Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3833-F

Appeal MA16-91

The Corporation of the City of Oshawa

September 17, 2019

Summary: The appellant made a request under the *Municipal Freedom of Information and Protection of Privacy Act*, (the *Act*) for information relating to a specified utility's request for meeting(s) in the last quarter of 2015, the city's response and any confirmation between the city and the specified utility that a meeting would be held on December 17, 2015. The city conducted its search and granted access to some responsive records while withholding certain records, initially citing section 6(1)(b) (closed meeting), 11(c) (economic interests) and 11(d) (financial interest). The appellant appealed the city's decision and also claimed that further responsive records should exist. In Interim Order MO-3487-I, the adjudicator found that section 6(1)(b), 11(b) and 11(c) did not apply to exempt the withheld information. The adjudicator also found that the city did not conduct a reasonable search and ordered it to conduct a further search. Subsequent to the issuance of Interim Order MO-3487-I, the parties were asked to provide representations on the application of the mandatory exemption at section 10(1) (third party information). In this order, the adjudicator upholds the section 10(1) exemption for some of the withheld information, while ordering the city to disclose the remainder of the information. The adjudicator finds that the section 16 (public interest override) raised by the appellant, did not apply to the exempt information. The adjudicator also finds that the city's search is reasonable.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 16 and 17.

OVERVIEW:

[1] The appellant made a request to the Corporation of the City of Oshawa (the city) under the *Act* for the following:

1. [A specified utility's] request to the city for meeting(s) last quarter of 2015

2. the city's response(s) to [the specified utility]

3. confirmations between the city and [the specified utility] that a meeting would be held on Dec 17 2015 9:00 am.

[2] After conducting a search, the city granted partial access to the responsive records it located, withholding portions of some records and one entire record completely pursuant to sections 6(1)(b) (closed meeting), 11(c) and (d) (economic and other interests) and 14 (personal privacy) of the *Act*.

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

[4] During mediation, the mediator consulted with both the appellant and the city. In addition to objecting to the city's application of sections 6, 11 and 14 of the *Act*, the appellant raised the issue of reasonable search with the mediator, articulating her belief that more correspondence should exist pertaining to the meeting at issue. These concerns were brought to the city's attention, which responded by conducting a secondary search and subsequently providing the appellant with copies of the agenda and minutes pertaining to the closed meeting at issue. The city also attempted to address the appellant's concerns by providing an emailed explanation of the city's search and exemptions claimed.

[5] Subsequent to the receipt of this information, the appellant advised the mediator that she still wanted to pursue the appeal and still had concerns about the reasonableness of the search. The city advised the mediator that it maintained its original position with regards to the records at issue.

[6] As no further mediation was possible, the file was transferred to the adjudication stage of the appeals process, where an adjudicator conducts a written inquiry under the *Act*. I commenced my inquiry by seeking the representations of the parties. Representations were shared in accordance with section 7 of IPC's *Code of Procedure* and *Practice Direction 7*.

[7] In Interim Order MO-3487-I, I found that sections 6(1)(b), 11(c) and 11(d) did not apply to the withheld information. I also ordered the city to conduct a further search for responsive records. I raised the potential application of the mandatory third party information exemption at section 10(1) and remained seized of the appeal to address the issue of the application of section 10(1) to the records and to address the city's search. Representations were sought and received from all parties on this issue.

[8] Subsequent to the issuance of the interim order, the city provided its evidence surrounding the ordered search. The appellant indicated that she continued to be of the view that further records should exist. The parties were invited to provide further representations surrounding whether the city conducted a further search and were also

invited to speak to whether the mandatory exemption at section 10(1) applied to the withheld information.

[9] In this order, I uphold the section 10(1) exemption, in part, and order the city to disclose some of the withheld information. I also find that the public interest override does not apply to the remaining withheld information. Finally, I find that the city's search was reasonable.

RECORDS:

[10] Pages 13 to 26 of the records remain at issue, made up of two pages of emails (three emails in total) and eleven pages consisting of a PowerPoint presentation provided to the city by the specified utility. There are two copies of the same presentation contained in the records at issue.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the records?

B. Does the public interest override at section 16 apply to the information that is exempt under section 10(1)?

C. Did the institution conduct a reasonable search for records?

DISCUSSION:

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

[11] 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
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> (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.

