

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2997

Appeal MA-060119-3

City of Toronto

January 15, 2014

**Summary:** The appellant sought access to records relating to the City of Toronto's sale of its street lighting assets to Toronto Hydro in 2008. After considerable mediation and the resolution of a number of procedural issues, the parties provided representation on the application of the exclusion in section 52(3) and the exemptions in section 6(1)(b), 7(1), 10(1), 11(c), (d) and (e) and 12 to the 144 records remaining at issue.

In this order, the city's decision with respect to the application of the exclusion in section 52(3) is partly upheld, as is its decision on the application of the exemptions in sections 7(1) and 12 to the majority of the records. The adjudicator does not, however, uphold the city's decision to deny access to other records on the basis that they are exempt under sections 6(1)(b) or 11(c), (d) or (e). In addition, the adjudicator does not accept the appellant's position that there exists a compelling public interest in the disclosure of the records and concludes that section 16 does not apply.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1), 10(1), 11(c), (d) and (e), 12, 16 and 52(3).

**Orders and Investigation Reports Considered:** Orders MO-2396-F, PO-2028, PO-2084, PO-1993 and MO-1738.

**Cases Considered:** *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.); *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163

(Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

## **OVERVIEW:**

[1] In January 2006, a request was submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (the Act) to the City of Toronto (the city) for access to the following information:

All documents related to the purchase of Toronto's street lights and expressway lights by Toronto Hydro Street Lighting Inc. [THESI], including but not limited to the following:

- The agreement(s) of sale.
- The agreement(s) for Toronto Hydro Street Lighting Inc. to provide street lighting and expressway lighting services to the City.
- Staff reports related to the sale.
- Staff reports related to the service agreement(s).

[2] The city located approximately 271 pages of responsive records and granted access to one page in a decision letter dated February 13, 2006. Access to the remaining records was denied pursuant to sections 6(1)(b) (closed meetings) and 15(a) (publicly available) of the *Act*. In addition, the city informed the requester that there was information in the first 208 pages of records which may be exempt under the mandatory exemption at section 10(1) (third party information) of the *Act*. Therefore, pursuant to section 21, notice would be given to the third party, Toronto Hydro, in order to provide it with the opportunity to make representations on disclosure of the information.

[3] In a supplementary decision letter dated March 15, 2006, the city informed the requester that partial access to information contained in the first 208 pages of records would be granted as these did not meet the requirements of the mandatory exemption for third party information at section 10(1) of the *Act*.

[4] The requester (now the appellant) appealed the city's decision to deny access to certain records which had been withheld under section 6(1)(b) of the *Act*, which resulted in the opening of Appeal MA-060119-1, resolved by Order MO-2468-F, dated October 27, 2009. The appellant also informed this office that he would not pursue an appeal of the decision to deny access to one of those records (pages 252-271) because the same record was already the subject of a related matter, Appeal MA-050410-1 that was resolved by Order MO-2389 on January 30, 2009. The appellant also chose not to

pursue an appeal of the decision relating to records for which the city was claiming the application of section 15(a).

[5] In a third decision letter issued May 5, 2006, the city wrote that it would be granting partial access to the records referred to in the March 15, 2006 letter as Toronto Hydro had not objected to their disclosure. The remaining portions of those records, which form parts of the agreements requested, were withheld under sections 10(1), 11 (economic and other interests) and 14(1) (personal privacy) of the *Act*.

[6] No mediation of the issues was possible and Appeal MA-060119-1 was moved to the adjudication stage of the process.

[7] During the course of that inquiry, the appellant raised the possibility that the city had not conducted an adequate search for the records at issue. As a result, the first adjudicator assigned to the file added "Scope of the Request/Responsiveness of Records" and "Search for Responsive Records" as issues in that appeal. Adjudicator Loukidelis dealt with these two issues in Interim Order MO-2135-I, issued on December 20, 2006. In that order, the adjudicator found that the city had interpreted the appellant's request too narrowly, and that its search for responsive records was not reasonable. As a result, she ordered the city to conduct a further search for responsive records and to issue a new access decision.

[8] On February 5, 2007, the city issued a new decision letter regarding the results of the searches ordered in Interim Order MO-2135-I. The city identified three e-mails, totalling eight pages, as responsive to the appellant's request and denied access to them pursuant to sections 11 and 12 of the *Act*.

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

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

[11] During the course of that inquiry, the city provided this office with affidavits advising that a considerable number of records were located and subsequently deemed to be non-responsive to the request or the parameters of search that were set out in Interim Order MO-2135-I. Adjudicator Loukidelis wrote to the city on August 22, 2007, requiring that the city provide all of the records that were located to this office. The city subsequently sent five boxes containing approximately 12,145 pages of records without descriptions or explanations as to whether they were responsive and without

issuing an access decision on them.

[12] The adjudicator then issued an Interim Order (in letter form) to the city on November 13, 2007, in which she ordered the city to issue a decision on access with respect to the approximately 12,145 pages of records and to prepare an index of records to accompany the decision.

[13] The city issued an access decision on December 7, 2007, granting the appellant partial access to the records at issue. With the decision, the city enclosed a 285 page index of records which described the responsive records. As set out in the index, the city took the position that some of the records to which it denied access fell outside of the scope of the *Act* due to the operation of the exclusionary provisions in sections 52(3)1, 2, and 3 (labour relations) of the *Act*. Access to the remaining records or portions of records was denied pursuant to the mandatory exemptions at sections 10(1) (third party information) and 14(1) (personal privacy) and the discretionary exemptions at sections 6(1)(a) (draft by-law), 6(1)(b) (closed meetings), 7(1) (advice or recommendations), 11(c), (d), (e), (f) (economic and other interests), 12 (solicitor-client privilege) of the *Act*. The index also identified a number of records that the city believed were not responsive to the request.

[14] Additionally, in its decision the city advised that because the disclosure of a number of records could affect the interests of a third party, it would be notifying that party pursuant to section 21 of the *Act* to offer it the opportunity to make representations.

[15] The appellant appealed the city's decision of December 7, 2007 to this office and the present appeal, MA-060119-3, was opened.

[16] During the course of mediation of this appeal, the appellant maintained that the city did not disclose all of the records identified as disclosed in the index of records. Appeal MA-060119-4 was opened to address that issue and resulted in the issuance of Order MO-2275 on February 14, 2008 by Registrar Robert Binstock. In Order MO-2275 the city was ordered to disclose all of the records that were to have been disclosed according to the index of records.

[17] Additional concerns were raised relating to the index of records and Adjudicator Loukidelis issued Order MO-2282-I on February 27, 2008 ordering the city to provide a revised index of records.

[18] In a letter dated March 26, 2008, the city provided the appellant and this office with a revised index of records. This office then arranged for staff from the city's Corporate Access and Privacy office to meet with an IPC mediator assigned by this office to review the records to ensure that all records had been provided and that they were all numbered and described. As a result of this meeting, the city amended its

index and provided this office with most of the pages which were noted as missing.

[19] Following further reviews and revisions, the city provided the parties with a revised index of records in a letter dated June 27, 2008. The appellant reviewed the revised index and provided this office with an affidavit identifying the records that he had not received from the city. The mediator provided the city with a listing of these records and the city agreed to send the appellant all of the records noted as disclosed on the index of records.

[20] In a letter dated July 23, 2008, the appellant wrote to the city advising that pages ARL 7072A-ARL7099A were included in the disclosure of records but that these records were noted as exempt on the index of records. In a letter dated July 30, 2008, the city responded to the appellant's letter advising that the above-noted records were inadvertently disclosed and requesting that they be returned. The appellant agreed to return these records to the city.

[21] The appellant subsequently confirmed that he was generally satisfied that he had received the records marked as disclosed on the index of records and they are no longer at issue in this appeal. Additionally, as a result of the discussions outlined below, the appellant removed a large number of records from the scope of the appeal.

[22] First, the appellant conducted a detailed review of the revised index of records in an effort to identify those records which he might be prepared to withdraw from the scope of the appeal. Specifically, the appellant identified a number of records which appear to be exempt pursuant to section 12 of the *Act*. The mediator then reviewed the records and provided the appellant with her view with respect to the application of section 12 of the *Act*. Subsequently, the appellant identified a number of records that he was prepared to remove from the scope of the appeal.

[23] Second, the mediator advised the appellant that in her review of the records, she identified a number of duplicate records. The appellant confirmed that he was prepared to remove the duplicates from the scope of the appeal.

[24] Third, the mediator reviewed with the appellant the records identified by the city as non-responsive. In most cases, the appellant agreed that the records were not responsive to the request and confirmed that they could be removed from the scope of the appeal. However, the appellant took the position that some records were responsive to the request. Accordingly, "Scope of the request/responsiveness" remained at issue at this stage of this appeal.

[25] Finally, certain records listed on the index of records as not being subject to exemption that were not provided to the appellant; for example, Records ARL 192-196 and ARL 8399-8410. Additionally, in some cases the index of records notes that the record is missing or has already been disclosed, but the appellant claims that he has not

been provided with a copy. Further, Records ARL 1497-1500 and ARL 4763-4765 are noted on the index of records as "disclosed in part", but no exemptions were cited for the pages that were withheld. Finally, Record ARL 6042-6044 is noted as missing on the index of records; however, an earlier version of the index indicates that it has been disclosed to the appellant. At the conclusion of mediation, these undisclosed records remained at issue in this appeal.

[26] During mediation, the appellant claimed that there is a compelling public interest in the disclosure of the records at issue. As a result, section 16 of the *Act* was added as an issue in this appeal.

[27] The city advised that further mediation would not be possible. As a result, this file was forwarded to the adjudication stage of the appeal process.

[28] Shortly after Appeal MA-060119-3 was moved to the adjudication stage of the appeal process, the adjudicator who had carriage of this group of files (Adjudicator Laurel Cropley) issued a decision in Appeal MA-060119-1. In Order MO-2468-F dated October 27, 2009, Adjudicator Cropley ordered the city to disclose all but one paragraph of the records at issue in that appeal.

[29] Following receipt of Order MO-2468-F, the city indicated that it would be reviewing its decision regarding the records at issue in Appeal MA-060119-3. On January 14, 2010, the city issued a revised decision respecting Appeal MA-060119-3. In that decision, the city agreed to disclose 24 records in full and six records in part, to the appellant.

[30] After reviewing this decision and the records that were disclosed to him, the appellant indicated that he wished to proceed with all of the outstanding issues.

[31] On April 7, 2010 this office issued a Notice of Inquiry seeking representations from the city and Toronto Hydro on the issues pertinent to their respective involvement in this appeal. The city submitted representations. Toronto Hydro chose not to do so.

[32] In the Notice of Inquiry, as one of the issues, the city was asked if it was claiming exemptions for the records outlined above that had not been disclosed to the appellant but for which no exemptions had been claimed. Specifically the City was asked to identify the exemption(s) relied upon to withhold access to Records ARL 192-196 and ARL 8399-8410 in their entirety, as well as to the portions of Records ARL 1497-1500 and ARL 4763-4765 that it had not disclosed. The city was also asked to locate Record ARL 6042-6044 and identify any exemption(s) relied upon to withhold access to it. In its representations, the city advised that it has disclosed all of the above-noted records and they are therefore no longer at issue in this appeal. Accordingly, this issue has been removed from scope of the appeal.

[33] Also, in its representations, the city raised a number of preliminary issues and asked for a reconsideration of the Notice of Inquiry, all of which were addressed by the adjudicator.

