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

ORDER MO-2261

Appeal MA-050363-1

The Corporation of the City of London

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NATURE OF THE APPEAL:

The Corporation of the City of London (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> We hereby request … that the [City] produce the following records relating to the ongoing road sewer project at Pine Street and Oak Street, London (which includes tunneling under Canadian National Railway tracks for a storm sewer):
>
> 1. all plans, contracts, and schedules;
>
> 2. records relating to the borer that became stuck in the ground, which blocked Pine Street and Oak Street for approximately 20 months.

After locating records responsive to the request, the City informed the requester that disclosure of a number of the records may affect the interests of third parties, and that it was giving the third parties an opportunity to make representations concerning disclosure. The City notified seven third parties pursuant to section 21 of the *Act*.

Based on my review of the records at issue, it appears that the third parties include the engineering firm hired by the City to manage the storm sewer project (the contract administrator); the firm that was contracted to lead the work on the storm sewer project (the contractor); the firm that was subcontracted to build the tunnel for the storm sewer (the tunnel subcontractor); and other consultants and subcontractors.

The City sent each third party a letter, along with an index of records and a copy of the records relating to them. It referred them to the exemption in section 10(1) of the *Act* (third party information) and invited them to notify the City in writing of any concerns they may have with respect to disclosure of the records.

The City received the following response to its letters:

- Two third parties consented to the disclosure of the records relating to them;
- Two third parties did not respond to the letters;
- Three third parties objected to the disclosure of the records relating to them, including the contract administrator, the contractor and the tunnel subcontractor.

The City then issued a decision letter that granted the requester full access to 71 documents, partial access to eight documents, and no access to five documents. It further advised her that it had decided to disclose additional records relating to third parties but that these records would be withheld from disclosure for 30 days to give these parties an opportunity to appeal its decision to the Commissioner's office.

Subsequently, the City located an additional record (an amending agreement between the City, the contractor and the tunnel subcontractor) that was partly responsive to the request. It issued a

supplementary decision letter that provided the requester with access to those portions of the amending agreement that were responsive to her request.

Both the contractor and the tunnel subcontractor appealed the City's initial and supplementary decisions to this office. In particular, they appealed the City's decision to disclose the records relating to them to the requester. The contract administrator did not appeal the City's decision to disclose the records relating to it to the requester.

The appellant in this appeal is the contractor, which objects to the City's decisions to disclose the records relating to it to the requester. I also have a related appeal before me (MA-050358-1) that was filed by the tunnel subcontractor, which also objects to the City's decisions to disclose the records relating to it to the requester. The issues in the related appeal are being addressed in a separate order.

During the mediation stage of the appeal process, the requester agreed to disclose her identity to the appellant and to clarify that her law firm was representing a developer. This appeal was not settled in mediation and was moved to adjudication.

I began this adjudication by sending a Notice of Inquiry to both the appellant and the City, inviting them to submit representations on the issues in this appeal. In response, the City submitted representations to this office. The appellant did not submit representations but asked me to treat its appeal letter as its representations. In addition, it asked that its representations be withheld from the requester in their entirety because of confidentiality concerns. I issued a sharing order to the appellant that found that fair procedure requires that portions of its representations be shared with the requester.

I then sent the same Notice of Inquiry to the requester, along with the severed representations of the appellant and the complete representations of the City. In response, the requester submitted representations to this office.