[12] 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]

[13] 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

[14] 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]

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[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]
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> *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]

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

[16] In its representations, the city submits that the withheld information in the records constitute 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 technical information as contained in the records relates to the proposed corporate governance and organizational structure of the combined utility. The financial information is provided in the form of detailed financial projections regarding expected revenue, debt, dividends, savings and synergies. 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.

[17] The third parties[7] who provided representations in this appeal submit, for similar reasons to that of the city, that the information at issue constitutes commercial and financial information.

[18] In her representations, the appellant does not specifically comment on the type of information listed in section 10(1) or how it applies to the records in dispute.

[19] From my review of the records, I agree with the city and the affected parties that the PowerPoint presentation contains commercial and financial information as those terms have been defined in past decisions. 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

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[4] Order PO-2010.
[5] Order P-1621.
[6] Order PO-2010.
[7] Two of the three third parties are represented by the same legal counsel.

mechanical arts or information prepared by a professional in the field that describes the construction, operation or maintenance of a structure, process, equipment or thing. However, with regard to the three emails at issue which appear on two pages, I find that they do not contain information that would qualify them for exemption under section 10(1). These emails do not contain financial, commercial or technical information and it was not submitted by the parties that they do. As a result, I will order the city to disclose these emails to the appellant.

Part 2: supplied in confidence

Supplied

[20] 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.[8]

[21] 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.[9]

[22] In the initial representations, none of the parties addressed the supplied issue specifically and spoke instead to whether the record was "supplied" in confidence.

[23] In examining the records, it is clear that the PowerPoint presentation was supplied to the city by a third party. I therefore find that the requirement that the information be supplied to the city has been met. However, with regard to one of the three emails at issue in this appeal, it is apparent that this email was not supplied to the city. Therefore, I find that this email does not meet the first part of the test. The city will be ordered to provide a copy of this email to the appellant.

In confidence

[24] 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.[10]

[25] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

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[8] Order MO-1706.
[9] Orders PO-2020 and PO-2043.
[10] Order PO-2020.

- 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[11]

Representations

[26] The city submits that the PowerPoint presentation was clearly marked "Private and Confidential". 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 would remain confidential in its entirety. This fact was referred to at the beginning of the presentation and at certain times during the meeting.

[27] 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 the time 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.

[28] Two of the third parties who made representations in this appeal also commented on this part of the test submitting that the PowerPoint presentation 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.

[29] Further, the third parties submit that they understood based on representations

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[11] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

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.

[30] 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 confidentially of "confidential information and trade and business secrets." Given the non-disclosure agreement, the third party submits that the PowerPoint presentation, which clearly contains commercial and financial information, would only be supplied to the city with the understanding that the city would maintain its confidentiality.

[31] The appellant submits that the expectations of confidentiality that the city and affected parties have in this appeal are not based on reasonable and objective grounds considering the public has access to detailed Ontario local distribution companies' (LDC) financials past, current and projected and merger information from different on-line sources, in particular the Ontario Energy Board (OEB), and the Independent Electricity System Operator (IESO) and the Electricity Distributors Association (EDA) websites.

[32] The appellant refers to the representations of the affected parties where they indicated that the PowerPoint presentation was explicitly provided to the city in confidence. The appellant submits that there was a clear attempt by the organizers of the special council meeting of December 17, 2015 to conceal the real subject matter of the meeting to avoid public scrutiny. The appellant submits that this unavoidable fact puts the allegations of the third parties' expectations of confidentiality in doubt.

[33] The appellant refers to the city's representations where it submits that the information at issue would only have been supplied with the understanding that the city would maintain its confidentiality. The appellant submits that this cannot be assumed and the third parties would have had to make an on the spot decision not to proceed with the presentation if the vote went against presenting this information in a closed session. The appellant submits that it is unlikely that the third parties would have declined to present the information given that the special counsel meeting had been called with their presentation as the only item on the agenda.

Finding

[34] After reviewing the record along with the parties representations, I find that the PowerPoint presentation was provided to the city by the third parties expressly in confidence. I note that each page of the presentation itself is marked as "Privileged and Confidential." I also accept that the city discussed the presentation in a closed meeting in order to protect the confidentially of the information.

