Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3129

Appeal MA13-313

Enwin Utilities Ltd.

November 26, 2014

Summary: An individual submitted a request for access to "an unabridged copy of any and all signed 'Terms and Conditions and Supporting Documents'" associated with the Water Services Operating Agreement between the Windsor Utilities Commission (WUC) and Enwin Utilities Ltd. Two records were identified as responsive to the request. The decision letter sent to the appellant advised him that access to the records was denied under section 11(a) (valuable government information). Upon appeal to this office, Enwin added sections 11(c) and (d) (economic and other interests) as the basis for denying access. In this order, the adjudicator finds that section 52(3)3 (employment and labour relations exclusion) applies to one record and a portion of the WSOA, thereby removing them from the scope of the *Act.* Respecting the rest of the WSOA, the adjudicator finds that sections 11(a), (c) and (d) do not apply, and she orders it disclosed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 11(a), (c) and (d), 52(3)3.

Orders and Investigation Reports Considered: Orders P-395, P-1026, MO-2186, PO-2632 and PO-3116.

OVERVIEW:

[1] This order addresses the issues raised in the appeal of a decision issued in response to an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) for:

> … an unabridged copy of any and all signed "Terms and Conditions and Supporting Documents" associated with the WSOA [Water Systems Operating Agreement] between Windsor Utilities Commission and Enwin Utilities Ltd. [Enwin]

[2] Although the request was submitted to the Windsor Utilities Commission (WUC), Enwin responded to it, acknowledging receipt of the request and advising that:

> I regret to inform you that access is denied to the above-noted records under section 11(a) of the *Act*. This provision applies to the records as the supporting documents associated with the WSOA are specific to economic and other interests, which may include but are not limited:
>
> > Trade secrets of financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value.

[3] After the decision was appealed to this office, a mediator was appointed to explore the possibility of resolution. During mediation, Enwin advised that the two records identified as responsive to the request are the *Water System Operating Agreement* (WSOA) and its sub-contract, the *Employee Arrangement Agreement* (EAA), both dated November 6, 2012. Enwin added sections 11(c) and 11(d) as grounds for denying access and confirmed that it is denying access to both records, in their entirety, under sections 11(a), (c) and (d). The appellant indicated that his main interest is in knowing more about the approvals process around costing and labour costs outlined in the agreements, but he seeks full access to the WSOA and EAA. The appellant also maintains that there is a public interest in disclosure of the records and this led to the possible application of the public interest override in section 16 of the *Act* being added as an issue in this appeal.

[4] It was not possible to achieve a mediated resolution of this appeal and it was transferred to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. I started my inquiry by sending a Notice of Inquiry to Enwin, outlining the issues and seeking representations. When Enwin did not respond to the Notice of Inquiry, I asked staff to contact it to determine its intentions. Enwin indicated that it would not be submitting representations in response to the Notice of Inquiry and that it "had nothing further to add" to the comments provided earlier in the appeal

process. In the circumstances, it was not necessary for me to seek representations from the appellant.

[5] In this order, I find that the EAA and portions of the WSOA are excluded from the *Act* because the employment and labour relations exclusion in section 52(3)3 applies to this information. I find that Enwin has not provided sufficient evidence to establish that sections 11(a), (c) or (d) apply and I order it to disclose the remaining portions of the WSOA.

RECORDS:

[6] The two records at issue are the *Water System Operating Agreement* (WSOA) (approximately 53 pages, including two schedules) and a sub-agreement to it, the *Employee Arrangement Agreement* (EAA) (8 pages), both dated November 6, 2012.

