Information and Privacy Commissioner,
Ontario, Canada

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

INTERIM ORDER MO-3177-I

Appeal MA13-261

City of Markham

March 30, 2015

Summary: The appellant sought access to reports prepared by a number of specified firms and individuals relating to the proposal for the construction of an arena in the city. The city located records responsive to the request and issued a decision denying access to them in their entirety. The city relied on the discretionary exemptions at sections 6(1)(b) (closed meeting), 7 (advice or recommendations), 11 (a), (c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege), and the mandatory exemption at section 10(1) (third party information) to deny access. The appellant appealed the city's decision to this office and raised the possible application of the public interest override in section 16 of the *Act.* In this interim order, the adjudicator finds that the mandatory third party information exemption does not apply. The adjudicator orders disclosure of one record, with the exception of some personal information. The city is ordered to reconsider all the remaining discretionary exemption claims and may disclose the records to the appellant, if it decides to, in accordance with the timelines in the interim order provisions.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7, 10(1), 11, 12 and 14; *Municipal Act*, *2001,* S.O. 2001, c.25, sections 239(1)(a), (c) and (f), and 239(3.1).

Orders and Investigation Reports Considered: Orders MO-2151 and MO-3058-F.

Cases Considered: *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, reversing 2007 ONCA 32, which reversed (2004) 70 O.R. (3d) 332 (Div. Ct.); *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div. Ct.); *John Doe v. Ontario (Finance)*, 2014 SCC 36.

OVERVIEW:

[1] The appellant, a representative of a local ratepayers association, submitted a request to the City of Markham (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all reports relating to the Markham Sports Entertainment and Cultural Centre (GTA Centre), naming eight specific sources for the reports.

[2] The city located 12 records and indicated that only 11 of them were responsive to the request. It suggested that one record was not responsive to the request because it is not a report, but rather a work plan. The city also advised that it did not locate any records relating to one of the individuals named by the appellant as a potential source. The city issued a decision denying access to all of the records, in their entirety, including the record it identified as being non-responsive, relying on the discretionary exemptions at sections 6(1)(b) (closed meeting), 7 (advice or recommendations), 11 (a), (c), (d) and (e) (economic and other interests) and 12 (solicitor-client privilege) and the mandatory exemption at section 10(1) (third party information). The city provided the appellant with an index of records, which identified each record and the corresponding exemptions claimed.

[3] The appellant was not satisfied with the city's decision and appealed it to this office.

[4] During the mediation stage of the appeal, this office notified three affected parties about the appeal and sought their views on disclosure of the records. None of these affected parties consented to disclosure. In addition, one affected party indicated that the records pertaining to his organization also contained the personal information of certain individuals, thus raising the possible application of the mandatory exemption at section 14(1) (personal privacy).

[5] Also during mediation, the appellant confirmed that she seeks access to the record identified by the city as being non-responsive and she wants this to be included as a record at issue. As well, the appellant claimed that there is a compelling public interest in disclosure of the records, and accordingly, the public interest override in section 16 was added as an issue in the appeal.

[6] A mediated resolution of the appeal was not possible and this file was forwarded to the adjudication stage of the appeal process for a written inquiry under the *Act.* The adjudicator who was originally assigned to this appeal sought and received representations from the appellant and the city. She also invited the representations of three third parties whose interests could be affected by disclosure of the records (the affected parties); two of the affected parties provided representations in response, Affected Party 1 and Affected Party 3.

[7] Because it was not clear to the adjudicator from the appeal file whether the city agrees to include the record it identified as non-responsive as a record in the appeal, she added the responsiveness of record 3 as an issue in the appeal. Also, in response to the privacy concerns of one of the affected parties, she added as issues in the appeal the definition of "personal information" in section 2(1) and the possible application of section 14(1) of the *Act*.

[8] The adjudicator shared the representations she received with the parties in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7.* She did not share the portions of the city's representations and those of Affected Party 1 and Affected Party 2 which she determined satisfied the confidentiality criteria of this office.

[9] The appeal file and related Appeal MA12-508, were then transferred to me for final determination.

[10] In the meantime, there have been a number of developments which have significant bearing on the appeal:

- The city decided not to proceed with the GTA Centre proposal.
- Information relating to the city's plan for the GTA Centre has been published in the media; this is in addition to the information previously disclosed by the city about the proposal.
- Information relating to this appeal and to related Appeal MA12-508 has been published in the media.
- The city informed this office that a motion before City Council (Council) to have all of the records at issue in this appeal and in related Appeal MA12-508 disclosed to the public was defeated on the basis that the *Act* prohibits disclosure.

[11] In light of these developments, I have decided to issue this interim order addressing a number of the issues in this appeal and reserving my decision on certain issues pending further representations from the city, including additional representations on its exercise of discretion to apply certain discretionary exemptions to the records.

[12] In this interim order, I find that part of record 3 is exempt under the mandatory personal privacy exemption in section 14; however, the remainder of record 3 does not qualify for exemption under any of the discretionary exemptions claimed by the city or under the mandatory exemption in section 10, and I order it disclosed. I also find that none of records 1, 1(a), 1(b), 1(c), 1(d) or 2 qualifies for mandatory exemption under

section 10. I order the city to re-exercise its discretion to withhold records 1, 1(a), 1(b), 1(c), 1(d), 2 and 4 through 13 under the various discretionary exemptions claimed for them.

RECORDS:

[13] The records at issue in this appeal as set out in the index provided by the city are the following:

Record	Pages	General Description	Sections Applied
1	1 – 18	Report/Power Point Presentation entitled "New Arena Development in Markham: A Review" dated April 12, 2012, prepared by Affected Party 1	6(1)(b), 7, 10, 11
1(a)	19 – 22	Background Reports (final deliverables 1/5) undated, prepared by Affected Party 1	6(1)(b), 7, 10, 11
1(b)	23 – 30	Background Reports (deliverable 2) undated, prepared by Affected Party 1	6(1)(b), 7, 10, 11
1(c)	31 – 39	Background Reports (deliverable 3) undated, prepared by Affected Party 1	6(1)(b), 7, 10, 11
1(d)	40 – 45	Background Reports (deliverable 4) undated, prepared by Affected Party 1	6(1)(b), 7, 10, 11
2	46 – 55	Memo re: Land Values and a Major Sports Complex, dated April 7, 2011, from Affected Party 2 to [named individual], Markham	7, 10, 11
3	56 – 82	Work Plan Agreement dated February 25, 2011, from Affected Party 3 to [named individual], Markham	7, 10, 11