[34] At this point, the adjudicator decided to seek the representations of the appellant. Included with the Notice of Inquiry was the following statement respecting the adjudicator's approach to the treatment of records that were also addressed in earlier decisions involving the subject matter of this appeal:

As I advised the City in the Notice of Inquiry sent on April 7, 2010, in Order MO-2468-F, Adjudicator Laurel Cropley made the following comments:

It is important to note that appeals MA-060119-2 (recently resolved by my Order MO-2396-F) and MA-060119-3 (currently in adjudication) are closely linked to appeal MA-060119-1 as well as appeal MA-050410-1 (recently resolved by my Order MO-2389). All of these files had previously been dealt with by the same adjudicator, and the appellant raised a number of similar procedural and process issues in each file. All of these files were transferred to me to complete the adjudication process. In the interim decisions issued by the previous adjudicator and in the two decisions I issued in the related appeals, a number of these procedural and process issues were addressed. In my view, any decision issued by either the previous adjudicator or myself relating to these similar issues with respect to one appeal file should be construed as applying to all of the appeal files in this group, and will, therefore, be incorporated by reference into the other files, even though the substantive issues in each one will be dealt with separately.

I agree with the approach taken by Adjudicator Cropley and I intend to follow this approach. Moreover, I find that the discussions and findings in Order MO-2468-F may be relevant to many of the issues on appeal in Appeal MA-060119-3. The appellant is invited to refer to Order MO-2468-F when responding to the issues set out below.

[35] Rather than submitting representations in response to the Notice, the appellant proposed that the appeal return to the mediation stage to attempt to address some or all of the issues outstanding, including narrowing the scope of the records. As a result of this very lengthy mediation process, the number of records at issue was reduced to 144, as outlined in a shared Index of Records. The appellant also proposed that the appeal ought to proceed "fresh", with the solicitation of new representations from the

parties on the application of the exclusions and exemptions claimed for each of the 144 responsive records. At this point, the file was re-assigned to me to conduct the inquiry and resolve the appeal.

[36] Accordingly, I sought and received representations from the city and the affected party, Toronto Hydro, initially. A complete copy of the affected party's representations was shared with the appellant, along with a severed version of the city's representations. Several excerpts from pages 36, 57 and 58 of the city's representations were withheld because of confidentiality concerns.

[37] The appellant also submitted detailed representations which were shared, in their entirety, with the city. The final step in the inquiry was completed with the solicitation and receipt of final reply representations from the city.

[38] In this order, I uphold the city's decision to deny access to most of the records for which it had applied the exclusion in section 52(3) and the exemption in sections 7(1) and 12. I do not uphold the city's decision to deny access to certain other records, which are described in greater detail below.

## **RECORDS:**

[39] The records at issue in this appeal consist of 144 documents including various reports, emails, proposals, memoranda, correspondence and other, similar documents. The records are described in greater detail in an Index of Records which was shared by the parties to the appeal during the inquiry.

## **ISSUES:**

- A: Are the records excluded from the *Act* as a result of the operation of section 52(3)?
- B: Are the records exempt from disclosure under the discretionary exemption in section 12 of the *Act*?
- C: Are the records exempt from disclosure under the discretionary exemptions in sections 11(c), (d) and (e) of the *Act*?
- D: Are the records exempt from disclosure under the discretionary exemption in section 7(1) of the *Act*?
- E: Are the records exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*?



- F: Are the records exempt from disclosure under the mandatory exemption in section 10(1) of the *Act*?
- G: Did the city properly exercise its discretion to deny access to the records which are found to be exempt under sections 6(1)(b), 7(1), 11 and 12?
- H: Is there a compelling public interest in the disclosure of the records under section 16 of the *Act* which outweighs the purpose of the exemptions claimed for them?

## **DISCUSSION:**

### **Issue A: Are the records excluded from the *Act* as a result of the operation of section 52(3)?**

[40] The city takes the position that Records 1, 7, 10, 11, 12, 16, 17, 20, 21, 22, 23, 24, 25, 26, 27, 29, 29, 30, 31, 32, 33, 34, 35, 36, 37, 38, 86, 87, 94, 99, 116, 127 and 128 fall within the ambit of section 52(3) and are, accordingly, excluded from the operation of the *Act*. The city describes the records which are excluded as fitting within one of three categories of information:

- Correspondence, including attachments, to and from its solicitors relating to labour relations and employment-related matters arising from the "street lighting transaction;"
- Documents created by or provided to its legal counsel for the other parties to the transaction relating to the labour relations and employment-related matters arising from it; and
- Drafts of documents containing information not subsumed in the two categories above.

### **General principles with respect to section 52(3)**

[41] Section 52(3) states:

Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:

1. Proceedings or anticipated proceedings before a court, tribunal or other entity relating to labour relations or to the employment of a person by the institution.

2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. Meetings, consultations, discussions or communications about labour relations or employment related matters in which the institution has an interest.

[42] If section 52(3) applies to the records, and none of the exceptions found in section 52(4) applies, the records are excluded from the scope of the *Act*.

[43] For the collection, preparation, maintenance or use of a record to be "in relation to" the subjects mentioned in paragraph 1, 2 or 3 of this section, it must be reasonable to conclude that there is "some connection" between them [Order MO-2589; see also *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner*, 2010 ONSC 991 (Div. Ct.)].

[44] The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships. The meaning of "labour relations" is not restricted to employer-employee relationships [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.). See also Order PO-2157].

[45] The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

[46] If section 52(3) applied at the time the record was collected, prepared, maintained or used, it does not cease to apply at a later date [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.), leave to appeal refused [2001] S.C.C.A. No. 507].

[47] Section 52(3) may apply where the institution that received the request is not the same institution that originally "collected, prepared, maintained or used" the records, even where the original institution is an institution under the *Municipal Freedom of Information and Protection of Privacy Act* [Orders P-1560 and PO-2106].

**Section 52(3)1: court or tribunal proceedings**

[48] For section 52(3)1 to apply, the city must establish that:

1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; and
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.

[49] The city submits that it is a party to the collective agreement between the International Brotherhood of Electrical Workers (the IBEW) and the Electrical Trade Bargaining Agency of the Electrical Contractors Association of Ontario (the ETBAECAO), governing its use of electricians and electrical work. The collective agreement governs the relationship between the electricians employed by the city and addresses "a broad range of labour relations issues that arise in respect of electrical work in [the] construction industry. The street lighting transaction between the City and Toronto Hydro raised complex issues under the collective agreement and the *Labour Relations Act* (the *LRA*)." It argues that the records which are claimed to fall within the ambit of the section 52(3) exclusion address various labour relations and employment-related matters that flowed from the street lighting transaction involving the city's workforce and the ramifications of a possible grievance by the IBEW under the provisions of its collective agreement with the city.

[50] In its initial representations, the city argues that each of these records, which it refers to collectively as the Labour Relations Documents, were collected, prepared, maintained or used by the city; specifically, its solicitors and those who received the solicitor's advice on the labour relations issues addressed in the records. It goes on to add that these records "were created to ensure that the City's position with respect to the anticipated proceedings was appropriately addressed." It states that the records spoke to:

. . . issues concerning sale of the street lighting assets and the potential consequences of the sale *vis-à-vis* the workforce. Each addressed specifically the City's positions, issues or concerns that arose or could arise with respect to the actual or anticipated proceedings, negotiations or other labour relations or employment-related matters in which the City had an interest. Each was prepared or used in the context of preparing or providing advice on how to address the employment/labour relations issues affecting the City arising from the street lighting transaction.

***Section 52(3)2: negotiations***

[51] For section 52(3)2 to apply, the city must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; and
3. these negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861 and PO-1648]

[52] With regard to section 52(3)2, the city argues that because there existed the possibility of complex labour relations proceedings as an outcome of the street lighting transaction, extensive negotiations between it, the IBEW, other union locals and the ETBAECAO were, or could have been, required. It submits that the disclosure of the records would be "highly prejudicial" to the interests of the city in those negotiations.

***Section 52(3)3: matters in which the institution has an interest***

[53] For section 52(3)3 to apply, the city must establish that:

1. the records were collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; and
3. these meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the institution has an interest.

[54] The city submits that its collection, preparation, maintenance and use of the records were in relation to meetings, consultations, discussions and communications about labour relations or employment-related matters arising from its position as a signatory to the collective agreement. Particularly with respect to the negotiation of an

Indemnity Agreement with the IBEW, the city argues that disclosure would be highly prejudicial to its legal interests.

[55] The appellant relies on the test described in Order MO-2468-F in which Adjudicator Cropley held that the correct standard for establishing the application of section 52(3) is whether there is a "substantial connection" between the collection, preparation, maintenance or use of the information in the record and the proceedings or anticipated proceedings. However, more recently, this test was expressly overruled in *Ministry of the Attorney General and Toronto Star and Information and Privacy Commissioner, supra*, in which the Divisional Court held that only "some connection" is required between the collection, preparation, maintenance and use and the subjects mentioned in paragraphs 1, 2 and 3 of section 52(3).

[56] The appellant also takes issue with the evidence presented by the city that links the records to a particular proceeding or anticipated proceeding. While he recognizes that once the exclusion in section 52(3) is established, it is permanent, he suggests that the city has failed to establish that the purpose behind the exclusion is to protect information about "dynamic events in the workplace", all of which have long since taken place.

[57] In its reply submissions, the city provided me with greater detail concerning the circumstances surrounding the creation of the records and the imperatives at work within the organization at that time, as they related to the street lighting transaction. In particular, the city refers to certain anticipated proceedings surrounding a possible grievance filed by the IBEW which could have resulted in a hearing before the Ontario Labour Relations Board (the OLRB). With its reply submissions, the city also provided a table in which it outlined how the exclusion applies, in its view, to each of the documents which it has claimed to be excluded under section 52(3).

### **Are the records excluded from the operation of the *Act*?**

[58] Record 1 is an email exchange between the City Manager and a solicitor with the city's Legal Department in which the solicitor requests instructions on how to proceed with a negotiation, the particulars of which are contained in the email. Much of the email exchange addresses the labour relations component of the negotiations and the city's position in that discussion. I find that Record 1 was prepared and used by the city in relation to consultations and discussions about a labour relations matter in which it had an interest. The city's role as employer is addressed in the record and the discussion involved an examination of one important aspect of the negotiation process. As a result, I find that Record 1 consists of information that is excluded from the *Act* as a result of the operation of section 52(3).

[59] Record 7 is a lengthy set of documents consisting of several drafts of a document entitled "Due Diligence Request List". Large portions of these documents

have already been disclosed. The city has not provided me with any representations on the application of section 52(3) to these documents and it is not apparent to me on their face why the exclusion would apply to the undisclosed portions of them. Based on my review of these records, I find that they are not excluded from the operation of the *Act* by virtue of section 52(3). The city has claimed other exemptions for this information which will be addressed below.

[60] Records 10 and 11 are a two-page fact sheet setting out various components of several collective agreements between the city and its bargaining agents. Records 10 and 11 also describe certain activities to be undertaken by its staff with respect to and as part of the city's preparation for the potential sale of its street lighting assets. I find that this information qualifies for exclusion under section 52(3)3 as it pertains directly to employment-related matters affecting the city's workforce.

[61] Record 12 is an email passing from a city solicitor to city staff setting out his opinion with respect to a legal problem involving the city's workforce. This communication is clearly about labour relations issues in which the city has an interest, in its capacity as employer. As such, I conclude that it is excluded under section 52(3)3.

[62] Record 16 is the third draft of an insert that was to accompany a report to City Council. The document describes in detail several issues that arose regarding the street light transaction relating to labour relations and the interpretation of the collective agreements which the city has entered into with two bargaining agents. Again, I conclude that this information falls within the ambit of the exclusion in section 52(3)3.