RECORDS:

There are 16 records at issue in this appeal. They consist mainly of correspondence between the appellant and the contract administrator, and the appellant and the tunnel subcontractor. In addition, the responsive portions of the amending agreement between the City, the contractor and the tunnel subcontractor are at issue. I have summarized these records in the following chart, which is based on the index of records submitted by the City:

Record number	Description of record	Number of pages	City's decision
21	Correspondence regarding water sample test results	3	Disclose in full

25b	Correspondence regarding dewatering work plan	6	Disclose in full
53a	Correspondence regarding tunnel section	2	Disclose in full
60	Correspondence regarding tunnel section	4	Disclose in full
72	Correspondence regarding subcontractor's intent to claim for costs	3	Disclose in full
78	Correspondence regarding tunnel	1	Disclose in full
94a	Claim for additional work completed to reopen street intersection	2	Disclose in part
95a	Claim for dewatering system removal	2	Disclose in part
111a	Correspondence regarding opening of street intersection	1	Disclose in full
125	Correspondence regarding completion of open-cut section across street	3	Disclose in part
133	Correspondence regarding tunnel section	3	Disclose in full
151	Correspondence regarding completion of open-cut section across street	2	Disclose in full
166a	Correspondence regarding tunnel shaft	1	Disclose in full
179	Correspondence regarding dewatering wells	2	Disclose in full

180	Correspondence regarding dewatering wells	2	Disclose in full
217	Amending agreement between City, appellant and tunnel subcontractor	6	Disclose in part

DISCUSSION:

THIRD PARTY INFORMATION

The appellant, who objects to the City's decision to disclose the records at issue, claims that the mandatory exemption in section 10(1) of the *Act* applies to these records.

Section 10(1) states:

> 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;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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.)]. 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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record [Order P-203].

In the circumstances of this appeal, the City has decided to disclose the records at issue, but the third party (the appellant) has appealed that decision. Consequently, the onus is on the appellant to prove that the section 10(1) exemption applies to the records at issue.

For section 10(1) to apply, the appellant 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In order to satisfy Part 1 of the test, the appellant must show that each record contains one or more of the types of information listed in section 10(1).

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

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (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].
>
> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the

> observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [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].

In my view, all of the records, except for one, reveal "technical information" or "financial information," for the reasons that follow.

The appellant submits that the records at issue contain "valuable scientific, technical and financial information which would clearly constitute 'trade secrets' … and which would be of great value to its competitors."

The City states that it agrees that Records 21, 25b, 125, 133, 151, 166a, 179 and 180 contain "technical information," and that Records 94a, 95a and 125 contain "financial information." However, it asserts that Records 53a, 60, 72, 78 and 111a do not contain any trade secrets or scientific, technical, commercial, financial or labour relations information, and that the appellant has not presented any persuasive arguments to the contrary.

The requester simply asserts that the records do not reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

I have reviewed the records at issue and find that Records 21, 25b, 60, 72, 78, 111a, 125, 133, 151, 166a, 179 and 180 reveal "technical information" about the tunnel project. In particular, these records reveal information prepared by engineers or professionals in other technical fields relating to the construction of the tunnel.

Although Record 53a contains a brief reference to one component of the tunnel project, this information does not, in my view, meet the definition of "technical information" or any other types of information listed in section 10(1). Because the Part 1 of the three-part test has not been met with respect to Record 53a, this record does not qualify for exemption under section 10(1). Consequently, I uphold the City's decision to disclose this record to the requester.

Moreover, I find that Records 94a, 95a, 125 and 217 reveal "financial information" relating to the costs involved in constructing the tunnel.

The appellant did not provide any detailed representations to support its assertion that the records at issue contain "trade secrets." In addition, I have reviewed the information in the records and find that it does not fall within the definition of a "trade secret," as set out above.

However, given that I have found that all of the records, except for one, reveal "technical information" or "financial information," the appellant has satisfied Part 1 of the three-part section 10(1) test with respect to those records.

Part 2: supplied in confidence

For section 10(1) to apply, the appellant must also satisfy Part 2 of the three-part test, which is that the information must have been supplied to the institution in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

In my view, the information in Records 21, 25b, 60, 72, 78, 94a, 95a, 111a, 125, 133, 151, 166a, 179 and 180 was "supplied" to the City. However, the information in Record 217 (the amending agreement) was not "supplied" to the City, for the reasons that follow.