4	83 – 107	Report / Power Point dated January 24, 2011, from Law Firm 1	6(1)(b), 7, 11, 12
5	108 – 127	Report / Power Point entitled “Exploratory Economic Impact Analysis of a Major Sports / Even Arena in Markham Centre” dated January 22, 2011, prepared by Economic Development Department, Markham	6(1)(b), 7, 11
6	128 – 131	Legal Memo dated June 21, 2011, from Law Firm 2 to Markham	7, 11, 12
7	132	Legal Memo dated June 21, 2011, from Law Firm 2 to Markham	7, 11, 12
8	133 – 145	Legal Memo dated June 21, 2011, from Law Firm 2 to Markham	7, 11, 12
9	146 – 148	Legal Memo dated September 13, 2011, from Law Firm 2 to Markham	7, 11, 12
10	149 – 155	Legal Memo dated September 14, 2011, from Law Firm 2 to Markham	7, 11, 12
11	156 – 162	Legal Memo dated December 7, 2011, from Law Firm 2 to Markham	7, 11, 12
12	163 – 164	Letter dated April 27, 2012, from Law Firm 2 to Markham	7, 11, 12
13	165 – 173	Legal Memo dated February 24, 2013, from Law Firm 2 to City Solicitor	7, 11, 12

ISSUES:

A. What is the scope of the request? Is record 3 responsive to the request?

B. Does the mandatory third party exemption at section 10 apply to records 1, 1(a), 1(b), 1(c), 1(d), 2 and 3?

C. Does record 3 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

D. Does the mandatory exemption at section 14(1) apply to any of the personal information in record 3?

E. Does the discretionary exemption at section 12 apply to records 4 and 6 through 13?

F. Does the discretionary exemption at section 6(1)(b) apply to records 1, 1(a), 1(b), 1(c), 1(d) and 5?

G. Does the discretionary exemption at section 7 apply to record 2 and to the remainder of record 3?

H. Would disclosure of the remainder of record 3 harm the city's economic or other interests under section 11(a), (c), (d) and/or (e) of the *Act*?

I. Was the city's exercise of discretion proper in the circumstances?

DISCUSSION:

A. What is the scope of the request? Is record 3 responsive to the request?

[14] The city claims that record 3 is not responsive to the appellant's request. In determining the scope of a request, a consideration of section 17 of the *Act* is necessary. Section 17 imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. It states, in part:

> (1) A person seeking access to a record shall,
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> (a) make a request in writing to the institution that the person believes has custody or control of the record;
>
> (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record;
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> . . .

> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

[15] This office has consistently stated that institutions should adopt a liberal interpretation of a request in order to best serve the purpose and spirit of the *Act*. And that generally, ambiguity in the request should be resolved in the requester's favour.[1] To be considered responsive to the request, records must "reasonably relate" to the request.[2]

[16] In her request, the appellant specifically identifies Affected Party 3, the consulting firm that authored record 3. She also identifies the specific issue Affected Party 3 was to address in respect of the GTA Centre. The appellant lists Affected Party 3 and the subject matter as the first item in her request after starting off by stating that she seeks access to: "All reports relating to the MSECC (NHL Arena) GTA Centre." The appellant does not address this issue directly in her representations. However, her position throughout the appeal process has been that record 3 qualifies as one of the reports that she specifically requested and that it, like all the other reports at issue in this appeal, should be disclosed.

[17] The city submits that there is no ambiguity in the scope of the appellant's request and thus, no clarification of her request was required. The city states that the request is for access to "reports" pertaining to the GTA Centre and it understood this to mean access to "records of statements of fact, investigations, opinions, or options pertaining to the GTA Centre." The city asserts that its interpretation of the request is consistent with the plain meaning of the words of the request as submitted. It concludes by stating that record 3 does not reasonably relate to the scope of the request because it is merely a proposed work plan and contract for services from Affected Party 3 which would have led to the issuance of a report and account on a particular matter; the work was never completed and no report was ever created. The city provides an affidavit from its Treasurer who affirms that the city terminated the engagement of Affected Party 3 before the work contemplated in record 3 was completed and no work product as envisioned in the work plan was provided to the city.

[18] Affected Party 3 states that record 3 is a letter, not a report as requested by the appellant. It explains that its letter is a proposal from it to the city to enter into an engagement with the city which would ultimately culminate in the preparation of a report. It continues that the letter does not contain any of its findings, guidance or advice as would be contained in a report that it would normally prepare. Rather, it contains a detailed work plan, an overview of its qualifications and past experience in

[1] Orders P-134 and P-880.
[2] Orders P-880 and PO-2661.

the area, its proposed team for the engagement, its fees and timing, and the applicable terms and conditions. Affected Party 3 asserts that record 3 can properly be classified as a contractual precursor for the ultimate preparation of a report and on this basis, should be considered non-responsive to the request for "reports."

Analysis and findings

[19] The appellant's request for "all reports" relating to the GTA Centre from eight named sources is sufficiently detailed for the city to be able to identify the records responsive to the request. I find that in specifically identifying Affected Party 3, which authored record 3, as well as the subject matter that Affected Party 3 was intended to advise the city on, which is precisely the issue record 3 addresses, the appellant placed record 3 squarely within the scope of the request. My conclusion is supported by the appellant's consistent position throughout the appeal process that she sought access to record 3 as part of her request. It is difficult to understand why the city would take the position that record 3 is not responsive to the request in these circumstances and attempt to justify its position by arguing the record is not a report; particularly after the appellant was advised at mediation that record 3 consisted of a work plan agreement from Affected Party 3 and she confirmed that she wished for it to be included as a responsive record in her appeal.

[20] I also note that this is the second of two appeals before this office in which the appellant is seeking and has been denied access to a number of reports and other records related to the GTA Centre by the city; in these circumstances, it is clear that she is interested in the subject matter of record 3 and that record 3 in turn, reasonably relates to her request. The fact that record 3 is not called a report or that it technically is not a report is not a reasonable basis, in the face of the appellant's clear request for records originating with Affected Party 3 about the GTA Centre regarding a specific issue, for the city's decision to narrow the scope of the request by asserting that record 3 is not responsive. I find that record 3 is responsive to the request and falls within the scope of this appeal.

B. Does the mandatory third party exemption at section 10 apply to records 1, 1(a), 1(b), 1(c), 1(d), 2 and 3?

[21] Section 10(1) is a mandatory exemption designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4] Section 10(1) states:

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

> 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;
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> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
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> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[22] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[23] The types of information listed in section 10(1) have been discussed in prior orders:

> *Trade secret* 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,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[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]
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

[24] I adopt these definitions in this appeal.

Representations

[25] The city submits that the records reveal trade secrets of third parties, including financial models, proprietary analysis tools, methodologies and descriptions of past work. It adds that only the affected parties who have an interest in the records can fully provide me with sufficient information necessary to make a decision on the applicability of section 10 to the records.

