Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2396-F

Appeal MA-060119-2

City of Toronto

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BACKGROUND AND NATURE OF THE APPEAL:

The City of Toronto (the City) and Toronto Hydro Corporation (Toronto Hydro) are separate legal entities, and they are also separate institutions for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The City is the sole shareholder of Toronto Hydro. On December 31, 2001, Toronto Hydro Street Lighting Inc. became a separate subsidiary of Toronto Hydro, as required under the *Ontario Energy Board Act*. In September 2006, Toronto Hydro Energy Services Inc. (THESI) was amalgamated with Toronto Hydro Street Lighting Inc. and continued as THESI.

In January 2006, the requester submitted a request to the City under the *Act* for access to the following information:

> All documents related to the purchase of Toronto's street lights and expressway lights by Toronto Hydro Street Lighting Inc. [THESI], including but not limited to the following:
>
> - The agreement(s) of sale.
> - The agreement(s) for Toronto Hydro Street Lighting Inc. to provide street lighting and expressway lighting services to the City.
> - Staff reports related to the sale.
> - Staff reports related to the service agreement(s).

The City located approximately 271 pages of responsive records and granted access to one page in a decision letter dated February 13, 2006. Access to 62 pages was denied under the discretionary exemptions at sections 6(1)(b) (closed meeting) and 15(a) (information available to the public). In addition, the City informed the requester that there was information in the first 208 pages to which the mandatory exemption at section 10(1) (third party information) may apply and that notice would be given to THESI as the third party pursuant to section 21 of the *Act* to offer the opportunity for the THESI to make representations.

In a supplementary decision letter dated March 15, 2006, the City informed the requester that partial access to information contained in the first 208 pages of records may be granted as these did not meet the requirements of the mandatory exemption for third party information at section 10(1). THESI was provided an opportunity to appeal.

During this time, the requester (now the appellant) appealed the City's decision to deny access to certain records which had been withheld under section 6(1)(b) of the *Act*, which resulted in the opening of Appeal MA-060119-1 (currently in adjudication). The appellant also informed this office that he would not pursue an appeal of the decision to deny access to one of those records (pages 252-271) because the same record was already the subject of a related matter (Appeal MA-050410-1; resolved by Order MO-2389, dated January 30, 2009). The appellant also chose not to pursue an appeal of the decision relating to records for which the City was claiming the application of section 15(a).

In a third decision letter issued May 5, 2006, the City wrote that it would be granting partial access to the records referred to in the March 15, 2006 letter as THESI had not objected to their disclosure. However, the remaining portions of those records, which form parts of the

agreements requested, were withheld under section 10(1). The City also mentioned for the first time in this decision letter that it was claiming the application of sections 11 (valuable government information) and 14(1) (personal privacy) to deny access to the undisclosed portions of certain records.

No mediation of the issues was possible and Appeal MA-060119-1 was moved to the adjudication stage of the process. In correspondence sent to this office in June 2006 regarding the related appeal (MA-050410-1), the appellant expressed dissatisfaction with what he construed as the City's unwillingness to engage in mediation to resolve any of the issues in Appeal MA-060119-1 because of its concurrent involvement with him in the related appeal.

Shortly thereafter, and while the adjudicator previously assigned to this appeal was preparing the initial Notice of Inquiry to send to the City, correspondence was received from the appellant, confirming that on July 5, 2006, he had received copies of the records to which the City was granting either partial or full access (per the May 5, 2006 decision letter) and that he would be pursuing his appeal of the City's decision to deny access to the undisclosed portions.

The City did not provide this office with a copy of the May 5, 2006 decision letter, nor did it provide copies of the approximately 208 pages of records first identified in its February 13, 2006 decision and then dealt with in the May 5, 2006 decision. At the previous adjudicator's request, the City forwarded copies of the records, its decision and an index of records to this office.

On August 23, 2006, the appellant corresponded with the City by e-mail, requesting clarification of certain matters relating to the responsiveness of some of the records identified. The appellant also raised the possibility that the City had not conducted an adequate search for records in response to his request and listed four different records, or categories of records, he believed existed but had not yet been identified or located. The appellant's e-mail communication with the City was copied to this office. The City did not respond to the appellant, which led to a number of communications from the appellant expressing dissatisfaction with the City's lack of response and its attitude towards the request and appeal processes.