ISSUES:

Preliminary Issue: transfer of request and notification

A. Does the employment and labour relations exclusion in section 52(3) apply?

B. Would disclosure of the records harm Enwin's economic or other interests under sections 11(a), (c) or (d)?

DISCUSSION:

Preliminary Issues: transfer of request and notification

[7] Early in the appeal, clarification was sought from Enwin as to why it had responded to the request, rather than WUC, which was the entity to which the request had been submitted. Enwin explained that both it and WUC are institutions under the *Act*: Enwin by virtue of section 2(1)(c) of the *Act* and Ontario Regulation 372/91, s. 1(1)4.1; and WUC pursuant to section 2(1)(b) of the *Act.*[1] Enwin advised that it had initially responded to the request on behalf of WUC as WUC's authorized agent, but had subsequently assumed conduct of the request as the institution with a greater interest in the agreements, according to section 18(3) of the *Act*.[2]

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[1] Under section 2(1)(c) of the *Act*, an institution is defined as any agency, board, commission, corporation or other body designated as an institution in the regulations. And under section 1(1)4.1 of O. Reg. 372/91, every corporation incorporated under section 142 of the *Electricity Act, 1998* is an institution.

[2] Section 18(3) of the *Act* provides that: "If an institution receives a request for access to a record and the head considers that another institution has a greater interest in the record, the head may transfer the request and, if necessary, the record to the other institution, within fifteen days after the request is received, in which case the head transferring the request shall give written notice of the transfer to the person who made the request."

[8] Enwin also explained that:

> [Enwin] and WUC have a long history together. From 1935 until December 1999, both entities were part of WUC. [Enwin] was formed pursuant to the *Electricity Act, 1998.* Notwithstanding the separation of these electricity and water utilities, [Enwin] and WUC continued to share management and administration, including in relation to MFIPPA matters. In November 2012, [Enwin] and WUC entered into a Water System Operating Agreement ("WSOA"). A sub-contract to the WSOA, the Employee Arrangement Agreement ("EAA"), was also entered into at that time. Through these agreements, WUC transferred all [of] its staff to [Enwin] and outsourced the operation of the water system to [Enwin]. WUC has a Board of Commissioners which oversees WUC, but all staffing is provided through [Enwin], including in relation to MFIPPA matters. On April 15, 2013, WUC appointed its Chair the Head for MFIPPA purposes. The WUC Chair subsequently delegated his responsibilities to [Enwin] management. As a result, [Enwin] handles WUC's MFIPPA matters.

[9] Enwin also took the position that both WUC and the City of Windsor ought to be notified as affected parties in this appeal. In a letter to the IPC sent following its receipt of the appeal of the decision to deny access, Enwin asserted that "there are two other institutions whose interests are at stake in this appeal, who ought to have notice and the opportunity to provide comments." In the Notice of Inquiry sent to Enwin, I noted that Enwin handles WUC's MFIPPA matters by delegation from the WUC Chair, and I asked Enwin to explain the need for a separate notification of WUC in the circumstances. I also asked Enwin to explain why the City of Windsor should be notified in this context. As indicated previously, Enwin declined to provide representations in response to the Notice of Inquiry.

[10] Under the *Act,* protection of the confidential business or commercial interests of third parties is provided for in the third party information exemption in section 10(1). In this appeal, Enwin has alluded to the possible application of section 10(1) by referring to the engagement of "third party" interests. However, in its decision letter, Enwin relies only on the application of section 11, which is intended to protect certain government economic interests and valuable government information. In my view, this is the correct approach since the two parties are both institutions[3] and, moreover, there is ample

[3] As discussed in Orders MO-2186 and MO-2468-F, agreements between institutions do not attract the protection of section 10(1). In Order MO-2186, a municipality submitted a proposal to an institution under the provincial Act in response to a RFP issued by the provincial institution. Adjudicator Caddigan stated the following respecting the non-application of section 10(1) of the *Act* in the circumstances:

> … Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to institutions. This finding

precedent to suggest that section 10(1) would not apply to the agreement between Enwin and WUC.[4] Again, although requested to do so, Enwin has provided no support for its position that WUC and the City of Windsor ought to be notified of this appeal.