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.[12]

[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.*[13]

Representations

[37] The third parties submit that the harms set out in section 10(1)(a), (b) and (c) all apply. They submit that there is growing competition in Ontario's utility sector with a 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, attracting strategic and financial buyers and third party investors. The third parties submit that disclosure of the record in its entirety will undoubtedly prejudice its 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 the third party another specified corporation that has continued.

[39] The third parties submit that disclosing the information in the record has the real potential to prejudice its future commercial and contractual arrangements. They point 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 a specified company, 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

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[12] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[13] Order PO-2435.

providing advice, counsel and representations to the city for fear that its 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 its clients as well as to the specified utility, another specified hydro company 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 essentially repeat that of the third parties set out above. With regard to section 10(1)(b), the city adds that failure to protect sensitive confidential information found in the records would alert other professional advisors and consultants, or any other party, to be wary of providing advice, counsel and representations to the city for fear that its confidential information would be disclosed.

[43] The appellant submits that although the city and the third parties attempt to establish that disclosure of the record could reasonably give rise to the harms specified in section 10(1)(a) to (d) they have not supplied sufficient evidence that is detailed and convincing.

[44] The appellant submits that in Orders MO-3174-I and MO-3175 the adjudicator held that for section 10 to apply, an institution must satisfy all of a three-part test. The appellant submits that although parts 1 and 2 of the test were satisfied, the adjudicator (and Divisional Court upon judicial review) concluded that the town had not supplied "detailed and convincing" evidence to establish a "reasonable expectation of harm."

[45] The appellant submits that prejudice to competitive position is a matter of perspective. She submits that the third parties' opposition to the release of the information shores up their interest in establishing market power.

[46] The appellant addresses that the city and third parties' allegation that disclosure of the records will result in the harm in section 10(1)(b) by submitting that this speculation is not supported by the context and circumstances of hydro mergers in Ontario. The appellant submits that the history of local distribution companies' (LDC) in Ontario provides a strong basis for ensuring that the public has free access to the types of records the city is refusing to disclose. She refers to Ontario's *2012 Renewing Ontario's Electricity Distribution Sector: Putting the Consumer First* where panel members recommended consolidation of LDC's. The appellant submits that this gives context to LDC's trends in Ontario which are not stagnant. The appellant submits that hydro mergers in the beginning may have had parties fixated on controlling future

changes but that time has passed, in spite of the third parties' representations to this office which "convey a need to dominate or control information related to a matter that is now of keen public interest."

[47] The appellant submits that contrary to what the city submitted, mergers have been happening and will continue to happen, and "key players" know that this will continue until, as the 2012 panel expects, the province will be served by between six and ten regional distributors. The appellant submits, therefore, that the city's argument on the section 10(1)(b) harm be taken with a grain of salt

Analysis and finding

[48] 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 provide that disclosure will in fact result in such harm.

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

[49] After reviewing the representations and the records, I am convinced that disclosure of some of the information in the record could reasonably be expected to significantly prejudice the competitive position of one or more third parties. After a review of the PowerPoint presentation, I find that the presentation contains numerous references to monetization opportunities, including attracting strategic and financial buyers and third party investors and disclosure of which could reasonably be expected to prejudice the third parties' competitive position. I agree with the third parties' submission that disclosure of portions of the PowerPoint presentation could reasonably be expected to prejudice their interest *vis-à-vis* competitors by revealing commercial information, operational detail and financial projections. However, I find that the entire PowerPoint presentation does not qualify for the section 10(1)(a) exemption because disclosure of some portions would not reasonably be expected to prejudice the third parties' competitive position.

Section 10(1)(b) and section 10(1)(c): similar information no longer supplied, undue loss or gain

[50] Because I have found that section 10(1)(a) applies to portions of the records, I will not consider if section 10(1)(b) and (c) also apply to this same information. After a review of the remaining information in the records and the representations, I find that the city has not provided detailed evidence of why the remaining information would meet the harms test set out in section 10(1)(b) and/or (c). As noted, a 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. In my review of the record, I find that the remaining information consists of background information along with considerations that would not meet the harms test if disclosed.