[63] Record 17 is a six-page staff report dated June 13, 2005 which was submitted to the city's Works Committee by the Acting General Manager of its Transportation Services Department regarding the evaluation of a street lighting maintenance pilot project. I find that this report, much of which has already been disclosed, was not collected, prepared, maintained or used by the city in relation to any of the three enumerated categories in section 52(3). As a result, I find that it is not excluded from the operation of the *Act* on that basis. I will discuss the application of the section 12 exemption to portions of this record below.

[64] Records 20 to 38 are minutes of meetings, action logs, notes of conference calls and agendas of meetings between the city and Toronto Hydro at the time the street lighting transaction was discussed and certain issues were resolved. Portions of the records were disclosed to the appellant. While the records discuss details about the transaction and its completion, issues relating to labour relations or employment related matters are referred to only peripherally, or not at all in these records. Accordingly, I find that these records are not excluded from the operation of the *Act* under section 52(3), although I will address the exemptions claimed for the undisclosed portions of these records below.

[65] Records 86, 87, 94, 99, 116, 127 and 128 are internal records prepared by the city's Legal Department describing in detail a number of issues relating to the street lighting transaction. The issues identified in the records relate primarily to the mechanics of the transaction itself and set out the city's position in the negotiations with Toronto Hydro. I have reviewed these records and conclude that they are not excluded from the operation of the *Act* as a result of the operation of section 52(3). These records were not collected, prepared, maintained or used by the city in relation to any of the subjects described in paragraphs 1, 2 or 3 of section 52(3). Again, I will address the application of the other exemptions claimed for these records below.

[66] To summarize, I find that Records 1, 10, 11, 12 and 16 are excluded from the operation of the *Act* under section 52(3)3. I will not, accordingly, be addressing these records further in this order.

**Issue B: Are the records exempt from disclosure under the discretionary exemption in section 12 of the *Act*?**

**General Principles governing the application of section 12**

[67] The city claims the application of the discretionary solicitor-client privilege exemption in section 12 to all of the remaining records at issue. This exemption states:

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

[68] Section 12 contains two branches as described below. Branch 1 arises from the common law and branch 2 is a statutory privilege. The institution must establish that one or the other (or both) branches apply.

***Branch 1: common law privilege***

[69] Branch 1 of the section 12 exemption encompasses two heads of privilege, as derived from the common law: (i) solicitor-client communication privilege; and (ii) litigation privilege. In order for branch 1 of section 12 to apply, the institution must establish that one or the other, or both, of these heads of privilege apply to the records at issue. [Order PO-2538-R; *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4<sup>th</sup>) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39)].

***Solicitor-client communication privilege***

[70] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made

for the purpose of obtaining or giving professional legal advice [*Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.)].

[71] The rationale for this privilege is to ensure that a client may confide in his or her lawyer on a legal matter without reservation [Orders PO-2441, MO-2166 and MO-1925].

[72] The privilege applies to “a continuum of communications” between a solicitor and client:

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

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

[74] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication [*General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.)].

### ***Litigation privilege***

[75] Litigation privilege protects records created for the dominant purpose of litigation, actual or contemplated [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)* (cited above)].

[76] 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.

### ***Loss of privilege***

#### ***Waiver***

[77] Under branch 1, the actions by or on behalf of a party may constitute waiver of common law solicitor-client privilege.

[78] Waiver of privilege is ordinarily established where it is shown that the holder of the privilege

- knows of the existence of the privilege, and
- voluntarily evinces an intention to waive the privilege

[*S. & K. Processors Ltd. v. Campbell Avenue Herring Producers Ltd.* (1983), 45 B.C.L.R. 218 (S.C.)].

[79] Generally, disclosure to outsiders of privileged information constitutes waiver of privilege [J. Sopinka et al., *The Law of Evidence in Canada* at p. 669; see also *Wellman v. General Crane Industries Ltd.* (1986), 20 O.A.C. 384 (C.A.); *R. v. Kotapski* (1981), 66 C.C.C. (2d) 78 (Que. S. C.)].

[80] Waiver has been found to apply where, for example

- the record is disclosed to another outside party [Order P-1342; upheld on judicial review in *Ontario (Attorney General) v. Big Canoe*, [1997] O.J. No. 4495 (Div. Ct.)]
- the communication is made to an opposing party in litigation [Orders MO-1514 and MO-2396-F]

- the document records a communication made in open court [Orders P-1551 and MO-2006-F]

[81] Waiver may not apply where the record is disclosed to another party that has a common interest with the disclosing party. The common interest exception has been found to apply where, for example

- the sender and receiver anticipate litigation against a common adversary on the same issue or issues, whether or not both are parties [*General Accident Assurance Co. v. Chrusz* (above); Order MO-1678]
- a law firm gives legal opinions to a group of companies in connection with shared tax advice [*Archean Energy Ltd. v. Canada (Minister of National Revenue)* (1997), 202 A.R. 198 (Q.B.)]
- multiple parties share legal opinions in an effort to put them on an equal footing during negotiations, but maintain an expectation of confidentiality vis-à-vis others [*Pitney Bowes of Canada Ltd. v. Canada* (2003), 225 D.L.R. (4<sup>th</sup>) 747 (Fed. T.D.)]

### ***Branch 2: statutory privileges***

[82] Branch 2 is a statutory exemption that is available in the context of counsel employed or retained by an institution giving legal advice or conducting litigation. The statutory exemption and common law privileges, although not necessarily identical, exist for similar reasons.

#### ***Statutory solicitor-client communication privilege***

[83] Branch 2 applies to a record that was “prepared by or for counsel employed or retained by an institution for use in giving legal advice.”

#### ***Statutory litigation privilege***

[84] Branch 2 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.”

[85] Termination of litigation does not affect the application of statutory litigation privilege under branch 2. [*Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)*, (cited above)]

[86] Branch 2 includes records prepared for use in the mediation or settlement of actual or contemplated litigation. [*Liquor Control Board of Ontario v. Magnotta Winery Corporation*, 2010 ONCA 681]

### ***Loss of Privilege***

[87] The application of branch 2 has been limited on the following common law grounds as stated or upheld by the Ontario courts:

- waiver of privilege by the *head of an institution* (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)) and
- the lack of a “zone of privacy” in connection with records prepared for use in or in contemplation of litigation (see *Ontario (Attorney General) v. Big Canoe*, [2006] O.J. No. 1812 (Div. Ct.)).

### **Are the records exempt under section 12?**

#### ***Representations of the parties***

[88] The city argues that all 144 of the records at issue in this appeal are exempt from disclosure under section 12. It submits that 121 of them, Records 1 to 19 and 39-144, were located in files maintained by the city’s Legal Services Office and that they are:

. . . *prima facie* documents that were collected, prepared, maintained and used by the City’s solicitors for the purpose of giving legal advice with respect to the various issues relating to the subject transactions – as each one was located in the working files (electronic and paper) of the City’s Legal Services Office. The other 23 Solicitor-client Documents relate to drafts of documents held by other city divisions (where it forms part of the correspondence between the division and Legal Services) reflect, or are documents utilized at meetings where Legal Services staff were present or the issue of legal advice arose.

[89] The city goes on to submit that most of the documents to which it has applied section 12 can be categorized into one of four “sub-classes” which it describes as:

1. Correspondence and attachments to and from city solicitors (internal and external) and its staff;
2. Correspondence and attachments to and from counsel, officers or employees of third parties involved in the street lighting transaction “collected by the City’s solicitors for the City of Toronto for the purpose of formulating legal advice (such as Records 14, 39 and 144)”;

3. Documents such as lists or charts of issues that are referred to in meetings convened to discuss the street lighting transaction "where the issue of legal advice or the involvement of Legal Services/outside counsel were the subject of discussion, or the City's legal representatives participated in the meeting"; and
4. "Solicitor's Documents" such as handwritten notes taken at meetings or during telephone conversations relating to the street lighting transaction.

[90] The city submits that because all of the records were prepared by or for counsel employed or retained by the city for use in giving legal advice, they are exempt under the statutory solicitor-client communication privilege, in addition to common law solicitor-client communication privilege.

[91] The city submits that the records which comprise category 1 are correspondence between its internal and external solicitors and city staff that was mainly transmitted electronically. It goes on to indicate that these communications may have included various attachments which the lawyers were asked to, and often did, comment upon. It then indicates that the issues addressed in each of these communications dealt with the "possibility of contemplated litigation and its ramifications, as well as the legal ramifications of the subject matter of negotiations." In addition, the city states that the records which comprise category 1 "represent a continuum of correspondence in which a variety of legal advice, opinions and suggestions were either requested or provided in relation to a myriad of developments in relation to the street lighting transaction."

[92] Further, the city submits that the records in category 1 were prepared by or for counsel employed or retained by the city for use in contemplated or actual litigation. The records were "used to form legal advice with respect to the contemplated litigation, which could arise from the street lighting transaction." The city suggests that the records address specific questions about the city's possible liability in the event of litigation over the street lighting transaction and the defences that would be available to it. The city takes the position that many of the records which comprise category 1 were created for the dominant purpose of reasonably contemplated litigation to ensure that counsel has a "zone of privacy" around documents which serve "to investigate and prepare a case for trial."

[93] Those records identified as falling within category 2 consist of correspondence and communications with outside parties who were adverse in interest to the city in the street lighting transaction. The city suggests that these communications were conducted on a "without prejudice" basis and were intended to be treated confidentially by the counsel involved. The city also claims that the same principles apply to exempt any attachments to these communications and that they are also exempt under the solicitor-client communication privilege aspect of section 12.

[94] The city then states that the records it has designated as category 2 and 3 records:

. . . reflect the nature of meetings held between Client and solicitor and the advice given. Providing access to the records in Sub-Class #2 and #3 would violate solicitor-client privilege in the following three ways:

- a. By directly disclosing the content of the discussions between solicitor and client;
- b. By allowing an 'assiduous investigator' to determine the content of solicitor-client privileged communication between the City and its solicitors; and
- c. By disclosing the content of 'litigation privileged' documentations.

[95] Record category 4 consists of what the city describes as "Solicitor's Documents", which include counsel's personal notes which were prepared by her in the course of meeting her responsibilities as counsel to the city. It adds that these records contain information that reflects the advice sought and the advice provided to her clients.

[96] In response, the appellant points out that the city's representations are general in nature and do not address the application of section 12 to any of the many individual records which remain at issue. Rather, the appellant asserts that the city simply makes bald assertions that the records fall within the ambit of the various components of the section 12 exemption, without referring to any of the contents of the records specifically.

[97] The appellant refers to those records from categories 2, 3 and 4 which reflect communications passing between counsel for the city and Toronto Hydro's counsel and staff. He relies on the finding in Order MO-2396-F where Adjudicator Cropley rejected a claim for solicitor-client communication privilege in similar documents passing between counsel for the city and counsel for Toronto Hydro. In that decision, Adjudicator Cropley held that:

Although there is a close relationship between Toronto Hydro and the City, I find that in the circumstances of this transaction, they maintain opposing interests. In that regard, this record is correspondence sent between opposing counsel, and I am not satisfied that, in the circumstances, this record qualifies for exemption under the solicitor-client privilege in section 12.

[98] The appellant also points out that just because counsel is asked to review a document, that record does not automatically become privileged. He suggests that in order for such a document to become privileged, the solicitor must have offered "advice" as to its contents.

[99] Finally, the appellant argues that there was no litigation identified or contemplated at the time that the records were prepared.

