO-2166.

²⁷ Order PO-2724.

Analysis/Findings

[76] I agree with the city that the information at issue in the record has monetary value to the city. The information at issue refers to cost estimates and risk valuations associated with the Biosolids Project. I find that there will be a direct cost to the city if this information is disclosed while the city is in negotiation with the consortia to obtain the best price to construct the Biosolids Plant. If disclosed, prospective proponents of the Biosolids Plant would be able to ascertain the particulars of the cost estimates, risk valuations and risk exposures, thereby giving the bidders on the project an unfair advantage in developing their proposals.

[77] Furthermore, disclosure may result in a delay in the development of the Biosolids Plant, which will cause the city to pay for other options in the interim to address sludge disposal.

[78] Therefore, I find that disclosure of the information at issue would deprive the city of the monetary value of the information, as it needs to keep this information confidential while negotiations are ongoing.

[79] Accordingly, I find that the information at issue in the record is subject to the discretionary exemption in section 11(a). Therefore, there is no need for me to also consider whether the information is subject to the remaining claimed discretionary exemptions in sections 11(c), (d), (e), (f) and (g) and 7(1).

[80] I will now consider whether the city exercised its discretion in a proper manner concerning the application of section 11(a) to the information at issue in the record.

C. Did the institution exercise its discretion under sections 11(a)? If so, should this office uphold the exercise of discretion?

[81] The section 11(a) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[82] 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.

[83] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁸ This office may not, however, substitute its own discretion for that of the institution.²⁹

[84] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:³⁰

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

²⁸ Order MO-1573.

²⁹ Section 43(2).

³⁰ Orders P-344, MO-1573.

[85] The city states that it recognizes that one of the purposes of *MFIPPA* is that information should be made available to the public and that exemptions from the right of access should be limited and specific. In addition, the city submits that a significant amount of information relating to the Biosolids Project generally and the DBFOM procurement specifically, has already been released to the public through public meetings, the city's website, press releases, public consultation sessions and press coverage. It states that it has:

... plans to announce the award of the Biosolids Plant RFP once city staff is prepared to make a recommendation for an award. As such, the city submits that the city's efforts to achieve transparency factor into the Head having properly exercised her discretion with respect to the release of this record.

Finally, the city has made efforts to release portions of the record to the requester while attempting to balance a number of concerns, including:

- a. the city's concerns about the impact on the ongoing procurement process due to the sensitive nature of the information contained in the record,
- b. the concerns of the consultant who has a right to the protection of its commercially valuable information under section 10 of *MFIPPA*,
- c. and the requester's right to access under *MFIPPA*.

While release of the record may mitigate in favour of increasing public confidence in the city, the detrimental effects of releasing information favour denying access to the record largely because of the nearness to the end of the negotiation process with the consortia interest in the Biosolids Project and because of the large amount of information that has already been released to the public.

...With respect to section 11, while the city does not regularly conduct VFM analyses or negotiate the procurement of a DBFOM facility frequently, the city maintains consistent confidential processes for all city procurement processes in recognition of the fact that there is commercially valuable information that must remain confidential frequently exchanged through procurement processes.

The city's exercise of discretion is further supported by the fact that the city has not been provided with evidence of a sympathetic or compelling need for why the requester seeks the information. Even if such need were

to exist, the city maintains that the substantial amount of information put into the public realm regarding this project has made it such that the need is no longer compelling.

The principle of providing access to a person's own personal information is not an issue in this case because the requester is an organization. Similarly, the organization is not seeking its own information and thus the principle of ensuring persons have access to their own information is not at play on this appeal. Furthermore, the relationship between the third party, the consultant, and the requester does not appear to be relevant.

Finally, with respect to the city's usual treatment of such documents, consistent with the city's practice regarding all sensitive information that may impact an ongoing procurement, only city employees or partners with a need for access to the information may have access to the information.

Analysis/Findings

[86] Based on my review of the city's representations and the record, I find that the city exercised its discretion in a proper manner, taking into account relevant factors and not taking into account irrelevant factors. The contract for the Biosolids Plant has not yet been awarded. Until this contract is awarded, the information at issue in the record is significant information to the city in the procurement process for this facility. Once the contract is awarded the city may be in a position to re-exercise its discretion concerning the information that I have found subject only to the section 11(a) discretionary exemption.

[87] Accordingly, as the procurement process is still ongoing, I find that the city's exercise of discretion was proper under section 11(a) and I will uphold this exercise of discretion.

[88] I will now consider whether there is a compelling public interest in disclosure of the information at issue in the record that clearly outweighs the purpose of the section 11(a) exemption.

D. Is there a compelling public interest in disclosure of the information at issue in the record that clearly outweighs the purpose of the section 11(a) exemption?

[89] Section 16 states:

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

[90] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[91] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.³¹

[92] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.³² Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.³³

[93] A public interest does not exist where the interests being advanced are essentially private in nature.³⁴ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³⁵

[94] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".³⁶

[95] Any public interest in *non*-disclosure that may exist also must be considered.³⁷ If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.³⁸

[96] The city acknowledges that there is a public interest in accessing information associated with the Biosolids Project. However, the city states that it acknowledged and satisfied that public interest by proposing to release the majority of the information in the record, by creating opportunities for public consultation and by releasing substantial

³¹ Order P-244.

³² Orders P-984 and PO-2607.

³³ Orders P-984 and PO-2556.

³⁴ Orders P-12, P-347 and P-1439.

³⁵ Order MO-1564.

³⁶ Order P-984.

³⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁸ Orders PO-2072-F and PO-2098-R.

amounts of information relating to the Biosolids Project as a whole over the course of the last few years. Furthermore, the city will announce the award of the Biosolids Project final agreement once it is awarded.

[97] The city states that there is a public interest in non-disclosure of the information at issue in the record. In particular, there is an important public interest in having adequate waste management facilities constructed at a reasonable cost as soon as possible and there are financial and fairness implications which could affect the public purse should the consortia gain access to the information at issue in the record while negotiations are ongoing.

Analysis/Findings

[98] Based on my review of the information at issue in the record and the city's representations, and in the absence of representations from the requester, I find that the evidence supports a finding that there is not a compelling public interest in disclosure of the record. Instead, I find that because the contract for the Biosolids Plant has not yet been awarded, there is a public interest in non-disclosure of the information at issue in the record, which is key information for the city in its consideration of the proposals for construction of this project.

[99] As I have found that there is no compelling public interest in disclosure of the record, there is no need for me to consider whether this interest outweighs the purpose of the section 11(a) exemption.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original signed by: _____
Diane Smith
Adjudicator

_____ April 5, 2013