[26] In its non-confidential representations, Affected Party 1 explains that its consulting arrangement with the city entailed the preparation of the reports in records 1, 1(a), 1(b), 1(c) and 1(d). It continues that the main aim of its work was to examine other reports prepared for the city, including the financial model proposed for the GTA Centre, and to provide some comments on these. Affected Party 1 states that it was not

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[5] Order PO-2010.
[6] *Ibid*.
[7] Order P-1621.
[8] *Supra*, note 5.

involved in the development of the financial model, the forecasting of attendance and revenue, and any economic impact studies. Rather, it was invited to review and comment on the model and projections made by the city and other consulting groups. Affected Party 1 submits that that record 1(a) contains recommendations regarding an agreement structure which is an innovative, proprietary strategy that has potential monetary value for it. It adds that record 1(b) contains summary information on specific agreements that it compiled for the city as a reference, and that it obtained some of the information in this record from a third party on the condition that it would be included in a report that would not be made public. Affected Party 1 states that the remaining records contain its assessments of other reports and statements provided by consultants to the city. It states that these remaining records also contain information from it and from another third party that was included in the records on the condition that the records would not be made public. Portions of the representations of Affected Party 1 are confidential and although I have taken them into consideration in arriving at my decision, I am not able to refer to them in this order.

[27] Affected Party 2 did not provide representations in this appeal although it was invited to do so. During the mediation stage of the appeal when Affected Party 2 objected to disclosure of record 2 it submitted, "[I]t is possible that the release of this document could have significant impacts that would be consistent with the issues anticipated in 10(a) and (c)."

[28] Affected Party 3 states that record 3 contains a detailed description of its work plan including its fees. It argues that this qualifies as commercial information, since it relates to the selling of services, and financial information since it reflects its pricing practices.

[29] The appellant does not address this issue directly in her representations.

[30] Based on my review of records 1, 1(a), 1(b), 1(c), 1(d), 2 and 3 and having considered the representations of the parties including the confidential representations provided, I find that only record 3 contains commercial and financial information in accordance with the definitions above. Having found that record 3 reveals the type of information protected by section 10(1) in satisfaction of part 1 of the test, I will consider whether it also satisfies the remaining two parts of the test under section 10(1) of the *Act.*

[31] I find that the information contained in records 1, 1(a), 1(b), 1(c), 1(d) and 2, is not of the type that qualifies for protection under section 10(1) of the *Act.* These records do not relate to the selling or buying of services such that they reveal commercial information. Nor do they contain the financial information or trade secrets of the affected parties in accordance with those definitions above. As I have found that records 1, 1(a), 1(b), 1(c), 1(d) and 2 do not meet part 1 of the test, they cannot qualify for exemption under section 10(1) of the *Act*. However, for the sake of

completeness, I will review the other parts of the test as they apply to all of the records for which the city has claimed section 10(1).

Part 2: supplied in confidence

[32] 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.[9] 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.[10]

[33] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[11] 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
- prepared for a purpose that would not entail disclosure.[12]

[34] The city asserts that the affected parties submitted the records to it with a reasonable expectation of confidentiality that was both implicit and explicit. It states that both it and the affected parties have consistently ensured that the information in the records has not been made publicly available. It adds that it implemented special systems and processes to control access to the information contained in the records out of concern about protecting the confidentiality of the information.

[35] Affected Party 1 states that it submitted the information in the records to the city on the understanding that the information would not be made public. Affected Party 3 submits that it directly supplied record 3 to the city with the expectation that the work

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[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Order PO-2020.
[12] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

plan would remain confidential. It adds that the information contained in record 3 is not publicly available and was prepared only for the consideration and review of the city.

[36] The appellant does not directly address this issue.

[37] I am satisfied that the affected parties supplied all of the information in the records to the city; however, I am not convinced that they did so in explicit confidence as there is insufficient evidence for such a finding. The records do not, on their face, contain any indication of confidentiality. With respect to record 3, its confidentiality is not addressed in the body of the letter. The sole reference to confidentiality is found in the copy of Affected Party 3's "standard terms and conditions" attached to the letter which states that the client will treat in confidence Affected Party 3's methodologies, know-how, knowledge etc. Affected Party 3 has not specified which parts of record 3 if any, contain its methodologies, know-how and knowledge; rather, it has made the general assertion that the entire record contains such information. Both the city and the affected parties submit that they treated the records confidentially in accordance with their understanding that they were prepared for the sole use of the city and not for publication. I accept that the evidence before me supports a conclusion that the records were supplied with an implicit expectation of confidentiality, and on this basis, I find that part 2 of the test has been met.

Part 3: harms

[38] This part of the test requires the city and the parties resisting disclosure in this appeal, to provide detailed and convincing evidence about the potential for harm. Evidence amounting to speculation of possible harm is not sufficient.[13] The failure of the parties resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[14] 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]

[39] The city submits that disclosure of the records could significantly prejudice the competitive position of persons or an organization as contemplated by section 10(1)(a) of the *Act.* It asserts that the information contained in the records was supplied by the affected parties, which practice in a highly competitive industry comprised of many competing firms providing similar service. It adds that the models, analysis, methodologies and past client work contained in the records are proprietary to the

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[13] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[14] Order PO-2020.
[15] Order PO-2435.

affected parties and give them a competitive advantage over other firms practicing in the same field. The city asserts that disclosure of the records could interfere significantly with the contractual negotiation of the city as it relates to the GTA Centre. In respect of sections 10(1)(b), the city submits that only the affected parties can reasonably be expected to identify whether the disclosure of the record would result in similar information no longer being supplied to it. The city adds that it is in the public interest for it to continue to have access to similar information so that it may be able to freely access the advice of experts to assist it in any analysis of proposed commercial transactions. It asserts that if experts do not supply necessary confidential information out of fear that the information may be disclosed, its inability to obtain such information can be reasonably expected to impact its ability to transact business. Finally, with respect to the harms described in section 10(1)(c), the city defers to the affected parties to identify any reasonably expected undue loss or gain.

[40] The representations of Affected Party 1 are summarized under part 1 of the test above. Affected Party 1 submits that record 1(a) contains recommendations regarding an agreement structure which is an innovative, proprietary strategy that has potential monetary value for it. It adds that record 1(b) contains summary information on specific agreements that it compiled for the city as a reference, and that it obtained some of the information in this record from a third party on the condition that it would be included in a report that would not be made public. Affected Party 1 states that the remaining records contain its assessments of other reports and statements provided by consultants to the city.

[41] Affected Party 3 states that record 3 contains information that represents its proprietary methodology for consulting engagements. It explains that its proprietary methodology is based on the extensive experience and knowledge amassed by its partners and employees, and that this extensive experience and knowledge is the principal asset through which it carries on business and a critical factor upon which prospective clients rely in determining which consultant to retain. It submits that for this reason, disclosure of the information could reasonably be expected to significantly prejudice its competitive position as contemplated by section 10(1)(a), and to result in its undue loss and undue gain to its competitors as contemplated by section 10(1)(c). Affected Party 3 states that its competitors looking to take business away from it would unduly gain from the disclosure of the record, particularly inexperienced consulting firms that do not have the knowledge or experience necessary to develop a “best-in-class proprietary methodology” for performing this type of advisory engagement.

[42] I find the city’s representations on part 3 of the test to be tentative, speculative and unconvincing. The city has not provided me with detailed and convincing evidence that any of the harms under sections 10(1)(a), (b) or (c) could reasonably be expected to occur if the records were disclosed.

