

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3811-I

Appeal MA16-488

The Corporation of the City of Oshawa

August 2, 2019

Summary: A request was made to the City of Oshawa (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an audio recording of a closed meeting between the mayor, some city councillors and a specified utility. The city located one responsive record and ultimately withheld a portion of that record claiming the exemptions at section 10(1) (third party information) to withhold some information and the exemption at section 12 (solicitor-client privilege) to withhold the remainder of the withheld information. The appellant appealed. During the inquiry, the appellant raised the issue of the possible application of the public interest override to the withheld information. In this order, the adjudicator upholds the city's decision for the information withheld under section 10(1) and defers his finding pursuant to section 12. He also finds that there is no public interest in disclosing the information withheld under section 10(1).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 12, 16.

OVERVIEW:

[1] A request was made to the Corporation of the City of Oshawa (the city) pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), for access to the following records:

...a copy of the audio recording of the closed meeting held on December 17-2015 between the Oshawa Mayor and some City Councillors and [a specified utility].

[2] The city located one responsive record and issued a decision denying access claiming sections 6(1)(b) (closed meeting) and 11(c) and (d) (economic and other interests) of the *Act*.

[3] The requester (now the appellant) appealed the decision to this office.

[4] At the mediation, the city issued a revised decision claiming section 12 (solicitor-client privilege) to the record at issue, in addition to the exemptions already claimed in its original decision letter.

[5] During mediation, the city clarified that it is only relying on section 12 to withhold portions of the record at issue. The city also continued to withhold the entire record pursuant to sections 6(1)(b), 11(c) and (d).

[6] The appellant indicated he wished to pursue the appeal at adjudication.

[7] A Mediator's Report was issued to both the appellant and the city indicating the appeal was proceeding to the adjudication stage. The city, upon receipt of the report, informed the mediator it wished to revise its decision. The appellant agreed to wait for the city to issue its revised decision.

[8] Prior to issuing its revised decision, the city, in accordance with section 21(1) of the *Act*, notified three affected parties of the request seeking their views on disclosure. The affected parties provided representations to the city. The city subsequently issued a revised decision to the appellant and the affected parties granting partial access to the audio recording and withholding portions of the record under section 10(1) of the *Act*. The record was not released for 30 days to allow the affected parties an opportunity to appeal the city's revised decision. The affected parties did not appeal.

[9] The appellant, after receiving the information from the city, informed the mediator that he wished to pursue the appeal at adjudication for the remaining withheld information.

[10] The mediator clarified with the city that it also continues to rely on section 12 to withhold additional portions of the record from disclosure and is no longer relying on sections 6(1)(b) and 11(c) and (d) of the *Act*.

[11] As mediation did not resolve this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry under the *Act*. As the adjudicator, I commenced an inquiry by seeking the representations of the city, the affected parties and the appellant on the issues set out in this Notice of Inquiry. Representations were received and shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[12] In this order, I uphold the city's decision pursuant to section 10(1) and defer any finding pursuant to section 12.

RECORD:

[13] The record at issue consists of the undisclosed portions of a CD-R audio recording of a meeting held on December 17, 2015.

ISSUES:

- A. Does the mandatory exemption at section 10(1) apply to the information withheld under that section?
- B. Does the discretionary exemption at section 12 apply to the information withheld under that section?
- C. Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 10(1) exemption?

DISCUSSION:

Preliminary Issue

[14] The appellant, in his representations, predominantly focuses his submission on the fact that the city held a closed meeting and the Ontario Ombudsman found that it did not have the authority to go into a closed meeting. As section 6(1)(b) (closed meeting) is not an issue in this appeal, I will not address the Ombudsman's findings in this order.

Issue A: Does the mandatory exemption at section 10(1) apply to the information withheld under that section?

[15] Section 10(1) states:

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

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[16] 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

[17] 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

[18] The types of information listed in section 10(1) have been discussed in prior orders. The three that are relevant in this appeal are:

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.³

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.) (*Boeing Co.*).

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

³ Order PO-2010.

