Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2820

Appeal MA11-490

Corporation of the City of Brantford

December 19, 2012

Summary: The city received a request for the peer review report for a water treatment plant upgrade project. This order considers the application of sections 6(1)(b) (closed meeting), 10(1) (third party information), and 12 (litigation privilege) of the *Act* to the report and orders the city to disclose the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 10(1)(a), 10(1)(b), 12.

Orders and Investigation Reports Considered: Order PO-2490.

OVERVIEW:

[1] The City of Brantford (the city or Brantford) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following information in relation to a specific project:

> a) The results of the peer review conducted in relation to [name of consultant who prepared report's] process design of the Filter Backwash System; and,

b) The result(s) of any other peer review conducted in relation to any other aspect of [name of consultant who prepared report]'s design of the above referenced project.

[2] The city denied access to the responsive record pursuant to sections 6(1)(b) (closed meeting), 11(c) and (d) (economic and other interests) and 12 (litigation privilege) of the *Act*. In the decision, the city indicated that no other peer reviews were conducted in relation to clause (b) of the request.

[3] The requester, now the appellant, appealed the city's decision.

[4] During mediation, the appellant clarified that he does not take issue with the city's response in relation to clause (b) of the request.

[5] As mediation was not successful in resolving the issues in this appeal, the file was transferred to adjudication where an adjudicator conducts an inquiry. I sought and received representations from the city and the appellant. The city did not provide representations on sections 11(c) and (d), although asked to do so in the Notice of Inquiry; therefore, the discretionary section 11 exemption is no longer at issue in this appeal.

[6] As it appeared to me that the mandatory third party information exemption in section 10(1) of the *Act* may possibly apply to the record, representations were sought on this exemption from the city and also from two affected parties, the consultant who prepared the record (the consultant) and the engineering firm that worked on the project (the engineer). I also sought representations from both affected parties on all of the exemptions claimed by the city.

[7] Representations were shared in accordance with *Practice Direction 7* and section 7 of the IPC *Code of Procedure*. Neither the consultant nor the engineer provided specific representations on the claimed exemptions, other than providing a general statement adopting the position of the city in this appeal.

[8] In this order, I find that the record is not exempt and order it disclosed.

RECORD:

[9] The record is a report titled "Technical Memorandum - Holmedale Water Treatment Plant Filter Backwash System Review (Final Draft)," dated August 2011.

ISSUES:

A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the record?

B. Does the discretionary litigation privilege exemption at section 12 apply to the record?

C. Do the mandatory third party information exemptions at sections 10(1)(a) and (b) apply to the record?

DISCUSSION:

A. Does the discretionary closed meeting exemption at section 6(1)(b) apply to the record?

[10] Section 6(1)(b) reads:

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

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

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

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

3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.[1]

[12] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision;[2] and

- "substance" generally means more than just the subject of the meeting.[3]

[13] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to

[1] Orders M-64, M-102 and MO-1248.
[2] Order M-184.
[3] Orders M-703 and MO-1344.

the names of individuals attending meetings, and the dates, times and locations of meetings.[4]

[14] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.[5]

[15] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.[6]

[16] The city states that the first and second parts of the test were established on November 9, 2009, when Brantford City Council brought forward a special resolution *in camera* to consider "Litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board and advice that is subject to solicitor-client privilege, including communications necessary for that purpose" pursuant to section 239(2)(e) of the *Municipal Act*. Pursuant to the direction of Council, the city states that its Public Works Commission continued deliberations in confidential meetings with the affected party consultant.

[17] The city states that the record was prepared for use in litigation in respect of the Holmedale Water Treatment Plant (the WTP). It states that disclosure of the record will reveal the substance of the *in camera* deliberations of both Brantford City Council and the Public Works Commissioner in respect of this litigation, both ongoing and contemplated.

[18] The city provided a copy of the minutes of Council that included the resolution moving the meeting *in camera* to consider potential litigation affecting the city and advice that is subject to solicitor-client privilege, including communications necessary for that purpose concerning the WTP. The city also provided a copy of the statement of claim issued on March 3, 2010 and the appellant's statement of claim issued against the city on March 1, 2011.

[19] The appellant concedes the first and second parts of the three part test under section 6(1)(b) but disputes that the third part of the test has been met.

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[4] Order MO-1344.
[5] Order M-102.
[6] Orders MO-1344, MO-2389 and MO-2499-I.

[20] The appellant states that although the city refers to the record as a "Draft Memoranda", the formal title of the document is "Technical Memorandum No.1 - Holmedale WTP Filter Backwash System Review".