The appellant states that most of the records at issue consist of correspondence between itself and two private companies, one of which is the engineering firm that was retained by the City to act as the contract administrator for the tunnel project. It submits that although it sent a copy of some correspondence to the City, most of these letters were not copied to the City. Instead, these letters were forwarded to the City by the contract administrator without the appellant's knowledge.

The City submits that it was appropriate for the contract administrator to provide the records at issue to the City. It asserts that the contract administrator had a contractual obligation to report back to the City with respect to how the tunnel project was progressing.

Based on the parties' submissions, it appears that the contract administrator hired to oversee the project was acting as the City's agent. I accept the City's submission that the contract administrator had an obligation to report back to the City on the progress of the project, which included providing the City with relevant documentation submitted by the appellant and other parties involved in the construction of the tunnel.

Given that the contract administrator was acting as the City's agent, I find that any information in the records at issue that the appellant provided to the contract administrator was, procedurally speaking, directly "supplied" to the City, for the purposes of section 10(1) of the *Act*. In particular, I find that the information in Records 21, 25b, 60, 72, 78, 94a, 95a, 111a, 125, 133, 151, 166a, 179 and 180 was "supplied" to the City, although it must still be determined whether this information was supplied "in confidence."

With respect to Record 217 (the amending agreement) I find that the information in the responsive portions of this record was not "supplied" to the City. The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

In Order PO-2435, Assistant Commissioner Brian Beamish adopted this approach with respect to per diem rates paid to consultants in accordance with contracts between the Ontario Family Health Network and these consultants. He observed that the government had the option of accepting or rejecting a consultant's bid, which is "a form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

I agree with Assistant Commissioner Beamish's reasoning and will apply it in the circumstances of the appeal before me. In my view, the responsive portions of the amending agreement between the City, the contractor (the appellant) and the tunnel subcontractor were subject to negotiation and mutually generated by the parties. I find that these contractual provisions were not "supplied" to the City by either of the third parties. Consequently, the appellant has not satisfied Part 2 of the three-part section 10(1) test with respect to Record 217 (the amending agreement), and the responsive portions of this record must be disclosed to the requester.

In confidence

I have found that the information in Records 21, 25b, 60, 72, 78, 94a, 95a, 111a, 125, 133, 151, 166a, 179 and 180 was "supplied" to the City. However, to satisfy Part 2 of the section 10(1) test, the information in these records must have been supplied "in confidence" to the City.

In order to satisfy the "in confidence" component of Part 2 of the section 10(1) test, the party resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

The appellant asserts that the information in the records was supplied in confidence with the expectation that "this highly sensitive information" would not be disclosed to the public.

The City submits that the appellant has not demonstrated that the information in the records at issue was supplied to the City "in confidence." In particular, it asserts that regular progress meetings were held at the office of the contract administrator to discuss the "technical details" of the project, and that numerous parties involved in the project attended these meetings. In addition, minutes of these meetings were distributed to all of these parties as well as several private companies and public bodies who had an interest in the project.

Moreover, the City states that the appellant had a contractual obligation to submit information relating to the storm sewer project to both the contract administrator and the City, including information relating to the tunnel boring machine, associated equipment and construction methodology, and construction schedules. It submits that there is no suggestion in the contract that the information was to be supplied "in confidence."

In her brief representations, the requester submits that the appellant did not supply the information in the records at issue to the City "in confidence."

I have considered the representations of the parties. In my view, it is evident that the appellant did not have a reasonable expectation of confidentiality that was *explicit* with respect to the information that it supplied to the City through the contract administrator. As the City has pointed out, numerous external parties were privy to the "technical details" of the project and there were no explicit confidentiality assurances with respect to the information that the appellant was contractually required to provide.

However, based on my review of the records and the appellant's representations, I am prepared to find that the appellant had a reasonable expectation of confidentiality that was *implicit* with respect to at least some of the information in the records at issue that it supplied to the City through the contract administrator. In my view, it was reasonable for the appellant to expect that some of this information would not be widely disseminated.