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

[19] I adopt these definitions for the purpose of this appeal.

[20] In its representations, the city submits that the withheld information in the record constitutes technical, financial and commercial information. The city submits that based on the description and categorization of the information, it is evident that detailed technical, commercial and financial commentaries and projections were all being disclosed during this closed meeting, with the view to discuss the viability of a potential utility merger with far-reaching implications. The city submits that the technical information as contained in the audio recording relates to the proposed corporate governance and organizational structure of the combined utility. It submits that the financial information is provided in the form of detailed financial projections regarding expected revenue, debt, dividends, savings and synergies. Finally, it submits that the commercial information relates to strategic investors including strategic and financial partners and other private sector participants who are cited as potential partners for the proposed combined utility.

[21] The third parties who provided representations in this appeal submit, for similar reasons to those of the city, that the information at issue constitutes commercial and financial information.

[22] In his representations, the appellant does not comment on the type of information listed in section 10(1) or how it applies to the information in dispute. As noted, the appellant's arguments predominantly focus on the fact that the city held a closed meeting and the Ombudsman found that it did not have the authority to go into a closed meeting to discuss a PowerPoint presentation. The appellant submits that had the city not gone into a closed meeting to discuss the presentation, he would have been able to hear the audio of the meeting since he was in attendance at the open portion of

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

the meeting.

[23] In my review of the record, I agree with the city and the affected parties that the information contains commercial and financial information. I do not agree that the record contains technical information because it is not information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts or information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.

Part 2: supplied in confidence

[24] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁷

[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.⁸

[26] In my review of the record and the representations, it is clear that the withheld information under section 10(1) originated from a PowerPoint presentation that was supplied by the third parties to the city.

In confidence

[27] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁹

[28] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure¹⁰

Representations

[29] The city submits that the audio recording as it relates to the specified utility's presentation was conducted with the view that the information being disseminated during this closed session would be held strictly in confidence. The city submits that it is reasonable to assume that the specified utility, and the other third parties had, at minimum, an expectation and understanding that all of the information being conveyed, including documents and discussions, would remain confidential in their entirety, a fact which was referred to at the beginning of the presentation and at certain times during the closed meeting.

[30] The city submits that it was also understood by the affected parties that as per earlier representations made by city council, the December 17, 2015 meeting would be held *in camera*, (i.e. a meeting of the council that is properly closed to the public in accordance with subsection 239(2) of the *Municipal Act, 2001*), and thus not made public. As such, the city submits that both Council members and its staff are required to maintain any information gathered from closed meetings in strict confidence until such time as such confidentiality is no longer required (i.e. so long as there is no reasonable expectation of harm as per the three-part test under Section 10(1)). The city submits that the approach that was adopted by the third parties and the specified utility and their treatment of this closed session of the council meeting strongly indicates that the discussion was conducted with the expectation that the meeting would be held *in camera* and that any information provided would be held in confidence by the city.

[31] Two of the affected parties who made representations in this appeal also commented on this part of the test submitting that the PowerPoint presentation which was discussed in the audio recording was explicitly provided to the city in confidence. They submit that it was their expectation that the PowerPoint presentation would remain confidential in its entirety in order to protect the informational assets contained therein. The third parties submit that this is clear from the fact that the presentation is labelled "Private and Confidential" at the top of each page. Further, the third parties submit that they understood based on representations from the city that the presentation would be considered *in-camera* and thus not made public. The third parties submit that treatment of the presentation would indicate that it was expressly provided to the city in confidence.

¹⁰ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

[32] One of the third parties submits that it is a party to a non-disclosure agreement which places a heavy onus on it to maintain the confidentiality of “confidential information and trade and business secrets.” Given the non-disclosure agreement, the third party submits that the PowerPoint presentation (which was discussed in the audio recording), which clearly contains commercial and financial information, would only be supplied to the city with the understanding that it would maintain its confidentiality.

[33] The appellant did not speak to this part of the test in his representations.

