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

INTERIM ORDER MO-2617-I

Appeal MA08-408

City of Windsor

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BACKGROUND

[1] The Windsor-Detroit tunnel (the tunnel) is a motor vehicle tunnel under the Detroit River that connects the Cities of Windsor, Ontario (the City) and Detroit, Michigan (Detroit). The City is the owner of the portion of the tunnel that is situated in Canada and Detroit is the owner of the portion of the tunnel that is situated in the United States (U.S.).

[2] Detroit leased the U.S. portion of the tunnel to Detroit Windsor Tunnel, LLC (DWT) and DWT operates that portion. The City also contracted with DWT to manage the Canadian portion of the tunnel pursuant to a joint operating agreement (JOA). The JOA expired and as of the end of December 2010, the City and DWT were in the process of renegotiating its terms.

[3] There is no agreement between the City and Detroit respecting the ownership, control, operation, maintenance or repair of the entire tunnel. The City desires to enter into an agreement with Detroit to ensure that it will remain in public ownership and under public control and management; will continue to provide access between the downtowns of both cities; and, will operate profitably as a unitary and integrated tunnel. The City and Detroit entered into a letter of intent that provides terms for any negotiations between them for such an agreement and for the financing of any resulting arrangement.

[4] The City believes that it is in its interest to acquire control of the U.S. portion of the tunnel from Detroit to ensure its maintenance and repair and protect its financial interests. As Detroit would not agree to sell the U.S. portion of the tunnel to the City, a number of alternative structures for the transaction are being explored.

[5] Due to a variety of circumstances, negotiations between the City and Detroit have been stalled for some time. The City intends to resume negotiations as soon as Detroit is prepared to do so.

[6] A number of other parties, including DWT and the owner of the Ambassador Bridge, also wish to acquire an interest in the U.S. portion of the tunnel and are seeking a franchise or lease that will give them control of that portion for terms between 75 and 99 years.

OVERVIEW

[7] The appellant submitted a seven-part request to the City under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) seeking access to records. In the first part of the request, the appellant sought access to "the Audit Report prepared by [named former City auditor] with respect to the 400 City Hall Square building." The remaining six parts of the request addressed records relating to the tunnel described above.

[8] In response, the City issued a fee estimate of $177,325 and advised that it was extending the time to respond to the request by an additional 500 days.

[9] Subsequently, the appellant proposed to the City that the request be divided into two separate requests. The first revised request was for access to the following information:

(1) The audit report for the 400 City Hall Square building.

(2) Any and all appraisal reports, valuations prepared by any party with respect to the tunnel or any part of it from September 2005 to the date of the request.

(3) The application made to Infrastructure Ontario regarding an infrastructure loan for the tunnel.

(4) Any and all records received from Infrastructure Ontario by the City and/or the Windsor Tunnel Corporation including records to outside counsel and consultants as they pertain to the Infrastructure Ontario loan application.

[10] The second revised request addressed the remaining three parts of the original seven-part request. This second revised request is not at issue in this appeal.

[11] The City issued a final decision in relation to the records responsive to part 1 (the request for the audit report for the building at 400 City Hall Square) and part 3 (the loan application made to Infrastructure Ontario) of the revised request, denying access to the audit report pursuant to section 53(1) of *MFIPPA* and granting partial access to two records related to the loan application advising that access was denied in part pursuant to sections 10(1) (third party information), 11 (economic interests), and 12 (solicitor-client privilege). The City advised that access to the portions of the loan application that it was prepared to disclose was subject to a fee of $40.70. The City subsequently waived this fee and granted the appellant partial access to the loan application.

[12] The City also issued an interim decision and fee estimate that dealt with the second and fourth parts of the revised request. The City advised that there were a significant number of records responsive to those parts and that a fee of $105,146.40 was estimated. The City requested a deposit of $52,573.20 in order to continue processing the request and advised that it would be relying on sections 6(1)(b) (closed meeting), 7 (advice or recommendations), 11, and 12 of *MFIPPA* to deny access to some of the information. Finally, the City advised that due to the large number of responsive records, an extension from the day of the receipt of the deposit would be required.

[13] The appellant appealed the City's fee estimate and access decision.

[14] During mediation, in an effort to reduce the number of responsive records and corresponding fee, the appellant narrowed the scope of requested records in the second and fourth parts of the request. For each narrowed portion of the request the City provided a revised fee estimate with a breakdown of the fee.

[15] With respect to the second part of the request, the appellant ultimately narrowed the scope to access to an appraisal report of the tunnel prepared by an identified firm. He advised that he no longer sought access to any other appraisal reports or valuations. The City issued a

supplementary decision denying access to the specified appraisal report pursuant to sections 10(1), 11, and 12 of *MFIPPA*. The City also advised that the portion of the estimated fee associated with the second part of the request was no longer required.

[16] With respect to the fourth part of the request relating to records received from Infrastructure Ontario as they pertain to the loan application, the appellant ultimately narrowed the scope of the request by removing all duplicate copies of the records and limiting the search to records held by the City's legal counsel's office. The narrowed request for part four stated:

> For Part Four I wish to clarify and further narrow the scope of my request to read:
>
> **Any or all records of response received from Infrastructure Ontario** as they pertain **to the Ontario Infrastructure Loan application** made on May 8, 2008 by [named legal counsel] from April 24, 2008 until July 3, 2008.

[17] In response to this narrowed request, the City issued a second revised fee estimate of $7,940, requesting a deposit of $4,370 before proceeding further with the request. The City again advised that it believed that it would be relying on sections 6(1)(b), 7, 9 (relations with other governments), 10(1) (third party information), 11, 12, and 15 (information published or available) of *MFIPPA* for denying access to parts of the records.