The previous adjudicator then completed the Notice of Inquiry to be sent to the City. Based on her consideration of the information received by this office from the appellant, she added "Scope of the Request/Responsiveness of Records" and "Search for Responsive Records" as issues in this appeal and included them in the initial Notice of Inquiry for Appeal MA-060119-1, dated September 26, 2006. This Notice of Inquiry was sent to the City and to THESI to seek representations on the issues pertinent to their respective involvement in this appeal. Both the City and THESI submitted representations.

After addressing issues related to the sharing of representations on November 16, 2006, the previous adjudicator sent a modified Notice of Inquiry to the appellant on December 5th, 2006, enclosing copies of the non-confidential representations of the City and THESI.

On December 6, 2006, the previous adjudicator received copies of communications relating to an exchange between the City and the appellant. In these circumstances, and given the information already available to her relating to the scope of the appellant's request and the adequacy of the search conducted by the City in response, the previous adjudicator decided to issue an interim order on those issues before proceeding with the remainder of the inquiry.

In Interim Order MO-2135-I, issued December 20, 2006, Adjudicator Daphne Loukidelis addressed a number of the appellant's concerns about the manner in which the City had dealt with his access requests, initially and throughout the appeal process. She found that the City had interpreted the appellant's request too narrowly, and that its search for responsive records was not reasonable. As a result, she ordered the City to conduct a further search for responsive records and to issue a new access decision.

On February 5, 2007, the City issued a new decision letter regarding the results of the searches ordered in Interim Order MO-2135-I. The City identified three e-mails, totalling eight pages, as responsive to the appellant's request and denied access to them pursuant to section 11 (valuable government information) and section 12 (solicitor-client privilege).

In correspondence dated February 15th, the appellant raised a number of concerns about the City's response to Interim Order MO-2135-I. Consequently, Appeal MA-060119-2 (the current appeal) was opened to address issues related to the adequacy of the City's February 5, 2007 decision, the adequacy of the City's search for responsive records, and the denial of access to the three newly identified records.

The mediation stage of Appeal MA-060119-2 concluded with no resolution of the issues possible as the City declined to participate in mediation. This appeal was subsequently moved to adjudication.

The previous adjudicator sent a Notice of Inquiry to the City, initially, along with a copy of the appellant's February 15, 2007 letter of appeal**,** to seek representations on the exemptions claimed, the adequacy of the City's search for responsive records following Interim Order MO-2135-I, and the resulting decision letter issued to the appellant.

The City submitted representations, including affidavits of search, in response and the previous adjudicator sent a modified Notice of Inquiry to the appellant, along with a copy of the non-confidential representations of the City. It should be noted that, in addition to the submissions made in the current appeal, the City's initial and reply representations from Appeal MA-060119-1 were incorporated by reference into the City's representations in this appeal with respect to the claim of the exemption in section 11. In addition, according to information in the affidavits of search provided by the City, a considerable number of records were located and subsequently deemed to be non-responsive to the request or the parameters of search that were set out in Interim Order MO-2135-I.

The appellant submitted representations in response. In them, the appellant expressed serious concerns about the adequacy of the City's searches in response to Interim Order MO-2135-I, and questioned whether many of the records they did locate were actually non-responsive to his request. Noting that the records deemed to be non-responsive by the City had not been counted, described or indexed, the previous adjudicator wrote to the City on August 22, 2007, to require it to provide all of the records that were located to this office. The City subsequently sent five boxes of records containing approximately 12,145 pages of records without descriptions or explanations as to their responsiveness.

This led the previous adjudicator to issue an Interim Order (in letter form) to the City on November 13, 2007, in which she addressed the adequacy of the City's decision regarding the newly located records. She ordered the City to issue a decision on access to the approximately 12,145 pages of records and to prepare an index of records to accompany the decision.