[11] In Order P-395, Assistant Commissioner Tom Mitchinson addressed a similar request from the Public Archives of Ontario to add other institutions as affected parties to an appeal related to the Grandview Training School for Girls. The former assistant commissioner responded as follows:

> … [S]ections 25-27 of the *Act*[5] provide a scheme to address the situation where more than one institution has an interest in certain requested records. These sections permit inter-institution consultations and the transfer of a request from one institution to another. There is no statutory right for an institution other than the one which has responded to an access request to be a party to an appeal; rather, it is the responsibility of the Commissioner or his delegate to consider the circumstances of a particular appeal and determine if any other person should be given the status of an "affected party", based on the necessity or desirability of having those persons participate.

[12] This summary continues to reflect the general approach of this office to notification of affected parties.[6]

[13] Enwin assumed the responsibility of processing this access request after WUC transferred the request to it under section 18(3) of the *Act.* Since Enwin did not submit representations in response to my Notice of Inquiry, it has therefore provided no evidence to support its position that I should exercise my discretion to seek submissions

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> has been upheld in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.). In this case, the parties are two public bodies, not businesses or other non-public sector organizations.
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> This view is supported by the ability an institution has to exempt records from disclosure under section 9. That section may be claimed to exempt information received in confidence by municipal institutions from government bodies, as opposed to business entities. I also note that where the objective of denying access is to protect the business interests of an institution such as the Municipality, the exemption found in section 11 of the Act (economic and other interests) exists for this purpose.

[4] In Order PO-3116, for example, the Ontario Lottery and Gaming Corporation received a request for the interim and permanent operating agreements between the OLGC and a named company. OLGC granted access to both records in their entirety. Upon appeal by the third party, Adjudicator Cathy Hamilton found that the operating agreements were not exempt, but that section 17(1) did apply to certain schedules and exhibits. Adjudicator Hamilton accepted that these schedules and exhibits contained that had been "supplied in confidence" by the third party, based on detailed and convincing evidence provided by the third party appellant.

[5] In MFIPPA, the corresponding provisions are sections 18-20.

[6] This approach has been applied in many previous decisions, including Orders P-270, P-395, P-902, P-965, PO-1846-F, PO-2126 and PO-2876.

from WUC or the City of Windsor. Enwin has not explained why it did not consult with WUC or the City of Windsor itself, in order to seek their views on disclosure of the WSOA or EAA, when it clearly had an opportunity to do so prior to this appeal.

[14] Indeed, based on the evidence presented by Enwin prior to my inquiry, I am satisfied that Enwin is capable of speaking for, and representing, the interests of both itself and WUC, given their relationship. Regarding Enwin's request that I notify WUC and the City of Windsor as affected parties, I have exercised my discretion not to do so. Given Enwin's decision to deny access solely under the discretionary exemption in section 11, together with the other circumstances of this appeal, I am satisfied that it was not necessary for me to notify WUC or the City of Windsor in order to properly dispose of this appeal.

A. Does the employment and labour relations exclusion in section 52(3) apply?

[15] Enwin did not identify section 52(3) as an issue or claim that it applied to the records. However, section 52(3) of the *Act* pertains directly to my jurisdiction in this appeal, and I must review its possible application when it is raised by the content of the records themselves. Based on my review of them, I concluded that section 52(3)3 may apply to the EAA and portions of the WSOA. When the exclusion applies to records, and none of the exceptions in section 52(4) apply, the *Act* does not apply to them. In such a situation, it follows that I would lack jurisdiction to review the issue of access, or denial thereof, to those records.

[16] The part of section 52(3) that is relevant in this appeal states:

> Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> > 3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[17] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them.[7]

[18] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining

[7] Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.).

legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships.[8]

[19] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship.[9]

[20] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date.[10]

[21] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act*.[11]

[22] The type of records excluded from the *Act* by section 52(3) are documents related to matters in which the institution is acting as an employer, and terms and conditions of employment or human resources questions are at issue. Employment-related matters are separate and distinct from matters related to employees' actions.[12]

Part 1: collected, prepared, maintained or used

[23] Based on my review of the EAA and WSOA and the circumstances of their creation, I am satisfied that they were collected, prepared, maintained or used by Enwin or on its behalf. Accordingly, I find that the first of three requirements for the application of the section 52(3)3 exclusion is met.