[18] During mediation the appellant submitted a fee waiver request to the City claiming that the dissemination of the records at issue will benefit public health and safety. The fee waiver request was denied.

[19] At the conclusion of mediation, the appellant confirmed that he was appealing the following:

- The City's decision to rely on section 53(1) of *MFIPPA* to deny access to the record responsive to the first part of the request, which was for the audit report for the building at 400 City Hall Square;
- The City's decision to deny access to the appraisal report;
- The City's decision to deny access to the two records related to the loan application: the loan application (denied in part), and the certificate of officer regarding litigation (denied in its entirety).
- The City's fee estimate of $7,940 for the Infrastructure Ontario records held by the City's legal counsel's office that are responsive to part four of his request.
- The City's denial of his fee waiver request.

[20] Additionally, during mediation, the appellant advised that he was of the opinion that the public interest override provision at section 16 of *MFIPPA* should also be included as an issue in this appeal.

[21] In this order, I will address all of the issues raised by the appellant in mediation, with the exception of the City's decision to reply on section 53(1) of *MFIPPA* to deny access to the record responsive to the first part of the request, which was for the audit report for the building at 400 City Hall Square. I will address that issue in a future order.

[22] This office began the inquiry into this appeal by sending a notice of inquiry to the City and the firm that prepared the appraisal report, initially. The City provided representations in response. The firm that prepared the appraisal report did not.

[23] Representations were then sought from the appellant. The appellant was provided with severed copies of the City's representations to assist him in preparing his submissions.

[24] As the appellant's representations raised issues to which I believed the City should be given an opportunity to reply, the appellant's representations were provided to the City. The City provided reply representations in return.

RECORDS:

[25] There are four records that remain at issue in this appeal. As noted above, I will address the appellant's request for an audit report dealing with the 400 City Hall Square building in a later order. This order will address the following three records:

- The appraisal report (withheld in its entirety pursuant to sections 10(1), 11, and 12);
- Ontario Infrastructure Projects Corporation loan application (page 4 has been withheld pursuant to the exemptions at section 10(1), 11, and 12); and,
- certificate of officer regarding litigation (withheld in its entirety pursuant to sections 10(1), 11, and 12)

ISSUES:

A. Should the City's fee estimate be upheld?
B. Should the fee be waived?
C. Does the discretionary exemption at section 11 apply to the records?
D. Did the City properly exercise its discretion under section 11?
E. Does the compelling public interest override provision at section 16 apply to the records?

DISCUSSION:

A. SHOULD THE CITY'S FEE ESTIMATE OF $7,940 BE UPHELD?

[26] The City calculated a fee estimate of $7,940 for providing access to the records responsive to the narrowed part four of the appellant's request, the records of response received from Infrastructure Ontario pertaining to the loan application between April 24, 2008 and July 3, 2008 located in the City's legal counsel's office.

[27] Section 45(1) of *MFIPPA* requires the City to charge fees for processing requests. That section reads:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
>
> (a) the costs of every hour of manual search required to locate a record;
>
> (b) the costs of preparing the record for disclosure;
>
> (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
>
> (d) shipping costs; and
>
> (e) any other costs incurred in responding to a request for access to a record.

[28] More specific provisions regarding fees are found in sections 6, 6.1, 7 and 9 of Regulation 823. Those sections read:

> 6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For manually searching a record, $7.50 for each 15 minutes spent by any person.
>
> 4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.
>
> 5. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 6. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.

> 6.1 The following are the fees that shall be charged for the purposes of subsection 45(1) of the Act for access to personal information about the individual making the request for access:
>
> 1. For photocopies and computer printouts, 20 cents per page.
>
> 2. For records provided on CD-ROMs, $10 for each CD-ROM.
>
> 3. For developing a computer program or other method of producing a record from machine readable record, $15 for each 15 minutes spent by any person.
>
> 4. The costs, including computer costs, that the institution incurs in locating, retrieving, processing and copying the record if those costs are specified in an invoice that the institution has received.
>
> 7. (1) If a head gives a person an estimate of an amount payable under the Act and the estimate is $100 or more, the head may require the person to pay a deposit equal to 50 per cent of the estimate before the head takes any further steps to respond to the request.
>
> (2) A head shall refund any amount paid under subsection (1) that is subsequently waived.
>
> 9. If a person is required to pay a fee for access to a record, the head may require the person to do so before giving the person access to the record.

[29] Where the fee exceeds $25, the institution must provide the requester with a fee estimate. Where the fee is $100 or more, the institution may require the requester to pay a deposit equal to 50% of the fee estimate before the institution takes any further steps to process the appeal. A fee estimate of $100 or more must be based on either:

- The actual work done by the institution to respond to the request, or
- a review of a representative sample of the record and/or the advice of an individual who is familiar with the type and content of the records.[1]

[30] In all cases, the institution must include a detailed breakdown of the fee, and a detailed statement as to how the fee was calculated.[2]

[31] This office may review an institution's fee and/or fee estimate to determine whether it complies with the fee provisions of *MFIPPA* and Regulation 823.

[1] Orders P-81 and MO-1699
[2] Orders P-81 and MO-1614

Representations

[32] In its representations the City submits that it "has been clear and detailed in providing a breakdown of the total fee to the appellant" and identifies the fee estimate letter sent to the appellant setting out a breakdown of the total estimated fee. It also submits that in preparing the fee estimate it sought advice from an individual who is familiar with the type and contents of the records but provides no further information about that individual.