[51] Therefore, I find that I have been provided with sufficient evidence to establish that some of the withheld information in the records falls within the ambit of section 10(1)(a), however, for the remaining information, the city will be ordered to disclose these portions of the records.

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

[52] 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.

[53] 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.

[54] 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.[14]

[55] 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.[15] 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.[16]

[56] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[17]

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[14] Order P-244.
[15] Orders P-984 and PO-2607.
[16] Orders P-984 and PO-2556.
[17] Order P-984.

[57] Any public interest in *non*-disclosure that may exist also must be considered.[18] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".[19]

[58] 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;[20] or
- disclosure would shed light on the safe operation of petrochemical facilities[21] or the province's ability to prepare for a nuclear emergency[22]

[59] 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;[23]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[24]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[25] or
- the records do not respond to the applicable public interest raised by appellant.[26]

[60] 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.

[61] 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

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[18] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).
[19] Orders PO-2072-F, PO-2098-R and PO-3197.
[20] 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.
[21] Order P-1175.
[22] Order P-901.
[23] Orders P-123/124, P-391 and M-539.
[24] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[25] Order P-613.
[26] Orders MO-1994 and PO-2607.

information is consistent with the purpose of the exemption.[27]

Representations

[62] The appellant raised the issue of the possible application of the public interest override in her representations. She submits that it is irrefutable that there is a strong public interest in Ontario's electricity organization. She submits that the spiraling hydro rates and distribution problems in the past decade near the top of the list for matters of public concern for Ontarians.

[63] The city was provided with a copy of the appellant's representations and was asked to speak to the public interest override. While the city acknowledges the appellant's concerns related to the city going into closed session, it submits that the remaining question is whether or not the public interest overrides section 10, not the city's use of the closed meeting provisions of the *Municipal Act*.

[64] The city refers to Orders MO-2591 and MO-2179-F submitting that the IPC has previously found that information that could reasonably be expected to interfere significantly with an organization's future contractual organization, should not be disclosed in order to address the public interest. The city submits that there is a reasonable expectation that the three types of harms considered in Part 3 of section 10(1) may occur should the records be released. The city submits that there are ongoing negotiations regarding hydro mergers in the Durham region and if it were compelled to disclose the third party information it could significantly impede its competiveness in the marketplace.

[65] The city also submits that section 16 involves a consideration of whether there exists a compelling public interest in the non-disclosure of the information in the record. It submits that disclosure of the PowerPoint presentation may prevent other organizations from providing it with similar supplied information in the future and therefore impede its ability to conduct business on behalf of its citizens. The city submits that as a result, there may be undue loss or gain to the city, the specified utility and the third parties. It submits that given the potential unwillingness of companies to engage in future mergers that may be beneficial to stakeholders, there is a compelling public interest in non-disclosure of the information at issue.

[66] In her subsequent representations, the appellant submits that hiding the record from the public is unwarranted and the city and third parties' claims about the prejudice of forced disclosure are hyperbole and unreasonable. The appellant submits that disclosure is in the public interest, especially considering that more Oshawa hydro

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[27] 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.).

merger talks appear inevitable. The appellant submits that the public will benefit from accessing the information in the record and will likely be able to better evaluate whether there is a fair or worse deal in the offing for them as stakeholders and shareholders of Oshawa and the specified utility.

Finding

[67] As I have found that only a portion of the withheld information is exempt under section 10(1) of the *Act,* I will only examine if the public interest override in section 16 applies to this information.

[68] Based on my review of this information and the parties' representations, I do not agree that there is a compelling public interest in disclosing the information I have found exempt under section 10(1). Once the non-exempt information is disclosed, a large amount of the information about the merger will be disclosed. In my view, the information that will be disclosed will address any public interest considerations. 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.

[69] As noted, the information that is exempt consists of ways to make the utility competitive, with numerous references to monetization opportunities. I have found that the exemption at section 10(1)(a) applies to this information. 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 information assets of third parties and the third parties' competitive position, would outweigh any compelling public interest, if one existed.

Issue C: Did the institution conduct a reasonable search for records?

[70] As noted, in Interim Order MO-3487-I, I found that the city had not provided sufficient evidence to establish that it had conducted a search of its database for responsive records. I ordered the city to conduct a further search for responsive records, which it did.