Part 2: meetings, consultations, discussions or communications

[24] In light of the contents of the EAA and WSOA, I am also satisfied that the collection, preparation, maintenance or usage of the records was in relation to meetings, consultations, discussions or communications. Accordingly, I find that the second part of the test for the application of the exclusion in section 52(3)3 is met.

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[8] *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.); see also Order PO-2157.
[9] Order PO-2157.
[10] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507.
[11] Orders P-1560 and PO-2106.
[12] *Ministry of Correctional Services*, cited above.

Part 3: labour relations or employment-related matters in which the institution has an interest

[25] The EAA provides for the transfer of WUC's employees to Enwin and other matters related to their transfer. There is a corresponding provision in the WSOA that contains some of the same terms described in the EAA. Under part 3 of the test for exclusion in section 52(3)3, past orders have established that the phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce.[13]

[26] In Order PO-2632, I considered whether the provincial *Freedom of Information and Protection of Privacy Act* applied to a Pension and Benefits Cost Allocation Agreement and a Deferred Employee Transfer Agreement, two of several sub-agreements created when Ontario Power Generation contracted out the management and operation of its business processes and technology services in 2002.[14] In determining that section 65(6)3 (the equivalent to section 52(3)3 in FIPPA) applied to exclude the two sub-agreements, I wrote:

> It may be … that the overriding purpose of the Agreements is to give effect to a commercial transaction in which the Company is to provide technology and business services to OPG. However, I find that it does not necessarily follow that the Agreements, or individual records or components of the Agreements, do not fall within the exclusion in section 65(6) as a consequence of that overriding purpose. …
>
> …
>
> Previous orders, for example, have established that an institution may have an interest in records containing information relating to benefits provided to former employees for the purposes of this part of the 65(6) test [Orders PO-2212 and PO-2536]. Furthermore, records that directly address other potential labour relations or employment-related issues surrounding the main Agreements under consideration have been found to satisfy the "in which the institution has an interest" criteria [see Order MO-1587]. In my view, this principle applies equally to the appendices containing the Pension & Benefits Cost Allocation Agreement and the Deferred Employee Transfer Agreement, which were prepared to clarify the signatories' understandings with respect to their future pension obligations.

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[13] *Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)*, cited above.

[14] At issue in Order PO-2632 were the withheld portions of the Information Technology IT Service Agreement and the Energy Markets IT Services Agreement between OPG and a named company, contained in four volumes.

> Furthermore, I accept that OPG, as an employer, has an interest in addressing and resolving issues relating to employee severance, indemnification and termination as part of the overall management of the Agreements entered into with the Company.
>
> Section 65(6) is record-specific and fact-specific and this is relevant to my determination that certain components of the Agreements in this appeal - even individual terms - are "about" labour relations or employment-related matters in which OPG has an interest, for the purposes of section 65(6).
>
> Based on the information before me, my review of the Agreements and the representations of the parties, I am satisfied that OPG has established that the meetings, consultations, discussions or communications in which it made use of the appendices addressing issues related to pensions and benefits, and employee transfer, as well as certain other portions of the larger Agreements, are about labour relations or employment-related matters in which it has an interest. The only reason these particular appendices exist is because of the employment relationship its employees have with OPG. For these reasons, I find that OPG's interest in the particular records, or components thereof, goes well beyond "mere curiosity or concern" in that they directly address potential labour relations issues. As a result, I conclude that they are subject to the exclusion in section 65(6)3.

[27] In this appeal, based on my review of the EAA and the corresponding provisions to it in section 4.7 of the WSOA, I find that they directly relate to labour relations or employment-related matters about Enwin's workforce. Specifically, I note that the EAA contains provisions covering potential labour relations or employment-related issues surrounding the WSOA, generally, and that it is intended to outline the signatories' existing and future obligations with respect to these issues. As was the case with OPG in Order PO-2632, I accept that Enwin, as an employer, has an interest in addressing and resolving issues relating to employee transfer, severance, indemnification and termination as part of the overall management of the WSOA. Based on my review, I find that the EAA and its corresponding provisions in section 4.7 of the WSOA are about labour relations or employment-related matters in which Enwin has an interest. Therefore, I find that the last of the three requirements for the application of section 52(3)3 is met.