[21] The appellant states that disclosure of the peer review would not reveal the actual substance of the deliberations of the *in camera* meeting of November 9, 2009 as the damages to the Backwash Filter System which gave rise to the appellant's filter claim did not even arise until one year later, in early 2011. It states:

> …"litigation or potential litigation" in relation to this issue could never have been contemplated at that time… nor does [the city] reasonably set out "how" disclosure of the [record] would reveal the actual substance of the *in camera* deliberations…

[22] In reply, the city states that the record is a "draft technical memoranda" dated August 2011 and that the 'substance' of the November 2009 *in camera* meeting was part of Council's broader litigation strategy relating to the WTP site.

[23] In sur-reply, the appellant disputes that the meeting was held *in camera* and relies on the statement in the city's representations that:

> As part of [the city's] preparation for litigation with [the appellant] (and potentially [its] contractors]) regarding the WTP filter underdrains, [the city] retained an engineering expert …to peer review the WTP upgrade project. City Council approved the retention of the independent witness. …The decision to retain an expert was not made *in camera* because …Council may not make decisions to spend money during an *in camera* session.

Analysis/Findings

[24] As stated above, the appellant agrees that parts 1 and 2 of the test under section 6(1)(b) have been met. I agree and I find that these two parts of the test have been met. In this appeal, Council held a meeting and section 239(2)(e) of the *Municipal Act* authorized it to hold the meeting in the absence of the public. This section of the *Municipal Act* reads:

> A meeting or part of a meeting may be closed to the public if the subject matter being considered is,
>
> > litigation or potential litigation, including matters before administrative tribunals, affecting the municipality or local board;

[25] As part of its representations on this exemption, the city was asked in the Notice of Inquiry to provide answers to the following questions which relate to part 3 of the test under section 6(1)(b):

- How would disclosure of the record reveal the actual substance of the deliberations at the meeting, and not merely the subject of the deliberations? Please explain, and provide evidence in support of your position.

- Would the disclosure of any part of the record reveal the actual substance of the deliberations that took place at the closed meeting? If so, could any part of the record be disclosed?[7]

[26] I find that the city has not provided sufficient evidence to demonstrate how disclosure of the record or any part of it would reveal the actual substance of the deliberations at the closed meeting. The record is dated August 2011 and is titled "Technical Memorandum - Holmedale Water Treatment Plant Filter Backwash System Review (Final Draft)". The closed meeting referred to by the city took place almost two years earlier in November 2009.

[27] I do not accept the city's statement that disclosure of the record would reveal the actual substance of the deliberations of the November 9, 2009 meeting about Council's broader litigation strategy relating to the WTP site.

[28] The city provided me with a copy of a report to Council from its Manager, Corporate Policy and Management Practices dated May 24, 2011.[8] In this report, the affected party is described as an engineering consultant with extensive experience in the design and commissioning of filters and pumping stations. This report seeks Council's approval to retain the affected party to undertake a peer review and prepare a report. It describes the record as a detailed review of the design report, design calculations, contract documents, change orders, process malfunctions, shop drawings, field inspection reports, process control narratives and commissioning procedures of the Holmedale Water Treatment Plant Upgrades, Filtration and High Lifting Pumping Station (HLPS) (the project).

[29] The city has not provided me with any direct evidence as to what took place at the November 9, 2009 meeting in the form of minutes or other documents documenting the discussions at this meeting. In any event, based on my review of the record and the fact that it was prepared almost two years after this meeting, I do not accept that disclosure of the record would reveal the substance of the deliberations of the *in camera* meeting of Council on November 9, 2009. Therefore, I find that part 3 of the rest has not been met and the record is not exempt by reason of section 6(1)(b).

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[7] *St. Catharines (City) v. IPCO* 2011 ONSC 2346 (Div. Ct.).
[8] Report No. EN2011-076, dated May 24, 2011.

[30] I will now consider whether the discretionary exemption at section 12 applies to the record.

B. Does the discretionary litigation privilege exemption at section 12 apply to the record?

[31] Section 12 states as follows:

> 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.

[32] The city states that the record came into existence for the dominant purpose of preparing for contemplated litigation against the appellant, the general contractor that constructed the new facilities to upgrade the city's WTP. The city states that there was a reasonable prospect of litigation between it and the appellant as of April 21, 2011, when the appellant advised it that it would be making a claim for amounts relating to the damaged WTP filter underdrains.

[33] The city states that the affected party was retained by it after April 21, 2011 to prepare a report (the record) to address liability and costs associated with the damage to the city's WTP filter underdrains. The city submits that, therefore, the record came into existence for the dominant purpose of preparing for contemplated litigation. A copy of the record was provided to the city solicitor for use in this litigation.