[100] In its reply submissions, the city acknowledges that several records to which it has applied the solicitor-client privilege exemption in section 12 were "shared" between the city and Toronto Hydro, specifically, Records 14, 39, 103, 123 and 144. The city argues that this "sharing" of information "does not constitute a waiver of solicitor-client privilege" as there exists a common interest privilege between the city and Toronto Hydro which operates as an exception to waiver of privilege. The city relies on Order MO-3154 which discusses the concept of common interest as it relates to two parties working towards "getting a deal done."

[101] The city also provided me with a lengthy reiteration of its original submissions as they relate to the position taken by the appellant in his representations. It is not necessary for me to set out these submissions in this order as they are essentially the same as those described above.

### ***Findings***

[102] Many of the records remaining at issue in this appeal were located in what the city describes as "the working files" of a solicitor in the Municipal Law Section of the City Solicitor's Office and, in the original index prepared by the city, these records are given the prefix "L". It indicates that these records often include the handwritten notations of the solicitor about "individualized items which relate to specific tasks undertaken by her as solicitor for the city" and that these records fall within the ambit of the section 12 solicitor-client communication privilege exemption on that basis.

[103] The city maintains that the Issue Lists which comprise Records 2, 3, 4, 5, 6, 13, 59, 76, 85, 86, 87, 94, 96, 99, 127 and 128 form part of the working notes of counsel. I note that Record 82 also consists of a similar issues list and I will also determine if it qualifies for exemption in this basis. The city submits that these records were prepared to enumerate certain issues with respect to the City Council's decision and direction to the Deputy City Manager and Chief Financial Officer to proceed with the sale of city street and expressway lighting to Toronto Hydro.

[104] Many of the issues addressed in the documents are about legal concerns raised with respect to the transaction, its implementation and particularly the nature of its structure. The issue lists also describe the finalization of the language to be included in

the agreement and the subjects which were discussed at meetings in which these issues were raised.

[105] Based on my review of each of the issue lists set forth above, I find that they form part of the working papers of the solicitors, both internal and external, engaged on behalf of the city to participate in the discussions and give legal advice respecting the form of the transaction which was ultimately arrived at. As a result, I find that Records 2, 3, 4, 5, 6, 13, 59, 76, 82, 85, 86, 87, 94, 96, 99, 127 and 128 are exempt under the solicitor-client communication privilege aspect of Branch 1 of section 12.

[106] Record 8 is an email communication from a city employee to a member of its legal department seeking advice on a specific question. The majority of the communication has been disclosed. I find that the remaining portion of the email is exempt under solicitor-client communication privilege as it represents a confidential communication between a solicitor and client about a legal issue.

[107] Record 14 is an email from the Deputy City Manager to a number of city staff, including legal counsel, seeking their advice on a development in the transaction. I find that this issue has certain legal connotations attached to it and that the sender of the email was seeking the advice of not only his staff, but also a solicitor from the city's Legal Services Department. As a result, I find that this record constitutes a privileged communication between a client and his solicitor seeking legal advice about a legal issue and it is, accordingly, exempt under section 12.

[108] Record 15 is a table setting out a number of discussion points arising from meetings held between the city and Toronto Hydro on October 11 and 14, 2005. There is nothing on the face of this agreement to indicate who prepared it. The city submits that a copy of it was found in its solicitor's file in relation to the street lighting transaction and that it constitutes part of her "working papers" used in the course of giving legal advice and, thereby, qualifies for exemption under the solicitor-client communication privilege aspect of section 12. Based on my review of the document, including the agenda attached to it, I find that it addresses a wide range of issues relating to the transaction and does not contain legal advice or information that would disclose legal advice. While it may have found its way into the solicitor's file, I have not been provided with any evidence that it was relied upon or that it formed part of the process around the solicitor giving or receiving legal advice to her client. As a result, I find that it does not qualify for exemption under section 12.

[109] Record 17 is a staff report which has been disclosed to the appellant with the exception of certain notations made by someone in the City Solicitor's Office, according to the city's representations. The notations include underlining and some "crossing out" but do not include anything that would reveal legal advice provided by the solicitor to his or her client. As a result, I find that these notations are not exempt under section

12. As no other exemptions or exclusions have been claimed for this document, I will order that it be disclosed to the appellant.

[110] Record 18 is similarly a copy of an agenda for a meeting of the Street Lighting Steering Committee held on May 26, 2005 and a number of attachments. In contrast to the contents of Record 17, however, the notations made on these documents by counsel are substantive in nature and address the legal issues under consideration as part of the transaction. I find that Record 18, including the attachments to it, forms part of the solicitor's working papers and is exempt under the solicitor-client communication privilege aspect of section 12.

[111] Record 19 is an email passing between the Deputy City Manager and a number of officials with the city, including a member of its legal department. The email sets out a number of issues and outlines the next steps to be taken or actions to be taken following a meeting on August 18, 2005. I find that the email deals only peripherally with issues that involve the provision or seeking of legal advice. Rather, the involvement of the city's legal department is of marginal relevance to the subjects being raised in the communication. For this reason, I find that Record 19 is not exempt under section 12.

[112] Records 20 to 38 and 74 are "action logs" and minutes of meetings or conference calls between the city and Toronto Hydro that took place during the period May to August 2005. The city has not provided any representations in support of its argument that the records are subject to solicitor-client privilege beyond their general submissions that all of the records were located in the solicitor's file relating to the street lighting transaction. I note that the solicitor appears to have been present at each of the meetings and has made notes on some, but not all, of the records which resulted from them. In my view, the notations made on the records by counsel represent her working papers which she relied upon in giving legal advice to her client, the city. As a result, I find that the notations made on each of these records are exempt under the solicitor-client communication privilege aspect of section 12. It is unclear to me from the representations of the parties whether the remaining portions of these records were disclosed to the appellant. If they have already been disclosed, I will not require that the city do so again.

[113] Record 39 is a valuation report prepared by a consulting firm for Toronto Hydro. Although this record was included in the solicitor's file, it does not fall within any part of the section 12 exemption. I will discuss this record in greater detail in my discussion of section 10(1).

[114] Record 40 is a memorandum sent by the City Clerk to the city's Chief Financial Officer and Treasurer on March 8, 2005. Essentially, the document sets out a set of recommendations endorsed by Council respecting the street lighting transaction. Again,



I find that this record does not contain or relate to the seeking or giving of legal advice by the solicitor and it is not, therefore, exempt under section 12.

[115] Record 41 is an undated, unattributed document entitled "Key Issues for Confirmation". It was located in the files maintained by the solicitor employed by the city. I have carefully reviewed the contents of this record and find that it does not relate to the seeking or giving about advice pertaining to a legal issue; nor would its disclosure reveal other information of such a nature. As a result, I find that it does not qualify for exemption under section 12.

[116] Records 42 and 43 are an email exchange between the city's Manager of Traffic Operations and the Manager of Business, Investments and Intergovernmental Finance. These records do not pertain to the giving or seeking of legal advice and would not reveal any such advice obtained from counsel. They do not, accordingly, qualify for exemption under section 12. As no other exemptions have been claimed for these records, I will order that they be disclosed to the appellant.

[117] Records 44 and 45 are identical except for the inclusion of notes written by a solicitor with the city on Record 44. I find that the notes are properly exempt under the working papers aspect of solicitor-client communication privilege while the remainder of the two documents are not. Similar notes appear on Record 55, which is also exempt for the same reason. The remaining portions of these records have been disclosed, according to the index provided by the city.

[118] Record 46 is not a communication passing between solicitor and client and its disclosure would not reveal confidential solicitor-client communications. I find that it is not, accordingly, exempt from disclosure under section 12. As no other exemptions have been claimed for this record, I will order it disclosed.

[119] Record 47 is a series of confidential communications passing between a city solicitor and her clients with respect to a legal issue. I find that it is exempt under section 12 on that basis.

[120] Record 48 is an email from a lawyer employed by the city addressed to the City Solicitor and a manager in that office. I find that this record represents part of the continuum of communications passing between the solicitors as part of their responsibilities in providing legal advice to city staff about legal issues arising from the street lighting transaction.

[121] Record 49 is a staff report dated September 13, 2005 which is reproduced at Record 52, 53 and 54. The city describes this document as a working draft relating to the finalization of a report for City Council and that the city's legal staff were asked for and provided their input into each version. I have reviewed each copy of this draft and am not satisfied that they reflect or would reveal solicitor-client privileged

communications about a legal issue. In my view, they do not qualify for exemption under section 12.

[122] Records 50 and 51 are email communications passing between representatives of Toronto Hydro and the city. They do not contain solicitor-client communications, nor would their disclosure reveal them. I find that they are not, accordingly, exempt under section 12.

[123] Records 56, 57 and 58 are draft versions of staff reports dated September 9, 2005, June 13, 2005 and September 2005 respectively. For the same reasons set forth in my discussion of Record 49, I find that these documents are not exempt under section 12.

[124] Record 61 is a set of draft working notes prepared by city staff for use by the working group, including the city's counsel, addressing the street lighting transaction. I find that this record formed part of the solicitor's working papers and is, accordingly, exempt from disclosure under section 12. Record 63 is a draft version of a staff report dated February 21, 2005 which is significantly annotated with comments from the city's lawyer. I find this document constitutes part of her working papers and is also exempt.

[125] Records 60, 62, 107, 108, 109, 110 and 117 consist of various drafts of another staff report dated February 14, 2005 prepared by the city's Chief Financial Officer and Treasurer for its Policy and Finance Committee. Again, a copy of these records was provided to the lawyer, but she was not asked to provide any comments or opinions respecting their contents, from a legal perspective. I find that these records are also not exempt under section 12.

[126] Records 64, 65 and 70 are emails passing between the city's lawyer and her colleagues respecting various technical aspects of the transaction. I find that these emails form part of the continuum of communications between solicitor and client in the context of that relationship. As a result, I find that these documents are exempt under section 12.

[127] Record 66 is an email passing between two senior city staff which was copied to the city's lawyer that discusses in detail some of the financial aspects of the transaction. In my view, this record does not contain confidential communications between a solicitor and her client about a legal issue. Nor would its disclosure reveal information provided by the lawyer to the client. I find that section 12 does not apply to this record.

[128] Records 67, 68, 69, 71, 72, 73, 75, 92 and 112 are handwritten notes made by the city's lawyer in the course of her preparing various documents and meeting with staff in relation to the street lighting transaction. I find that all of these records

represent the solicitor's working papers which qualify for exemption under the solicitor-client communication privilege aspect of section 12.

[129] Records 77 to 81, 83 and 84 are emails passing between the city's outside legal counsel and city staff, including lawyers with the city's Legal Department. I find that these communications are privileged as between a solicitor and his client and are properly exempt on that basis under section 12.

Records 88 and 89 are emails from counsel with the city's Legal Department to the City Manager (Record 88) containing the legal advice that was provided by the city's outside legal counsel in Record 89. I find that both are exempt under section 12 on the basis that they would reveal confidential legal advice about a legal issue passing between a solicitor and his client.

[130] Record 90 is an email from the City Manager to her Deputy and a Manager from the city's Corporate Finance Department. It was copied to a lawyer with the city's Legal Department but it does not appear to be a confidential communication about a legal issue. Accordingly, it is not exempt under section 12.

[131] Record 91 is an email communication between a lawyer with the city's Legal Department and its Manager of Traffic Operations. I find that this record qualifies for exemption under section 12 as it is a confidential communication between a solicitor and her client about a legal issue.