Finding

[34] After reviewing the record along with the parties’ representations, I find that the PowerPoint presentation that was the subject of the audio recording was provided to the city by the third parties expressly in confidence. First, I note that the city and affected parties submitted that the physical presentation itself is clearly marked as “privileged and confidential” on each page. I also accept that the city discussed the presentation in a closed meeting in order to protect the confidentiality of the information. Although it was later found by the Ontario Ombudsman that the city closed this meeting in contravention of the *Municipal Act*, the fact that the city attempted to discuss the information in a closed meeting in order to protect the confidentiality of the information is evidence that the information was supplied in confidence. Further, I do not accept the appellant’s submission that had the city not gone *in camera* for this meeting, he would have been able to hear the audio of the meeting since it is not clear if the information would have been presented if the city council did not vote to hold the meeting *in camera*.

Part 3: harms

[35] The party resisting disclosure must provide detailed 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 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.¹¹

[36] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order PO-2435.

Representations

[37] The third parties submit that the harms in sections 10(1)(a), (b) and (c) all apply in the circumstances of this appeal. With regard to section 10(1)(a), they submit that there is growing competition in Ontario's utility sector with a growing number of mergers and proposed mergers in recent years. The third parties submit that concepts of competition are infused throughout the PowerPoint presentation, and therefore in the record, with numerous references to monetization opportunities, and attracting strategic and financial buyers and third party investors. They submit that disclosure of the record in its entirety will undoubtedly prejudice one of the third parties' interest *vis-à-vis* its competitors in the utility market by revealing commercial information, technical governance and operational details, and financial projections.

[38] The third parties submit that it is well known that the specified utility has removed itself from merger discussion with a third party; however, they note that there is an ongoing dialogue between that third party and another hydro energy corporation that has continued.

[39] The third parties submit that disclosing the information in the record has the real potential to prejudice one of the third parties' future commercial and contractual arrangements. They also refer to subsections 10(1)(b) and (c) to support their position. With regard to section 10(1)(b), the third parties submit that it is in the public interest that professional advisors such as one of the third parties continue to supply the city with expert advice in areas affecting its economic interests. They submit that the disclosure of professional technical, commercial and financial advice that is intended to be kept confidential may have a chilling effect on such information being provided to the city in the future. They submit that as a result, the city would be deprived of necessary information for making informed decisions.

[40] The third parties also submit that the failure to protect such sensitive confidential information would alert other professional advisors and consultants to be wary of providing advice, counsel and representation to the city for fear that their confidential information would be disclosed.

[41] With regard to section 10(1)(c), the third parties submit that revealing the identified third party financial and commercial information contained in the record has the potential to result in undue loss or gain to the third party's clients as well as to the specified utility, another hydro corporation and the city. The third parties submit that given that utility mergers are a relatively new occurrence, there is a great deal of uncertainty within the utility sector regarding the viability and desirability of mergers. They submit that if key players in the utility market cannot guarantee that their confidential information will be maintained, the result may be an unwillingness to entertain potential mergers in the future with the further result of depriving the city and its residents from a more efficient, cost effective distribution of utilities.

[42] The city's representations on this part of the test are essentially the same as

those of the third parties set out above.

[43] The appellant spoke to the harms test in his representations. He submits that releasing the full audio recording will not cause undue hardship to other parties and would have no repercussions on them. The appellant submits that the third parties' submissions with regard to potential harm are unfounded. He also submits that in another jurisdiction, that city has been open and transparent about a merger, allowing public engagement and noted that one of the third parties held a meeting that was open to the public where it answered all questions both for and against merger talks.

Analysis and finding

[44] As noted, the third party claiming an exemption under section 10(1) must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm.

Section 10(1)(a): prejudice to competitive position

[45] After reviewing the representations and the record, I find that disclosure of the information withheld under section 10(1) in the record could reasonably be expected to significantly prejudice the competitive position of a third party. After a review of the audio recording, I agree that concepts of competition are mentioned throughout, with numerous references to a third party's business strategy, including monetization opportunities, and attracting strategic and financial buyers and third party investors. I agree with the third parties' submission that disclosure of portions of the audio recording could reasonably be expected to prejudice interest of one of the third parties *vis-à-vis* its competitors by revealing commercial information, operational detail and financial projections. Further, I find the appellant's argument about third party disclosure in another city irrelevant in the circumstances. Therefore, I find that the information withheld under section 10(1) should not be disclosed to the appellant.