[34] The city submits that despite the record being shared with the engineer that designed the new facilities required to upgrade the WTP that privilege still applies by reason of the application of common interest privilege. The cover letter to the engineer states that the record was confidential and that distribution was restricted. The city states that this principle still applies despite the fact that the parties claiming the privilege may at some future point become adversaries in litigation. Accordingly, the city states that the fact the city, the engineer and the appellant are parties to litigation in civil actions relating to the excavation of the WTP site, and the resulting damage to the WTP building, does not affect the engineer's and the city's common interest as against the appellant. The city and the engineer are adverse to the appellant on the same issue - establishing that the damage to the filter underdrains was due to a commissioning error by the appellant or its subcontractors.

[35] The appellant asserts that the dominant, if not sole purpose, for the preparation of the record was to assist the city in determining which of the parties, namely, the city, the engineer or the appellant, should bear the responsibility of the additional costs claimed by the appellant regarding the Backwash Filter System.

[36] The appellant states that on, March 1, 2011, a statement of claim was issued by it against, among others, the city. According to the appellant, this claim is not related to the events which gave rise to the appellant's claim for additional costs regarding the Backwash Filter System.

[37] The appellant submits that its request for costs regarding the Backwash Filter System have always been in accordance with the summary method of dispute resolution set out in the general conditions of the contract, and not, the litigation process, therefore, litigation privilege cannot apply. It refers to a letter from the engineer dated January 2, 2012, which reads:

> This letter acknowledges your request from the December 1, 2011 site meeting to enter in a dispute resolution process for this issue, as outlined under Item GC 3.13 Claims, Negotiations, Mediation of the General Conditions.

[38] In the alternative, the appellant states that if the record was prepared in reasonable contemplation of litigation, this letter from the engineer effectively terminates any contemplation of litigation. It also states that the provision of the record to the engineer by the city caused any litigation privilege to be lost.

[39] The appellant also submits that the city's reliance on common interest privilege must fail as the engineer and the city are adversaries and do not share a common interest against a common adversary. The appellant refers to a letter from the city to the engineer, asking the engineer to respond to the findings contained in the record. The appellant states:

> In addition, [the engineer] was obligated to notify their liability insurer owing to the fact that the alleged design flaw, if proven to exist as a result of the [record], would make the [city] responsible to pay [the appellant's] costs related to [claim for additional costs regarding the Backwash Filter System].
>
> Furthermore, an adversarial relationship between the [city] and [the engineer] existed prior to [the claim for additional costs regarding the Backwash Filter System]. On March 3, 201[0], the [city] commenced an action against, among others, [the engineer] for breach of contract and negligence in relation to the same project. The subject matter of this litigation is not; however, related to [the claim for additional costs regarding the Backwash Filter System].

[40] In reply, the city submits that litigation privilege still applies, even if the dispute is to be resolved by the contractual dispute resolution process through arbitration and mediation because:

- the term "litigation" cannot be construed so narrowly as to refer only to lawsuits in Superior Court. Any dispute between the parties (whether in Superior Court, arbitration, or mediation) entitles [the city] to a zone of privacy, and the expectation of litigation privilege.

- [the appellant's] intentions are irrelevant to the establishment of litigation privilege. The dominant purpose is determined by reference to the intention of the person who commissioned the [record], which was [the city].

- litigation privilege remains until the termination of the dispute. That has not occurred, and the potential for further litigation remains.

[41] Furthermore, the city states that the appellant is not able to invoke arbitration as a mechanism to resolve the claim for additional costs regarding the Backwash Filter System. In any event, the city submits that as the "dominant purpose" test is to be determined by reference to the intent of the person under whose direction the document at issue was created, it is irrelevant that the appellant now says it intended to seek to resolve the matter through the dispute resolution mechanism contained within the contract. The city states that:

> The uncontroverted evidence … is that [the appellant] advised [the city] on April 21, 2011, that it intended to "make a claim" against [it] relating to the damaged WTP filter underdrains. At that time, [the appellant] and [the city] were already engaged in litigation before the Superior Court (i.e. a pattern of litigating disputes was already established). [The city] reasonably anticipated more litigation with [the appellant] over this new dispute relating to the damaged WTP filter underdrains and commissioned the [record] for that purpose. The [record was] therefore prepared at a time when [the city] objectively and reasonably believed that further litigation with [the appellant] was likely.
>
> In any event, at the time the [the record was] commissioned by [the city], [the appellant] had not yet advised that it intended to invoke the dispute resolution processes under the Building Contract.

[42] The city also states that litigation has not been terminated as all related litigation has not been resolved. According to the city, a civil claim or arbitration relating to the damaged WTP underdrains remains a strong possibility.