[43] I have reviewed the representations of Affected Party 1, including its confidential representations as they relate to each of the records it authored. I find that its submissions on the risk of harm are neither detailed nor convincing and at best, amount to speculation of possible harm, which is not sufficient to meet this part of the test. Without referring specifically to the confidential representations made by this party, I find that its representations on records 1 and 1(d) are not convincing, given that it was involved in this project as a consultant at the time, on the basis that the project would likely proceed. With respect to its representations in support of its position that records 1(a), 1(b) and 1(c) qualify for exemption, they identify possible harms that will result to Affected Party 1 and focus on the expectation of confidentiality it had when providing the information to the city. I do not accept Affected Party 1's position that these harms could result from disclosure as the harms are speculative. As a result, I find that the harms in section 10(1) are not established for records 1, 1(a), 1(b), 1(c) or 1(d), and these records do not qualify for exemption under section 10(1).

[44] As noted above, Affected Party 2 does not provide representations on the possible harms resulting from the disclosure of the record relating to it. In the absence of such representations, and in consideration of the information contained in record 2, I find that the harms in section 10(1) are not established, and that record 2 does not qualify for exemption under that section.

[45] The representations of Affected Party 3 on this issue focus on the nature of the information it asserts is contained in record 3 rather than the risk of harm posed by disclosure. As with the city, I find that Affected Party 3's submissions on the risk of harm are neither detailed nor convincing; rather, they are bald assertions that essentially repeat the words of the *Act.* In particular, Affected Party 3 has not explained why disclosure of record 3 would significantly prejudice its competitive position under section 10(1)(a). The record is a proposed work plan prepared over four years ago that was never accepted or undertaken for a project that did not go ahead. The representations of Affected Party 3 do not convince me that in these circumstances, disclosure of the information in the record would significantly prejudice its competitive position or significantly interfere with any contractual or other negotiations.

[46] Affected Party 3 has also not sufficiently explained why a competitor would derive undue gain from the disclosure of record 3. As noted above, record 3 is a project specific work plan in the form of an offer letter that sets out the terms for the engagement that were generated based on the city's specific circumstances and needs regarding the GTA Centre. It also contains terms and conditions of the agreement as well as estimated professional fees. Affected Party 3 has not addressed the specific way or ways in which the harms in section 10(1)(c) could reasonably be expected to result from disclosure of the record and its various parts. Based on my review of the record and my consideration of the representations before me, I disagree that disclosure of the record would give its competitors a competitive advantage or undue gain considering the very specific circumstances of the engagement, the age of the record and its status

as an agreement that was never executed, and the stature of Affected Party 3 in the consulting industry. Affected Party 3 is a well-established industry leader with global reach, a fact that is stated in the record itself. The GTA Centre project was specific to the city and the circumstances that existed at the time. The engagement described in record 3 is not a particularly extensive or lucrative one as it deals with one issue primarily. The suggestion that an inexperienced competitor would be able to use record 3 in order to successfully bid on another similar project to the detriment of Affected Party 3 and its competitive position is highly speculative.

[47] I am unable to infer the harms claimed by Affected Party 3 and the city from record 3 itself, or from the circumstances surrounding record 3 and its disclosure in this appeal. I find that there are no exceptional circumstances in this appeal that lead me to conclude that any of the section 10(1) harms claimed could reasonably be expected to result from disclosure of record 3.

[48] Accordingly, I do not accept that disclosure of the work plan agreement prepared by Affected Party 3 for the city's consideration regarding the GTA Centre and its very specific surrounding circumstances, would lead to any of the harms under section 10(1). I also find that there are no exceptional circumstances in this appeal that would lead me to such a conclusion in the absence of adequate evidence from Affected Part 3 and the city.

[49] In summary, I find that none of the records for which the section 10(1) exemption is claimed, qualifies for mandatory exemption.

C. Does record 3 contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[50] In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1), in part, as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

> . . .
>
> (h) the individual's name where it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[51] The list of examples of personal information under section 2(1) is not exhaustive and therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[16]

[52] Sections 2(2.1) and (2.2) also relate to the definition of personal information and state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[53] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[17] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[18] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[19]

[54] Affected party 3 submits that record 3 is replete with personal information regarding its personnel since it contains information regarding the employment and education histories of a number of identifiable individuals. The city take the position that there is no personal information contained in record 3 or any of the records at issue in this appeal. The appellant does not specifically address this issue in her representations.

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[16] Order 11.
[17] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[18] Orders P-1409, R-980015, PO-2225 and MO-2344.
[19] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

[55] One part of record 3 contains the names of the team proposed by Affected Party 3 to work on the engagement. The information in this section of the record consists of the names of a number of personnel, their professional title within Affected Party 3, their role for the proposed engagement with the city, and a professional biography for each that includes details about their professional qualifications and experiences. I find that while this information appears to be about these individuals in a professional capacity, it also reveals something of a personal nature about them including detailed information about their professional qualifications and experiences, and the fact that they have worked on specific projects. I find that this information is about these individuals in a personal capacity and that it would be reasonable to expect that these individuals would be identified if the information were disclosed. Accordingly, I find that this information qualifies as "personal information" as defined in paragraphs (a), (b) and (h) of the definition in section 2(1). I will therefore consider whether the information in record 3 that I have found to be "personal information" qualifies for exemption under section 14(1).

[56] I find that the remainder of record 3 does not contain personal information and cannot qualify for exemption under section 14(1). I will consider whether this remaining information qualifies for exemption under the discretionary exemptions in sections 7 or 11.

D. Does the mandatory exemption at section 14(1) apply to any of the personal information in record 3?

[57] Section 14(1) of the *Act* prohibits the disclosure of another individual's personal information to a requester unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies. In this appeal, the only exception that might apply is section 14(1)(f), which allows disclosure of the personal information if it would not constitute an unjustified invasion of personal privacy. The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of privacy under section 14(1)(f). Section 14(2) provides some criteria to be considered when making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Section 14(3)(d) states that disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information relates to employment or educational history.

[58] Affected Party 3 takes the position that the presumption in section 14(3)(d) applies to the personal information in record 3. The presumption in section 14(3)(d) protects information that relates to an individual's employment or educational history such as the start and end dates of employment and the number of years of service. Information contained in resumes[20] and work histories[21] falls within the scope of section

[20] Orders M-7, M-319 and M-1084.
[21] Orders M-1084 and MO-1257.

14(3)(d). A person's name and professional title, without more, does not constitute "employment history".[22]

[59] Affected Party 3 submits that the proposed team information contains information relating to the employment and educational histories of a number of identifiable individuals. It relies on Orders M-7, M-319, MO-1084 and MO-1257 to argue that of this resume or work history information falls within the scope of section 14(3)(d) and therefore, its disclosure is presumed to be an unjustified invasion of privacy.