[46] Because I have found that section 10(1)(a) applies to the portions of the record withheld under section 10(1), I will not also consider if sections 10(1)(b) and (c) also apply to this same information.

Issue B: Does the discretionary exemption at section 12 apply to the information withheld under that section?

[47] The city claims that section 12 applies to two excerpts in the audio recording. It submits that during its closed meeting, the city council received advice from the city solicitor regarding the legal interpretation of what constituted an *in camera* or "closed" session under the *Municipal Act*.

[48] Section 12 states as follows:

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.

[49] Section 12 contains two branches. Branch 1 (“subject to solicitor-client privilege”) is based on the common law. Branch 2 (“prepared by or for counsel employed or retained by an institution...”) is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In the city’s representations, it claims that both branches apply.

[50] Under Branch 1, the common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege. The city does not submit that litigation privilege applies in the circumstances of this appeal.

[51] 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. It applies to communications within the “framework” of the solicitor-client relationship.¹³

[52] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.¹⁴ The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.¹⁵

[53] The privilege may also apply to the legal advisor’s working papers directly related to seeking, formulating or giving legal advice.¹⁶

[54] 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.¹⁷ The privilege does not cover communications between a solicitor and a party on the other side of a transaction.¹⁸

[55] Branch 2 is a statutory privilege that applies where the records were “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.” The statutory and common law privileges, although not identical, exist for similar reasons.

¹³ *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).

¹⁴ Orders PO-2441, MO-2166 and MO-1925.

¹⁵ *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).

¹⁶ *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.

¹⁷ *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.

¹⁸ *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).

[56] The city submits that statutory solicitor-client communication privilege applies in the circumstances of this appeal.

Statutory solicitor-client communication privilege

[57] Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice.

Loss of privilege

Waiver

[58] Under the common law, solicitor-client privilege may be waived. An express waiver of privilege will occur where the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.¹⁹

[59] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.²⁰

[60] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.²¹ However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.²²

Representations

[61] The city submits that at its December 17, 2015 meeting, its council went into closed session pursuant to section 239(3.1) of the *Municipal Act*, the supporting provisions of which authorize a closed meeting of city council. The city submits that during that closed session, council solicited and received advice from its solicitor regarding the legal interpretation on what constituted an *in camera* or "closed" session under the *Municipal Act*, and particularly in regards to its applicability to the "Education and Training" session from the specified utility which primarily dealt with the current local distribution company trends in Ontario and the potential legal implications of the proposed utility merger.

¹⁹ *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).

²⁰ *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.

²¹ J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

²² *General Accident Assurance Co. v. Chrusz*, cited above; Orders MO-1678 and PO-3167.

[62] It is the city's position that the portions of the audio recording that were withheld under section 12 contain advice as provided by its solicitor to the council during the closed council session in which Oshawa city council (the client) sought legal advice from its legal counsel (the City Solicitor), and confirmed via Confirming By-Law 151- 2015.

[63] The appellant did not address this issue in his representations.

Finding

[64] After reviewing the audio recording where the record is severed for solicitor-client privilege, along with the representations of the parties, I am not convinced that I have enough information to make a finding of whether the exemption at section 12 applies. One of my main hurdles is that the appellant did not speak to this issue at all in his representations though he was specifically invited to. Therefore, it is not clear to me if he is seeking access to the information that was withheld under section 12. In addition, although the city spoke to this issue, in my view, it did not adequately address the waiver issue.

[65] Therefore, I will not make a finding with regard to the information that was withheld under section 12. If the appellant, in fact, is seeking access to this information, he should inform this office of that intent within 30 days of receiving this interim order and representations will again be sought with regard to this issue.

Issue C: Is there a compelling public interest in disclosure of the record that clearly outweighs the purpose of the section 10(1) exemption?