The City issued an access decision on December 7, 2007, and Appeal MA-060119-3 was opened to deal with the newly located records (and is currently in mediation). Issues subsequently arose relating to the City's failure to disclose all of the records identified for disclosure in the Index of Records. Appeal MA-060119-4 was opened to address these issues, which resulted in Order MO-2275, issued by Registrar Robert Binstock on February 14, 2008.

Additional issues continued to emerge relating to the December 7, 2007 decision and Index of Records, which led the previous adjudicator to issue Interim Order MO-2282-I on February 27, 2008.

The appellant continued to send additional correspondence to this office.

The file was subsequently transferred to me to complete the adjudication process.

As is apparent from the discussion above, appeals MA-060119-2 and MA-060119-3 are closely linked to appeal MA-060119-1 as well as appeal MA-050410-1 (recently resolved by Order MO-2389). All of these files have been dealt with by the same adjudicator, and the appellant has raised similar procedural and process issues in each file. All of these files were transferred to me to complete the adjudication process. In my view, any decision issued by the adjudicator relating to these similar issues in one file should be construed as applying to all of the appeal files in this group, and will, therefore, be incorporated by reference into the other files, even though the substantive issues in each one will be dealt with separately.

This Order will address only the three records located by the City in its February 5, 2007 decision following Interim Order MO-2135-I, and the exemptions claimed for them. I am satisfied that the corollary concerns raised by the appellant regarding the manner in which the City had dealt with him has been adequately addressed in Interim Order MO-2135-I (issued in connection with Appeal MA-060119-1), Interim Order MO-2282-I (issued in connection with the current appeal, appeal MA-060119-2, and appeal MA-060119-3), the letter decision sent to

the City by Adjudicator Loukidelis on November 13, 2007, in relation to similar issues raised by the appellant in the current appeal (appeal MA-060119-2), and Order MO-2389.

PRELIMINARY MATTER

At the outset of this appeal, the records identified as being at issue consisted of three e-mails from THESI staff to staff at the City of Toronto sent on the following dates:

- December 1, 2005 (2 pages) = Record 1
- September 27, 2005 (3 pages) = Record 2
- November 15, 2005 (3 pages) = Record 3

As identified above, a Notice of Inquiry requesting representations on the application of the exemption claims to these records was sent to the City and the City provided representations in which it indicated that the exemptions in sections 11 and 12 were claimed for all three records. Along with his submissions, the appellant attached copies of a number of records that he received as a result of a similar access request he previously made to Toronto Hydro. On review of these records, I note that Records 1 and 2 had been disclosed to him as a result of the previous access request.

A number of orders of this office have found that no useful purpose would be served by adjudicating an exemption claim regarding records where it appeared that they were already in the possession of the appellant (Orders PO-2756 and MO-2049-F, for example). In Order PO-2756, the appellant raised the concern that the copies at issue could be different versions or may contain notations, and argued that it was therefore necessary to proceed with the inquiry as regards those records so that there could be an opportunity to compare the copies and determine any such differences.

In concluding that no useful purpose would be served by proceeding with an inquiry in relation to the copies of the records that the appellant provided with his representations, the adjudicator in Order PO-2756 found that the "two copies of these records…that the appellant submitted are the same as those records provided to this office by the Ministry." In the circumstances, she found that "there is no live controversy in relation to Records 1 and 3, and I find that no useful purpose would be served by proceeding with my inquiry in relation to them."

On reviewing the copies of Records 1 and 2 provided by the appellant with his submissions, I find that, except for the fact that the "to" and "from" lines are reversed, reflecting the sender and recipient of the e-mails, the contents of them are identical. In my view, Records 1 and 2 are substantively identical to the copies provided by the appellant. In these circumstances, I similarly find that there is no live controversy in relation to them. I conclude, therefore, that no useful purpose would be served by proceeding with my inquiry with respect to Records 1 and 2 (see Order MO-2049-F, relying on *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 and Order P-1295). Accordingly, I have removed the two records from the scope of the appeal

and it is not necessary for me to address the possible application of sections 11 and/or 12 to them in this order.

RECORDS:

The record remaining at issue in this appeal is Record 3, which consists of a 3-page e-mail from THESI staff to staff at the City sent on November 15, 2005.