[33] The letter referenced by the City in its representations breaks down the fee estimate as follows:

(4) Infrastructure Ontario Records	**Electronic Records**	**Paper Records**	**Total**	**Costs**
# of pages Copying Costs	2050	900	2950	$590
Search time (hours) includes severing 2 minutes/page	170	75	245	$7,350
Total Part 4				$7,940

[34] In his representations, the appellant states:

> The appellant disputes legal counsel's fee estimate in that it is unlikely that 2,050 electronic pages and 900 paper records exist in the period of time from April 24, 2008 until July 3, 2008 **of records of *response* received from Infrastructure Ontario**, as stated in the revised fee estimate dated March 2, 2009. The appellant respectfully challenges this estimate.
> [Emphasis in original]

On reply, the City confirms that its estimate of the number of pages of records responsive to part four of the appellant's request is accurate and that it does not include the appraisal report. The City also confirms that it does not agree to waive or reduce the fees in relation to those records.

Finding and analysis

[35] In determining whether to uphold a fee estimate, my responsibility under section 45(5) is to ensure that the estimated amount is reasonable. The burden of establishing the reasonableness of the fee estimate rests with the City. To discharge this burden, the City must provide me with detailed information as to how the fee estimate has been calculated in accordance with the provisions of *MFIPPA*, and produce sufficient evidence to support its claim.

Photocopies

[36] Section 6.1 of Regulation 823 permits the City to charge the appellant $0.20 per page to photocopy the records for disclosure. Accordingly, I uphold the City's calculation of a fee

estimate of $590 for photocopying 2950 pages of records. The City is entitled to adjust this fee based on the final number of responsive records to be disclosed to the appellant.

Preparation

[37] Under section 6.4 of Regulation 823, the City is entitled to charge $7.50 for each 15 minutes (or $30 per hour) of preparation time (including severances). As a general rule, this office has accepted that it takes two minutes to sever a page that requires multiple severances.[3]

[38] In its interim decision and fee estimate the City indicated that it believes that it will be relying on sections 6(1), 7, 9, 10(1), 11, 12, and 15 of *MFIPPA* for denying access to parts of the records. Accordingly, it would be required to spend time severing the records. In the City's breakdown of the fee, the cost for preparing the records for disclosure has been subsumed into the search costs. However, it does indicate that it has applied the generally accepted estimate of two minutes per page, multiplied by the $30 per hour fee of preparation time, which is in keeping with the fee structure permitted under section 6.4 of Regulation 823. The City's representations do not make any estimates on the percentage of records that might require severing.

[39] Given that, in its fee estimate, the City has calculated preparation time (including time for severing) together with search time it is difficult to determine an estimate of the percentage of records that might require preparation, specifically severing. However, given the nature of the records, I accept that the majority of them likely contain portions that are subject to the exemptions identified by the City. Accordingly, applying an estimate of 75% of the records requiring severances, the preparation fee that would be in keeping with the fee structure permitted under the regulations would amount to $2213 (2213 pages of records at two minutes per page at $30 per hour). Accordingly, I uphold a fee estimate of $2213 for the costs associated with severing the records for disclosure. If more than 2213 pages require severing the City is entitled to charge two minutes per page at $30 per hour for the additional pages. Of course, where pages are fully exempt, or fewer pages require severing, the City would be required to adjust its final fee for severing these records.

Search

[40] Under section 6.3 of Regulation 823, the City is entitled to charge $7.50 for each 15 minutes (or $30 per hour) of time spent for manually searching for records.

[41] As noted above, in its fee estimate, the City has calculated preparation time (including time for severing) together with search time making it difficult to determine the portion of that amount that is assigned to preparation of the records and that which is assigned to searching for the records. Neither the City's fee estimate nor its representations provide any additional detail on the search or searches undertaken to locate the responsive records. It does not provide any information on how or where the records are stored or provide any description of how or where the searches were conducted and by whom. The City also does not provide any type of description of the search, such as what search words were used to conduct the search of electronic records, the number of boxes or filing cabinets searched to prepare the fee estimate

[3] Orders MO-1169, PO-1721, PO-1834 and PO-1990

and the estimated number of boxes or files to be searched in total. The fee estimate indicates that the search has not yet been completed and that not all records have been reviewed in detail, which indicates the fee estimate was based on a search of a representative sample of the records. However, the City does not indicate how that sample was determined. The City also does not provide any indication of the number of hours that it has already spent searching for records or the estimated number of hours that it will need to spend conducting additional searches.

[42] In the absence of information that provides a breakdown of the specific elements of the search, I find that the City has not provided sufficient information for me to assess whether the amount of the fee estimate is reasonable in the circumstances and whether it was calculated in accordance with the fee provisions of *MFIPPA*. Accordingly, I do not uphold any portion of the City's fee estimate that deals with fees charged for the time already spent searching for responsive records.

[43] Additionally, I accept that the City will likely be required to conduct additional searches for the remaining records, for which it would likely be able to charge the appellant. However, in the absence of any indication of the amount of information that remains to be searched and the time that it would take to conduct additional searches, I find that the City has not provided sufficient information about the remaining searches for me to determine whether or not the portion of its fee estimate that deals with future searches is reasonable in the circumstances.

[44] Accordingly, I will not allow the City to claim fees for either the time already spent searching for responsive records or the time that it will take to conduct additional searches. I do not uphold any portion of the City's fee estimate that deals with search fees.

Fee estimate summary

[45] In summary , I have found that the City is entitled to charge the appellant:

- $590 for photocopying the records,
- $2213 for severing the records

[46] I have also found that the City is not entitled to charge the appellant for the time spent searching for records.

[47] Accordingly, I uphold a fee estimate of $2803. Should the appellant wish to pursue access to the records related to part four of his request (specifically, any or all records of response received from Infrastructure Ontario as they pertain to the Ontario Infrastructure Loan application made on May 8, 2008 by [named legal counsel] from April 24, 2008 until July 3, 2008), he must pay a deposit equal to 50% of the fee estimate, or $1401.50 to the City.