[132] Record 93 is a two-page email between counsel for the city and counsel for Toronto Hydro, to which is attached a 10-page issues note that contains notes taken by the city's inside counsel. The first two pages of this record do not qualify for exemption as a solicitor-client communication because they were passed between counsel for opposing parties. For this reason, I find that any privilege in the document was waived. However, I find that the following 10 pages are exempt under section 12 as they represent the city's lawyer's working papers in relation to her giving advice to her client in the transaction.

[133] Record 95 is an undated draft version of the Service Agreement entered into between the city and Toronto Hydro. It includes a number of handwritten notations made by a city lawyer and was apparently drafted by the city's outside legal counsel. I find that this document is a privileged communication between legal counsel and their client pertaining to a legal issue. As a result, it is properly exempt under section 12.

[134] Record 97 consists of two identical pages entitled "Purchase of Street Lighting Assets – Summary of Recommendations for Selected Financial Conditions 08/09/05." The city has not provided me with any representations as to the origin of this record, only that it was found in the solicitor's file. It is not clear to me that this record was used by legal counsel in providing legal advice to her client because the document does

not address legal issues. In the absence of sufficient evidence, I find that it does not qualify for exemption under section 12.

[135] Record 98 is a set of draft minutes with editing indicated. The minutes were taken at a meeting held on May 25, 2005 with representatives of the city and Toronto Hydro. I find that this record is not exempt under section 12 as it consists simply of a recording of discussion at a meeting between opposing parties to the street lighting transaction.

[136] Record 100 is a two page letter dated August 2, 2005 addressed to Toronto Hydro's Director of Corporate and Financial Planning from the city's Acting Director, Traffic Management Centre setting out a number of what are described as office activities/business practices that need to be addressed in the course of completing the transaction. Despite being copied to the city's lawyer, I find that the document is not subject to solicitor-client privilege and is not exempt under section 12.

[137] Record 101 is an email from a Senior Financial Analyst to other city staff, including a lawyer, discussing various legal issues surrounding the street lighting transaction. I find that the record is a confidential communication about a legal issue passing between a client and her counsel. For this reason, it is exempt under section 12.

[138] Record 102 is not a communication passing between a solicitor and client and only found its way into the solicitor's file. I have not been provided with sufficient evidence to enable me to find that it was relied upon or formed part of the advice given by counsel to her client. As a result, I find that Record 102 is not exempt under section 12.

[139] Record 103 is an email from the city's lawyer to counsel for Toronto Hydro. Since this communication passed between opposing counsel in the street lighting transaction, any privilege that may have existed in the document was waived. The city claims that the common interest exception to waiver applies. It argues that the city and Toronto Hydro were engaged in a common enterprise, seeking to have the transaction completed and that, for this reason, their communications are privileged. I do not agree. The records demonstrate that the negotiations taking place at the time the email was sent were adversarial in nature, with both parties taking opposing positions on a number of outstanding issues in the process. The interests of the parties, and their counsel, did not coincide and were, in fact, aiming to secure the best possible deal for each. Therefore, I reject the submission that this communication was privileged because it took place between counsel representing diametrically opposed parties to a contentious commercial negotiation. As a result, I find that Record 103 does not qualify for exemption under section 12.

[140] Similarly, Record 104 is an email from a representative of Toronto Hydro to a Senior Financial Analyst with the city, responding to a series of questions which she posed to him. The email was copied to the city's lawyer, as well as other individuals within the city's staff. I find that this record was not a confidential communication between the city's legal counsel and her client. The lawyer was copied on the document but was not asked to comment on it or provide any legal advice respecting it. I find that it is not subject to exemption under section 12.

[141] Record 105 is an email between the city's lawyer and the city's Senior Financial Analyst. I find that it represents part of the continuum of communications passing between a solicitor and her client and that it is properly exempt under the communications privilege aspect of section 12.

[142] Record 106 is a briefing note prepared by the city's Corporate Finance Division reporting on issues involving that branch of the city government which was copied to the lawyer assigned to the file by the city's Legal Department. I find that the record was provided to the lawyer for informational purposes only. She was not asked to comment on it or provide advice based on its contents. As a result, I find that it is not exempt under section 12.

[143] Record 111 is an email chain involving communications between the city's lawyer and several staff of other city departments about the street lighting transaction. I find that this email chain represents a part of the continuum of communications passing between the lawyer and her clients and the record is exempt under the solicitor-client communication privilege component of section 12.

[144] Record 113 is a covering email and a briefing note prepared by a Senior Financial Analyst with the city for its Chief Financial Officer and Treasurer dated February 14, 2005. The copy which made its way into the lawyers file, which is the copy at issue in this appeal, has been significantly annotated by the lawyer. In my view, the version before me contains a great deal of information setting out the lawyer's thought processes and analysis of the contents of the record. As a result, I find that it qualifies as part of the lawyer's working papers and is properly exempt under section 12.

[145] Record 114 is a similarly annotated version of a draft report which was also commented upon by the city's lawyer. Again, I find that this copy of the report dated February 11, 2005, and the cover email which is attached to it, are exempt under section 12. Record 115 is yet another earlier version of this same report dated February 10, 2005. It too contains extensive annotations and comments from the city's lawyer and I find that it too is, accordingly, exempt as well under section 12.

[146] Record 116 is an email to the city's lawyer from the Manager of Traffic Operations seeking the views of the lawyer on an issue relating to the street lighting transaction. I find this to be a confidential communication between a solicitor and her client relating to a legal issue and it is, accordingly, exempt under section 12.

[147] Records 118, 119 and 120 are copies of notes made by the city's lawyer as part of her consideration and preparation of legal advice for her clients. I find that these records qualify as her working papers and are properly exempt from disclosure under section 12.

[148] Records 121 and 122 are emails between the city's lawyer and her clients about legal issues involving the transaction. I find that they qualify for exemption on the basis that they are confidential communications between a solicitor and client.

[149] Record 123 is an email which encloses a draft legal opinion prepared by counsel for Toronto Hydro, the party opposite the city in the negotiations which form the basis for the records at issue in this appeal. I find that this email is not a communication passing between a solicitor and client and that it is not exempt under section 12.

[150] Record 124 is a legal opinion prepared by a member of the City Solicitor's office for the Director of the Legal Department's Municipal Law Group. I find that this communication is exempt from disclosure as it is a confidential communication relating directly to the giving of legal advice.

[151] Records 125 and 126 are confidential communications between the city's lawyer and its Deputy City Manager in which advice is sought and given respecting certain legal issues arising from the street lighting transaction. Again, I find that these records are exempt under the solicitor-client communication privilege aspect of section 12.

[152] Records 129 and 130 are identical to Record 19, which I found above was not exempt under section 12. An additional email at the top of page 3 of Record 129, which was also designated as #667-2 is a communication from the city's Corporate Finance staff person to the city's outside legal counsel. I find that this communication was about a legal issue and was of a confidential nature. Accordingly, I conclude that it qualifies for exemption under the solicitor-client communication privilege component of section 12. The remainder of Records 129 and 130 are not exempt.

[153] Records 131, 132, 133, 135 and 136 are email chains involving discussion between the city's senior staff and its internal and external legal counsel about various legal issues surrounding the transaction. I find that these communications qualify for exemption under the solicitor-client communication privilege component of section 12.

[154] Records 134 and the first page of Record 137 are emails between senior city staff which do not include legal counsel. These records do not reveal any legal advice received and do not qualify for exemption under section 12.

[155] Pages 2 and 3 of Record 137 represent a summary of recommendations which include a number of notations made by the city's lawyer. I find that this part of Record 137 constitutes part of her working papers relating to the giving of legal advice and that it is exempt under section 12 on that basis.

[156] Records 138 and 139 are an email chain which includes a request from city staff for legal advice from counsel and the advice provided by the city's lawyer. I am satisfied that these communications are subject to solicitor-client privilege and I find that they are exempt under section 12.

[157] Records 140 and 141 consist of handwritten notes taken by the city's legal counsel during a teleconference on August 5, 2005 and a meeting on April 22, 2005 respectively. These records form part of the lawyer's working papers prepared in the course of giving legal advice and I find that they are properly exempt under section 12.

[158] Record 142 and 143 are emails between the city's lawyer and its staff in relation to certain legal issues arising from the street lighting transaction. I find that they are also exempt under the solicitor-client communication privilege aspect of section 12.

[159] Record 144 is a report prepared by consultants retained by Toronto Hydro to provide a valuation of the fair market value of the city-owned streetlights and poles, as well as expressway lighting and poles. I conclude that this record is not exempt under section 12 for the same reasons outlined in my discussion of Record 39, which is a similar valuation document prepared by the same consulting firm.

[160] By way of summary, I conclude that the following records are exempt from disclosure under section 12, in whole or in part, as indicated:

Records 2, 3, 4, 5, 6, 8, 13, 14, 18, the notations made on Records 20 to 38 and 74, 44 and 55, Records 47, 48, 59, 61, 63, 64, 65, 67, 68, 69, 70, 71, 72, 73, 75, 76, 77, 78, 79, 80, 81, 82, 83, 84, 85, 86, 87, 88, 89, 91, 92, pages 3 to 13 of Record 93, Records 94, 95, 96, 99, 101, 105, 111, 112, 113, 114, 115, 116, 118, 119, 120, 121, 122, 124, 125, 126, 127, 128, the email at the top of page 3 of Record 129, Records 131, 132, 133, 135, 136, pages 2 and 3 of Record 137, Records 138, 139, 140, 141, 142 and 143.

[161] The following records are ordered disclosed as they are not exempt under section 12 and are not excluded under section 52(3). As no other exemptions have

been claimed for Records 17, 42, 43 and 46 and no mandatory exemptions apply, I will order that they be disclosed.

**Issue C: Are the records exempt from disclosure under the discretionary exemptions in sections 11(c), (d) and (e) of the *Act*?**

[162] The city claims the application of the discretionary exemptions in sections 11(c), (d) and (e) for all of the records remaining at issue. In its initial decision letter, the city also claimed the application of section 11(f) but has made no submissions respecting this exemption to the records. As section 11(f) is a discretionary exemption, I will not be referring to it further in this decision. Sections 11(c), (d) and (e) state:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

***General application of section 11***

[163] 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 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

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.

[164] For sections 11(b), (c), (d) or (g) 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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

[165] 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 [Orders MO-1947 and MO-2363].

[166] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

***Section 11(c) and (d): prejudice to economic or financial interests***

[167] The purpose of sections 11(c) and (d) is to protect the ability of institutions to earn money in the marketplace. These exemptions recognize that institutions sometimes have economic interests and compete for business with other public or private sector entities, and they provide discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Orders P-1190 and MO-2233].

[168] These exemptions are arguably broader than section 11(a) in that they do not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemptions require only that disclosure of the information could reasonably be expected to prejudice the institution's economic (or financial) interests or competitive position [Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758].

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

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

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution [Order PO-2064].

[170] Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536].

[171] The terms "positions, plans, procedures, criteria or instructions" are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598].

[172] The term "plans" is used in sections 11(e), (f) and (g). Previous orders have defined "plan" as ". . . a formulated and especially detailed method by which a thing is to be done; a design or scheme" [Orders P-348 and PO-2536].

[173] The section does not apply if the information at issue does not relate to a strategy or approach to the negotiations themselves but rather simply reflects mandatory steps to follow [Order PO-2034].

### ***Representations of the parties***

[174] The city's representations with respect to sections 11(c) and (d) focus on the possible harm to the city's economic and financial interests which would result from the disclosure of the information in the records. The city submits that the records "relate to finding ways in which the city may improve its financial and economic health". As a result, the city suggests that disclosing the records would give rise to the release of "knowledge of what the city's financial objective is and the manner in which it would be pursued could prejudice the city's financial position."