[43] The city states that the damage to the WTP underdrains may involve a claim as against the engineer, by the appellant or the city or both by parties. However, the engineer is not a party to the dispute resolution mechanisms under the Building Contract and is not, therefore, bound by the Building Contract or its dispute resolution

provision. A civil action in Superior Court may be necessary sometime in the future, on some or all of points related to the WTP underdrain damage, to properly include all relevant parties. In addition, according to the city, the contract may not allow the dispute resolution process to be utilized in the case of the claim for additional costs regarding the Backwash Filter System.

[44] The city also states that the engineer and the city may, at some point in the future, become adversaries in the WTP underdrain issue, however they are not currently adverse in interest, but are aligned in interest against the appellant to establish that the damage to the filter underdrains was due to a commissioning error by the appellant or its subcontractors.

[45] In addition, the city states that, although the engineer and the appellant advised their respective insurance companies about the claim issued by the appellant relating to damaged filter underdrains, this notification is not evidence that the city is currently adverse in interest to the engineer.

[46] In sur-reply, the appellant refers to the statement in its initial representations that it was informed by the city that the sole purpose for the preparation of the record was to allow the city to determine which party or parties should bear the cost of the Filter System Repairs. The appellant also points out that the report to Council of May 24, 2011 from the city's Manager, Corporate Policy and Management Practices fails to make any reference to the fact that the record was:

> a) commissioned at the request of Brantford's legal counsel;
> b) for the purpose of assisting legal counsel;
> c) for the purpose of assisting in any contemplated litigation; or,
> d) to be made and distributed in confidence.

[47] In disagreeing that the dominant purpose for the preparation of the record was for use in contemplated litigation, the appellant quotes from the Peer Review of Water Treatment Plant Upgrades Project report to Council from the city's Manager, Corporate Policy and Management Practices of May 24, 2011, which was included in the city's representations and is also available on the city's website. This report includes the following information:

> Item 10.0 Conclusion
> It is common in the industry to undertake a Value Engineering Audit (Peer Review) for projects over $25 million…

[48] The appellant explains that when the project reached substantial completion, in order to get paid certain holdback monies, the appellant was required by the contract to provide Brantford with a release. On June 8, 2012, the appellant delivered a release to Brantford, which did not contain an exception related to the Filter System Repairs. The

appellant's position is that, as it has released Brantford from its claim against it in relation to the Filter System Repairs, there is not any future possibility of litigation in relation to this item. The appellant states that, as a result, the issue of common interest privilege has also been rendered moot.

[49] In reply, the city objects to the appellant raising the issue of the release, as it claims that this is not a proper sur-reply, being new evidence. In any event, it states that the release has not been signed by either the appellant or the city and specifically excludes all claims relating to: "Additional unapproved changes to the Contract." Further, it states that the costs related to the damaged filter underdrains is an "additional unapproved change to the Contract," which would be excluded from the effect of the proposed draft release. The city further states that there is a future possibility of litigation, since:

> Even if the document attached to the "amended" affidavit did release Brantford from claims by [the appellant] relating to the underdrains, it would have no impact on Brantford's claims against [the appellant] for the damages that Brantford has suffered as a result of [the appellant's] negligence. Similarly, it would not affect direct claims against Brantford by [the appellant's] subcontractors. Nor would it prevent [the appellant] from asserting a claim against [the engineer], and [the engineer] then asserting a claim over against Brantford.

[50] The city also states that the alleged release is a first draft of a release and is nothing more than a unilateral offer to resolve litigation. It submits that the fact that a release is being negotiated is conclusive proof that litigation is ongoing between the parties.

Analysis/Findings

[51] The city relies on the section 12 litigation privilege exemption on the basis that the record came into existence for the dominant purpose of preparing for contemplated litigation.

[52] Section 12 contains two branches. Branch 1 arises from the common law and branch 2 is a statutory privilege. Both branch 1 and branch 2 encompass litigation privilege. Branch 2 litigation privilege applies to a record that was prepared by or for counsel employed or retained by an institution "in contemplation of or for use in litigation." The institution must establish that one or the other (or both) branches apply.

[53] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated.[9]

[54] In *Solicitor-Client Privilege in Canadian Law* by Ronald D. Manes and Michael P. Silver, (Butterworth's: Toronto, 1993), pages 93-94, the authors offer some assistance in applying the dominant purpose test, as follows:

> The "dominant purpose" test was enunciated [in *Waugh* v. *British Railways Board*, [1979] 2 All E.R. 1169] as follows:
>
> > A document which was produced or brought into existence either with the dominant purpose of its author, or of the person or authority under whose direction, whether particular or general, it was produced or brought into existence, of using it or its contents in order to obtain legal advice or to conduct or aid in the conduct of litigation, at the time of its production in reasonable prospect, should be privileged and excluded from inspection.
>
> It is crucial to note that the "dominant purpose" can exist in the mind of either the author or the person ordering the document's production, but it does not have to be both.
>
> . . . . .
>
> [For this privilege to apply], there must be more than a vague or general apprehension of litigation.