[48] Upon receipt of the appellant's deposit the City is required to continue processing the request and issue an access fee in accordance with the provisions of *MFIPPA*. Once the search is complete, if the cost for severing the responsive records is less than the estimated $2213 the City must reimburse the appellant. If the amount is greater, it is entitled to charge the appellant for the

additional preparation time in accordance with the section 6.4 of Regulation 823, cited above. As previously noted, the City is not entitled to charge for search time.

B. SHOULD THE FEE BE WAIVED?

[49] In an email sent to the City, the appellant requested that the fee charged by the City be waived on the basis that dissemination of the records will benefit public health or safety. The City denied the appellant's fee waiver request.

[50] Section 45(4) of *MFIPPA* requires an institution to waive fees, in whole or in part, in certain circumstances. Section 8 of Regulation 823 sets out additional matters for a head to consider in deciding whether to waive a fee. The relevant provision states:

> 45. (4) A head shall waive the payment of all or any part of an amount required to be paid under subsection (1) if, in the head's opinion, it is fair and equitable to do so after considering:
>
> (c) whether dissemination of the record will benefit public health or safety.

[51] This office may review the City's decision to deny the request for a fee waiver, in whole or in part, and may uphold or modify its decision.[4] The standard of review applicable to the City's decision under this section is "correctness."[5]

[52] The fee provisions in the *Act* establish a user-pay principle which is founded on the premise that requesters should be expected to carry at least a portion of the cost of processing a request unless it is fair and equitable that they not do so. The fees referred to in section 45(1) and outlined in section 6 of Regulation 823 are mandatory unless the requester can present a persuasive argument that a fee waiver is justified on the basis that it is fair and equitable to grant it or *MFIPPA* requires the institution to waive the fees.[6] In other words, while the burden of proof for establishing that its fee estimate is reasonable and is calculated in accordance with *MFIPPA* and the regulations rests with the City, in the case of my review of the fee waiver request, the burden of proof rests with the appellant.[7]

[53] There are two parts to my review of the City's decision under section 45(4) of *MFIPPA*. I must first determine whether the appellant has established the basis for a fee waiver under the criteria listed in subsection (4). If I find that a basis has been established, I must then determine whether it would be fair and equitable for the fee, or part of it, to be waived.[8]

[4] Orders M-9134, P474, P-1393 and PO-1953-F
[5] Order P-474
[6] Order PO-2726
[7] Orders M-429, M-598, and MO-2495
[8] Order MO-1243

Part 1: basis for fee waiver

Public health or safety – section 45(4)(c)

[54] In past orders of this office, the following factors have been found to be relevant in determining whether dissemination of a record will benefit public health or safety under section 45(4)(c):

- whether the subject matter of the record is a matter of public rather than private interest
- whether the subject matter of the record relates directly to a public health or safety issue
- whether the dissemination of the record would yield a public benefit by
    - disclosing a public health or safety concern, or
    - contributing meaningfully to the development of understanding of an important public health or safety issue
- the probability that the requester will disseminate the contents of the record.[9]

[55] The focus of section 45(4)(c) is "public health or safety." It is not sufficient that there be only a "public interest" in the records or that the public has a "right to know." There must be some connection between the public interest and a public health and safety issue.[10]

Representations

[56] In his fee waiver request to the City, the appellant argues that the fee should be waived because (a) the costs "are not legitimate" and (b) the record is an issue of "public safety." With respect to the issue of "public safety" the appellant states that the financial implications of the alleged loan could significantly impact the City's ability to properly maintain the tunnel structure and potentially expose its users to existing or emergency safety issues.

[57] In its representations, the City argues that the subject matter of the record for which the fee is being charged does not relate directly to a public health or safety issue. Specifically, the City states:

> The appellant argues that the financial implications of the loan could impact the City's ability to maintain the tunnel. [Adjudicator Laurel] Cropley in IPC Order MO-1336 decided that there must be a connection between the public interest and the public health or safety issue. She relied on the decision of [former Assistant Commissioner Irwin] Glasberg in order P-474 who decided that the subject matter of the record must relate directly to a public health or safety issue. There is no basis for that argument because the subject matter of the record does not relate directly to a public health or safety issue.

[9] Orders P-2, P-474, PO-1853-F and PO-1962
[10] Orders MO-1336, MO-2071, PO-2592 and PO-2726

[58] The appellant did not make any specific representations on the issue of fee waiver other than those outlined in his request for a fee waiver submitted to the City.

Analysis and findings

[59] I have considered the appellant's submissions made in his request for a fee waiver and the City's representations, as well as the substance of the records at issue. In the circumstances, I find that the appellant has not established the basis for fee waiver at section 45(4)(c). Applying the criteria from previous orders set out above, I am not satisfied that section 45(4)(c) applies.

[60] I accept that it is likely that the appellant will disseminate the contents of the records and I agree that the City's ability to properly maintain the tunnel structure in a manner that does not expose its users to safety issues is a public, rather than private interest. However, in my view, I have not been provided with sufficient evidence to be persuaded that the subject matter of the particular records and specific portions of records at issue in this appeal relates *directly* to a public health and safety issue or concern in relation to the tunnel. Not only have I not been provided with sufficient evidence to demonstrate that the City's ability to properly maintain the tunnel structure has been placed into question, the information contained in the records relate primarily to the City's securing of financing and the terms of that financing, arbitrations that the City has been involved in regarding the tunnel, and an appraisal report. I am not persuaded that disclosure of this specific type of information would contribute meaningfully to the development of understanding of an important public health or safety issue in the manner suggested by the appellant.