[60] Based on my review of the record, I partly agree with Affected Party 3. The biographical information about the individuals that I have found to be personal information describes the number of years they have worked in a particular area, specifics about their professional experiences and expertise, and a list of recent projects that each individual has completed. This information, although not provided in a resume format, is similar to a resume in that it sets out the individuals' skills and experience. Many previous orders of this office have determined that information about employment or educational history contained in resumes falls within the scope of section 14(3)(d).[23] I agree with and adopt those findings. I find that all of this information relates to these individuals' employment history and falls within the ambit of the presumption in section 14(3)(d). I further find that disclosure of this information would constitute an unjustified invasion of personal privacy and therefore, the information is exempt under section 14(1).

E. Does the discretionary exemption at section 12 apply to records 4 and 6 through 13?

[61] The city submits that record 4, the PowerPoint presentation by Law Firm 1, and records 6 through 13, memos and correspondence to the city from Law Firm 2, are solicitor-client privileged records exempt from disclose under section 12 of the *Act*. This section states:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[62] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The city submits that both branches of section 12 apply to records 4 and 6 through 13.

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[22] Order P-216.
[23] Orders MO-2151 and MO-3058-F.

Branch 1: common law solicitor-client communication privilege

[63] At common law, solicitor-client privilege encompasses solicitor-client communication privilege and litigation privilege; only solicitor-client communication privilege is relevant in this appeal.

[64] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice.[24] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[25] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between the solicitor and client aimed at keeping both informed so that advice can be sought and given.[26] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[27]

[65] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[28] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[29]

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

- knows of the existence of the privilege, and
- voluntarily demonstrates an intention to waive the privilege.[30]

[67] An implied waiver of solicitor-client privilege may also occur where fairness requires it and where some form of voluntary conduct by the privilege holder supports a finding of an implied or objective intention to waive it.[31]

[68] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege.[32] However, waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party.[33]

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[24] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[25] Orders PO-2441, MO-2166 and MO-1925.
[26] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[27] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[28] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[29] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[30] *S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.).
[31] *R. v. Youvarajah*, 2011 ONCA 654 (CanLII) and Order MO-2945-I.
[32] J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; Order P-1342, upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.).

Branch 2: statutory solicitor-client communication privilege

[69] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons. Like the common law solicitor-client communication privilege, this privilege covers records prepared for use in giving legal advice. Only the head of an institution may waive the statutory privilege in section 12.[34]

Representations

[70] The city submits that the records are privileged under both the common law and statutory branches because they are communications between it and its solicitors. The city states that it retained Law Firms 1 and 2 and sought legal advice from them regarding various aspects of the proposed GTA Centre. It provides an affidavit from the City Solicitor which describes the nature of the legal advice provided by the law firms and contained in each of the records it claims are privileged. These details formed part of the confidential representations of the city and I am therefore not able to describe them in this order. The city asserts that its solicitor-client communication privilege in these records has not been lost through waiver.

[71] The appellant does not address this issue directly in her representations. Her position is that the city should exercise its discretion to disclose all of the requested records, including those for which it has claimed solicitor-client privilege.

Analysis and findings

[72] Having reviewed the parties' representations in their entirety and the records themselves, I am satisfied that records 4 and 6 through 13 are solicitor-client privileged communications under both branches 1 and 2 of section 12. All of these records are direct written communications prepared by lawyers at Law Firms 1 and 2 for their client, the city, conveying legal advice on various issues relating to the GTA Centre in confidence. In addition, in the absence of evidence to the contrary, I accept the city's assertion that it has not lost its privilege through waiver with respect to records 6 through 13. As a result, I find that records 6 through 13 qualify for exemption under the discretionary exemption in section 12 of the *Act*, subject to my review of the city's exercise of discretion below.

[73] However, it is not clear to me whether the solicitor-client privilege in record 4 has been waived.

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[33] *General Accident Assurance Co. v. Chrusz,* cited above; Orders MO-1678 and PO-3167.
[34] See *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.).

[74] The city states that record 4 was presented to the General Committee of Council on January 24, 2011; a closed meeting. However, the confidential material it provides to this office suggests that certain third party individuals who were not members of Council or city staff may have attended the January 24th closed meeting during which this solicitor-client privilege record was presented. If record 4 was in fact disclosed to a third party, the solicitor-client privilege may have been lost by the city. Because it is not clear from information provided to me whether any third party individuals were in fact present during the closed meeting presentation of record 4 and if so, in what capacity they were present, and because the city has not specifically addressed in its representations the possible loss of privilege with respect to record 4, I will invite the city under separate correspondence to provide specific representations on whether the circumstances resulted in the loss of the solicitor-client privilege.

[75] Although I reserve my decision regarding the application of section 12 to record 4, I will nonetheless order the city to provide representations on its exercise of discretion to apply the section 12 exemption to this record below. If the city chooses to re-exercise its discretion and disclose record 4, then it need not provide representations on its waiver of privilege in record 4.

[76] I have found that, subject to my review of the city's exercise of discretion, records 6 through 13 qualify for exemption under section 12, and my decision on the application of section 12 to record 4 is reserved. In these circumstances, I will not at this time review the possible application of sections 6(1)(b), 7 and 11 to these records.

F. Does the discretionary exemption at section 6(1)(b) apply to records 1, 1(a), 1(b), 1(c), 1(d) and 5?

[77] The closed meeting exemption in section 6(1)(b) reads:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[78] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting

2. a statute authorizes the holding of the meeting in the absence of the public, and

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[35]

[79] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[36] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the question to ask is whether the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.[37]

[80] With respect to the third requirement set out above, section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. Rather, it specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[38] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision[39]; and
- "substance" generally means more than just the subject of the meeting.[40]

[81] Section 6(2) of the *Act* sets out exceptions to section 6(1). It reads, in part:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record if,
>
> (a) in the case of a record under clause (1)(a), the draft has been considered in a meeting open to the public.

Representations

[82] The city submits that section 6(1)(b) applies to records 1, 1(a), 1(b), 1(c), 1(d) and 5, and refers to a number of meetings held by Council or a committee of Council which discussed these records. In particular, it refers to four specific General Committee meetings and two specific Council meetings as closed meetings relating to all of these records. It also refers to two closed meetings of the Markham Sports Entertainment &

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[35] Orders M-64, M-102 and MO-1248.
[36] Order M-102.
[37] *St. Catharines (City) v. Ontario (Information and Privacy Commissioner)*, 2011 ONSC 2346 (Div. Ct.).
[38] Orders MO-1344, MO-2389 and MO-2499-I.
[39] Order M-184.
[40] Orders M-703 and MO-1344.

Cultural Centre Committee, a sub-committee of Council, relating to records 1, 1(a), 1(b), 1(c) and 1(d).