DISCUSSION:

SOLICITOR-CLIENT PRIVILEGE

The City submits that section 12 of the *Act* applies to Record 3. Section 12 reads:

> 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.

Section 12 contains two branches as described below. To rely on this exemption, the City must establish that one or the other (or both) branches apply.

Branch 1 derives from the first part of section 12, which permits the City to refuse to disclose "a record that is subject to solicitor-client privilege".

Branch 2 derives from the second part of section 12 and it is a statutory exemption that is available in the context of institution counsel giving legal advice or conducting litigation. The statutory exemption and common law privilege, although not necessarily identical, exist for similar reasons.

Branch 1: common law solicitor-client privilege

Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 457 (S.C.C.)].

Solicitor-client communication privilege

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

The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Order P-1551].

The privilege applies to "a continuum of communications" between a solicitor and client:

> . . . Where information is passed by the solicitor or client to the other as part of the continuum aimed at keeping both informed so that advice may be sought and given as required, privilege will attach [*Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.)].

The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice [*Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27].

The privilege has been described by the Supreme Court of Canada as follows:

> …all information which a person must provide in order to obtain legal advice and which is given in confidence for that purpose enjoys the privileges attaching to confidentiality. The confidentiality attaches to all communications made within the framework of the solicitor-client relationship … [*Descôteaux v. Mierzwinski*, supra)].

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 [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

Litigation privilege

Litigation privilege protects records created for the dominant purpose of existing or reasonably contemplated litigation [Order MO-1337-I; *General Accident v. Chrusz, supra*].

Branch 2: statutory privileges

Branch 2 is a statutory solicitor-client privilege that is available in the context of institution counsel giving legal advice or conducting litigation. Similar to branch 1, this branch encompasses two types of privilege, as derived from common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. The statutory and common law privileges, although not necessarily identical, exist for similar reasons. One must consider the purpose of the common law privilege when considering whether either of the statutory privileges apply.

Representations and Findings

In its representations, the City takes the position that solicitor-client communication privilege applies to the record at issue. The City states:

> … although the e-mails at issue are between City staff and Hydro staff, all are contained in the files of the City solicitor who had carriage of the negotiations with Hydro/[THESI]. These documents constitute part of her working papers directly related to the seeking, formulating or giving of legal advice to a staff in the various program areas involved in the sale of the assets to Hydro/[THESI], including advice on [identified categories of information]

The appellant takes the position that this record does not qualify for exemption under section 12 on the basis that the e-mail was from Toronto Hydro to the City, or rather, from someone outside the City to someone inside the City.

Previous orders of this office have found that correspondence between opposing counsel is not covered by the section 12 exemption (Orders PO-2405 and MO-1514). In Order PO-2405, Senior Adjudicator John Higgins considered whether solicitor-client communication privilege attached to correspondence and memoranda exchanged between the LCBO's outside counsel and the affected party's in-house or outside counsel concerning the negotiation, drafting and implementation of a settlement. In these circumstances, he found:

> The protection of settlement-related information that has been shared between parties adverse in interest derives from the doctrine of settlement privilege. I am not in possession of any binding authority that suggests in any way that this protection derives from solicitor-client communication privilege, which exists to protect confidential communications within a different relationship, namely that of a solicitor (or solicitors) and his or her own client. **The fact that a record was either created by or sent to opposing counsel provides a clear indication that it was not intended to be confidential as between solicitor and client, and therefore such records cannot normally be subject to solicitor-client communication privilege.** Accordingly, even where a copy of a letter to opposing counsel is sent by fax from solicitor to client, or where correspondence to opposing counsel is copied to the client by the solicitor, I find that in the absence of any added confidential communication, such records cannot be found to be privileged, even as part of the "continuum of communications". This finding also applies to transcribed voice-mail messages from opposing counsel. [my emphasis]

Similarly, in Order MO-1514, Adjudicator Donald Hale addressed whether solicitor-client communication privilege attached to a letter from the Region's Senior Counsel to the solicitors for a landowner adjacent to a sewer construction project addressing a claim made on behalf the landowner. In that case, the Region claimed that the record disclosed a recommendation which

its counsel would be prepared to make to the Region in response to the claim and that this fell within the ambit of solicitor-client privilege. In rejecting this claim, Adjudicator Hale stated:

> I find that communications between opposing counsel are not privileged under the solicitor-client communication component of section 12. Any advice which may be contained in this communication has been waived by virtue of it being shared with an opposite party. Accordingly, I find that this document is not exempt under the solicitor-client privilege exemption in section 12.