[175] The city concedes that the agreements entered into between the city and Toronto Hydro for the sale of the street lighting assets have been finalized and made public, however, the city maintains that "there are still issues relating to the on-going management of the transaction" and the disclosure of the information in the records "could affect the city's underlying strategies." As an example, the city indicates that the disclosure of the internal discussion surrounding the "buy-back" component of the transaction may directly and adversely affect its interests. It also indicates that there are on-going issues that may require further management involving the Indemnity Agreement and the Asset Purchase Agreement, which were made public.

[176] With respect to the application of section 11(e), the city argues that some of the records contain "an actual pre-determined course of action for the city in the context of negotiations in relation to decisions taken by the city" pertaining to "various issues with respect to the street lighting transaction", particularly those involving negotiations.

[177] The appellant relies on the findings in Order MO-2468-F with respect to the application of the section 11 exemptions to similar records involving the same

transaction. In that decision, Adjudicator Cropley upheld the city's decision to deny access to a portion of a Service Agreement but not to the remainder of the records, which were the actual agreements entered into between the city and Toronto Hydro that have now been disclosed.

[178] The appellant argues that the transaction was not the result of an open bidding process and that the only purchaser of the assets was Toronto Hydro and that the contract was essentially an internal one involving the city and its wholly-owned utility that cannot be described as being at "arms-length." As a result, the appellant argues that "the city cannot argue that it will be harmed by disclosure of its special, non-arm's length, non-competitive arrangement with its wholly-owned company." The appellant also provided evidence to support its contention that at the time of the transaction, it was described by the Mayor and councilors as "an inconsequential transfer between two closely related entities – almost a bookkeeping entry." For this reason, the appellant submits that the city cannot now claim that harm will result from the disclosure of the information in the records when the agreement was not described as a commercial transaction "in the first place."

[179] In its reply representations, the city argues that despite the age of the records and the fact that the agreements which document the actual transaction have been made public, "there are still issues relating to the on-going management of the transaction." It goes on to reiterate the submissions made at the initial stage of the inquiry without providing any submissions on how the section 11 exemptions claimed actually apply to the individual records remaining at issue in this appeal. The city continues to state that "it is a matter of common sense and can be accepted as a fact that knowledge of what the city's financial objective is and the manner in which it would be pursued could prejudice the city's financial position."

### ***Findings***

[180] The city initially claimed the application of sections 11(c), (d) and (e) to nearly all of the records at issue in the appeal. Many of the records which it has claimed to be exempt under these exemptions have been found to be exempt under section 12 above. I will not, accordingly, be addressing the possible application of section 11 to those records.

[181] The city has claimed the application of sections 11(c), (d) and (e) to the following records which remain at issue:

Records 7, 15, 19 (which is the same as Records 129 and 130), Records 39, 45, 49, 50, 51, 52, 53, 54, 56, 57, 58, 60, 62, 66, 74, 90, page 1 and 2 of Record 93, Record 97, 98, 100, 102, 103, 104, 106, 107, 108, 109, 110, 117, 123, those portions of Record 129 which are not exempt under

section 12, Record 130, 134, 137 (which is the same as page 1 of Record 134) and Record 144.

[182] The records under consideration in this appeal involve a transaction which was negotiated and implemented over eight years ago. The closing date for the transaction was January 1, 2006. While information that is subject to solicitor-client communication privilege or litigation privilege under section 12 remains so indefinitely, the same cannot necessarily be said for information that may, at one time, have been subject to exemption under section 11. The agreement between the city and Toronto Hydro has been in effect for many years and its operating principles have been public for all of that time. The events that the city speculates in its representations may occur have likely happened by now, or they will not transpire at all. For this reason, I approach the question of harm to the city's economic or financial interests resulting from disclosure with a degree of skepticism, given the passage of so much time and the fact that events since 2005 have changed the landscape around transactions of this sort.

[183] Record 7 represents two copies of a document entitled Due Diligence Request List. A complete version that is unmarked (described as pages 5532 to 5549) has been disclosed while another version containing underlined passages has not. The city has failed to provide me with detailed and convincing evidence to substantiate its claim that the section 11 exemptions apply to this information, and the harms alleged are not self-evident based on my examination of the record itself. Without sufficient evidence to support a finding that the disclosure of the specific information in this record could reasonably be expected to give rise to the harms contemplated in sections 11(c), (d) or (e), I find that they do not apply to this information. No other exemptions have been claimed for this document, no mandatory exemptions apply and I have found that the section 52(3) exclusion has no application. Therefore, I will order that Record 7 be disclosed.

[184] Record 15 is a chart dated October 19, 2005 listing a number of follow-up items to be addressed from the Due Diligence Request List that was disclosed as part of Record 7. The city did not make specific reference to the application of the exemptions to the information in this record beyond the generalized comments contained in the index of records provided. Again, it is not self-evident that the disclosure of the information in this record could reasonably be expected to result in the harms contemplated by section 11. As a result, I find that Record 15 is not exempt under sections 11(c), (d) and (e). Because no other exemptions or exclusions apply to this record, I will order that it be disclosed.

[185] Record 19 is an email chain involving the City Manager, Deputy City Manager and the Manager of Business, Investments and Intergovernmental Finance in the city's Corporate Finance office. The email summarizes the discussion at an earlier meeting at which certain options with respect to the terms for inclusion in the agreement were discussed. Again, this communication took place in August 2005 and involves an

agreement which was negotiated and implemented shortly thereafter. I disagree with the position taken by the city that the disclosure of this information could reasonably be expected to result in the harms contemplated by sections 11(c), (d) or (e) and I find that these exemptions do not apply.

[186] Record 39 is a document entitled "Estimate of Fair Market Value" dated October 31, 2005 which was prepared by a third party consulting firm for Toronto Hydro. The submissions from the city with respect to section 11 are not persuasive because they do not address the actual content of this record in any way. However, the city and Toronto Hydro have also claimed the application of section 10(1) to portions of Record 39 and have provided significant representations respecting that exemption and how it applies to protect certain third party interests. Accordingly, I will address Record 39 in greater detail in my discussion of section 10(1), as it is not exempt under section 11.

[187] Record 40 is a memorandum dated March 8, 2005 and addressed to the city's Chief Financial Officer and Treasurer from the City Clerk's office which lists a set of recommendations, the first of which was adopted by City Council and made public. The city has not provided me with representations on why the information in this record continues to be subject to exemption under section 11, and it is not evident on the face of the record why this might be so. As a result, I find that Record 40 is not exempt under sections 11(c), (d) or (e). As no other exemptions have been claimed for this record and no mandatory exemptions apply, I will order that it be disclosed.

[188] Record 41 is an undated table setting out "Key Issues for Confirmation". In the index accompanying the city's representations, the notes respecting Record 41 read, in part, "Unfortunately, this copy of the document cannot be disclosed, as the formatting of the handwritten notes of [the city's lawyer] makes partial redaction impossible. Although other 'duplicates' of this document have been disclosed." The copy of Record 41 which was provided to this office contains no handwritten notes and since the city has already disclosed it to the appellant, it cannot be exempt from disclosure under section 11 and I will order that it be released.

[189] Record 45 is identical to Record 44, which was disclosed to the appellant with certain notes of the city's lawyer redacted, according to notations made by the city in its index. As a result, I find that this document is not exempt under section 11 and will order it disclosed.

[190] Record 49 is a working draft dated September 16, 2005 of a staff report pertaining to the street lighting transaction which was prepared for the city's Policy and Finance Committee from the City Manager, Deputy City Manager and Chief Financial Officer pertaining to the street lighting transaction. Records 52, 53, 54, 56, 57 and 58 are other versions of the same record dated September 13, 2005, September 9, 2005, June 13, 2005 and September 2005. Without representations setting out the city's

specific concerns about the disclosure of the contents of this document, I find that sections 11(c), (d) or (e) do not apply to Records 49, 52, 53, 54, 56, 57 or 58.

[191] Record 50 and 51 are an email chain between an official with Toronto Hydro and the city's Manager of Traffic Operations. I reject the city's contention that section 11 applies to these records, particularly in the absence of representations in support of the exemption claim.

[192] Similarly, Records 60, 62, 107, 108, 109, 110 and 117 are copies of a staff report dated February 14, 2005. For the same reasons set out in my discussion of Record 49, I find that these documents are not exempt under section 11.

[193] Record 66 is an undated, untitled email passing between two staff with the city's Corporate Finance Department. Legal counsel with the city was copied on the communication, though she was not asked to comment on it. The subject matter of the email solely relates to the financial implications of the sale from the perspective of Toronto Hydro, as well as the city. It may be that at the time this record was created, it contained information whose disclosure could reasonably be expected to have prejudiced the city's economic or financial interests. With the passage of nearly eight years however, the likelihood of such harm has diminished considerably. I find that this record is not subject to the section 11 exemptions claimed to apply to it.

[194] Record 90 is a series of emails passing between the City Manager, the Deputy City Manager and a Manager from the city's Corporate Finance Department in which they discuss strategy to be employed in the city's discussion with Toronto Hydro. As the transaction has been long-since completed, I disagree that sections 11(c), (d) or (e) have any application to these communications and find that they do not apply.

[195] Previously in this order, I found above that pages 3 to 13 of Record 93 are exempt under section 12. The first two pages consist of an email exchange between outside counsel for the city and outside counsel for Toronto Hydro. I have not been provided with sufficient evidence to support a finding that this communication qualifies for exemption under section 11.

[196] Record 97 is entitled "Summary of Recommendations for Selected Financial Conditions". It is undated and it is not clear who prepared the document and who its intended recipient was. The representations of the city do not address these questions. I find that Record 97 is not exempt under section 11.

[197] Record 98 is a set of draft minutes of a meeting which took place on May 25, 2005 between the representatives of the city and Toronto Hydro. I have not been provided with any submissions respecting the application of section 11 to this record and it is not self-evident on its face that it would apply. As a result, I find that Record 98 is not exempt under section 11.

[198] Record 100 is a letter dated August 2, 2005 from the city's Director, Traffic Management Centre to the Director of Corporate and Financial Planning for Toronto Hydro in which certain issues around the assumption of certain office activities/business practices by Toronto Hydro are addressed. Given the passage of time and actual implementation of the transaction, I am not satisfied that disclosure could reasonably be expected to result in the harms contemplated by sections 11(c), (d) and (e) and I find that Record 100 is not exempt under that section.

[199] Records 102, 103 and 104 are email communications passing between representatives of the city and Toronto Hydro respecting specific aspects of the transaction. In the absence of representations respecting these records and given their age and subject matter, I find that section 11 has no application to these records.

[200] Record 106 is a briefing note dated March 31, 2005 prepared by a Senior Financial Analyst for the City Manager and Deputy City Manager with respect to several issues relating to the street lighting sale to Toronto Hydro. The city has not provided me with representations explaining how the exemptions in section 11 might apply to this record and it is not evident to me on their face. As a result, I find that section 11 has no application to them.

[201] Record 123 is a legal opinion dated April 25, 2005 prepared by Toronto Hydro's outside counsel that was shared with the city. I find that section 11(c), (d) or (e) have no application to this record, particularly in the absence of any representations in that regard.

[202] Records 129 (with the exception of the email at the top of page 3), 130, 134 and page 1 of Record 137 are a series of emails passing between the City Manager, the Deputy City Manager and a Manager from the city's Corporate Finance Department in which they discuss strategy to be employed in the city's discussion with Toronto Hydro. As the transaction has been long-since completed, I find that sections 11(c), (d) or (e) have no application to these communications.