[61] Therefore, I conclude that the basis for a fee waiver on the grounds of public health or safety under section 45(4)(c) of *MFIPPA* has not been established. Having concluded that the basis for fee waiver has not been established, it is not necessary for me to determine whether it is "fair and equitable" to do so in the circumstances. Accordingly, I uphold the City's decision to deny the appellant a fee waiver on the grounds of section 45(4)(c) of *MFIPPA*.

C. DO THE DISCRETIONARY EXEMPTIONS AT SECTIONS 11(c) AND/OR (d) APPLY TO THE RECORDS?

[62] Sections 11(c) and (d) of *MFIPPA* 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;

[63] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom*

of Information and Individual Privacy 1980, vol. 2 (the Williams Commission Report)[11] explains the rationale for including a "valuable government information" exemption in *MFIPPA*:

> 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.

[64] For section 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.[12] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11.[13]

[65] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of *MFIPPA*.[14]

[66] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[15]

Representations

[67] The City states generally that it has three main concerns respecting the disclosure of the information at issue. First, it submits that disclosure would hamper its negotiations with Detroit in acquiring an interest in the U.S. portion of the tunnel:

> In order to protect its interest in the Canadian tunnel, it is necessary for [the City] to enter into an agreement with Detroit, the owner of the U.S. tunnel, so that the two halves of the tunnel will operate as a unitary and integrated tunnel.… Since the agreement is still in the negotiation stages, the nature of the agreement has a broad range of possibilities. An agreement between [the City] and Detroit can only take effect when the term of DWT's lease expires on 3 November, 2020…. Premature public discussion related to such negotiations or any component thereof can adversely direct the negotiations one way or the other and affect the result. Any agreement reached will be made public and considered by [City]

[11] Toronto: Queen's Printer, 1980
[12] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[13] Orders MO-1947 and MO-2363
[14] Order MO-2363
[15] Orders MO-2363 and PO-2758

> Council in a meeting open to the public before a decision whether to approve or disapprove the agreement is made and before it is implemented.

Second, it submits that disclosure of the information related to the arbitration between it and DWT would hamper its negotiations and relationship with them:

> [The City] and DWT are required to control, operate, maintain and repair the Canadian tunnel. They presently desire to have the JOA continue until 3 November, 2020, and until an agreement with Detroit can be made…. [The City] is concerned that premature public discussion related to the JOA will adversely affect its continuing business relationship with DWT and cause DWT to terminate the JOA before it has made an agreement with Detroit.

Third, it submits:

> [The City] is concerned that public disclosure and/or discussion of the negotiations between [the City] and Detroit or between [the City] and DWT and/or the facts upon which such negotiations are based will influence a decision by Detroit and/or DWT respecting the nature or content of an agreement with [the City] and provide them and any other person desiring to acquire an interest in the U.S. tunnel with a competitive advantage.

[68] The City makes more specific representations with respect to each of the three records.

Appraisal Report

[69] The City submits that the appraisal report, which was withheld in its entirety, contains financial information in relation to the tunnel, disclosure of which would significantly prejudice its negotiations with Detroit and DWT and provide them or any third party desiring to acquire an interest in the tunnel with a competitive advantage. It submits that disclosure of the information would therefore be injurious to the City's financial position.

[70] The appellant submits that on April 29, 2009, *The Windsor Star* reported that the Chair of the Tunnel Commission and Mayor of the City stated that because of declining traffic volumes and the economic recession, the value of the tunnel would be impacted. It also reported that because of this, as well as a new administration in Detroit, tunnel negotiations would have to "start from scratch." The appellant submits, therefore, given that the value of the property has changed due to the economic decline the information contained in this appraisal report would be outdated and it is unlikely that it would be used by the City in future negotiations.

[71] On reply, the City submits that although *The Windsor Star* occasionally reports on political and financial matters related to the tunnel, those reports should not be used to speculate on what is and is not of importance in the discussions between the City and Detroit respecting the tunnel because those discussions are confidential and are not being conducted through the media. It also submits that the information at issue in the appraisal report, although several years

old, is still relevant to future negotiations with Detroit and DWT respecting the tunnel. It submits:

> The International Bridges and Tunnels Act (the IBTA), a Statute of Canada, governs the control, repair, maintenance and operation of the portion of the tunnel situated in Canada. [The City] believes that an agreement (the Owners' Agreement) between [the City] and Detroit, the two owners of the tunnel, respecting the ownership, control, maintenance and repair of the entire tunnel should be entered into. The Owners' Agreement should constitute the foundation for a separate agreement or agreements (the Operators' Agreement) between each owner and its respective operator of the Canadian and U.S. portions of the tunnel. The Owners' Agreement is necessary to extend the effects of the IBTA to the U.S. portion of the tunnel and ensure that the entire tunnel is kept in a proper state of repair and is safe.

[72] The City submits that it desires to resume negotiations with Detroit in this respect, however, Detroit and the State of Michigan are experiencing severe financial problems that are delaying the resumption of negotiations.

[73] The City submits that the information at issue in the appraisal report is relevant to current ongoing negotiations with DWT with respect to a new Operators Agreement or JOA. It submits that it is currently reviewing a draft JOA from DWT. The City explains that the negotiations with DWT for the Operators Agreement flow from the negotiations between the City and Detroit with respect to the Owners' Agreement.

[74] The City further submits that since DWT desires to replace the City as purchaser and/or operator of the Detroit portion of the tunnel, disclosure of the appraisal report would "immeasurably assist DWT in any discussions with Detroit" and that the City's interests in the negotiations would thereby be adversely affected.