I agree with the position taken by the appellant and the conclusions of the Orders cited above. I find that the principles enunciated above also apply to records that reflect the type of negotiations that were conducted in the current appeal between the City and Toronto Hydro. Record 3 is correspondence between the solicitor for Toronto Hydro and the solicitor for the City, and it contains information about the negotiations for the asset sale between those two parties. Although there is a close relationship between Toronto Hydro and the City, I find that in the circumstances of this transaction, they maintain opposing interests. In that regard, this record is correspondence sent between opposing counsel, and I am not satisfied that, in the circumstances, this record qualifies for exemption under the solicitor-client privilege in section 12.

ECONOMIC AND OTHER INTERESTS

The City claims that the discretionary exemptions in sections 11(c), (d) and (e) apply to exempt Record 3 from disclosure. These sections of the *Act* state:

> A head may refuse to disclose a record that contains,
>
> (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;

The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2* (Toronto: Queen's Printer, 1980) (the Williams Commission Report) provides the following description of the rationale for including a "valuable government information" exemption in the *Act*, which is helpful in considering the application of the exemptions in sections 11(c) and (d) in the context of this appeal:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute.... Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions ... on a charge back basis.... In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 11(c) or (d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]. Sections 11(c) and (d) may be contrasted with section 11(e) which is concerned with the type of the record, rather than the consequences of disclosure. [Order MO-1199-F]

Sections 11(c) and (d)

Prior orders have stated that section 11(c), or its provincial equivalent, serve the purpose of protecting 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. [see Order P-1190]

Sections 11(c) and (d) both include the phrase "could reasonably be expected to." In Order PO-1747, former Senior Adjudicator David Goodis provided the following guidance in interpreting the words "could reasonably be expected to":

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the [provincial *Freedom of Information and Protection of Privacy*] *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from

> disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Former Senior Adjudicator Goodis' statement applies equally to sections 11(c) and (d) of the *Act*. Accordingly, in order to establish the requirements of these exemptions, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" as described in these sections.

Section 11(e)

In order for section 11(e) to apply, the City 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. [Order PO-2064]

The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Order PO-2034]. Background information that may have formed the basis for positions taken during negotiations are distinguishable from the positions themselves, and such background information is not exempt under section 11(e) [Order M-862].

Representations

In its representations on this issue, the City states that the information in Record 3 contains "the same or similar information as records that are at issue in Appeal MA-060119-1 or is reasonably linked to information which is at issue in the other appeal." The City then provides an example of how the information can be linked, and states that it is relying on the exemption in section 11 "for the same or similar reasons as previously set out in the City's earlier representations." The City enclosed a copy of its representations on section 11 which were made in Appeal MA-060119-1.

The attached representations for Appeal MA-060119-1 referred to by the City which address the section 11 exemption focus on the possible harms to the City that would result from the

disclosure of the records at issue in Appeal MA-060119-1. Those records are the severed monetary amount found in a receipt, and two agreements (one of which was disclosed in part, and the other denied in total).

On my review of Record 3 at issue in this appeal, I find that it has no connection with the severed portion of the receipt or the agreement that was denied in full. The only possible section 11 arguments which may extend from the records at issue in MA-060119-1 to Record 3 in the current appeal are the ones relating to the information contained in the severed portions of an agreement at issue in MA-060119-1 (Record 2 in that appeal), and I will incorporate the City's representations on the possible application of section 11 to that record in the current appeal.

Section 11(c)

In its representation in Appeal MA-060119-1, the City did not initially address the possible application of section 11(c) to the records at issue in that appeal. However, THESI was notified as an affected party in that appeal and did provide representations on the application of section 11(c) to those records. In its reply representations, the City also provided some representations on the application of section 11(c).