[203] Record 144 is a valuation report dated February 28, 2005 prepared by a consulting firm for Toronto Hydro and shared with the city. I find that this document does not qualify for exemption under section 11 in the absence of representations in favour of such a finding or information on its face which would lead to that conclusion.

[204] By way of summary, I find that sections 11(c), (d) and (e) have no application to any of the records for which they were claimed.

**Issue D: Are the records exempt from disclosure under the discretionary exemption in section 7(1) of the *Act*?**

***General principles***

[205] Section 7(1) states:

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

[206] The purpose of section 7 is to ensure that persons employed in the public service are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making. The exemption also seeks to preserve the decision maker or policy maker's ability to take actions and make decisions without unfair pressure [Orders 24, P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.)].

[207] Previous orders have established that advice or recommendations for the purpose of section 7(1) must contain more than mere information [see Order PO-2681].

[208] "Advice" and "recommendations" have a similar meaning. In order to qualify as "advice or recommendations", the information in the record must suggest a course of action that will ultimately be accepted or rejected by the person being advised [Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, [2004] O.J. No. 163 (Div. Ct.), aff'd [2005] O.J. No. 4048 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 564; see also Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, [2005] O.J. No. 4047 (C.A.), leave to appeal refused [2005] S.C.C.A. No. 563].

[209] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit one to accurately infer the advice or recommendations given

[Orders PO-2028, PO-2084, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above); see also *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above)]



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

- factual or background information
- analytical information
- evaluative information
- notifications or cautions
- views
- draft documents
- a supervisor's direction to staff on how to conduct an investigation

[Order P-434; Order PO-1993, upheld on judicial review in *Ontario (Ministry of Transportation) v. Ontario (Information and Privacy Commissioner)*, (cited above); Order PO-2115; Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.); Order PO-2028, upheld on judicial review in *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner)*, (cited above)].

**Section 7(2): exceptions to the exemption**

[211] Section 7(2) creates a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Sections 7(2) states:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains:

- (a) factual material;
- (b) a statistical survey;
- (c) a report by a valuator;
- (d) an environmental impact statement or similar record;
- (e) a report or study on the performance or efficiency of an institution;
- (f) a feasibility study or other technical study, including a cost estimate, relating to a policy or project of an institution;

- (g) a report containing the results of field research undertaken before the formulation of a policy proposal;
- (h) a final plan or proposal to change a program of an institution, or for the establishment of a new program, including a budgetary estimate for the program;
- (i) a report of a committee or similar body within an institution, which has been established for the purpose of preparing a report on a particular topic;
- (j) a report of a body which is attached to an institution and which has been established for the purpose of undertaking inquiries and making reports or recommendations to the institution;
- (k) the reasons for a final decision, order or ruling of an officer or an employee of the institution made during or at the conclusion of an exercise of discretionary power conferred by or under an enactment or scheme administered by the institution.

***Representations of the parties***

[212] The city has not provided me with specific representations regarding the application of the section 7(1) exemption to any of the individual records for which it was claimed. Instead, the city provides general submissions respecting the application of the exemption. I also note that many of the record which are claimed to fall within the ambit of section 7(1) have already been found to be exempt under section 12 on the basis that they contain information that is subject to solicitor-client communication privilege. Accordingly, I will only address the possible application of section 7(1) to those records that are not subject to the section 12 exemption or the section 52(3) exclusion.

[213] The appellant argues that the city's representations reiterate the wording in the *Act* and that it has failed to meet its onus to demonstrate the application of the exemption to the records for which it is claimed.

[214] In reply, the city states its position that many of the records contain legal advice provided by its counsel while others contain advice to city officials from staff. It also points out that to the greatest extent possible, the majority of the records which are

subject to section 7(1) have been disclosed, with the advice or recommendations redacted.

### ***Findings***

[215] I will examine the application of section 7(1), as well as the mandatory exceptions to that exemption in section 7(2), with respect to the following records:

Records 19 (as well as Records 129 and 130), 45, 49, 50, 51, 52, 53, 54, 56, 57, 58, 60, 62, 66, 74 (in part), 90, 93, 97, 98, 100, 102, 103, 104, 106, 107, 108, 109, 110, 117, 123, 129, 130, 134 and 137.

[216] Record 19, which is identical to Record 129 (with the exception of the top email on page 3 which I found to be exempt under section 12) and Record 130, is an email chain passing between the City Manager, Deputy City Manager and a Manager in its Corporate Finance Department which serves to document the outcome of a meeting held the day before the first email was written, August 18, 2005. Having reviewed the contents of the original email and the responses made to it, I find that they contain information that qualifies as "advice or recommendations" within the meaning of section 7(1). The advice takes the form of specific suggestions for future action to be taken by the City Manager with respect to the transaction. As a result, I find that the portions of Records 19, 129 and 130 that remain at issue are exempt under section 7(1).

[217] Record 45 is identical to Record 44, except that Record 44 includes certain notes made by counsel which I have found to be exempt under section 12 above. The notes that accompany the references to these records in the city's Index of Records indicate that the remainder of Record 44 and all of Record 45 were disclosed to the appellant. As a result of this disclosure, it is not necessary for me to address the possible application of section 7(1) to these records.

[218] Record 49, 52, 53, 56, 57, 58, 60 and 62 are drafts of a staff report prepared for the city's Policy and Finance Committee from the office of the City Manager. In the absence of any specific representations respecting the application of the exemption to the remainder of the documents, I find that they are not exempt under section 7(1). I note that much of the information qualifies as "factual information" within the meaning of the mandatory exception to the exemption in section 7(2)(a). No other exemptions have been claimed or found to apply to Records 56, 57, 58 and 62. I will, accordingly, order that these records be disclosed.

[219] Records 50 and 51 are two copies of an email exchange between a representative of Toronto Hydro and the Manager of the city's Traffic Operations. Clearly, such a communication cannot qualify for exemption under section 7(1) as it does not contain advice or recommendations respecting a contemplated course of

action. As section 7(1) does not apply and none of the other exemptions that have been claimed for these records apply, I will order that they be disclosed.

[220] Record 54 is identical to an Appendix to Record 49 which I have found is not exempt under section 7(1). Similarly, I find that Record 54 is also not exempt under section 7(1).

[221] Record 66 is a two-page email exchange passing between staff with the city's Corporate Finance Department. I find that the communications contain advice or recommendations about a specific course of action with respect to the street lighting transaction and that Record 66 qualifies for exemption under section 7(1).

[222] Record 90 is an email communication between the City Manager and her Deputy, as well as a Manager from the city's Corporate Finance Department. This document is reproduced at Record 134 and page 1 of Record 137. The exchanges contain very specific instructions as to a course of action to be taken as part of the negotiations between the city and Toronto Hydro. Accordingly, I find that Records 90, 134 and page 1 of Record 137 qualify for exemption under section 7(1).

[223] Pages 1 and 2 of Record 93, referred to in the index as L-199 and L-199-2, are an email exchange between counsel for Toronto Hydro and outside counsel for the city. This document does not contain advice or recommendations for the purposes of section 7(1). As a result, I find that it does not qualify for exemption under section 7(1).

[224] Record 97 is a document which sets out a series of "Recommendations for Selected Financial Conditions" dated August 9, 2005. While I have not been provided with specific evidence as to who created the record and to whom it was directed, it is clearly a document which describes the recommended position for the city to take with respect to its on-going negotiations with Toronto Hydro respecting the street lighting sale. I find that it qualifies for exemption under section 7(1).

[225] Record 98 is a set of draft minutes of a meeting held on May 25, 2005 involving representatives of the city and Toronto Hydro. I find that the minutes do not contain information that qualifies as "advice or recommendations" under section 7(1) and it is not, therefore, exempt under that section. As no other exemptions have been claimed for Record 98, I will order that it be disclosed.

[226] Record 100 is a letter to the Director of Corporate and Financial Planning at Toronto Hydro from the Acting Director of Transportation Services with the city. The nature of the relationship between these two individuals and their respective positions in the negotiation of the transaction preclude the possible application of section 7(1) to this communication. As no other exemptions have been claimed for it, I will order that it be disclosed.

[227] Record 102 is an email passing from the city's Manager of Corporate Finance to the Deputy City Manager and Acting General Manager of Transportation Services dated February 10, 2005. This record does not contain advice or recommendations with respect to a suggested course of action and I find that it is not, therefore, exempt under section 7(1). As none of the other exemptions claimed for this record apply, I will order that it be disclosed.

[228] Record 103 is an email from the city's lawyer to counsel for Toronto Hydro with an attached draft resolution to be considered by City Council on February 21, 2005. The nature of the relationship between the parties to this communication precludes the possible application of section 7(1) to its contents. As none of the exemptions claimed for this record apply, I will order that it be disclosed.

[229] Record 104 is an email exchange between officials with the city and Toronto Hydro in which they discuss certain financial considerations to be factored into the negotiations on the street lighting sale. Again, because of the nature of the relationship between these individuals, section 7(1) cannot apply to this document. I will order this record disclosed as well since none of the claimed exemptions apply.

[230] Record 106 is a briefing note prepared for the city's Manager and Deputy City Manager by a Senior Financial Analyst on March 31, 2005. This document sets out factual information concerning the transaction and the progress made on it to that date. It goes on to refer to a recommendation made to city council by the Policy and Finance Committee in its Report No. 3, which is a public document. Otherwise, Record 106 does not contain a recommended course of action to be taken by the recipient of the communication. I find that it does not, accordingly, qualify for exemption under section 7(1). As none of the exemptions claimed for Record 106 apply, I will order that it be disclosed.

[231] Records 107, 108, 109, 110 and 117 are drafts of a report prepared for the city's Policy and Finance Committee from the Chief Financial Officer and Treasurer dated February 2005 and entitled "2005 Operating Budget Funding – Hydro Proceeds". In my discussion of the identical document, Record 60, above, I found that it was not exempt under section 7(1). I find that in the absence of specific representations as to the nature of the advice or recommendations respecting a course of action, these records are also not exempt under section 7(1). No other exemptions have been upheld with respect to Record 117 and I will, accordingly, order that it be disclosed.

[232] Record 123 is a legal opinion dated April 25, 2005 that was provided to Toronto Hydro by its outside counsel and subsequently shared with the city. Any advice that may be contained in this record was made to Toronto Hydro, and not to the city. I find that section 7(1) has no application to this record. As none of the exemptions claimed for this record apply, I will order that it be disclosed.

[233] By way of summary, I conclude that Records 19, 66, 90, 97, 129, 130, 134 and page 1 of Record 137 qualify for exemption under section 7(1). However, I find that Records 49, 50, 51, 52, 53, 54, 56, 57, 58, 60, 62, page 1 and 2 of Record 93, 98, 100, 102, 103, 104, 106, 107, 108, 109, 110, 117 and 123 do not qualify for exemption under section 7(1).

**Issue E: Are the records exempt from disclosure under the discretionary exemption in section 6(1)(b) of the *Act*?**

[234] The city has claimed the application of the discretionary exemption in section 6(1)(b) to Records 49, 52, 53, 54, 60, 107, 108, 109 and 110. These records are various drafts of two staff reports submitted on September 13, 2005 and February 14, 2005 to the city's Policy and Finance Committee.

[235] 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.

[236] For this exemption to apply, the city 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

[Orders M-64, M-102, MO-1248]

[237] Previous orders have found that:

- "deliberations" refer to discussions conducted with a view towards making a decision [Order M-184]; and
- "substance" generally means more than just the subject of the meeting [Orders M-703, MO-1344].

[238] 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 the names of individuals attending meetings, and the dates, times and locations of meetings [Order MO-1344].

[239] 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* (Order M-102).

