Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4086

Appeal MA19-00321

City of Ottawa

July 27, 2021

Summary: A media organization made a request to the City of Ottawa (the city) for records related to the daily testing of vehicles operating within Phase One of the city's Light Rail Transit (LRT) system, otherwise known as the Confederation Line. The city located records responsive to the request and granted partial access to them claiming the application of the mandatory exemption at section 10(1) (third party information) as well as a number of other exemptions. The primary contractor for the project (the appellant) appealed the city's decision to disclose any portion of the records in which it has an interest, claiming section 10(1) applies. While the requester did not appeal the city's decision to withhold portions of the records, they did raise the possible application of the public interest override at section 16. In this order, the adjudicator finds that some of the records are exempt from disclosure under section 10(1) and that the public interest override at section 16 does not apply. The adjudicator finds that other records are not exempt under section 10(1) and orders them disclosed. The adjudicator also orders the city to disclose several other pages of records to the requester, as the appellant consented to their disclosure.

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

Orders and Investigation Reports Considered: Orders MO-2151, MO-3628, MO-3827 and MO-4045.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] This appeal addresses information related to the construction of Phase One of the City of Ottawa's (the city's) Light Rail Transit (LRT) system, otherwise referred to as the Confederation Line. The construction of the city's LRT system is the largest ongoing

infrastructure project in Ottawa. The primary contractor for Phase One of the project, awarded through a competitive bidding process, is a consortium of companies created for the purpose of the public-private partnership project that designed, built and currently maintains Phase One of the project.[1]

[2] A media organization made a request to the city under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information about daily testing results for multiple individual Light Rail Vehicles (LRVs) for a period of approximately 10 weeks as Phase One of the LRT project progressed towards completion. Specifically, the requester sought access to the following information:

> Any and all communications, including but not limited to emails and reports, on the daily testing of all Alstom Citadis Spirit light-rail vehicles from Dec. 1, [2018] to Feb. 17, 2019.

[3] The city identified the responsive records. Prior to issuing a decision on access, the city notified the primary contractor of the request pursuant to section 21(1) of the *Act* and provided it with the opportunity to make representations on how its interests might be affected by the disclosure of the records. Although the primary contractor objected to the disclosure of the records in their entirety on the basis of its view that they are exempt under section 10(1) (third party information) of the *Act*, after considering its representations, the city issued a decision granting partial access to the responsive records. The city withheld portions of the records based on the application of the exemption at section 10(1) of the *Act*. The city also withheld portions of the records based on the discretionary exemptions at sections 7(1) (advice or recommendations) and 11 (economic and other interests), as well as the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

[4] The primary contractor, now the appellant, appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC) claiming that the records should be withheld, in their entirety, pursuant to the exemption at section 10(1). The requester did not appeal the city's decision to withhold some of the records. A mediator was appointed to attempt to reach a mediated resolution.

[5] During mediation, the appellant maintained that the responsive records are exempt from disclosure, in their entirety, based to the exemption at section 10(1) of the *Act*. The city maintained its position, set out in its decision letter, that only portions of the records should be withheld pursuant to that exemption.

[6] During mediation, the requester confirmed that they are not appealing the city's decision to withhold portions of the records under section 10(1), or any of the other exemptions claimed, but advised that they maintain their position that the records should be disclosed in accordance with the city's decision. The requester also argued that there is a compelling public interest in the disclosure of the information at issue. As a result, the possible application of the public interest override at section 16 of the *Act* was added as an issue in the appeal.

[7] As a mediated resolution was not reached, the appeal was transferred to the

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[1] This background was provided by the parties in their representations.

adjudication stage of the appeal process, where an adjudicator may conduct a written inquiry. As the adjudicator assigned to the appeal, I decided conduct an inquiry. I sought and received representations from the appellant, the city and the requester. The representations were shared among the parties in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[8] In this order, I find that some of the records at issue are exempt from disclosure under section 10(1)(a) of the *Act* and that the public interest override at section 16 does not apply. However, I find that section 10(1) does not apply to some of the records and order the city to disclose them to the requester. I also order the city to disclose several pages of records to the requester as, in its representations, the appellant consented to their disclosure.