[28] Additionally, in view of the identity of the parties and the nature of the EAA (and section 4.7 of the WSOA), I find that none of the exceptions in section 52(4) apply to bring these records back under the *Act*. Therefore, the EAA and section 4.7 (4.7.1, 4.7.2 and 4.7.3) of the WSOA are excluded from the *Act* and are, thereby, removed from the scope of the appeal.

[29] In view of this finding, it is not necessary for me to consider whether the exemptions claimed to deny access to the EAA and section 4.7 of the WSOA apply to them. Section 16 also cannot apply to records that are beyond the scope of the *Act.* However, I will now review whether sections 11(a), (c) or (d) apply to the rest of the WSOA.

B. Would disclosure of the records harm Enwin's economic or other interests under sections 11(a), (c) or (d)?

[30] 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. As stated, Enwin did not respond to the Notice of Inquiry, which outlined the approach of this office to reviewing exemption claims under section 11(a), (c) and (d). As such, I will review the possible application of section 11 of the *Act*, based on Enwin's correspondence sent at the outset of this appeal and the content of the WSOA. In keeping with my finding above, that section 4.7 of the WSOA falls outside the *Act,* that portion of the record does not form part of my review in this section.

[31] The relevant parts of the discretionary exemption in section 11 state:

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

[32] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act* by section 10(1).[15]

[33] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that

[15] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[16]

[34] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[17]

[35] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[18]

Enwin's position on section 11

[36] When Enwin responded to this office initially upon notification of the appeal,[19] it acknowledged that the exemptions in sections 11(a), (c) and (d) are discretionary and asserted that it had considered whether the records should be disclosed notwithstanding the application of section 11.

[37] In support of its position that the records are exempt under the three different parts of section 11 claimed, Enwin stated:

> Communities in Ontario compete for businesses and residents with the quality and efficiency of their services, including water services. The unique business model underlying the WSOA was created, and the WSOA was negotiated and drafted, at considerable expense to the parties, to provide high quality water service at low rates for ratepayers in the City of Windsor. It has considerable value to Enwin as a means to attract and maintain industrial development and ratepayers to its service area. The value lies in the commercial structure which has been devised and the legal advice which is embedded in the agreement.
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> … [T]he existence of the WSOA is not a secret. Importantly, the plans and operations of the WUC, as being implemented by Enwin under the WSOA, are fully open to public scrutiny. This is the first year of the WSOA, and all the details with respect to its 2013-2105 Operating Expenses Plan, Capital Expenditure Plan and Water Rates are discussed in some 150 pages of

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[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[17] Order MO-2363.
[18] Orders MO-2363 and PO-2758.
[19] Undated correspondence from Enwin, received by the IPC on July 22, 2013.

> detail on the WUC website [reference and web address deleted]. The goals of MFIPPA, in particular transparency and accountability, are met, as the public is able to scrutinize the ongoing business operations, plans and costs related to the management of the water system in the City of Windsor.
>
> What has not been disclosed is the information capital and intellectual property reflected in the WSOA itself, that is, the commercial structure and legal terms which result in the efficient and effective provision of water services in the City of Windsor. Enwin does not believe that the [appellant] ought to be allowed to control the dissemination of that information capital for his own purposes or be able to have access to proprietary intellectual property, and thereby eliminate the competitive advantage it brings to the ratepayers of the City of Windsor. Ultimately, the agreement may form part of a model for service delivery throughout the Province, but if so, the institutions in issue ought to be permitted to derive value from the business and legal structure that has been created at their expense.

[38] As stated, I did not ask the appellant to submit representations in this appeal.