[240] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting? [*St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.)]

[241] 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 (Orders MO-1344, MO-2389 and MO-2499-I).

[242] The appellant relies on the decision of Adjudicator Cropley in Order MO-2468-F which involved the same parties and addressed the application of this exemption to other records relating to the same transaction. In that decision, Adjudicator Cropley found that because the subject matter staff reports at issue in that appeal did not meet the stipulated items listed in section 239(2)(a) of the *Municipal Act*, the city was not entitled to go *in camera* in its discussion of the street lighting transaction. Specifically, following a very lengthy and exhaustive discussion, the adjudicator held that the street lighting transaction did not meet the criteria for an *in camera* meeting to address the "security of property" set out in that section. As a result, the meeting of Council or its committees where this subject matter was under consideration was not properly authorized by section 239(2)(a) of the *Municipal Act* and the city could not, accordingly, rely on the exemption in section 6(1)(b) to refuse to disclose it. Adjudicator Cropley concluded her discussion as follows:

Therefore, I am not persuaded by the City's arguments that the Legislature intended the phrase "security of the property" in section 239(2)(a) of the *Municipal Act, 2001* to encompass all forms of harm to the City's economic interests generally, or more specifically, to the City's negotiations and bargaining strategy regarding the buying and selling of property other than land.

On this basis, I conclude that the City was not permitted, under section 239(2)(a), to hold a meeting closed to the public in order to discuss the sale of street and expressway lighting to THESI.

[243] In Order MO-2468-F, Adjudicator Cropley found that section 6(1)(b) did not apply to exempt a document entitled "2005 Operating Budget Funding – Hydro Proceeds," which was described as Record 9, from disclosure. Based on my review of the records at issue in the current appeal, it is clear that the records identified as Records 60, 107, 108, 109 and 110 are identical to or earlier drafts of the document identified as Record 9 in Order MO-2468-F. Despite the lengthy submissions by the city arguing that I ought to uphold its decision to deny access to this record, I decline to do so. The reasons set out by Adjudicator Cropley in Order MO-2468-F are extremely thorough and address all of the arguments put forward by the city in comprehensive and complete fashion. As the application of section 6(1)(b) to the identical document was addressed in Order MO-2468-F, it is not necessary for me to consider the same arguments with respect to the same records in this order. I adopt Adjudicator Cropley's reasoning and conclude that section 6(1)(b) does not apply to Records 60, 107, 108, 109 and 110.

[244] Insofar as Records 49, 52, 53 and 54 are concerned, these are also copies of the same staff report prepared for a meeting of the city's Policy and Finance Committee scheduled for September 20, 2005. Based on the reasoning set out in Order MO-2468-F, I agree that the city has not satisfied all three aspects of the test under section 6(1)(b) and I find that Records 49, 52, 53 and 54 do not qualify for exemption on that basis.

[245] As section 6(1)(b) does not apply to any of the records for which it was claimed, and no other exemptions have been claimed to apply to them, I will order that Records 49, 52, 53, 54, 60, 107, 108, 109 and 110 be disclosed.

**Issue F: Are the records exempt from disclosure under the mandatory exemption in section 10(1) of the *Act*?**

[246] The city and Toronto Hydro object to the disclosure of Records 39 and 144 on the basis that they satisfy the requirements of the mandatory exemptions in 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;

- (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;

[247] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*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.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

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

***Part 1: type of information***

[249] Toronto Hydro submits that the records contain information that meets the requirements of a trade secret, while the city argues that the records contain commercial, financial and technical information within the meaning of those terms in section 10(1). These types of information have been discussed in prior orders:

*Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,

- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known,  
and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

*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 [Order PO-2010].

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

[250] Toronto Hydro submits that Record 39 consists of a report addressing the fair market value estimate of the street lighting assets that forms the subject matter of the transaction between it and the city. Toronto Hydro argues that the report was prepared for it by a consulting firm and that the disclosure of Record 39 would reveal the trade secrets of the consulting firm, specifically, the consulting firm's "unique methodology for providing valuation consultation services." Toronto Hydro submits that the report itself:

. . . reveals the various steps in its analysis, including its own perceptions regarding the Transaction and the business involved and the economic conditions and industry outlook, and sets out details regarding several methods of calculation used and the rationale behind their use.

[251] Toronto Hydro goes on to suggest that:

. . . all of this information, the layout and framework of the Report itself, as well as the topics chosen for discussion, are the result of [the consultant's] proprietary processes, used in its business, which are not generally known, have economic value to [the consultants], and are the result of years of building expertise in valuation services.

[252] The parties did not provide representations specifically addressing the application of section 10(1) to Record 144, though it was claimed in the index of records prepared and circulated to this office and the appellant by the city.

## **Findings**

[253] The information contained in the fair market valuation report sets out information relating to an asset which is owned by the city that was being considered for purchase by Toronto Hydro. I find that the information which may qualify as commercial or financial information that is contained in the record does not belong to and does not relate to the consultant, contrary to the position taken by Toronto Hydro. While the report was prepared by the consultants according to what I assume to be their usual (in 2005) methodology, I am not convinced that the record contains any information about the manner in which the consultant conducted its work and reached its conclusions that is unique to it or is not generally well-known in the consulting industry. I find that this is particularly true because the report itself is dated November 21, 2005 and was prepared using the format and methodology relied upon by the consultants over eight years ago.

[254] More importantly, however, I reject the argument that the information in Record 39 relates to the consultant, specifically its methodology and that the format of its report, prepared in 2005, continues to have economic value and is not well-known in the industry at this time. As a result, I find that Record 39 does not contain any information that qualifies as a trade secret relating to the consultant. I find support for this determination in Order MO-1738 in which former Assistant Commissioner Tom Mitchinson did not accept that the information contained in a record relating to a third party's "format, style and client list" qualified as third party information within the meaning of section 10(1).

[255] Record 144 is a letter dated February 25, 2005 from the consultant to Toronto Hydro setting out the terms of its engagement for the valuation which resulted in the preparation of the November 21, 2005 report. In this document, it sets out the scope of the work the consultant will perform and its fees, as well as what appears to be standard boilerplate language regarding the management of its work. Again, I find that this information does not qualify as a "trade secret" as that term has been defined in previous orders addressing section 10(1). The information relating to fees is now

nearly nine years old and certainly no longer reflects the amounts charged by the consultants for this type of work. The record itself does not contain any other information about the consultant and the methodology it intended to employ in its work which could be characterized as a "trade secret" for the purposes of section 10(1). As a result, I find that Record 144 does not contain information that falls within the ambit of trade secret under section 10(1).

[256] Similarly, in response to the arguments put forward by the city, I find that neither Record 39 nor 144 contain any information that qualifies as technical, commercial or financial information relating to the consultant. Rather, the information is about an asset owned by the city, its street and expressway lighting, which was the subject of a valuation process in 2005 conducted by the consultant. The appropriate exemption which may apply in that circumstance is section 11, not section 10(1).

[257] All three parts of the test under section 10(1) must be met in order for the exemption to apply and neither the city nor Toronto Hydro has provided me with sufficient evidence to establish its application to either Record 39 or 144. Therefore, I find that these records are not exempt under section 10(1).

**Issue G: Did the city properly exercise its discretion to deny access to the records which are found to be exempt under sections 7(1) and 12?**

[258] The section 7(1) and 12 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[259] 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.

[260] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

***Relevant considerations***

[261] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[262] The city lists a number of factors which it considered in making its decision to disclose or to withhold the records. I note that a large number of records that relate to this transaction have been disclosed to the appellant at the request stage and during several rounds of mediation through the course of the processing of this appeal. In

addition, as a result of this order, the appellant will obtain access to even more records responsive to the request pertaining to this long-concluded transaction.

[263] I note as well that the vast majority of records which will not be disclosed to the appellant are subject to the solicitor-client privilege exemption in section 12. This privilege belongs to the city and has not been waived or otherwise relinquished in the years following their creation.

[264] The appellant argues that the city has exercised its discretion in bad faith, though it has provided little evidence to support such a statement beyond what it describes as the city's "false assertion" as to the identity of the appellant's client. I put no credence in this allegation and find that it has no relevance in determining whether the city acted appropriately in this case.

[265] Much has been made by both parties to this appeal of the fact that the records at issue are now nearly nine years old. The appellant argues that any sensitivity that may have existed in the information has now diminished with time. The city argues that the information must now be less meaningful to the appellant and his client as it is now out of date. The information which I have found to be exempt is, in the main, subject to the solicitor-client communication privilege aspect of the section 12 exemption. The privilege endures and, unless waived, is permanent in nature.

[266] I find that regardless of the age of the records that are subject to exemption under section 7(1) or 12, the city properly exercised its discretion in denying access to them. I find that the city did not rely on any improper factors or exercise bad faith in the manner in which it determined how to exercise its discretion in favour of denying access to these records. Accordingly, I uphold the city's exercise of discretion in this appeal.

**Issue H: Is there a compelling public interest in the disclosure of the records under section 16 of the *Act* which outweighs the purpose of the section 7(1) exemption?**

[267] Section 16 states:

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

[268] As noted above, the majority of the records which are to be withheld from disclosure as a result of this order were found to be exempt under section 12, which is not subject to the "public interest override" provision in section 16. Therefore, I will only address the possible application of section 16 to the records which I found to be

exempt under section 7(1): Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137.

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

[270] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant 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. [Order P-244]

### ***Compelling public interest***

[271] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government [Orders P-984, PO-2607]. 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 [Orders P-984 and PO-2556].

[272] Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137 are internal communications passing between senior city managers in the course of their negotiation of the street lighting sale to Toronto Hydro in 2005. These communications represent the sharing of views or a suggested course of action that will ultimately be accepted or rejected by the person being advised. I find that their disclosure would not serve the purpose of informing the public about the city’s activities, nor would it add in some way to the information available to the public about a current public interest. The transaction was completed many years ago and, in my view, the issue is not one that is currently of interest to the public, compelling or otherwise.

[273] A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347 and P-1439]. In my view, the interest expressed by the appellant in the subject matter of Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137 is a private interest belonging to his client. I find that because the financial details of the transaction have long ago been made public by both the city and Toronto Hydro, any public interest in disclosure was answered long ago. Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137 do not relate to what

may once have been a matter of public interest, rather they describe the discussion that took place within the city's administration around the transaction and its structure.

[274] Finally, the word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. I find that any public interest that may have once existed in the contents of Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137 is not now a compelling one. I find that the appellant has failed to provide any basis for such a finding, particularly with respect to these records found to be exempt under section 7(1).

[275] Because I have found that there is not a compelling public interest in the disclosure of the contents of Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137, it is not necessary for me to consider whether the second part of the test under section 16 has been satisfied. However, based on the paucity of the appellant's representations on this aspect of section 16, I find that the purpose of the exemption in section 7(1) is not clearly outweighed by a public interest in the disclosure of Records 29, 66, 90, 97, 129, 130, 134 and page 1 of Record 137.

**ORDER:**

1. I order the city to disclose the following records to the appellant by providing him with a copy by **February 19, 2014** but not before **February 14, 2014**:

Records 7, 15, 17, 39, 40, 41, 42, 43, 44, 45, 46, 49, 50, 51, 52, 53, 54, 56, 57, 58, 60, 62, page 1 and 2 of Record 93, 98, 100, 102, 103, 104, 106, 107, 108, 109, 110, 117, 123 and 144.

2. I uphold the city's decision to deny access to the remaining records.
3. In order to verify compliance with Order Provision 1, I reserve the right to require the city to provide me with a copy of the records which are ordered disclosed.

Original Signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ January 15, 2014