[71] As noted in Interim Order MO-3487-I, if I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the city's search. If I am not satisfied, I may order further searches.

[72] The *Act* does not require the city to prove with absolute certainty that further records do not exist. However, the city must provide sufficient evidence to show that it

has made a reasonable effort to identify and locate responsive records.[28] To be responsive, a record must be "reasonably related" to the request.[29] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[30] In Order M-909, the adjudicator made the following finding with respect to the obligation of an institution to conduct a reasonable search for records. She found that:

> an institution has met its obligations under the *Act* by providing experienced employees who expend a reasonable effort to conduct the search, in areas where the responsive records are likely to be located. In the final analysis, the identification of responsive records must rely on the experience and judgment of the individual conducting the search.

[73] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[31]

[74] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[32]

[75] I adopt the approach taken in the above referenced orders.

[76] Following the city's subsequent search, the appellant provided representations submitting that the search was not reasonable. The appellant submits that from information she obtained from another source, it appears that the merger was given a specified name by the city. The appellant submits that a specific email with the specified name was not provided and would have been a record responsive to her request for records relating to the merger.

[77] The appellant submits that the city has been aware that the specified name was a term pertinent to the December 17, 2015 meeting and the term should have been used in the city's search for responsive records.

[78] The city was provided with an opportunity to reply to the appellant's representation on the search. In its reply, the city submits that in conducting its initial search relating to the request, the staff chose to respond to the request literally as the

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[28] Orders P-624 and PO-2559.
[29] Order PO-2554.
[30] Orders M-909, PO-2469 and PO-2592.
[31] Order MO-2185.
[32] Order MO-2246.

original request was clearly worded. In its subsequent search, following the issuance of Interim Order MO-3487-I, the city submits that in keeping with the scope of the request, it conducted a further search using the following parameters:

> Copy of the [specified utility's request to the city to meet in the last quart of 2015 including the city's response to this request as well as confirmation from either party that the meeting will be held on December 17, 2015 at 9:00 a.m.

[79] The city submits that its staff in the following areas were requested to search electronic drive files, email folder and paper files for responsive records: city clerk services, city manager's office, councillors' offices and the mayor's office. The second search did not result in the discovery of additional responsive records.

[80] The city submits that the original request was clear and direct and it was asked to search for records related to the organization of a specific meeting and not for all records related to a specified project. Accordingly, the city submits that a request for "all records related to the specified project" is out of scope in context of this appeal.

[81] The city's representations were forwarded to the appellant for reply. In her reply, the appellant submits that at the time of her access request, she was unaware that the subject of the December 17, 2015 meeting had a code name. She submits that the city's objection to search for this specified name is essentially based on the fact that she was unaware of the name when making her request.

[82] The appellant submits that the IPC has made orders stating that institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. She submits that a search of the specified code name "reasonably relates" to the original request. The appellant also submits that the IPC has stated that an institution has an obligation to seek clarification regarding the scope of the request and, if it fails to discharge this responsibility, it cannot rely on a narrow interpretation of the scope of the request on appeal.

Finding

[83] In Interim Order MO-3487-I, I ordered the city to conduct searches of the database that it did not conduct during its initial search. Following this search, the appellant made further submissions, to the effect that other searches should be conducted before the city's search can be found to be reasonable. The appellant submits that further records should exist based on information she received about a code name that she now submits must be searched in order for the search to be reasonable. However, on my review of the representations and the actual records at issue in this appeal, I find that the city has properly identified the scope of the request. It is not apparent to me that by searching the specific code name the city would have located more responsive records.

ORDER:

1. I uphold the city's decision to withhold the information at issue pursuant to section 10(1) of the *Act*, in part.

2. I order the city to provide the appellant with a copy of the records as set out in the highlighted copy of those pages provided with the city's copy of this order, and I order it to do so by **October 23, 2019** but not before **October 16, 2019** order. To be clear, highlighted portions of the records should not be disclosed.

3. In order to verify compliance with order provision 2, I reserve the right to require the city to provide me with a copy of the pages disclosed to the appellant.

4. The remainder of the appeal is dismissed.

Original Signed By: September 17, 2019

Alec Fadel
Adjudicator