[83] The city submits that the meetings above were held in the absence of the public when the records were the substance of discussions or deliberations of Council or the committee of Council, and states that these meetings were closed to the public in accordance with various sections of the *Municipal Act*, *2001,* specifically, sections 239(1)(a), (c) and (f), and 239(3.1). Those sections state:

> *Meetings open to public*
>
> 239 (1) Except as provided in this section, all meetings shall be open to the public.
>
> *Exceptions*
>
> (2) A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> (a) the security of the property of the municipality or local board;
>
> (c) a proposed or pending acquisition or disposition of land by the municipality or local board;
>
> (f) advice that is subject to solicitor-client privilege, including communications necessary for that purpose;
>
> *Educational or training sessions*
>
> (3.1) A meeting of a council or local board or of a committee of either of them may be closed to the public if the following conditions are both satisfied:
>
> 1. The meeting is held for the purpose of educating or training the members.
>
> 2. At the meeting, no member discusses or otherwise deals with any matter in a way that materially advances the business or decision-making of the council, local board or committee.

[84] In order to determine whether the exemption in section 6(1)(b) applies, one of the issues I must decide is whether the purposes of the closed meetings were to deal with the specific subject matter described in the relevant provisions of section 239 of the *Municipal Act* relied on by the city. In particular, I must determine whether the subject matter being considered at these meetings was the security of the property (239(a)), a proposed or pending acquisition or disposition of land by the city (239(c)), advice that is subject to solicitor-client privilege (239(f)) or for the purpose of educating

or training the members (239(3.1)). If I find that the city had the authority to proceed *in camera*, the decision of the Divisional Court in *St. Catharines* then requires me to review the records to determine whether or not portions of them, which relate to other matters, can nevertheless be ordered disclosed on the basis that they do not qualify for exemption under section 6(1)(b) of the *Act*.

[85] However, prior to conducting such a review, I note that neither the city nor the appellant was given the opportunity to address a section of the *Municipal Act* which may have a significant bearing on my decision regarding the application of section 6(1)(b). Specifically, section 239(9) of the *Municipal Act*, which states:

> ***Record may be disclosed***
>
> (9) Clause 6(1)(b) of the *Municipal Freedom of Information and Protection of Privacy Act* does not apply to a record of a meeting closed under subsection (3.1).

[86] The city relies on section 239(3.1) of the *Municipal Act* as the reason for which two particular council meetings were closed to the public (the meetings of April 12 and 16, 2012). The city states that records 1, 1(a), 1(b), 1(c), 1(d), 4 and 5 relate to those meetings. Section 239(9) of the *Municipal Act* states that the section 6(1)(b) exemption of the *Act* does not apply to a record of a meeting closed under section 239(3.1) of the *Municipal Act*.

[87] The possible application of section 239(9) of the *Municipal Act*, and the impact it may have on my findings regarding the application of section 6(1)(b) of the *Act* to a number of the records before me, has not been identified as an issue in this appeal. Because the city has not addressed this issue, and because of the significant impact this section may have on my findings, I will invite the city and the appellant, by separate correspondence, to provide specific representations on what impact, if any, section 239(9) of the *Municipal Act* may have on the section 6(1)(b) issue before me.

[88] Although I reserve my decision regarding the application of section 6(1)(b) to the records at issue before me, I will nonetheless order the city to provide representations on its exercise of discretion to apply the section 6(1)(b) exemption to the records, below. If the city chooses to re-exercise its discretion and disclose the records, then it need not provide representations on the possible impact of section 239(9) of the *Municipal Act*.

G. Does the discretionary exemption at section 7 apply to record 2 and to the remainder of record 3?

[89] Section 7(1) states:

> A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[90] The purpose of section 7 is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.[41]

[91] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred.

[92] "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take. [42]

[93] "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.[43]

[94] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section

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[41] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[42] *Supra* note 41, at paras 26 and 47.
[43] Order P-1054.

7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.[44]

[95] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by section 7(1).[45]

[96] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information[46]
- a supervisor's direction to staff on how to conduct an investigation[47]
- information prepared for public dissemination[48]

[97] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7.

Representations

[98] The city makes general representations in support of its position that all of the information in all of the records qualifies for exemption under section 7(1). It states:

> The discretionary exemption at section 7(1) of the *Act* applies to all the records. Each of the records contains advice or recommendations used within the City governments deliberative decision-making process in respect to the GTA Centre, or have been used to inform the advice or recommendations pertaining to the GTA Centre.
>
> The Records contain more than mere information. The information contained in the records, individually and collectively, relates to suggested courses of action. The advice or recommendations have been provided to Markham Council, which can either accept or reject the advice or recommendations provided.

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[44] *Supra* note 41, at para 51.
[45] *Supra* note 41, at paras 50-51.
[46] Order PO-3315.
[47] Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).
[48] Order PO-2677.

> The City submits that the Records cannot be read in isolation of one another in respect to the exemption at section 7 of the *Act*. These Records form a cohesive body of advice and recommendations necessary to fully inform the decision makers on proposals related to the GTA Centre. All of the Records have collectively been part of the deliberative process pertaining to the GTA Centre. Where an individual record contains information, with no obvious suggested course of action, that record should be read in the context of all the other records, many of which do contain specific suggested courses of action. Collectively, these Records have been used to inform the decision makers, Markham Council, on the legal, financial and commercial options pertaining to proposals for the GTA Centre. It would be unreasonable to find that Section 7 of the *Act* requires that the advice or recommended course of action must be found in a single comprehensive record, or in every record at issue, where the decision to be made relates to a single and very large scale project such as the GTA Centre. Such a finding would strip section 7 of the *Act* of any meaning and purpose. The purpose of section 7 is to protect a properly functioning democratic process in which the Civil Service may, in confidence, provide a range of options, and the information necessary to support those options, to the decision making body. That process should not be jeopardized merely because of all of the materials and advice is not collated into one record. To jeopardize that process would have the chilling effect of limiting the Civil Services ability to provide decision makers with all the facts and information necessary to make fully informed and reasoned decisions, especially where those decisions necessarily require the advice and expertise of a broad range of professionals. [*sic*]

[99] The city then provides specific representations on the application of section 7(1) to each of the records. It provides confidential representations referring to the specific advice it claims is contained in each of records 2 and 3.

[100] The city asserts that advice and/or recommendations are contained in record 2 but it does not identify any recommended courses of action within the record. Alternatively, it asserts that where the advice or recommendation is not contained in a specific record, the information in the record has been the substance of presentations to Council or a committee of Council, to provide all necessary background and factual information that supports the advice or recommendations provided to Council on the proposed GTA Centre.

[101] The city then states that the advice in record 3 was given by a consultant it retained, and that the advice was communicated to Council members. It provides general representations in support of its position that disclosure might reveal advice or recommendations and that disclosure could reasonably be expected to inhibit the free

flow of advice to government. Lastly, it reviews the exceptions in section 7(2) and states that none of these exceptions apply to the record.

Analysis and Findings

[102] I must determine whether record 2 and the remainder of record 3 consist of advice or recommendations, or whether their disclosure would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.

[103] To begin, I do not accept the city's general representations that all of the records form a "cohesive body of advice and recommendations" and should be read in a collective context despite the fact that some contain "no obvious suggestion course of action."