Analysis and findings

[39] To begin, I note that although Enwin refers to the WSOA containing legal terms and "legal advice which is embedded in the agreement," there is no claim before me that the discretionary exemption in section 12 of the *Act* applies to exempt the record from disclosure.

Section 11(a): information that belongs to government

[40] For section 11(a) to apply, Enwin was required to 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.

[41] The types of information listed in section 11(a) have been discussed in prior orders. In this appeal, I am satisfied that the WSOA contains financial and/or commercial information, described in past orders as:

> *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.[20]
> *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.[21] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[22]

[42] The WSOA therefore meets part 1 of the test under section 11(a) on this basis.

[43] However, before I proceed to part 2 of the test, I note that I do not accept the suggestion implicit in Enwin's correspondence that the WSOA contains "trade secrets," whether in the form of "(proprietary) intellectual property," "information capital" or, even a "unique business model." According to this office's interpretation of the term under sections 10(1) and 11 of the *Act;* "trade secrets" 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
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

[44] There is no evidence before me that the WSOA satisfies this test.

[45] Turning to part 2, I begin with the final phrase of Enwin's appeal correspondence, providing the rationale for refusing to disclose the WSOA, which is that "…the institutions in issue ought to be permitted to derive value from the business and legal structure that has been created at their expense." As WUC and Enwin are public institutions, it seems to me that the WSOA between them was developed using taxpayer-sourced funding, not privately-sourced funding. Further, even accepting that there may indeed be value to the "business and legal structure" of the WSOA, it does

[20] Order PO-2010.
[21] Order PO-2010.
[22] Order P-1621.

not follow that its contents "belong to" Enwin within the meaning of that term in section 11(a) of the *Act*. Rather, the terms of the WSOA were negotiated by the parties and include the terms by which Enwin operates, manages and administers the provision of water services in Windsor. As to whether the WSOA, *as a whole*, reveals an underlying "unique business model," Enwin has not explained how this is the case; nor has it identified those portions of WSOA that might reflect its "unique" structure, thereby distinguishing it from these types of agreements generally. Certainly, in my view, some of its terms are common, even standard, in such agreements.

[46] In this appeal where Enwin declined to provide representations in response to the Notice of Inquiry, and with essentially only the WSOA to guide me, I conclude that there is insufficient evidence to establish that it "belongs to" Enwin in the sense contemplated by section 11(a). In particular, I find that Enwin has not established that it has any proprietary interest in the WSOA in the traditional intellectual property sense or that the content of the WSOA is in the nature of a trade secret that the courts would protect from misappropriation.[23] As such, I find that the WSOA does not meet part 2 of the test under section 11(a). Since all three parts of the test must be met, the WSOA cannot be withheld under section 11(a).

Sections 11(c) and (d): prejudice to economic interests or injury to financial interests

[47] I note that although the wording of sections 11(c) and (d) differ, namely "prejudice the economic interest" and "be injurious to the financial interests," the context of an institution's claim to both of them has often resulted in their possible application being considered together in orders of this office.[24] The circumstances of this appeal are such that I am satisfied that it is appropriate to address the possible application of section 11(c) and (d) together in this order.

[48] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[25] Section 11(c) is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record *belongs to* the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic

[23] See Orders P-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], PO-2632 and PO-2990.
[24] Order PO-2598 and PO-2987.
[25] Orders P-1190 and MO-2233.

interests or competitive position.[26] Similarly, establishing section 11(d) requires an institution to establish that disclosure of the information in the record reasonably be expected to be injurious to its financial interests. Establishing either of the exemptions requires detailed and convincing evidence of harm that is well beyond the merely possible or speculative.[27]

[49] Past orders have confirmed that it is in the public interest for the government, agencies and institutions to be able to negotiate favourable contractual arrangements.[28] However, the recognition of such a public interest does not negate the requirement that persuasive evidence must be tendered by the institution to establish an exemption from the public right of access to government-held information that is provided for by the *Act.*

[50] Enwin claims that disclosure of the "commercial structure and legal terms which result in the efficient and effective provision of water services in the City of Windsor" to the appellant would "thereby eliminate the competitive advantage it brings to the ratepayers of the City of Windsor." My determination in this appeal of whether the WSOA is exempt is not based on what the appellant may do with the information once it is received.[29] Rather, a finding that either section 11(c) or (d) applies requires a connection between the information and the harms alleged. Beyond general assertions of harm, which I find to be merely speculative, Enwin has not provided sufficient evidence to satisfy me that either section 11(c) or (d) applies because its submissions are silent on any possible linkages between the disclosure of the specific information contained in the WSOA and the alleged harms.

