Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4087

Appeal MA19-00436

City of Ottawa

July 27, 2021

Summary: A media organization made a request to the City of Ottawa (the city) for daily reports on the progress of and/or outstanding issues with 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 exemptions at section 10(1) (third party information) and section 14(1) of the *Act*. The primary contractor for the project (the appellant) appealed the city's decision to disclose any of the records, claiming section 10(1) applies. While the requester did not appeal the city's decision to withhold some records, they did raise the possible application of the public interest override at section 16 in relation to the operating reports. In this order, the adjudicator finds that the operating reports are exempt from disclosure under section 10(1)(a) and that the public interest override at section 16 does not apply.

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 member of the media 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) across the LRT system as a whole during the completion of Phase One of the LRT project. Specifically, the requester sought access to the following information:

> All and any daily reports on the progress of and/or outstanding issues with the Confederation Line that include OC Transpo senior staff from January 1, 2019 (to March 5, 2019) – may be informal updates and simply emailed between [three named individuals].

[3] The city identified 221 pages of responsive records. Prior to issuing a decision on access, the city notified the primary contractor of the request pursuant to section 21 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. 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 submissions, the city issued a decision granting partial access to the responsive records. The city withheld portions of the records based on the mandatory exemptions at section 10(1) and 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 agreed to the disclosure of some of the records at issue, specifically, pages 191 to 221 of the 221 pages at issue. The city disclosed these pages to the requester. Pages 1 to 190 remain at issue. The appellant maintains that these records are exempt from disclosure, in their entirety, based on section 10(1) of the *Act*.

[6] During mediation, the requester confirmed that they are not appealing the city's decision to withhold portions of the records under either section 10(1) or section 14(1) as claimed by the city but advised that they continue to seek access to the portions of pages 1 to 190 that the city intended to disclose. The requester also argued that there is a compelling public interest in the disclosure of the responsive records. As a result, 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 adjudication stage of the appeal process where an adjudicator may conduct a written inquiry. As the adjudicator assigned to the appeal, I decided to conduct an inquiry. I sought and received representations from the appellant and the city which were shared among the parties in accordance with this office's *Code of Procedure* and *Practice Direction 7*. Although I sought representations and sur-reply representations from the requester,

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

they declined to submit representations.

[8] In this order, I find that 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.

RECORDS:

[9] The records that remain at issue in this appeal are 190 pages of daily operating reports (operating reports) related to the testing of LRVs for Phase One of the city's LRT system, otherwise known as the Confederation Line.

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?

[10] 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,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[11] 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]

[12] For section 10(1) to apply, the institution and/or the third party must satisfy each

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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.

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

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

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

The parties' representations

The appellant's representations

[14] In its representations, the appellant describes the responsive records as consisting of operating reports covering 44 days of testing of individual LRVs between January 1, 2019 and March 5, 2019.

[15] The appellant explains that each operating report, authored by engineering experts, is two to four pages long and captures a detailed snapshot of the day's operations and testing across the LRT system as a whole. The appellant submits that the reports 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 also 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.

[16] 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.

[17] 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).

[18] 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 testing information falls within the exemption at section 10(1) and the records at issue in this appeal should be similarly exempt from disclosure.

[19] 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 testing information has been found to qualify as technical information within the meaning of section 10(1) of the *Act*.

[20] 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 LRFT, thus meeting the definition of "technical information" for the purposes of the first part of the three-part test in section 10(1).

[21] 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 records provide a roadmap for LRT testing which is an integral component of any LRT development.

The city's representations

[22] The city submits briefly that the operating reports contain technical and commercial information pertaining to the testing of LRVs between January 2, 2019 and March 5, 2019. The city submits that all of the records were created by the appellant, the consortium that designed, built and continues to maintain Phase One of the city's LRT system.

The requester's representations

[23] As noted above, although invited to submit representations on the issues on appeal, including the possible application of section 10(1), the requester chose not to make submissions.

Analysis and findings

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

[25] 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 this information was prepared by engineering professionals in the field and describes the construction, operation and maintenance of Ottawa's LRT system.

[26] 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: the information was supplied to the city in confidence

[27] 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

[28] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[8]

[29] 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]

In confidence

[30] 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]

[31] 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

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

[33] 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 shared them with the city through password-protected software.

[34] 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

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[8] Order MO-1706.
[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.

if it might not have been specifically identified as confidential information.

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

[36] In its sur-reply representations, however, the city changes its position with respect to whether some of the information in the operating reports was supplied to it by the appellant. It submits that the operating reports contain error codes which appeared in the LRVs on the Driver Display Unit and Train Operator Display. It submits that city employees tasked with operating the LRVs during testing recorded these error codes by hand and these were then transcribed into an excel spreadsheet provided to the appellant. The city also submits that the "lost time" indicated in the last column which represents the time lost as a result of the issue was information supplied by the city to the appellant. As a result, the city submits that the records constitute a summary of factual events associated with testing, which suggests that it is not information that was supplied to the city.

Analysis and finding

[37] Based on the parties' representations and my review of the records, I am satisfied that the operating reports were supplied by the appellant to the city in confidence, meeting the second part of the three-part test in section 10(1). In reaching this finding, I have taken into account that the operating reports were 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 confidentiality by both parties.