[104] Dealing first with record 3, I find that it does not qualify for exemption under section 7(1) of the *Act*. I reject the city's confidential representations on record 3, and although I cannot refer to them in this order, I find they have no merit for the following reasons.

[105] As set out above, record 3 is a Work Plan Agreement dated in February of 2011, from Affected Party 3 to the city. Although identified in the index as a work plan agreement, as indicated above, the city states that this record is merely a proposed work plan and contract for services from Affected Party 3 which would have led to the issuance of a report and account on a particular matter. It also states that the work was never completed and no report was ever created. Affected Party 3 confirms that record 3 is a letter proposal from it to the city to enter into an engagement with the city which would ultimately culminate in the preparation of a report. It also confirms that the letter does not contain any of its findings, guidance or advice as would be contained in a report that it would normally prepare; instead, it is a detailed work plan, an overview of its qualifications and past experience in the area, its proposed team for the engagement, its fees and timing, and the applicable terms and conditions.

[106] I accept the characterization of record 3 as described by the city and Affected party 3. This record is a proposal from Affected Party 3 to the city, indicating the nature of the work it proposes to do. This record, like most engagement letters, simply sets out the proposed terms for the engagement and does not contain the affected party's findings, guidance, or advice or recommendations. Accordingly, I find that the remainder of record 3 does not qualify for exemption under section 7(1) of the *Act*.

[107] Record 2 is somewhat different, as it is a memorandum that provides information on land values and an opinion from a real estate consulting firm. Some of the information in record 2 is factual, some is derived from published literature, and some consists of the analysis performed by Affected Party 2 to generate forecasted land values. The record identifies certain factors taken into account by Affected Party 2 in

providing its opinion on land values that could be expected in the city after the development of the GTA Centre. Based on my review of record 2, I accept that some of the information contained in it consists of an analysis of factors that could be considered by the city in making various decisions with respect to the GTA Centre. Some of this information appears to qualify for exemption under section 7(1), particularly considering the recent Supreme Court of Canada decision in *John Doe v. Ontario (Finance)*.[49] Other information contained in record 2 clearly does not qualify for exemption under section 7(1), as it contains factual or other objective information. However, in the circumstances, and because of my findings in this order requiring the city to re-exercise its discretion to apply the discretionary exemptions to the records, I will reserve my determination of which parts of record 2 qualify for exemption under section 7 until the city re-exercises its discretion as required by this order.

H. Would disclosure of the remainder of record 3 harm the city's economic or other interests under section 11(a), (c), (d) and/or (e) of the *Act*?

[108] The city takes the position that the discretionary exemptions in sections 11(a), (c), (d) and/or (e) of the *Act* apply to record 3. These sections read:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
>
> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[109] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[50]

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[49] *Supra* note 41.

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

[110] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[51]

[111] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[52]

[112] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.[53]

Section 11(a): information that belongs to government

[113] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;

2. belongs to an institution; and

3. has monetary value or potential monetary value.

[114] All three parts of this test must be established in order for a record to qualify for exemption under section 11(a). I will begin by reviewing the possible application of the second part of the test to the information in record 3.

Part 2: belongs to

[115] For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

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[51] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[52] Order MO-2363.
[53] Orders MO-2363 and PO-2758.

[116] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,[54] customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.[55]

[117] The city's representations on whether this part of the test has been met are brief. With respect to all of the records at issue, the city states:

> The information belongs to the City of Markham. The City retained consultants to provide the information contained in the records, or the information contained in the records was provided by employees of the City employed to provide the information.

[118] The city also refers to two paragraphs in an attached affidavit in support of its position.

[119] I have described record 3 in some detail above. It is a letter proposal from Affected Party 3 to the city to enter into an engagement with the city which would ultimately culminate in the preparation of a report. The work was never completed and nothing came from the proposal. In these circumstances, and on my review of record 3, I find that there is nothing in record 3 to suggest that any of the information contained in it "belongs to" the city in a sense that the city has some proprietary interest in it. As a result, the second part of the three part test under section 11(a) has not been met. As all three parts of the test must be established, I find that record 3 does not qualify for exemption under section 11(a).

Section 11(c): prejudice to economic interests

[120] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[56]

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[54] Order P-636.

[55] Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

[56] Orders P-1190 and MO-2233.

[121] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[57]

[122] The city takes the position that disclosure of the records would result in the harms envisioned in section 11(c). It states:

> The proposed GTA Centre, if built, will host concerts, civic and cultural celebrations, sporting events, and trade-shows/conventions.
>
> Each of these has the potential to increase economic activity for the City.
>
> The GTA Centre is a proposed commercial transaction of significant value ($325 million) between the City of Markham and private sector Proponents. The proposed GTA Centre will be owned by the City. The ownership of both the land and the GTA Centre has significant economic value to the City.
>
> The City will be responsible for half of the constructions costs associated with the project, and will finance the project, in-part, from a negotiated lease agreement, ticket surcharges, parking revenue, and other revenue sources (pp. 3-4, Attachment "C"). The construction and other revenue is potential economic activity for the City. Additionally, the GTA Centre will have other significant economic impact for the City including, but not limited to, employment and taxes. (p. 5, Attachment "C")
>
> The proposed commercial transaction has not been finalized. The financial and commercial information, and advice and/or recommendations, contained in the Records have been used by the City in developing negotiation strategies with the private sector Proponents. If the information is disclosed prior to completing these negotiations, it would impact City's economic or competitive position in those negotiations. Any impact on negotiations can reasonably be expected to materially change any economic or competitive interest arising from the project.

[123] I find the city's representations on section 11(c) unpersuasive and inapplicable to the remainder of record 3. The city has not described to me how disclosure of the information contained in an engagement letter that it never accepted could reasonably be expected to prejudice its economic interests or competitive position. I find that the

[57] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

city has not established that the harms in section 11(c) could reasonably be expected to occur from disclosure of the remainder of record 3. I further find that the remainder of record 3 does not qualify for exemption under this section.

Section 11(d): injury to financial interests

[124] Section 11(d) allows institutions to withhold records if disclosure of the information in the records could reasonably be expected to be injurious to the financial interests of the institution.

[125] In respect of its claim of section 11(d), the city submits that disclosure of the information contained in the records can reasonably be expected to be injurious to its financial interests. It continues that if built, the GTA Centre will host a variety of events that have the potential to generate financial returns for it in the form of lease revenue, ticket surcharges and parking revenue. The city adds that its acquisition and ownership of both the land and the GTA Centre facility, which are part of the proposed transaction, are a financial interest for it. It states that it has used the financial and commercial information, and advice and/or recommendations contained in the records in developing its negotiation strategies on the financial terms of any agreement with the private parties, and since the proposed commercial transaction has not been finalized, disclosure of the records can reasonably be expected to impact on negotiations and thereby, materially change its financial interests arising from the project.