[66] 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.

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

[68] 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 record 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 record with a view to determining whether there could be a compelling public interest in

disclosure which clearly outweighs the purpose of the exemption.²³

[69] 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.²⁴ 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.²⁵

[70] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.²⁶

[71] Any public interest in non-disclosure that may exist also must be considered.²⁷ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.²⁸

[72] A compelling public interest has been found to exist where, for example:

- public safety issues relating to the operation of nuclear facilities have been raised;²⁹ or
- disclosure would shed light on the safe operation of petrochemical facilities³⁰ or the province’s ability to prepare for a nuclear emergency³¹

[73] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations;³²
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;³³

²³ Order P-244.

²⁴ Orders P-984 and PO-2607.

²⁵ Orders P-984 and PO-2556.

²⁶ Order P-984.

²⁷ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

²⁸ Orders PO-2072-F, PO-2098-R and PO-3197.

²⁹ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

³⁰ Order P-1175.

³¹ Order P-901.

³² Orders P-123/124, P-391 and M-539.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;³⁴ or
- the records do not respond to the applicable public interest raised by appellant.³⁵

[74] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[75] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.³⁶

Representations

[76] In his representations, the appellant submits that he is the co-chair of a specified coalition concerning public hydro which holds the belief that there is a vested interest in keeping local utilities in the public sector. The appellant submits that a poll of Oshawa residents showed that 89% opposed the sale of Hydro One which suggests that the citizenry are strongly in favour of public-led hydro.

[77] The appellant's representations were shared with the city who was asked to provide submission on the public interest override. The city refers to the two requirements that must be met to show a compelling public interest exists and submits that neither is met. It submits that disclosure of the withheld information in the record will not serve the purpose of informing the citizenry about the activities of their government, by adding in some way to the information the public already has to make effective use of the means of expressing public opinion or to make political choices. The city also submits that it weighed any potential public interest against the purpose of the section 10(1) exemption and that its decision is consistent with that exemption and its underlying purpose.

[78] The city submits that the appellant has not provided details on what "compelling public interest" is served by full disclosure of the record other than alluding to "Council's ongoing lack of respect to be up front with the public and that the city broke off talks with the third party because it was not in the public interest." The city submits that the countervailing public interest is based on the sensitive disclosure of confidential economic, financial, commercial or technical information that would prejudice its

³³ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

³⁴ Order P-613.

³⁵ Orders MO-1994 and PO-2607.

³⁶ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

financial, economic and bargaining positions in any transaction that may be contemplated in the future.

Analysis and finding

[79] In my review of the information I have found exempt under section 10(1), I do not agree that there is a compelling public interest in disclosing this information. I note that the city has disclosed a significant amount of information and I uphold the exemption under section 10(1)(a) for the withheld portions of the record. In my view, the disclosed information addresses any public interest considerations in the information. I find that there is no relationship between the information that I have found to be exempt and the *Act's* central purpose of shedding light on the operations of government. Disclosure of this information would not serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies in any meaningful way.

[80] As noted, the information is exempt under section 10(1) as disclosure of the information could reasonably be expected to prejudice a third party's interests vis-à-vis its competitors by revealing commercial information, operational detail and financial projections. Even if I found that there was a compelling public interest in disclosing the withheld information that I have found to be exempt, in my view, this interest would not outweigh the purpose of the established exemption claim in this particular circumstance given the type of information at issue. In the circumstances of this appeal, after reviewing the exempt information, I find that the purpose of the exemption, to protect the confidential informational assets of third parties and the third parties' competitive position, would outweigh any compelling public interest, if one existed.

ORDER:

1. I uphold the city's decision to withhold the information at issue pursuant to section 10(1) of the *Act*.
2. I defer my finding on the city's exemption claim pursuant to section 12 of the *Act*. If the appellant wishes to pursue the information claimed to be exempt under section 12, he shall inform the IPC on or before **September 4, 2019**, in which case I will invite further representations on that issue.

Original signed by _____
Alec Fadel
Adjudicator

August 2, 2019 _____