RECORDS:

[9] The responsive records in this appeal consist of 117 pages of records relating to the daily testing of LRVs for Phase One of the city's LRT system, the Confederation Line, including correspondence, daily operating reports, and reports detailing LRV testing. The pages that remain at issue are those that the appellant objects to disclosure of and the city has decided to disclose either, in full or in part. They are: pages 1 to 5, 10 to 89, 90, 91 and 99 to 117.

[10] As the requester has not appealed the city's decision to withhold some of the records, the information that the city has claimed is exempt from disclosure, including that which it has decided to withhold under section 10(1), is not at issue in this appeal.

ISSUES:

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

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

DISCUSSION:

Issue A: Does the mandatory third party information exemption at section 10(1) apply to the records?

[11] The appellant claims that the third party information exemption at section 10(1)(a) applies to exempt the records from disclosure, in their entirety. Section 10(1)(a) 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[.]

[12] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[2] 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.[3]

[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: the records contain technical information

[14] The types of information listed in section 10(1) have been discussed in prior IPC orders. The following types are relevant to this appeal:

> *Trade secret*, which 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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[4]
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> *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

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[2] *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.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.

field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[5]

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]

The parties' representations

The appellant's representations

[15] In its representations, the appellant describes the responsive records as consisting of three types of documents:

a. daily LRV operating reports (operating reports) covering 37 individual days of testing between December 3, 2018 and February 13, 2019;

b. correspondence between the city's O-Train and Rail Construction Offices and the appellant's CEO directly speaking to and stemming from the results of the extensive technical LRV testing; and

c. two reports to the city's Rail Activation Management Program (RAMP) Project Management Team, dated November 27, 2018 and January 9, 2019, respectively, detailing the LRV testing schedules.

[16] The appellant explains that each operating report, authored by engineering experts, is two to four pages long and captures a detailed snapshot of a single day's operations and testing. The appellant submits that they provide a technical overview of the amount of time each vehicle was available that day, and list the start and end times for vehicles used for training, including detailed track positions and distance travelled. The appellant submits that the operating reports detail any faults or issues experienced by individual LRVs during the day's testing; these listings provide the time of the issue, the individual LRV number, track location, the amount of time lost due to the issue and a detailed description of what occurred, including the technical solutions applied to remedy the issue. The appellant submits that the operating reports also list the day's weather, which is particularly relevant as the reports describe testing conducted in the winter.

[17] The appellant explains that the correspondence relates to the testing set out in the operating reports and raises issues with respect to the testing results and/or procedures, including a list of tests that had not been submitted to the city as of February 2019.

[18] The appellant explains that the two reports to the RAMP Project Management Team (RAMP reports) contain an overview of the progress of LRV testing, as well as a listing of testing progress for each LRV. For each individual LRV, the RAMP reports list information

[5] Order PO-2010.
[6] Order PO-2010.
[7] Order P-1621.

including availability status, total distance travelled, whether the vehicle has received a retrofit, progress towards final acceptance, and the scheduled handover date to the city.

[19] This description of the records was also included in the affidavit sworn by the appellant's Project Director for Phase One of the Ottawa LRT project, which was attached to the appellant's representations.

[20] Addressing the types of information that these records contain, the appellant submits that the records contain technical information and trade secrets within the meaning of section 10(1).

[21] According to the appellant, the records set out details relating to the daily testing of LRVs as Phase One of the LRT Project was brought online. It submits that the IPC has consistently found that similar types of testing information falls within the exemption at section 10(1) and the records at issue in this appeal should be similarly exempt from disclosure.

[22] The appellant submits that the operating reports contain detailed and specific information prepared by professional engineers and construction scheduling experts about the testing of LRVs broken down by time and by individual LRVs. It submits that the related correspondence highlights issues that arose from testing and outlines the remedies that it undertook in response. It submits that the RAMP Reports provide technical information about the status of the LRV testing as a whole, and "serve as a collation of sorts for the information contained in the operating reports."

[23] In support of its position, the appellant points to Order MO-2004 where operating reports relating to environmental contamination of a property that contained explanations and descriptions of monitoring and testing procedures and test results were found to be "technical information." It also points to Order MO-3628 in which non-conformance reports issued with respect to the appellant's construction of Phase One of the LRT project, the same project that generated the operating reports in this matter, were found to qualify as "technical information." It submits that, in Order MO-3628, Adjudicator Cathy Hamilton stated:

> I am satisfied upon my review of the parties' representations and the operating reports themselves that they contain technical information prepared by professionals in the field of construction and that this information directly relates to the construction of Phase [One] of the city's LRT, thus meeting the definition of "technical information" for the purposes of the first part of the three-part test in section 10(1).