Loan application

[75] The City submits that the disclosure of the information that remains at issue in the loan application will prejudice its competitive position in negotiations relating to the tunnel. Specifically, it submits:

> The redacted portion on page 4 of the loan application contains the purchase price to be paid by DWT to [the City] for the Canadian Tunnel and the financing sources and terms of financing for the proposed rollover which has not yet been completed … [The City] does not want to reveal the price it placed on the Canadian Tunnel or the terms of the transaction at that time. To do so will provide Detroit, DWT, and others desiring to acquire an interest in the tunnel with [the City's] opinion of the value of the Canadian Tunnel at that time and impede the ongoing negotiations between [the City] and Detroit, [the City] and DWT, and provide [the City's] third party competitors who desire to acquire the U.S. Tunnel with information detrimental to [the City] and such negotiations.

[76] The City further indicates that were this specific information disclosed and its competitive position in negotiations harmed it would suffer an undue economic loss and injury to its financial position.

[77] The appellant submits that the portion of the loan application that has been disclosed to him indicates that the construction end date is July 2, 2008. The appellant submits that considering the article in *The Windsor Star* cited above indicates that the negotiating process has terminated, and if restarted would have to begin "from scratch" since the economic factors as well as declining traffic volumes have affected the value of the property, the disclosure of outdated figures in the loan application would have no impact on the parties because the transaction was never completed.

[78] On reply, the City states that the disclosure of the information at issue in the loan application is linked to the information contained in the appraisal report. It states that the severed information consists of project costs and financing that is based on the valuation of the tunnel outlined in the appraisal report. The City submits that accordingly, for the same reasons set out in its reply with respect to the appraisal report, that disclosure of this information would prejudice its competitive position as negotiations related to the tunnel are ongoing.

Certificate of Officer Regarding Litigation

[79] The City submits that this record (together with its attachments), withheld in its entirety, relates to the arbitration between the City and DWT. It submits that disclosure of the confidential financial information relating to the operation of the tunnel that is contained in this record will be injurious to its financial position and will significantly prejudice its economic interest, as well as its competitive position, in negotiations with DWT respecting the JOA. It also submits that disclosure would prejudice its competitive position with respect to negotiations with other parties desiring to acquire an interest in the tunnel.

[80] The appellant makes no specific representations with respect to this record.

Analysis and findings

[81] Order PO-2827 issued by Adjudicator Diane Smith in September 2009 relates to a request made under the *Freedom of Information and Protection of Privacy Act* (*FIPPA*) to Infrastructure Ontario for records that included the same three records that I am addressing in this order: the appraisal report, the loan application and the certificate of officer for litigation. In Order PO-2827, Adjudicator Smith found that the mandatory exemption for third party commercial information at section 17(1)(a) of *FIPPA* (the provincial equivalent of section 10(1) of *MFIPPA*) applied to exempt the records from disclosure. In that appeal the City was the third party and Adjudicator Smith relied on its representations to find that disclosure of the records could reasonably be expected to significantly prejudice the City's competitive position or interfere significantly with its negotiations to acquire an interest in the U.S. side of the tunnel.

[82] Adjudicator Smith stated:

> There are other entities which have an interest in acquiring the rights to own, control and operate the U.S. side of the Tunnel. I agree with the City that disclosure of all of the records at issue in this appeal would substantially interfere with the negotiations between the City and the City of Detroit regarding the tunnel as these interested parties could take advantage of the information contained in the records that have been submitted by the City to [Infrastructure Ontario] for financing the project to negotiate their own deal with the City of Detroit. Disclosure of the records could reasonably be expected to interfere significantly with the City's pending negotiations with the City of Detroit.

[83] In the current appeal, as the request for records was made to the City, it is the institution rather than the third party. As a result, the City must claim the exemption at section 11 to protect its own economic interests in the records. However, as Adjudicator Smith found in Order PO-2827 that disclosure of the very same information could reasonably be expected to result in harm to the City's commercial interests, I find that her reasoning is a relevant consideration in the determination of this appeal.

Section 11(c): prejudice to economic interests

[84] 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.[16] The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[17]

[85] The appellant takes the position that negotiations between the City and Detroit have terminated. However, the City's reply representations, which were submitted at the end of 2010, indicate that negotiations are pending as they are expected to resume once Detroit is ready to do so. Additionally, the City submits that any agreement between the City and Detroit can only take effect when the term of DWT's lease expires on November 3, 2020. In my view, this allows for a significant amount of time for the parties to continue to negotiate issues relating to the tunnel. Based on these submissions, as well as the fact that both the City and Detroit are owners of the tunnel and must work together regarding its control, maintenance, and repair, I accept that negotiations between those parties will resume and are therefore pending. I also accept that the City is also involved in ongoing negotiations with third parties who wish to operate the Canadian part of the tunnel. In fact, the City advises on reply that it is in the process of negotiating a new operator's agreement with DWT.

[86] I acknowledge the appellant's position that due to the passage of time the information at issue is dated and the tunnel's value has likely changed from what it was appraised to be and, as

[16] Orders P-1190 and MO-2233
[17] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758

a result, it is unlikely that any of the information contained in the three records at issue would be used by the City if any negotiations were recommenced in the future. However, none of this information has ever been made public during negotiations, a recommendation has not yet been brought before Council, and no decision has been approved. While the information at issue in this appeal is indisputably dated, I accept the City's position that disclosure of the information contained in these records could be applied in a manner that could reasonably be expected to adversely affect the City's pending or ongoing negotiations with Detroit, DWT or any other entity which may have an interest in acquiring the right to own, control and/or operate the tunnel.

[87] More specifically, I accept that disclosure of financial information that reveals the value that the City placed on the tunnel in a more positive economic state could be applied to current negotiations by the other parties or the City's competitors to their advantage, thereby prejudicing the City's economic interests and competitive position. The appraisal report reveals the value given to the tunnel and the loan application details project costs and financing structure which are based on that value. Having considered the parties' submissions and reviewed the records at issue, I accept that the disclosure of the value that the City placed on the tunnel in a more positive economic state could be applied to pending negotiations. In my view, disclosure of this information could substantially interfere with negotiations between the City and Detroit regarding the tunnel as any interested parties could take advantage of the information contained in the records to negotiate their own deal with Detroit.