In short, for the purpose of the "in confidence" component of part 2 of the section 10(1) test, I find that some of the information in Records 21, 25b, 60, 72, 78, 94a, 95a, 111a, 125, 133, 151, 166a, 179 and 180 was supplied to the City "in confidence." This is sufficient to establish that Part 2 of the three-part test has been satisfied with respect to the records remaining at issue.

Part 3: harms

I have found that Records 21, 25b, 60, 72, 78, 94a, 95a, 111a, 125, 133, 151, 166a, 179 and 180 reveal "technical" or "financial" information relating to the storm sewer project (Part 1 of the three-part test), and that at least some of this information was supplied to the City in confidence (Part 2 of the three-part test). However, this is not sufficient to trigger the application of the section 10(1) exemption. For section 10(1) to apply, the party resisting disclosure must also satisfy the last part of the three-part test, which is that the prospect of disclosure of a record must give rise to a reasonable expectation that one or more of the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) will occur.

To meet this part of the test, the party resisting disclosure 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.)].

The appellant provided general representations on the harms that could reasonably be expected to occur if the remaining records at issue are collectively disclosed. In addition, it identified specific records that are "especially sensitive" and provided additional representations on the harms that could reasonably be expected to occur if the information in each of these records is disclosed.

Section 10(1)(b)

In its general representations, the appellant asserts that if the detailed information in the records at issue is disclosed, both it and other companies would be "extremely reluctant" to share information with the City, which is not in the public interest [section 10(1)(b)].

In my view, the appellant's submissions on this point are not persuasive and amount to speculation of possible harm. It is undeniably in the public interest that any information relating to public works such as the tunnel project continue to be supplied to the City. However, it is simply not plausible that the appellant or other private companies that benefit financially from

publicly funded engineering projects would no longer provide information voluntarily if the type of information in this appeal is disclosed.

The City uses public funds to pay engineering firms for such projects, and it has a duty to taxpayers to require these firms to provide detailed information and progress reports. If some private companies make it clear that they will refuse to provide such information, the City can simply turn to those firms that will. In my view, it is not credible that the appellant or other companies would jeopardize their chances of winning future City bids by refusing to provide the type of information at issue in this appeal.

In short, I find that the appellant has not provided the detailed and convincing evidence required to establish that the harm contemplated by section 10(1)(b) of the *Act* could reasonably be expected to occur if the particular information in the records at issue in this appeal is disclosed.

Sections 10(1)(a) and (c)

The appellant further states that the City will likely be calling for re-tenders on the tunnel project. Consequently, it submits that disclosure of the technical and financial information in the records would prejudice its competitive position [section 10(1)(a)] and result in undue gain for its competitors [section 10(1)(c)], with respect to both the re-tendering of this project and future projects offered by the City and other municipalities.

The appellant also asserts that although some of its correspondence with other parties may appear innocuous, the collection of correspondence read as a whole would be of considerable value to its competitors because it provides a clear view of its business practices, methodologies, negotiation techniques and internal costs.

As noted above, the appellant identified specific records that are "especially sensitive" and provided additional representations on the harms that could reasonably be expected to occur if the information in each of these records is disclosed. Consequently, I will conduct a record-by-record analysis and take the appellant's specific representations into account in determining whether disclosure of the information in each record could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

The City submits that the appellant has not provided the kind of "detailed and convincing" evidence required to show that harms contemplated by section 10(1) of the *Act* could reasonably be expected to occur if the information in the records at issue is disclosed. In addition, it provides specific representations on Records 94a, 95a and 125, which I will take into account in my record-by-record analysis below.

The requester simply asserts that the prospect of disclosure of the records at issue does not give rise to a reasonable expectation of harm.

This office recently contacted the City to determine whether the re-tendering process for the tunnel project has occurred, because the initial tunnel project ground to a halt more than two years ago. The City informed this office that no re-tendering process has taken place. Consequently, I will take this factor into account in determining whether the harms specified in paragraphs (a) and (c) of section 10(1) could reasonably be expected to occur if the information in the records remaining at issue is disclosed.