[24] The appellant submits that the records also contain trade secrets as their disclosure would reveal its "learning curve" acquired in or applied to addressing certain project milestones or delays. It submits that the assembled totality of the records represents a detailed record of its learning curve during two months of winter testing for the LRV. It submits that the records reveal the unique challenges it faced and solutions it developed specifically related to Ottawa's winter weather. The appellant submits that, beyond the issues that it faced with respect to the weather, the records capture its approach to LRV testing generally, including its approach to challenges resulting from that testing over a period of two months. It submits that this represents a significant proportion of its total

LRV testing time and that the record provides a roadmap for LRT testing, which is an integral component of any LRT development.

The city's representations

[25] The city submits briefly that the records contain technical and commercial information supplied by the appellant, the consortium that designed, built and continues to maintain Phase One of the city's LRT system.

The requester's representations

[26] Although the requester submitted brief representations, they did not comment specifically on any part of the three-part test or generally, on whether the exemption at section 10(1) applies. Rather, the requester's representations focus on their view that there is a compelling public interest in the disclosure of the records that outweighs the purpose of section 10(1).

Analysis and findings

[27] Based on my consideration of the parties' representations and my review of the records at issue, I accept that they contain technical information within the meaning of section 10(1), thereby meeting the first part of the test for the exemption to apply.

[28] It is clear that the records contain information that relates directly to the testing of the LRVs used in Phase One of the city's LRT project by the appellant, the consortium that designed, built and maintains Phase One of the LRT system. I accept that the records outline an acquired body of knowledge, experience and skill and that this information was prepared by engineering professionals in the field and describes the construction, operation and maintenance of Ottawa's LRT system. While I acknowledge that the correspondence related to this testing may not itself have been prepared by professionals in the field, from my review I accept that it contains technical information about the operation of the LRT system, prepared by such professionals.

[29] As I have found that the records contain technical information, it is not necessary for me to determine whether the records also contain commercial information or information that can be described as a trade secret.

Part 2: some of the information was supplied to the city in confidence

[30] Part two of the three-part test itself has two parts: the appellant must have "supplied" the information to the city, and must have done so "in confidence," either implicitly or explicitly.

Supplied

[31] 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]

[32] Information may qualify as "supplied" if it was directly supplied to an institution by a

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[8] Order MO-1706.

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]

In confidence

[33] In order to satisfy the "in confidence" component of part two, the party 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]

[34] 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;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[11]

The parties' representations

[35] Both the appellant and the city take the position that the information was supplied by the appellant to the city in confidence.

[36] The appellant submits that the records were clearly "supplied" to the city within the meaning of section 10(1). It submits that it generated the operating records and the RAMP Reports, which were then shared with the city through password-protected software.

[37] With respect to the "in confidence" requirement, both the appellant and the city submit that the Project Agreement for Phase One of the LRT system requires that. "information related to the performance of [the appellant]," be treated confidentially, even if it might not have been specifically identified as confidential information.

[38] In their representations, both the appellant and the city reproduced the terms of the confidentiality provisions set out in the Project Agreement.

Analysis and finding

[39] Based on the parties' representations and my review of the records, I am satisfied that the daily operating reports and the RAMP reports were supplied by the appellant to

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[9] Orders PO-2020 and PO-2043.
[10] Order PO-2020.
[11] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* 2008 CanLII (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

the city in confidence, meeting the second part of the three-part test in section 10(1).

[40] In reaching this finding, I have taken into account the parties' submissions that the information was supplied to the city by way of a password-protected system that allowed the records to be treated confidentiality by limiting access to the information contained in them.[12] I have also taken into account the Project Agreement provision that stipulates that information related to the performance of the project is to be treated confidentially by both parties. I accept that the information that the operating reports and the RAMP reports contain relates to the performance of the LRT project and falls within the provision in the project agreement that stipulates that information related to performance will be treated confidentiality by the parties.

[41] Accordingly, I am satisfied that the daily operating reports and the RAMP reports were "supplied" "in confidence" to the city by the appellant, and I find that the second part of the section 10(1) test has been met for these records.