[38] I acknowledge the city's position that some of the information contained in the operating reports may have been provided to the appellant by city employees who were tasked with driving the LRVs during testing. However, in my view, the fact that information such as error codes and length of time of delay caused by the error was subsequently included in the operating reports does not alter the fact that the operating reports are records prepared by the appellant and subsequently supplied to the city. The operating reports detail issues that arose during testing, the techniques and processes that the appellant applied to attempt to resolve the issue and the results of the application of those techniques and processes. In my view, the collation of this information in a record prepared by the appellant that sets out the appellant's interpretation and response to the issue represented by the error code, amounts to information that was ultimately supplied to the city by the appellant. Also, according to the parties' submissions it was supplied through a password-protected program. Therefore, I am satisfied that it qualifies as having been supplied in confidence as contemplated by section 10(1).

[39] As I find that the operating reports were "supplied" "in confidence" to the city by the appellant, the second part of the section 10(1) test has been met.

[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.

Part 3: disclosure can reasonably be expected to prejudice the appellant

[40] 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. 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[.]

[41] For the reasons outlined below, I find that a reasonable expectation of harm under section 10(1)(a) has been established.

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

[43] 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

[44] The appellant submits that disclosure of the operating reports 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."

[45] 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

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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.

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).

[46] 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, if released reasonably be expected to result in probable harm to the third party's competitive position.

[47] 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 reports and found:

> …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).

[48] The appellant submits that disclosure of the specific operating reports at issue in this appeal 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 operating reports provide insight into the appellant's " 'learning curve' – its acquired body of knowledge and skill relating to the LRT project." It submits that the operating 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 the operating reports explicitly document the challenges faced by the appellant through this process and its solutions to those challenges.

[49] The appellant submits that disclosure of the operating reports 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 amount to prejudice within the meaning of section 10(1)(a) of the *Act*.

[50] These descriptions of the harms that could reasonably be expected to occur if the information is disclosed 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.

[51] The appellant submits that although it has been awarded, Phase Two of the LRT, further contemplated phases have not awarded and disclosure of the operating reports 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

[52] 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 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.

[53] The city then appears to alter it position and submits, however, that in this case it is "unclear as to how disclosure of information in the records could reasonably be expected to result in harms contemplated under section 10(1) of the *Act*." The city submits that although the appellant submits that the operating reports contain detailed descriptions of technical solutions applied to remedy issues that arose during testing, the city is of the view that the information is only a summary of what the issue was and who was contacted to resolve the issue. It submits that, despite the appellant's position, "it is a challenge to appreciate how competitors would obtain a significant 'head start' on processes, methods or techniques to conduct winter testing on LRT vehicles upon viewing the weather conditions and frequency/time periods together with the general issue/fault information [described in the records]."

The appellant's reply representations

[54] The appellant notes that the city does not dispute the appellant's submission that disclosure of the operating repots could reasonably be expected to prejudice significantly its competitive position. It submits that the city "merely states that the issue of prejudice is 'unclear'." The appellant reiterates its position that the operating reports reveal techniques and processes that the appellant developed with respect to testing issues experienced over the course of two months of winter testing of LRVs. The appellant reiterates that were this information disclosed, it could reasonably be expected to be used by its competitors to

reconstruct its detailed model of LRV testing and to accurately anticipate issues that might arise during testing, without having had to invest any of their own time or resources.

The city's sur-reply representations

[55] In sur-reply, the city states that it maintains its position that it is "unclear" as to whether disclosure of the operating reports could reasonably be expected to result in the harm contemplated by section 10(1)(a). It submits:

> …[E]ven if one assumes that the records reveal information supplied in confidence to the city, the alleged "learning curve" associated with months of LRV testing would be the only potential reasonable source of prejudice. Although the city does not purport to be in a position to rule out whether a competing LRV manufacturer would be able to analyze any pattern of issues/faults resulting in an undue gain on their part or loss to [the appellant] both the content and manner in which the records were created suggests that the harms as described by [the appellant] including in the supporting affidavit are speculative and at best overstated.

Analysis and finding

[56] I have considered the parties' representations and the operating reports at issue. For the reasons set out below, I find that the appellant has established that disclosure of the information that remains at issue in the responsive records 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.

[57] 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 the specified 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]

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

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

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

> 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* . . .

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

[61] As previously stated, the records at issue in this appeal consist of daily LRV operating reports covering 44 days of testing between January 2, 2019 and March 5, 2019. Having reviewed these reports, I accept that the reports 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 and trial and error.

[62] 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 operating 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.

[63] I acknowledge that recently, in Order MO-4045, Adjudicator Kowalski found that 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 result in 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.

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[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).

[64] In my view, the circumstances in Order MO-4045 are distinguishable from those in this appeal. Having carefully considered the records that are before me, I find that the operating 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 records 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.

[65] For the reasons set out above, I find that the appellant has established that disclosure could reasonably be expected to prejudice significantly its competitive position and that the harms component of the three-part test has been met. Accordingly, I find that section 10(1)(a) applies to the information at issue in the records. 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.