[88] Additionally, with respect to the certificate of officer regarding litigation, I accept that it contains confidential financial information that constitutes the City's basis for its negotiations with DWT, and that premature disclosure of that information could negatively impact its competitive position with respect to ongoing negotiations regarding the terms of the JOA.

[89] Accordingly, I find that disclosure of the information at issue could reasonably be expected to prejudice the City's economic interests and competitive position in ongoing or future negotiations with respect to the tunnel and that the exemption at section 11(c) of *MFIPPA* applies.

Section 11(d): injury to financial interests

[90] I find that the records at issue qualify for exemption under section 11(d) for similar reasons. As noted above, negotiations with respect to the City's interest in both the Canadian and U.S. portions of the tunnel are either ongoing or pending. In my view, disclosure of the information contained in the appraisal report, the loan application and the certificate of officer regarding litigation, could be used by the parties or third party competitors to weaken the City's negotiating position. Specifically, it could interfere with the City's ability to obtain fair terms with respect to its JOA with DWT or any agreement with Detroit with respect to an interest in the U.S. portion of the tunnel, thereby resulting in injury to the City's financial interests.

[91] Additionally, this office has specifically found that the release of appraisal reports could injure the financial interests of an institution because it would weaken the institution's negotiating position and would interfere with its ability to obtain fair return on the property.[18] I

[18] Orders MO-1228 and MO-1681

accept that, in the circumstances of this appeal, the disclosure of the information contained in the appraisal report could weaken the City's negotiating position by prematurely revealing the value that it placed on the tunnel during a strong economic time, which could reasonably be expected to cause injury to its financial interests.

[92] Accordingly, I find that disclosure of the information at issue could reasonably be expected to be injurious to the financial interests of the City, and section 11(d) applies.

[93] As I have found that the records are exempt pursuant to sections 11(c) and (d) of *MFIPPA*, it is not necessary for me to determine whether any of the other exemptions claimed by the City for this information apply.

D. DID THE CITY EXERCISE ITS DISCRETION IN A PROPER MANNER?

[94] I must now determine whether the City exercised its discretion in a proper manner in applying sections 11(c) and (d) of *MFIPPA* to the records at issue in this appeal.

[95] The exemptions at sections 11(c) and (d) 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

[96] In any of these cases, this office may send the matter back to the institution for an exercise of discretion based on proper considerations.[19] However, pursuant to section 43(2) of *MFIPPA*, this office may not substitute its own discretion for that of the institution.

[97] The City submits that it exercised its discretion under sections 11(c) and (d) of *MFIPPA* in a proper manner and that it refused to disclose the records at issue in good faith, for proper purposes and on proper and relevant evidence. The City also submits that it "took into account the sensitive nature of the records and their significance to the ongoing negotiations and it did not fail to take into account any relevant considerations."

[98] The appellant did not make any specific submissions on the City's exercise of discretion.

[99] In light of my review of the records, having considered the information that they contain and the circumstances under which they were created, as well as having considered the City's representations, I find that the City has properly exercised its discretion not to disclose the information at issue to the appellant. Accordingly, subject to my review of the possible application of the public interest override provision at section 16 of *MFIPPA*, I find that the

[19] Order MO-1573

information for which I have found sections 11(c) and (d) apply is properly exempt from disclosure.

E. IS THERE A COMPELLING PUBLIC INTEREST IN THE DISCLOSURE OF THE RECORDS THAT CLEARLY OUTWEIGHS THE PURPOSE OF THE EXEMPTION AT SECTION 11?

[100] The appellant takes the position that there is compelling public interest in the disclosure of the records at issue in this appeal.

[101] Section 16 of *MFIPPA* states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13, and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[102] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[103] *MFIPPA* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.[20]

Compelling public interest

[104] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and *MFIPPA*'s central purpose of shedding light on the operations of government.[21] Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices. [22]

[105] A public interest does not exist where the interests being advanced are essentially private in nature.[23] Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.[24]

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[20] Order P-244
[21] Orders P-984 and PO-2607
[22] Orders P-984 and PO-2556
[23] Orders P-12, P-347 and P-1439
[24] Order MO-1564

[106] A public interest is not automatically established where the requester is a member of the media.[25]

[107] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[26]

[108] Any public interest in *non*-disclosure that may exist also must be considered.[27] If there is a significant public interest in the non-disclosure of the record then disclosure cannot be considered "compelling" and the override will not apply.[28]

[109] A compelling public interest has been found *not* to exist where, for example:

- Another public process or forum has been established to address public interest considerations.[29]
- A significant amount of information has already been disclosed and this is adequate to address any public interest considerations.[30]
- A court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding.[31]
- There has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter.[32]
- The records do not respond to the applicable public interest raised by appellant.[33]

Purpose of the exemption

[110] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[111] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[34]

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[25] Orders M-773 and M-1074
[26] Order P-984
[27] *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).
[28] Orders PO-2072-F and PO-2098-R
[29] Orders P-123/124, P-391 and M-539
[30] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614
[31] Orders M-249 and M-317
[32] Order P-613
[33] Orders MO-1994 and PO-2607
[34] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.)

Representations

[112] The City takes the position that there is no compelling public interest in the disclosure of the records at issue that outweighs the purpose of any of the exemptions that it has claimed. It submits:

> The records do not shed any light on [the City's] operation of the tunnel. Indeed the records are related to matters that are current and on which no final decision has been made and disclosure of the records would interfere with and affect the decision making process. Premature disclosure of the records can improperly influence that process. There will be ample time to deal with the matters dealt with by the records when decisions have been made and submitted to Council for approval.