[126] Similar to my findings above, I find that the city has provided general and unpersuasive representations on section 11(d) that do not apply to record 3. The remainder of record 3 does not contain financial or commercial information that the city would rely on to develop negotiation strategies or financial terms, as it is simply an engagement letter. I find that the city has not established that disclosure of the remainder of record 3 could reasonably be expected to injure its financial interests. I further find that the remainder of record 3 does not qualify for exemption under section 11(d).

Section 11(e): positions, plans, procedures, criteria or instructions

[127] In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,

3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution.[58]

[128] Section 11(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.[59] The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.[60]

[129] This office has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".[61] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations but rather simply reflects mandatory steps to follow.[62]

[130] In support of its position that the exemption in section 11(e) applies, the city states:

> The Records contain positions, plans and criteria to be applied to any negotiations carried on by or on behalf of the City of Markham. (para. 9, [Treasurer's] Affidavit)
>
> The Records contain financial information and recommendations that the city is applying in negotiations with the private sector Proponents of the GTA Centre. The information is being used by the City to evaluate different proposals between the parties. The proposed commercial transaction has not been finalized, and there is no completed contract(s) between the City and private parties. ([Treasurer's] Affidavit)

[131] Similar to my findings above, I find that the city's representations on section 11(e) unpersuasive. The city has not demonstrated how record 3 satisfies each part of the test under section 11(e). More importantly, as noted above, there are no negotiations currently being conducted on behalf of the city, nor are there any negotiations anticipated to be conducted in the future on the city's behalf with respect to the GTA Centre which has been abandoned. As such, I find that section 11(e) does not apply to the remainder of record 3.

[132] To conclude, as the city has not established that any of the claimed exemptions in section 11 apply to the remainder of record 3, I find that the information contained

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[58] Order PO-2064.
[59] Orders PO-2064 and PO-2536.
[60] Orders PO-2034 and PO-2598.
[61] Orders P-348 and PO-2536.
[62] Order PO-2034.

therein cannot be withheld on this basis and I will order it disclosed. In this situation, it is unnecessary for me to review the city's exercise of discretion in choosing to withhold record 3. Further, given that section 11 does not apply, it is also unnecessary for me to review whether the public interest override in section 16 of the *Act* applies.

I. Was the city's exercise of discretion proper in the circumstances?

[133] The sections 6(1)(b), 7, 11 and 12 exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so. In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose,
- it takes into account irrelevant considerations,
- it fails to take into account relevant considerations.

[134] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[63] This office may not, however, substitute its own discretion for that of the institution.[64]

[135] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:[65]

- the purposes of the *Act*, including the principles that
    - information should be available to the public
    - individuals should have a right of access to their own personal information
    - exemptions from the right of access should be limited and specific
    - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

[63] Order MO-1573.
[64] Section 54(2).
[65] Orders P-344, MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[136] In its representations, the city submits that it considered the principles of the *Act* and the purpose of each of the discretionary exemptions when exercising its discretion to withhold the records. It also submits that it considered the nature of the information and that the GTA Centre commercial transaction has not yet been completed, and that there is no compelling need to disclose the records and no compelling interest in records that apply to a commercial transaction between the city and private parties.

[137] The appellant submits that there is a strong public interest in full disclosure of the records at issue. She asserts that the principles of open, transparent and accountable government should be respected and the city should exercise its discretion to disclose the records, particularly since the GTA Centre proposal has been abandoned and the records are now obsolete. She notes that the city spent over $700,000 on the records at issue in this appeal and in related Appeal MA12-508, and the people of Markham have every right to know what the city received in return for this extraordinary amount of tax dollars.

[138] To begin, I note that one of the factors the city considered in deciding to exercise its discretion to deny access under the discretionary exemptions is its position that there is "no compelling interest in records that apply to a commercial transaction between the city and private parties." Given the nature and magnitude of the commercial transaction being considered, and the statement by the Supreme Court of Canada that the public interest may be a factor to consider when an institution is exercising its discretion in deciding whether or not to apply an exemption,[66] I find that

[66] *Ontario (Public Safety and Security) v. Criminal Lawyers' Association*, 2010 SCC 23, reversing 2007 ONCA 32, which reversed (2004) 70 O.R. (3d) 332 (Div. Ct.).

the city failed to take into account a relevant consideration in exercising its discretion; specifically, the possible public interest. On this basis alone, I would have required the city to re-exercise its discretion, taking into account this factor.

[139] However, as identified above, since this appeal was transferred to me, there have been a number of developments which have significant bearing on the appeal. They include the city's decision not to proceed with the GTA Centre which appear to preclude the possibility of any future negotiations or contracts; the publication of information about the city's plan for the GTA Centre; the publication of information about this appeal and about related Appeal MA12-508; and the motion before Council in February 2015 to have all of the records at issue in this appeal and in related Appeal MA12-508 disclosed to the public, and the defeat of this motion on the basis that the *Act* prohibits disclosure.

[140] In the circumstances of this appeal, I find that these factors are also relevant considerations and should be considered by the city in exercising its discretion to apply the discretionary exemptions in section 6, 7, 11 and 12. Accordingly, I will order the city to re-exercise its discretion to apply each of these sections to the records for which they are claimed, taking into account the factors set out above.

INTERIM ORDER:

1. I find that the personal information starting at page 16 (under section "C") and continuing through to page 21 (appearing before section "D") of record 3 is exempt under the mandatory section 14(1) exemption, and order it not to be disclosed.

2. I find that the remainder of record 3 does not qualify for exemption under the mandatory exemption in section 10(1), or under the discretionary exemptions in section 7(1) and 11. I order the city to provide a copy of the remainder of this record (pages 1 through 15, the top part of page 16 (appearing before section "C"), the bottom part of page 21 (under section "D"), and pages 22 through 27 to the appellant by **May 6, 2015** but not before **April 29, 2015**.

3. I order the city to re-exercise its discretion to deny access to records 1, 1(a), 1(b), 1(c), 1(d), 2 and 4 through 13 under sections 6(1)(b), 7(1), 11(a), (c), (d) and (e) and 12 in accordance with the factors set out above, and to advise the appellant and this office of the result of this re-exercise of discretion, in writing no later than **April 22, 2015**.

4. If, after re-exercising its discretion, the city continues to withhold all or part of these records on the basis of any or all of the discretionary exemptions listed, I order it to provide the appellant and this office with an explanation of the basis for exercising its discretion to do so no later than **April 22, 2015**.

5. If, after re-exercising its discretion, the city decides to disclose records 4 through 13, it may do so immediately.

6. I find that records 1, 1(a), 1(b), 1(c), 1(d) and 2 do not qualify for exemption under the mandatory exemption in section 10(1). If the city re-exercises its discretion and decides to disclose these records, it may do so by **May 6, 2015** but not before **April 29, 2015**.

7. I remain seized of this appeal in order to address any outstanding issues as set out in this interim order.

Original Signed By: March 30, 2015
Stella Ball
Adjudicator