[51] In some past decisions, the application of section 11(c) has been established because the institution was able to point to current or ongoing negotiations that could be prejudiced by disclosure. In Order P-1210, for example, Ontario Hydro's submissions on the reasonable expectation of prejudice with disclosure of records dealing with financial impact analyses respecting privatization offered the adjudicator detailed and persuasive evidence about compromise to current and potential negotiations. Similarly, in Order P-1026, the adjudicator acknowledged the highly competitive nature of the gaming and casino environment in upholding the Ontario Casino Corporation's exemption claim under section 18(1)(c) (FIPPA's equivalent to section 11(c) in MFIPPA) to various draft versions of the pre-operating and interim operating agreements for the Windsor Casino. Based on the evidence provided, the adjudicator accepted that disclosure of draft versions of a casino operating agreement could reasonably be expected to interfere with ongoing negotiations of operating and development agreements for the permanent casino. There, the institution provided evidence about

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[26] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[27] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra.*
[28] See Orders P-1190, P-1210, PO-1894, PO-2632 and PO-2987.
[29] Order P-632.

"positions it initially took which changed significantly during the negotiation process as evidenced in the various succeeding drafts of the agreements." Notably, Order P-1026 did not involve a review of the *final* version of the Interim Operating Agreement for the Windsor Casino because the institution disclosed it, in its entirety.[30]

[52] In those orders, therefore, the institution had tendered sufficient evidence related to current or ongoing processes to satisfy the decision maker that the institution's competitive position or financial interests were susceptible to interference upon disclosure of the particular information at issue. I have not been provided with evidence of any current negotiations or other ongoing processes related to the WSOA that might trigger the same result. There is no persuasive evidence that the alleged competitive advantage offered to the City of Windsor's ratepayers by the WSOA would be "eliminated by disclosure." Similarly, there is no information available to support a conclusion that injury to Enwin's financial interests could result from disclosure of the WSOA. In my view, Enwin's contention that providing the appellant, and by extension the public, with access to the commercial structure of the arrangements between WUC and Enwin could reasonably be expected to lead to the harms in sections 11(c) and (d) is unsupported by the evidence provided to me. Enwin has simply not provided the requisite evidence to establish the harms in sections 11(c) and (d), and I conclude that their existence cannot be inferred from the surrounding circumstances.[31] Therefore, I find that sections 11(c) and (d) do not apply to the WSOA.

Conclusion

[53] As Enwin has not established that any of the claimed exemptions in section 11 apply to the WSOA, I find that it cannot be withheld on this basis and I will order it disclosed. In this situation, it is unnecessary for me to review Enwin's exercise of discretion in choosing to withhold the record. Further, given that section 11 does not apply, it is also unnecessary for me to review whether the public interest override in section 16 of the *Act* applies.

[30] For a discussion of the application of the third party information exemption in section 17(1) [section 10(1) in MFIPPA], see Order PO-3116 (footnote 4). The OLGC did not claim that section 18 applied to the operating agreements in that appeal.
[31] See Orders PO-1745 and PO-2758.

ORDER:

1. I order Enwin to disclose**, by December 29**, **2014** the WSOA to the appellant, with the exception of section 4.7, which must be severed under section 52(3)3.

2. To verify compliance with this order, I reserve the right to require Enwin to provide me with a copy of the record disclosed to the appellant.

Original Signed By: November 26, 2014
Daphne Loukidelis
Adjudicator