[113] The City also refers to Order PO-2827 issued by Adjudicator Smith in September 2009. As noted above, that order relates to a request made under *FIPPA* to Infrastructure Ontario for records that include the three records I am addressing in this order. In Order PO-2827, Adjudicator Smith found that section 23 of *FIPPA* (the provincial equivalent of section 16 of *MFIPPA*) did not apply to override the mandatory exemption for third party commercial information at section 17(1) of *FIPPA* (the provincial equivalent of section 10(1) of *MFIPPA*). The City submits that the same conclusion should be reached in the current appeal and it should be found that the compelling public interest override provision at section 16 of *MFIPPA* does not apply to the records at issue.

[114] The appellant does not make any specific submissions on whether there exists a compelling public interest in the disclosure of the records at issue. However, he submits that because the negotiation process has terminated and, if it were resumed would have to "begin from scratch" due to the change in economic factors and declining traffic volume, there is no compelling public interest in non-disclosure since "the release of outdated figures would have no impact on the parties since the transaction was never completed."

Analysis and finding

[115] In Order PO-2827, Adjudicator Smith was not persuaded that there was a compelling public interest in the disclosure of the records at issue in that appeal (which included the three records that are at issue in this order) that would outweigh the purpose of the third party commercial information exemption at section 17(1) of *FIPPA*. Moreover, she found that because another public process or forum existed to address the public interest concerns raised by the appellant, there was actually a public interest in the *non-disclosure* of the records. Adjudicator Smith stated:

> The information at issue is sensitive commercial and financial information and relates to an ongoing business transaction between the City and the City of Detroit in order to secure funds for the City to obtain an interest in the U.S. portion of the tunnel. In my view, there exists a public interest in the non-disclosure of

> information that could reasonably be expected to negatively impact on the ability of these parties to complete this transaction.
>
> In the circumstances of this appeal, I am not persuaded that the disclosure of the records at issue would provide the appellant with the information he is seeking to permit the public to review the activities of the City. The appellant primarily wants to know if the City is financially able to complete the transaction with the City of Detroit. The records contain information supplied by the City to [Infrastructure Ontario] for a loan application to finance this transaction. Neither the loan application nor the agreement between the City and the City of Detroit has been finalized.
>
> Further more, another public process or forum has been established to address public interest considerations. Once the loan has been arranged with [Infrastructure Ontario] and an agreement with Detroit is made the transaction documents will be made public and considered by City Council in a meeting open to the public before Council makes a decision whether to approve or disapprove the transaction.[35]
>
> Accordingly, in the circumstances, I am not satisfied that the public interest override applies to the withheld records or portions of records.

[116] Although I have found that the three records that I am addressing in this order are exempt under the discretionary exemption relating to economic or other interests found at section 11 of *MFIPPA* and not the mandatory third party commercial information exemption considered by Adjudicator Smith, these records are identical to three of the records at issue in Order PO-2827. Additionally, while a significant amount of time has passed since the issuance of Order PO-2827, given that the City intends to resume negotiations with Detroit sometime in the future, as acknowledged above in my discussion on the application of section 11, I accept that the negotiation process is ongoing and that the information at issue may be applied as a benchmark or the basis on which current value or price is determined. Accordingly, in my view, the circumstances before me in this appeal are very similar to those before Adjudicator Smith in the appeal that resulted in Order PO-2827 and therefore, her reasoning and analysis are relevant and applicable to my determination of whether, in the circumstances of the current appeal, the compelling public interest override applies to the appraisal report, the loan application, and the certificate of officer regarding litigation.

[117] Having considered Order PO-2827, the information at issue as well as the representations of the parties I am not persuaded that a compelling public interest exists in the disclosure of the information in the records that would outweigh the purpose of the section 11 exemption, which is to protect the City's economic interests. In my view, I have not been provided with any evidence that demonstrates that the disclosure of the specific information contained in the appraisal report, the loan application and the certificate of officer regarding litigation would shed any light on a public interest, compelling or otherwise, related to the tunnel, including the City's ability to operate it safely. Rather, I agree with Adjudicator Smith's position that there exists a public

[35] Orders P-123/124, P-391, M-539 and PO-2734

interest in the non-disclosure of the information as disclosure could reasonably be expected to negatively impact on the City's economic interests by harming its competitive position during negotiations with Detroit and other parties with respect to matters related to the tunnel.

[118] Additionally, as submitted by the City and as acknowledged by Adjudicator Smith in Order PO-2827, I accept there is another public process or forum that is in place to address any public interest considerations that might be raised by the information in the three records. Specifically, once negotiations are completed, any agreements that are reached must be made public and considered by City Council in a meeting open to the public. As noted above, previous orders have established that a compelling public interest has been found *not* to exist in such circumstances.[36]

[119] Accordingly, I am not satisfied that there exists a compelling public interest in the disclosure of the information at issue in the appraisal report, the loan application and the certificate of officer for litigation that outweighs the purpose of the section 11 exemption. I find, therefore, that the public interest override provision at section 16 of *MFIPPA* does not apply.

ORDER:

1. I do not uphold the City's fee estimate of $7,940.

2. I uphold the City's entitlement to charge the appellant $ .20 per page for photocopying and $30 per hour for severing the records responsive to part 4 of the appellant's request.

3. I uphold the City's decision not to grant the appellant a fee waiver.

4. I uphold the City's decision not to disclose the following to the appellant:

    - The appraisal report;
    - page 4 of the Ontario Infrastructure Projects Corporation loan application; and
    - the certificate of officer regarding litigation.

Original signed by: May 3, 2011
Catherine Corban
Adjudicator

[36] Orders P-123/124, P-391, M-539 and PO-2734