[42] With respect to the correspondence however, I note that it appears to have been prepared by the city and either sent to the appellant or circulated among city staff. From my review, none of it appears to be technical information that was originally supplied to the city by the appellant. In my view, I have insufficient evidence before me to conclude that the correspondence meets the requirement of part two of the test. As all three parts of the test must be met for section 10(1) to apply I find that the correspondence does not qualify for exemption under section 10(1). I will order the city to disclose it, subject to any portions that it claimed as exempt in its access decision.

Part 3: disclosure of some information could reasonably be expected to prejudice the appellant

[43] The final part of the test for exemption under section 10(1) requires that disclosure of the information "could reasonably be expected to" lead to one of the harms set out in that section. The appellant claims that section 10(1)(a) applies to all of the information at issue. As noted above, that section states:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
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> > prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[44] For the reasons outlined below, I find that a reasonable expectation of harm under section 10(1)(a) has been established for the information remaining at issue, that I have found meet parts one and two of the test: the operating reports and the RAMP reports.

[45] The appellant, as the party resisting disclosure, must establish a risk of harm from

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[12] See, for example, Order MO-3628 and MO-4045, involving the same parties and in which adjudicators Cathy Hamilton and Jessica Kowalski, respectively, found that records supplied to the city through the same password-protected system as at issue in this appeal were supplied to the city in confidence.

disclosure of the records that is well beyond the merely possible or speculative, but it need not prove that disclosure will in fact result in such harm.[13] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[14]

[46] 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 records themselves and/or 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.*[15]

The parties' representations

The appellant's representations

[47] The appellant submits that disclosure of the records could reasonably be expected to prejudice its competitive position under section 10(1)(a) because the information at issue is technical information and a record of its "learning curve."

[48] The appellant submits that the IPC has consistently held that the disclosure of third party operating reports that would provide competitors with an overview of a project could reasonably be expected to result in harms within the meaning of section 10(1) of the *Act*. The appellant points to Order MO-2151 where, its submits, former Senior Adjudicator Frank DeVries found that sample reporting operating reports satisfied the test for exemption under section 10(1):

> I also find that the disclosure of the specific information contained in the appendices identified above, which includes specific samples of the types of Operating Reports used by the affected party in carrying out the project, and the specific manner in which this information is recorded, could reasonably be expected to prejudice significantly the competitive position of the affected party, as it provides specific templates of those types of documents. Accordingly, I am satisfied that these portions of the record qualify for exemption under section 10(1)(a).

[49] The appellant also points to Order MO-2070, in which, it submits, I accepted the third party appellant's position that the disclosure of operating reports, including training operating reports and a project schedule for an electronic voting system, could reasonably be expected to result in probable harm to a third party's competitive position.

[50] Finally, the appellant points to Order MO-3628, mentioned above, which also addresses records related to the implementation of the city's LRT system, in that case, non-conformance reports. The appellant submits that Adjudicator Hamilton considered the non-conformance reports and found:

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[13] *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner),* [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

[14] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

[15] Order PO-2435.

> …I find that a competitor could use this information, not for the purpose of highlighting the third party appellant's non-conformance issues, which, in my view, would not prejudice the third party appellant's competitive position, but rather for the purpose of incorporating the technical information into its own construction practices. This potential adoption and use of the technical information could be used to directly compete against the third party appellant for the purpose of securing the contract for Phases [Two] and [Three] of the Ottawa LRT or other projects, thus meeting the threshold of the harms contemplated in section 10(1)(a).

[51] The appellant submits that disclosure of the records in this case could reasonably be expected to result in prejudice to its competitive position for similar reasons. It submits that by documenting the evolution of LRV testing over the winter months, the records provide insight into the appellant's "'learning curve' – its acquired body of knowledge and skill relating to the LRT project." It submits that the records, and in particular the operating reports and RAMP reports, provide a comprehensive template of its unique approach to LRV testing in the winter months for the large and complex project that was Phase One of the LRT. It submits that all of the records explicitly document, in different ways, the challenges faced by the appellant through that process and its solutions to those challenges.