[55] Upon my review of the record, I find that the record did not come into existence for the dominant purpose of preparing for contemplated litigation. The record does not indicate that it was produced or brought into existence to aid in the conduct of litigation. Nor does it appear from the city's documents that the affected party who prepared the record was retained to prepare it for the dominant purpose of actual or contemplated litigation.

[56] As submitted by the city, the "dominant purpose" test is to be determined by reference to the intent of the person under whose direction the document at issue was created. This record was created under the direction of Brantford City Council after

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[9] Order MO-1337-I; *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); see also *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).

review of the Report to Council from the Manager, Corporate Policy and Management Practices of May 24, 2011.[10]

[57] I find that the agenda and minutes of the meeting of Brantford City Council on May 24, 2011 contain information as to the dominant purpose for the preparation of the record. The agenda and minutes[11] include the following resolution, which was approved by Council on May 24, 2011:

> **8.3 Peer Review of Water Treatment Plant Upgrades Project (EN2011-076)** –
>
> 1. THAT Council APPROVE an upset limit of $90,000 to retain [the consultant] to undertake a peer review of the design and construction of the project carried out under Contract RFT 08-123, Holmedale Water Treatment Plant Upgrades, Filtration and High Lift Pumping Station (HLPS) (the "Project"); and
>
> 2. THAT City Council AUTHORIZE the Mayor and Clerk to enter into an agreement with [the consultant] to undertake the peer review of the design and construction of the Project; and
>
> 3. THAT Council APPROVE the transfer of $90,000 from the Water Treatment Reserve Account (RF 0352) to the Holmedale Treatment Plant Upgrades Capital Account (WT 0505) for this Project; and
>
> 4. THAT Council DIRECT the City Clerk to place the agreement with [the consultant] for this project on a future signing by-law

[58] This resolution can also be found in the May 24, 2011 Report to Council from the Manager, Corporate Policy and Management Practices,[12] which reads:

> **2.0 TOPIC**
> Peer Review of Water Treatment Plant Upgrades Project
> …
> **4.0 PURPOSE**
> To seek Council approval to retain the services of the consultant to undertake a peer review of the design and construction of the project carried out under Contract RFT 08-123, Holmedale Water Treatment Plant Upgrades, Filtration and High Lift Pumping Station (HLPS) .

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[10] Report to Council: Peer Review of Water Treatment Plant Upgrades Project (EN2011-076), May 24, 2011. This report to Council was included in the city's representations and is also available on the city's website.

[11] Copies of which are posted on the city's website.

[12] Report to Council: Peer Review of Water Treatment Plant, described above.

5.0 BACKGROUND

On October 27, 2008, Council approved the award of the tender to construct a new Filtration Building and High Lift Pumping Station Facilities at the Holmedale Water Treatment Plant to [the appellant]. The new construction replaces the existing facilities constructed in 1930. It also includes addition of ozonation and ultraviolet disinfection. Design and contract administration of the project is carried out by [the engineer].

…

The project is moving forward as per the schedule presented to Council in December 2010. More than 90% of the construction of the project has been completed. Four of the eight new filters and the new high lift pumping station should be in operation this summer and the rest of the project should be completed by October 2011.

…

8.0 ANALYSIS

To ensure that the water treatment plant upgrades project is designed and constructed properly, Council directed staff to undertake a peer review of the project.

Testing and commissioning of various components of the project are currently underway. It is critical to retain the services of a qualified consultant for peer review immediately so that they can observe the plant performance during the commissioning.

[The consultant] is a qualified engineering consultant with extensive experience in design and commissioning of filters and pumping stations. They designed and administered the construction of the water pre-treatment facility and the Northwest water storage reservoir & pumping station in Brantford. They are available to undertake the peer review immediately.

The estimated cost to undertake a review of the new filtration system only is up to $15,000. The consultant will review the design, testing results during start-up, and the operation of all filters during commissioning. It will take approximately 2 weeks to complete the review.

The estimated cost to undertake a review of all major components of the project including filters is up to $90,000. <u>This is an expansive review of process, mechanical design, control narrative protocol, and performance during commissioning. This detailed review will evaluate the design report, design calculations, contract documents, change orders, process malfunctions, shop drawings, field inspection reports, process control narratives and commissioning procedures.</u> It will take approximately 10 weeks to complete the review. After the completion of the review, the consultant will present the findings to Council.