The City takes the position that THESI competes in the marketplace, and that "disclosure of the key commercial terms" under which THESI provides services to the City would "undermine its competitive position in bidding or negotiating to provide such services to others in a competitive environment." The City also refers to its concerns that the disclosure of the severed terms of the agreement could "prejudicially affect the competitive position of [THESI] and the economic interest of the City".

THESI's representations on the possible harms under section 11(c) also refer to its position that it operates in a competitive market and competes with other private sector competitors. Its concerns about the disclosure of the information in Record 2 at issue in Appeal MA-060119-1 relate to its concern that the redacted pricing and other financial elements in the Record 2 agreement, if disclosed to competitors, would put THESI at a competitive disadvantage.

With respect to the information at issue in this appeal – that is – the information contained in Record 3, I am not satisfied that the arguments made for the application of the section 11(c) exemption in MA-060119-1 apply to this record. Record 3 is an e-mail from counsel for Toronto Hydro to City counsel referring to matters arising in the negotiations between these parties. The specific references in the e-mail are to information which appears to be of a public nature, and the e-mail identifies the concerns these matters raise in the circumstances of the negotiations. In my view, the section 11(c) harms identified in the representations for Appeal MA-060119-1 do not apply to the information at issue in this appeal. The information is of a different nature (the information severed from Record 2 in Appeal MA-060119-1 consists of negotiated terms of an agreement, whereas the information at issue in Record 3 in this appeal relates to concerns expressed by a party to that agreement in the negotiation process). In the circumstances, I have not been provided with sufficient evidence to satisfy me that Record 3 qualifies for exemption

under section 11(c) of the *Act*. I make this finding without making a finding on the possible application of the section 11(c) harms to the information at issue in Appeal MA-060119-1.

Section 11(d)

The City's representations on the possible application of section 11(d) to identified portions of the Record 2 agreement in MA-060119-1 state that disclosing the severed information in nine identified sections of the agreement could reasonably be expected to be injurious to the financial interest of the City. The City provides specific representations on each of those nine sections. The City identifies its concerns about the section 11(d) harm that may apply if information is disclosed, and refers specifically to various defined rates and prices (including in some instances, unit prices), as well as concerns that disclosure of certain terms may result in section 11(d) harms if they were to be disclosed in "advance of the event", or may affect certain valuations, and identifies respective rights and obligations under the agreement.

THESI's representations on the application of the exemption in section 11(d) to the Record 2 agreement at issue in Appeal MA-060119-1 again indicate that it operates in a competitive market and competes with other private sector competitors. Its concerns are that providing its competitors with access to various financial information in the agreement will unfairly prejudice THESI in the competitive bidding process it is often involved in with its competitors. THESI's competitors will have access to THESI's information, but would not be required to share similar information with THESI.

Looking at the information contained in the Record 3 e-mail, I am not satisfied that the arguments made for the application of the section 11(d) exemption in MA-060119-1 apply to this record. As I found above, Record 3 is an e-mail from counsel for Toronto Hydro to City counsel referring to matters arising in the negotiations between these parties. The specific references in the e-mail are to information which appears to be of a public nature, and the e-mail identifies the concerns these matters raise in the circumstances of the negotiations. I find that the section 11(d) harms identified in the representations for Appeals MA-060119-1 do not apply to the information at issue in this appeal. The information is of a different nature (the information severed from Record 2 in Appeal MA-060119-1 consists of negotiated terms of an agreement, whereas the information at issue in Record 3 in this appeal relates to concerns expressed by a party to that agreement in the negotiation process). In the circumstances, I have not been provided with sufficient evidence to satisfy me that Record 3 qualifies for exemption under section 11(d) of the *Act*. I again make this finding without making a finding on the possible application of the section 11(d) harms to the information at issue in Appeal MA-060119-1.

Section 11(e)

The City's representations on the possible application of section 11(e) to the two identified portions of the Record 2 agreement in MA-060119-1 for which it is claimed state:

> Record 2 contains two severed parts that relate to procedures and criteria to be applied to future negotiations between the parties.