[52] The appellant submits that disclosure of the records could reasonably be expected to give its competitors a "window into processes and techniques whose development required significant investment from [the appellant] in terms of time and resources." The appellant submits that, as a result, disclosure "would negate any competitive advantages that [the appellant] could derive from its development of these proprietary techniques and processes" as it would allow its competitors to copy the appellant's method giving them a "head start" that was not afforded to the appellant. The appellant submits that this would result in prejudice to its competitive position within the meaning of section 10(1)(a) of the *Act*.

[53] The appellant further submits that while the contract for Phase Two of the LRT has been awarded, further contemplated phases have not and disclosure of the records could reasonably be expected to prejudice the appellant's competitive position with respect to bidding on future phases of the LRT. Therefore, the appellant concludes, disclosure of the records could reasonably be expected to prejudice its competitive position within the meaning of section 10(1)(a) of the *Act*.

The city's representations

[54] The city notes that the representations provided by the appellant at adjudication are "significantly more expansive" that those it provided to the city during the processing of the request which were relied upon by the city when making its decision to grant partial access to the records. The city submits that unlike in the representations provided to the IPC, in the representations provided to the city, the appellant did not provide details or examples of how disclosure of information contained in the records would cause harms contemplated under section 10(1). It submits that the appellant's representations to the IPC "articulate what may constitute reasonably foreseeable harms to the competitive position of [the appellant]" if the information were disclosed. The city submits that

although it upheld section 10(1) only with respect to certain information found throughout the records, having considered the submissions made by the appellant to the IPC, section 10(1) may apply more broadly to content of the records, in particular the entire content of the daily operating reports.

[55] In support of its change of position, the city notes that in Order MO-3628, Adjudicator Hamilton found that information contained in LRT non-conformance reports could be used by a competitor "for the purpose of incorporating the technical information into its own construction practices" and therefore, that the harm set out in section 10(1)(a) had been established. The city submits that the reasoning applied in Order MO-3628 may be relevant in the circumstances of this appeal.

[56] Despite the city's submission that, in light of the representations submitted by the appellant to the IPC, section 10(1)(a) may apply more broadly then it originally applied, the city submits that it continues to take the position that section 10(1)(a) does not apply to the information on page 9 (correspondence) and pages 113 to 117 (an incident investigation report). The city submits that section 10(1)(a) would not apply as the information on these pages contains only factual information pertaining to a particular event.

The appellant's reply representations

[57] Replying to the city's position that section 10(1)(a) does not apply to the information on page 9 and pages 113 to 117, the appellant stated that it agrees to disclose those specific pages to the requester but maintains that the remaining records at issue are subject to the exemption at section 10(1)(a). It reiterates that disclosure of the remaining information could reasonably be expected to allow its competitors a window into processes and techniques, which the appellant invested significant time and resources to develop, and which could reasonably be expected to prejudice significantly its competitive position.

Analysis and finding

[58] I have considered the parties' representations and the portions of the records remaining at issue. For the reasons set out below, I find that the appellant has established that disclosure of the operating reports and the RAMP reports could reasonably be expected to prejudice significantly its competitive position as contemplated by section 10(1)(a), thereby meeting the harms component of the test for that exemption to apply.

[59] As previously noted, in order for me to find that the exemption at section 10(1)(a) applies in this case, the appellant must establish that harm could reasonably be expected to occur in the event of disclosure. To do so, the party resisting disclosure must provide sufficient 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 the seriousness of the consequences.[16]

[60] In *Ontario (Community Safety and Correctional Services) v. Ontario (Information*

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[16] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.

and Privacy Commissioner), [17] the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two other exemptions under the *Act*,[18] and found that it requires a *reasonable expectation of probable harm*.[19] As well, the Court observed that "the reasonable expectation of probable harm formulation . . . should be used whenever the *could reasonably be expected to* language is used in access to information statutes."

[61] In order to meet that standard, the Court explained that:

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence *well beyond* or *considerably above* a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and *inherent probabilities or improbabilities or the seriousness of the allegations or consequences* . . .

[62] This is the standard of proof that I will apply in this appeal.[20]

[63] Having reviewed the records remaining at issue, the daily operating reports and the two RAMP reports detailing the LRT testing schedules, I accept that the they provide technical information about the appellant's methods and techniques regarding the functioning of their product. I also accept that these methods and techniques have been developed over a great deal of time through the application of experience as well as through trial and error.