9.0 FINANCIAL IMPLICATIONS

The engineering fee for the peer review is $90,000 which can be funded from Water Treatment Reserve.

> **10.0 CONCLUSION**
> It is common in the industry to undertake a Value Engineering Audit (Peer Review) for projects over $25 million. Given the complexity and extensive work involved in the Water Treatment Plant Upgrades project, it is prudent to undertake such an Audit. The Audit provides added assurance that the entire project is designed, built and operates to meet the contract specifications, regulations and City's objectives. [The consultant] is a qualified consultant who is available immediately to undertake the peer review of the project [emphasis added].

[59] Although the city states that the consultant was retained by it to prepare the record to address liability and costs associated with the damage to the city's WTP filter underdrains, I find that this is not the case. The city, not the affected party consultant, directed the production of the record. I find that the dominant purpose for the production of the record was, as stated in the city's agenda, minutes, and report of May 24, 2011, to conduct a peer review. This purpose is also reflected in the record, which is to provide a peer review of the design and construction of the project, a common undertaking in the case of the construction of large projects.

[60] It may be that a copy of the record was also sent to the city's solicitor for use in litigation; however, I must consider the dominant purpose of the record's creation. In this appeal, after carefully considering all of the parties' representations and the contents of the record, I find that the dominant purpose was not to aid in the conduct of litigation.

[61] The relationship between access under the *Act* and civil litigation is dealt with in section 51(1), which provides that:

> This Act does not impose any limitation on the information otherwise available by law to a party to litigation.

[62] In Order PO-2490, former Senior Adjudicator John Higgins in considering section 64(1) of the *Freedom of Information and Protection of Privacy Act*[13] determined that:

> The legislature could have added a section precluding access under the *Act* to information that might be sought to be obtained through discovery in litigation, but it did not do so. In Order PO-1688, Senior Adjudicator David Goodis discussed the relationship between access under the *Act* and the discovery process. In that case, a third party appellant had argued that it was improper, in circumstances where the requester has commenced litigation against it, for the requester to utilize the access to information process under the *Act* as opposed to the discovery process

[13] Section 64(1) of the provincial *Act* is the equivalent section to section 51(1) of the *MFIPPA*.

under the Rules of Civil Procedure. He rejected this argument, and provided a helpful summary of the jurisprudence on this issue:

> The application of section 64(1) … was cogently summarized by former Commissioner Sidney B. Linden in Order 48, where he made the following points:
>
> > ... This section makes no reference to the rules of court and, in my view, the existence of codified rules which govern the production of documents in other contexts does not necessarily imply that a different method of obtaining documents under the [Act] is unfair ... Had the legislators intended the Act to exempt all records held by government institutions whenever they are involved as a party in a civil action, they could have done so through use of specific wording to that effect. …

In Doe v. Metropolitan Toronto (Municipality) Commissioners of Police (June 3, 1997), Toronto Doc. 21670/87Q (Ont. Gen. Div.), Mr. Justice Lane stated the following with respect to the relationship between the civil discovery process and the access to information process under the Act's municipal counterpart, in the context of a motion to clarify an earlier order he had made granting a publication ban:

> The order which I made on October 18, 1996 herein was not intended to interfere in any way with the operation of the *Municipal Freedom of Information and Protection of Privacy Act* legislation, nor ban the publication of the contents of police files required to be produced under that Act. … In my view, there is no inherent conflict between the Act and the provisions of the Rules [of Civil Procedure] as to maintaining confidentiality of disclosures made during discovery. The Act contains certain exemptions relating to litigation. It may be that much information given on discovery (and confidential in that process) would nevertheless be available to anyone applying under the Act; if so, then so be it; the Rules of Civil Procedure do not purport to bar publication or use of information obtained otherwise than on discovery, even though the two classes of information may overlap, or even be precisely the same.

[63] Adopting this analysis, I find that the usefulness of information in a court case does not necessarily result in a finding that the same information is exempt under the *Act*.[14]

[64] I recognize that the parties were in litigation as of March 2010 over various aspects of the project; however, I cannot ascertain, nor have I been directed to, any particular information in the record, the report to Council and the other city documents dated May 24, 2011, or the parties' statements of claim against each other, that indicates that this record was created for the dominant purpose of actual or contemplated litigation. Significantly, there is not any reference in the report to Council of May 24, 2011 that indicates that the record was to be produced to aid in the conduct of the litigation, which at that time was ongoing. Nor does it appear to me that the appellant's correspondence to the city of April 21, 2011 resulted in the creation of the record.