The City proceeds to identify the information contained in the two severed portions, and how this information reveals specific agreed-upon methods of future negotiations if the parties cannot agree on certain terms in the future under the agreement. The City then states:

> While the disclosure of these severed provisions will not prejudice the negotiating positions of the parties *inter se*, their disclosure could affect the competitive position of the affected party.

Similar to my findings above under sections 11(c) and (d), I am not satisfied that the arguments made for the application of the section 11(e) exemption in MA-060119-1 apply to Record 3. To reiterate, Record 3 is an e-mail from counsel for Toronto Hydro to City counsel referring to matters arising in the negotiations between these parties. As stated above, the specific references in the e-mail are to information which appears to be of a public nature, identified by counsel for THESI in the context of the negotiations regarding the agreement between the parties. I find that the information in this record does not reflect a "pre-determined course of action or way of proceeding." Rather, it simply identifies factors to be considered during the negotiations. Moreover, this e-mail does not refer to future negotiations or methods of resolving possible failure to agree in the future. On the contrary, the e-mail makes reference to matters that the parties are to address at the time the e-mail was sent. In my view, the section 11(e) harms identified in the representations for Appeals MA-060119-1 do not apply to the information at issue in this appeal, as the information is of a different nature. Accordingly, I find that I have not been provided with sufficient evidence to satisfy me that Record 3 qualifies for exemption under section 11(e) of the *Act*. Again, I make this finding without making a finding on the possible application of the section 11(e) harms to the information at issue in Appeal MA-060119-1.

Summary

In summary, I have reviewed the representations made by the City on the possible application of section 11(c), (d) and (e) to Record 3 in this appeal, and am not satisfied that the disclosure of the information in Record 3 would result in the section 11 harms. The City's representations on this discretionary exemption are brief, and to a large extent simply incorporate its representations on different records at issue in a different (though connected) appeal to the record at issue in this appeal. The records at issue in the other appeal (Appeal MA-060119-1) are different than the records at issue in this appeal, and many of the arguments are not particularly relevant to Record 3 in the current appeal.

I have also reviewed the representations of THESI on the section 11 harms in the connected appeal (MA-060119-1), and have found that section 11 does not apply to Record 3 in this appeal. I note that THESI was notified as an affected party in Appeal MA-060119-1, and provided representations on the application of the exemptions in both section 10 and 11 in that appeal. As I indicated above, THESI is an institution under the *Act*, and in its reply representations in Appeal MA-060119-1 it states:

> The nature, purpose and extent of protection of the information of private parties differs from that given to government institutions, reflecting the difference between sections 10 and 11…
>
> …The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace, and this has been THESI's articulated concern through this proceeding…
>
> It is the section 11 test, not the section 10 test, that should be applied to THESI's information. To treat an institution as a "third party" when a requester strategically directs its request to another institution undermines the protection of section 11. It is inappropriate to treat THESI as a third-party claiming the section 10 exemption, rather than as an institution claiming the section 11 exemption.

Based on this submission, THESI appears to acknowledge that its interests are protected under the section 11 exemption, rather than the mandatory section 10 exemption. Accordingly, it is not necessary for me to review the possible application of section 10 to Record 3. Having found that the section 11 harms are not established for this record, I will order that it be disclosed.

However, as I indicated above, THESI was not notified as an affected party in this appeal nor was Toronto Hydro. Although I am not fully convinced that notification of THESI or Toronto Hydro would be necessary given the nature of the records and my findings in this appeal, in the circumstances, and due to the close connection to the other related appeals as identified above and the involvement of THESI in those appeals, I have decided to provide a copy of this order to THESI as representative of both THESI and Toronto Hydro, and to extend the compliance date of the order provisions.

ORDER:

1. I order the City to provide the appellant with a copy of Record 3 by **March 31, 2009** but not before **March 26, 2009**.

2. In order to verify compliance with the terms of Order Provision 1, I reserve the right to require the City to provide me with a copy of the record that is disclosed to the appellant.

Original Signed by: February 24, 2009
Laurel Cropley
Adjudicator