[64] I accept the appellant's argument that there is a reasonable expectation of harm that is well beyond or considerably above a mere possibility of harm, as contemplated in section 10(1)(a), should the information in the operating reports and the RAMP reports be disclosed. More specifically, I accept the appellant's argument that a competitor could reasonably be expected to prejudice the appellant's competitive position by using or adopting the technical information that the appellant developed through the investment of time, experience and resources. Considering the nature of the information and the detail provided in the records, I accept that a competitor could reasonably be expected incorporate this type of information into its own practices. I also accept that this potential adoption and use of the technical information by a competitor could reasonably be expected to prejudice significantly the competitive position of the appellant in negotiations, including those it may enter into with respect to obtaining the contract for future phases of the Ottawa LRT or other LRT projects. Accordingly, I find that the harm contemplated in section 10(1)(a) has been established.

[65] I acknowledge that recently, in Order MO-4045, Adjudicator Kowalski found that

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[17] 2014 SCC 31 (CanLII).

[18] The law enforcement exemptions in sections 14(1)(e) and 14(1)(l) of the Act.

[19] See paras. 53-54.

[20] See also Order PO-3116, in which I noted that there is nothing in the *Merck Frosst* decision that necessitates a departure from the requirement that a party provide sufficient evidence of harm in order to satisfy its burden of proof under section 17(1) (the *Freedom of Information and Protection of Privacy Act*, which is the provincial equivalent to section 10(1) of the *Act*).

disclosure of monthly work reports also related to the appellant's development of Phase One of the city's LRT system, could not reasonably be expected to cause significant prejudice to the appellant's position and therefore, were not exempt from disclosure section 10(1)(a). In that order, Adjudicator Kowalski found that the level of detail regarding what the (same) appellant asserted were unique and proprietary developments was not present in the portions of the specific records that were at issue in that appeal. She noted that the information before her provided a summary snapshot of the project's progress over a six-month period as opposed to detailed information about the techniques and processes applied or the particulars of the work undertaken to complete the project's constituent components.

[66] In my view, the circumstances in Order MO-4045 can be distinguished from those in this appeal. Having carefully considered the records that are before me, I find that the operating reports and the RAMP reports that are before me contain detailed information regarding techniques and methods considered and applied by the appellant when running daily testing on individual LRVs. The operating reports and RAMP reports at issue in this appeal do not simply reveal summary snapshots of the project's progress over a six-month period. Instead, they document, in granular detail, the appellant's testing processes as well as its development and application, through its expertise and skill, of specific techniques and methods in response to the specific issues and conditions it encountered during testing on a day-by-day basis. As previously noted, I accept that this information could be used by a competitor by direct incorporation into its own practices which could reasonably be expected to significantly prejudice the appellant's competitive position. I find that part three of the test, the harms component, has been established for the operating reports and the RAMP reports.

[67] For the reasons set out above, I find that that the appellant has established that disclosure of the operating reports and the RAMP reports could reasonably be expected to prejudice significantly its competitive position and section 10(1)(a) applies to them. However, as the requester takes the position that the public interest override at section 16 applies to permit disclosure, I will consider its application below.

[68] As I have found that the correspondence at issue is not exempt from disclosure under section 10(1) because it does not meet part two of the test, it is not necessary for me to consider whether the public interest override at section 16 applies to it and I will order the city to disclose it to the requester.

[69] Additionally, I note that in its representations the appellant has agreed to disclose pages 9 and 113 to 117 to the requester. As a result of this consent, I will order the city to disclose page 9 (correspondence) and pages 113 to 117 (an incident investigation report),[21] along with the correspondence that I found not to be exempt under section 10(1), above.

[21] Section 10(2) of the *Act* states:

> A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

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

[70] The requester takes the position that there is a compelling pubic interest in disclosure of the records that clearly outweighs the purpose of the exemption at section 10(1)(a). As I have found that section 10(1)(a) only applies to the operating reports and the RAMP reports, I will consider whether section 16 applies to that specific information.

[71] 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.

[72] 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.