[65] I find that the record was not prepared for the dominant purpose of litigation, either actual or contemplated, and as such, it is not subject to litigation privilege under either branch 1 or branch 2 of section 12. Therefore, as the record is not privileged, there is no need for me to consider whether privilege has been waived by reason of the application of the common interest privilege principle. There is also no reason for me to consider whether the release delivered by the appellant to the city related to the litigation between these parties is relevant.

[66] Accordingly, the discretionary section 12 exemption does not apply to the record. I will now consider whether the mandatory third party information exemption in section 10(1) applies to the record.

C. Do the mandatory third party information exemptions at sections 10(1)(a) and (b) apply to the record?

[67] The city relies on sections 10(1)(a) and (b), which read:

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

[14] Orders PO-3130-I and PO-2899-R.

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

[68] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[15] Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[16]

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

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
>
> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
>
> 3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[70] The city submits that the first and second parts of the test are clearly established as the record includes the technical design of the WTP and the filter underdrains and was provided in confidence, with distribution restricted by the city' s solicitor.

[71] Concerning the third part of the test, the city relies on section 10(1)(a) and states that disclosure of the record can be expected to cause significant prejudice to the affected party engineer's competitive position in the market place as it will provide proprietary technical information to the appellant, some of which is not currently in the appellant or its subcontractor's possession. The city also states that disclosure will prejudice the engineer's position in the engineering design and consulting market.

[72] The city also relies on section 10(1)(b), as disclosure may result in information no longer being supplied to the affected party consultant, who the city states was retained for the purpose of providing advice during litigation. Should the record be disclosed, the city submits that it may need to retain a new expert to re-establish a "zone of privacy" in which to prepare its case.

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[15] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.).
[16] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[73] The appellant concedes that the first part of the test has been satisfied, since the record contains technical information. However, it disagrees that the second part of the test has been met as the information in the record would have been mutually generated as part of the contract specifications between the appellant and the city.

[74] In the alternative, the appellant states that even if the information in the record was supplied to the city, it was not supplied in confidence as:

> a) [The engineer's] Contract Documents were part of the public tendering process for this project;
>
> b) For a nominal fee, any interested party could purchase a copy of the Contract Documents, including [the engineer's] competitors;
>
> c) At the time of tender, interested bidders could view a copy of the Contract Documents by attending their local construction association(s).
>
> d) While inconsistent on this position, the [the city and the engineer] did indicate, initially and at other times that they would provide the appellant with a copy of the [record] once it became available.

[75] Concerning the third part of the test, the appellant submits that the city has repeated the words of the *Act* and makes only a general representation on the issue of harm.

[76] In reply, the city states the record was supplied in confidence by the affected party consultant, not the engineer, and contains technical information as well as the consultant's expert and privileged opinions/comments on the technical information. The city states that there is more information in the record than what was publicly disclosed in the contract with the affected party consultant.

[77] The city also states that while the terms of the contract with the engineer were part of the tendering process, the city's proprietary technical information and the consultant's expert opinion were not. Therefore, the city states that disclosure of the record can therefore be expected to cause significant prejudice to both affected parties' competitive position in the market place, contrary to section 10(1)(a) of the *Act*.

[78] The city disagrees that it had agreed to provide the appellant with a copy of the record. It also states that disclosure may result in a loss of privilege as between it and the consultant, retained for the purpose of providing advice during litigation.

[79] In sur-reply, the appellant disputes the city's suggestion that the consultant's expertise is a "proprietary trade secret". The appellant also argues that if section 10(1)

extended privilege on this basis, it would undermine the purpose of the *Act* by extending the exemption to any report containing an expert's opinion.

[80] The appellant points out that the WTP Filter System was designed and supplied by one of the appellant's subcontractors, who owns the proprietary rights to the Filter System's design.

[81] In sur-surreply, the city did not provide any further representations on the application of section 10(1) to the record.

Analysis/Findings

Part 1: type of information

[82] Both the city and the appellant submit that the record contains technical information. This type of information listed in section 10(1) has been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[17]

[83] I agree with the parties that the record contains technical information. This information was prepared by the consultant, an engineering consultant with extensive experience in design and commissioning of filters and pumping stations,[18] and describes the construction and operation of the WTP.

[84] Therefore, I find that part 1 of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[85] The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[19]

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[17] Order PO-2010.
[18] As described above in the report to Council: Peer Review of Water Treatment Plant Upgrades Project (EN2011-076), May 24, 2011.
[19] Order MO-1706.