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)?

[66] 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).

[67] 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.

[68] 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.

[69] 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 (or in this case, a requester) 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.[21]

[70] 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

[21] Order P-244.

central purpose of shedding light on the operations of government.[22] 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.[23]

[71] A public interest does not exist where the interests being advanced are essentially private in nature.[24] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[25]

[72] A public interest is not automatically established where the requester is a member of the media.[26]

[73] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[27]

[74] 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;[28] or
- disclosure would shed light on the safe operation of petrochemical facilities[29] or the province's ability to prepare for a nuclear emergency.[30]

[75] 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;[31]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[32]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[33] or
- the records do not respond to the applicable public interest raised by appellant.[34]

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[22] Orders P-984 and PO-2607.
[23] Orders P-984 and PO-2556.
[24] Orders P-12, P-347 and P-1439.
[25] Order MO-1564.
[26] Orders M-773 and M-1074.
[27] Order P-984.
[28] 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.), OrderPO-1805.
[29] Order P-1175.
[30] Order P-901.
[31] Orders P-123/124, P-391 and M-539.
[32] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[33] Order P-613.

[76] 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.

[77] 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.[35]

The parties' representations

The requester's representations

[78] As noted above, despite taking the position that the public interest override at section 16 applies to permit the disclosure of the operating reports, the requester did not make representations in this appeal.

The city's representations

[79] 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 which could result in widespread harm. The city submits that in contrast to the records at issue in Order MO-3628, the records at issue in this appeal do not appear to raise any safety issues.

[80] The city notes that in past IPC orders, adjudicators have found that the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*'s central purpose of shedding light on the operations of government. The city submits that it is not clear how disclosure of the information in the records would shed any light on matters pertaining to the operations of government. The city notes that in Order MO-3827, the adjudicator found that the public interest override applied in the context of a requester seeking to understand more about delays by a manufacturer that was contracted to supply streetcars to the Toronto Transit Commission at a significant cost to ratepayers. The city submits that the records at issue in this appeal are "entirely different" than the records at issue in that order and "it is difficult to identify any significant public interest in the records being made publicly available." It submits that "the city agrees with the position taken by [the appellant]…that the party claiming a compelling public interest must provide at least some evidence of such an interest."

[81] The city supposes that the appellant "may be seeking to acquire detailed information pertaining to delays in the completion and the construction and testing of the system." It notes that past orders, including Orders P-532 and P-568, the IPC has considered whether information that has already been disclosed or is in the public realm is sufficient to address any public interest considerations. The city submits that there may be documents that are already available to the public that contain the information the

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[34] Orders MO-1994 and PO-2607.

[35] 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.).

requester is seeking. It states that there have been numerous presentations to city committees and these presentations are also available on third party websites such as https://www.otrainfans.ca. It submits that, for example, information from an update to the City Finance Economic and Development Committee on March 5, 2019 is available on that website, including a 31-page slideshow presentation. The city submits that pages 17 through 19 of that slideshow presentation include a description of how the LRVs are tested and provide a summary of the progress made on testing various components, including the control system and the power system.

[82] The city submits that if I find that the issues addressed in the records rouse a strong public interest, a strong public interest in disclosure may or may not outweigh the purpose of the commercially valuable information exemption in section 10(1) of the *Act*, given the competitive nature of the public transport business.

The appellant's representations

[83] The appellant maintains that there is no compelling public interest in the disclosure of the records that is sufficient to override the harms that will result to the appellant from disclosure.

[84] 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."[36] 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.

[85] The appellant submits that the IPC undertook this analysis in Order MO-3628 where Adjudicator Hamilton found that some of the records at issue in that appeal raised sufficiently important issues of public safety to order disclosure of the non-conformance reports, which the appellant describes as summary reports, but not the attachments that contained confidential technical information.

[86] The appellant notes that in this case, the requester does not allege that that records raise issues of public safety or construction standards and it submits that, 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 also claims that the city agrees that the operating reports do not speak to those issues. The appellant 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 Lan An found that there was no compelling public interest in the disclosure of the portions of information that did not explicitly "inform or enlighten the public abut the reasons behind the delays."

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

[87] 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 two months 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 operating reports do not address the *reasons* for the delay in a manner that would enlighten the public.

[88] 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.

[89] 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 exemption at section 10(1).

Analysis and findings

[90] I have considered the parties' representations and the content of the operating reports at issue with a view to determining whether there is a compelling public interest in their 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.

[91] 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.

[92] 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 this case, the requester chose not to make representations. Accordingly, I have not been provided with sufficient evidence 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.

[93] Similarly, I have not been provided with sufficient evidence to conclude that disclosure 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 might have occurred. The records speak for themselves and do not reveal the requisite connection between their content and any such delays in completion.

[94] 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.[37] Applying that reasoning in this case, even though the requester in this case is a media organization, in the absence of sufficient arguments 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.

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

ORDER:

I find that the records at issue qualify for exemption under section 10(1)(a) and should not be disclosed. I grant the appellant's appeal of the city's decision to disclose them.

Original signed by: July 27, 2021
Catherine Corban
Adjudicator

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