[73] 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.[22]

[74] 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.[23] 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.[24]

[75] A public interest does not exist where the interests being advanced are essentially private in nature.[25] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[26]

[76] A public interest is not automatically established where the requester is a member of the media.[27]

[77] The word "compelling" has been defined in previous orders as "rousing strong

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[22] Order P-244.
[23] Orders P-984 and PO-2607.
[24] Orders P-984 and PO-2556.
[25] Orders P-12, P-347 and P-1439.
[26] Order MO-1564.
[27] Orders M-773 and M-1074.

interest or attention”.[28]

[78] Any public interest in *non*-disclosure that may exist also must be considered.[29] A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.[30]

[79] 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;[31] or
- disclosure would shed light on the safe operation of petrochemical facilities[32] or the province’s ability to prepare for a nuclear emergency.[33]

[80] 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;[34]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[35]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[36] or
- the records do not respond to the applicable public interest raised by appellant.[37]

[81] 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.

[82] 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.[38]

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[28] Order P-984.
[29] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[30] Orders PO-2072-F, PO-2098-R and PO-3197.
[31] 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.
[32] Order P-1175.
[33] Order P-901.
[34] Orders P-123/124, P-391 and M-539.
[35] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[36] Order P-613.
[37] Orders MO-1994 and PO-2607.
[38] 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.).

The parties' representations

The requester's representations

[83] The requester takes the position that section 16 applies to override section 10(1)(a) and permit the disclosure of the information at issue. Specifically, the requester submits:

> When [the appellant] entered the contract to build the Confederation Line with the city, the consortium did so with the knowledge that communications with municipal employees are subject to the province's municipal freedom of information laws.
>
> It is in the public interest for this information, some of it a year old now due to the consortium's efforts to delay its release, to be disclosed.
>
> This light-rail project cost taxpayers at least $2.1 billion, was completed more than a year beyond the original deadline, and since being launched…has experienced a number of on-going problems.
>
> [The appellant] has not been nor is currently, forthcoming about the nature of the technical issues that continue to plague the light-rail vehicles and the entire LRT system, which has deeply affected the very public that paid [the appellant] for the system.
>
> The people of Ottawa should be able to see the testing results of the light-rail vehicles – vehicles they paid for – especially now, in light of on-going problems with those very vehicles.

The city's representations

[84] The city states that Phase One of its LRT project is the largest infrastructure project ever awarded in Ottawa, at a cost of over 2.1 billion dollars. It also notes that in Order MO-3628, Adjudicator Hamilton found a compelling public interest existed in the disclosure of non-conformance reports revealing difficulties with the construction that raised potential safety issues that could result in widespread harm. The city submits that aside from the records at page 9 and pages 113 to 117, which it previously maintained are not subject to exemption under section 10(1)(a), the records at issue in this appeal do not appear to raise any safety issues.

[85] The city acknowledges, however, that a March 4, 2019 media article published by the Canadian Broadcasting Corporation (CBC) entitled "'Unreliable' LRT trains can't handle Ottawa winters, internal reports reveal" is one of many reports on concerns with the performance of the trains. It notes that in Order MO-3827, Adjudicator Lan An found that the public interest override applied where a requester was seeking to understand more about delays with a manufacturer that was contracted to supply streetcars to the Toronto Transit Commission at a significant cost to ratepayers. The city submits that it is not clear to what extent the disclosure of information in the daily operating reports, for example, will shed light on the delays by the appellant in completing the testing process, but it might serve as a catalogue of certain recurring issues that arose in the testing of LRVs.

The appellant's representations

[86] The appellant maintains that there is no compelling public interest in the disclosure of the records that outweighs the purpose of the section 10(1)(a) exemption.

[87] The appellant submits that the IPC has typically only found a compelling public interest outweighing the purpose of the statutory exemption "in unique circumstances dealing with specific public safety concerns."[39] It notes that, in Order MO-3628, Adjudicator Hamilton found that while non-conformance reports (which it describes as "summary" reports) raised sufficiently important issues of public safety that their disclosure attracted the application of section 16, the attachments to those reports, which contained confidential technical information, did not.