[86] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[20]

[87] The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above.[21]

[88] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[22]

In confidence

[89] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[23]

[90] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

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[20] Orders PO-2020 and PO-2043.
[21] See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.).
[22] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).
[23] Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access

- prepared for a purpose that would not entail disclosure.[24]

[91] Based on my review of the record and the parties' representations, I find that the record was supplied in confidence to the city by the consultant. This record is not a contract but a consultant's review of the design, construction and operation of the upgrades to a water treatment plant. It is the consultant's own review and is not merely a regurgitation of information that would have been contained in a contract that the city had with the consultant, the engineer, or the appellant.

[92] I agree that the record was communicated to the institution on the basis that it was confidential and that it was to be kept confidential and treated consistently in a manner that indicates a concern for its protection from disclosure by the consultant prior to being communicated to city. The record is not otherwise disclosed or available from sources to which the public has access and it was prepared for a purpose that would not entail disclosure.

[93] Therefore, I find that the record was supplied in confidence to the city and that part 2 of the test under section 10(1) has been met.

Part 3: harms

[94] Both affected parties were provided with a Notice of Inquiry, which set out section 10(1) of the *Act* in full and sought representations on this and the other exemptions at issue in this appeal.

[95] Concerning sections 10(1)(a) and (b), the subsections that the city claim apply to the record, the Notice of Inquiry asked both affected parties the following specific questions:

> Section 10(1)(a): prejudice to competitive position
>
> Could disclosure of the record significantly prejudice the competitive position of a person, group of persons or organization? Please explain.
>
> Could disclosure of the record interfere significantly with the contractual or other negotiations of a person, group of persons or organization? Please explain.

[24] Orders PO-2043, PO-2371 and PO-2497.

Section 10(1)(b): similar information no longer supplied

> Could disclosure of the record result in similar information no longer being supplied to the institution? Please explain.
>
> Is it in the public interest that similar information continue to be supplied to the institution? What is the harm that would result if similar information were no longer supplied to the institution? Please explain.

[96] Both affected parties were advised in the Notice of Inquiry that they should not assume that the harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[25] They were also informed in the Notice of Inquiry that:

> To meet [part 3] of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[26]
>
> The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[27]
>
> 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 10(1).[28]

[97] In response, neither affected party provided representations on the application of the mandatory third party information exemption in section 10(1) to the record.

[98] In particular, the consultant's representations state in their entirety:

> [The consultant] adopts the position of its client, the City of Brantford, with respect to this appeal. [The consultant] was retained as an independent expert in anticipation of litigation. We have, at all times, conducted ourselves and our correspondence as such. We understand

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

> that correspondence and reports passing between the City of Brantford and [the consultant] are subject to privilege and we have treated them as such, including restricting the circulation of any part of our file relating to the Holmedale Water treatment Plant.

[99] The engineer's representations state in their entirety:

> [We were] commissioned by the City of Brantford in 2006 to act as their agent with regard to the engineering work for the Brantford WTP Upgrade project. Our services are ongoing, while the project is in its warranty period. Being the agent of the City, we have common interests, and must respect our clients decision to deny access to the document titled, "Technical Memorandum - Holmedale Treatment Plant Filter Backwash System Review (Final Draft)". We have no contractual relationship with the author of the report and have no right to consent to its release or distribution.
>
> Furthermore, our understanding is that this document is only a draft version of the report.

[100] The city's representations allege harm to the engineer under section 10(1)(a) and to the consultant under section 10(1)(b).

[101] Neither the city nor the affected parties have provided any details in their representations what particular information in the record could reasonably be expected to cause the harms outlined in section 10(1).

[102] Based on my review of the record and the representations of the city and the affected parties, I find that I have not been provided with detailed and convincing evidence to establish that disclosure of the record could reasonably be expected to cause significant prejudice to either the engineer's or the consultant's competitive position in the market place. Nor do I find that disclosure could reasonably be expected to prejudice these parties' positions in either the engineering design or in the consulting market. Therefore, I find that part 3 of the test under section 10(1)(a) has not been met.

[103] I also find that I have not been provided with detailed and convincing evidence to establish that disclosure of the record could reasonably be expected to result in information no longer being supplied to the city by the affected parties. Instead, the city's representations focus on information not being supplied by it to the consultant. This is not the test under section 10(1)(b). Section 10(1)(b) seeks to exempt information when its disclosure could reasonably be expect to result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied.

[104] Accordingly, I find that part 3 of the test under section 10(1) has not been met and the record is, therefore, not exempt under this exemption. As no further exemptions have been claimed for the record, and as no other mandatory exemptions apply, I will order the record disclosed.

ORDER:

1. I order the city to disclose the record to the appellant by **January 28, 2013** but not before **January 21, 2013**.

2. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by the city to be provided to me.

Original Signed by: December 19, 2012
Diane Smith
Adjudicator