[88] The appellant notes that in this case, the requester does not allege that the records raise issues of public safety or construction standards and, as a result, there is "no nexus between the requester's submissions and the standard for public interest override typically required by the IPC." The appellant further notes that the city agrees that the records in this appeal do not speak to any issues of public safety or construction standards. It submits that the records document the evolving timeline and individual itemized work elements of a large and complex project but do not reflect instances of non-conformance with contractual standards. It submits that disclosure of the records or the information that they contain would not shed any light on the safety of the LRT project. The appellant further submits that the records do not speak to the underlying issues or reasons for the delay in Phase One of Ottawa's Confederation Line, unlike the delays to the TTC project considered in Order MO-3827. It notes, however, that in that order Adjudicator An found that there was no compelling public interest in the disclosure of information that did not explicitly "inform or enlighten the public abut the reasons behind the delays."

[89] Specifically addressing the records at issue in this appeal, the appellant submits:

> In this case, the records detail the daily results of testing for multiple individual LRVs for a period of approximately [six] weeks as the LRT project progressed towards completion, but do not include narrative information speaking to delays. While this information is sufficiently detailed and technical to allow [the appellant's] competitors to infer specific challenges encountered by [the appellant], the records do not address the *reasons* for the delay in a manner that would enlighten the public.

[90] The appellant notes that all parties acknowledge that the LRT project has been the subject of intense public scrutiny and media coverage and it submits that "a wealth of information already exists in the public sphere regarding the delays in the project." It submits that the requester has not established that disclosure of the records would shed any further light on the matter for the general public and accordingly, no compelling public interest in disclosure exists.

[91] The appellant concludes its submission by stating that even if a compelling public interest in the disclosure of the records at issue might exist, disclosure of the information would not benefit the public in a manner that is sufficient to outweigh the purpose of the

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[39] Orders PO-3633 and MO-3628.

exemption at section 10(1).

Analysis and findings

[92] I have considered the parties' representations and the information in the operating reports and the RAMP reports with a view to determining whether there is a compelling public interest in its disclosure that clearly outweighs the purpose of the third party information exemption at section 10(1)(a). I find that a compelling public interest in the disclosure of the particular information that remains at issue has not been established in this case. As a result, section 16 does not apply.

[93] As described above, the information that remains at issue is detailed technical information that describes, on a granular level, issues that arose during the testing of individual LRVs on a daily basis. I recognize that, not having had the benefit of reviewing the information at issue, one might presume that this type of information could reveal public safety issues related to the LRVs or the LRT system as a whole. However, from my review, the information does not clearly reveal such safety issues.

[94] As noted above, the burden on proof with respect to establishing the application of section 16 cannot be absolute, particularly in the case of a party who has not had the benefit of reviewing the records. However, a party that claims the existence of the compelling public interest override must provide some evidence to support their claim. In my view, the evidence before me is not sufficient to demonstrate a connection between the information in the records at issue and any public safety issues, existing or contemplated. As a result, I am not satisfied that disclosure of the exempt information would serve to inform or enlighten the public about safety issues about Phase One of the LRT. While I accept that there might be a public interest in the disclosure of the type of information contained in the records, considering the nature of the specific information and the evidence before me, I am unable to conclude that such interest is compelling as required by section 16 of the *Act*.

[95] Similarly, I have not been provided with sufficient evidence to conclude that disclosure of the information that remains at issue would serve to inform or enlighten the public about the reasons behind any delays in the completion of the construction of Phase One of the LRT system that occurred. The records speak for themselves and do not reveal the requisite connection between their content and any such delays in completion.

[96] As noted above, previous IPC orders have indicated that a public interest is not automatically established where the requester is a member of the media.[40] Applying that reasoning in this case, even though the requester in this case is a media organization, in the absence of sufficient argument to persuade me that there is a public interest in the disclosure of the information that is compelling in nature, I find that one has not been established.

[97] Accordingly, I find that the public interest override at section 16 of the *Act* does not apply and the operating reports and the RAMP reports are exempt from disclosure under section 10(1)(a).

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[40] Orders M-773 and M-1074.

ORDER:

1. I order the city to disclose the correspondence to the requester, in accordance with its original access decision, by **August 31, 2021** but not before **August 26, 2021**.

2. I order the city to disclose page 9 and pages 113 to 117 to the requester by **August 31, 2021** but not before **August 26, 2021**.

3. I find that the remaining responsive records qualify for exemption under section 10(1)(a) and should not be disclosed.

4. In order to verify compliance with order provisions 1 and 2, I reserve the right to require the city to provide me with a copy of the records disclosed to the requester.

Original signed by: July 27, 2021

Catherine Corban
Adjudicator