Record 21 – Correspondence regarding water sample test results

This three-page record includes a fax from the contract administrator to the City, a fax from the appellant to the contract administrator, and an attached Certificate of Analysis regarding water sample test results. The City's decision is to disclose this record in full to the requester.

The appellant submits that disclosure of the Certificate of Analysis would be "highly prejudicial" and of great value to any competitor who is considering submitting a tender for the construction of the new tunnel. In particular, it asserts that any such competitor would not have to include a "risk factor" when preparing its tender because it could rely on the appellant's water sample test results. In addition, because any such competitor would not be required to reimburse the appellant for the cost of obtaining this water analysis, this would constitute an "undue gain" for that competitor.

I have reviewed Record 21 and am not persuaded that disclosure of this record could reasonably be expected to prejudice significantly the competitive position of the appellant [section 10(1)(a)] or result in an undue gain for the appellant's competitors [section 10(1)(c)].

With respect to the two faxes, the appellant has not submitted the detailed and convincing evidence required to show that disclosure of the information in these two documents could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c) of the *Act*.

I have also carefully reviewed the attached Certificate of Analysis, which contains chemical data relating to a water sample that was taken and analyzed by a lab in October, 2003. Given the age of this record, I am not persuaded that its disclosure today could reasonably be expected to prejudice significantly the competitive position of the appellant [section 10(1)(a)] or result in an undue gain for the appellant's competitors [section 10(1)(c)], even if the City initiates a re-tendering process for the tunnel project.

In short, I find that the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 25b – Correspondence regarding dewatering work plan

This six-page record includes a one-page fax from the contract administrator to the City, a three-page letter from the appellant to the contract administrator, and two attached technical drawings. The City's decision is to disclose this record in full to the requester.

The appellant states that Record 25b contains a detailed de-watering work plan, including a step-by-step analysis of the proposed methodology and options for water discharge. It further states that the technical diagrams include a "de-watering and shoring technique" used by the appellant that is generally not used by its competitors. It submits that if Record 25b is disclosed, a technique which it perfected over many years of trial and effort would simply be given to its competitors, complete with illustrations.

I have carefully reviewed the information in Record 25b and accept the appellant's submission that it reveals detailed technical information about a "de-watering and shoring technique" used by the appellant that is generally not used by its competitors. In my view, the appellant has submitted the detailed and convincing evidence required to show that the harms contemplated by sections 10(1)(a) or (c) of the *Act* could reasonably be expected to occur if the information in this record is disclosed. I find, therefore, that disclosure could reasonably be expected to prejudice significantly the competitive position of the appellant [section 10(1)(a)] or result in an undue gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has satisfied Part 3 of the three-part test with respect to this record, which means that it qualifies for exemption under section 10(1) of the *Act*.

Record 60 – Correspondence regarding tunnel section

This four-page record includes a fax from the contract administrator to the City, a letter from the appellant to the contract administrator, and a letter from the appellant to the tunnel subcontractor.

The appellant states that this record contains technical information as to why the original tunnel failed, which would be of great interest to any of the appellant's competitors if the City initiates a re-tendering for the tunnel project. It submits that disclosure of this record would assist the appellant's competitors in determining their proposed methodology for the project.

However, more than two years after the tunnel project ground to a halt, the City has not initiated a re-tendering for the project, and it is not clear if and when such a process will take place. In my view, therefore, the appellant's arguments amount to speculation of possible harm, which is not sufficient to discharge the burden of showing that the harms contemplated in sections 10(1)(a) or (c) of the *Act* could reasonably be expected to occur if the information in this record is disclosed.

Moreover, even if the City decides to re-tender the tunnel project, it will have an obligation to be open and transparent with potential bidders as to the reasons why the original tunnel failed. Although the information in Record 60 might provide some assistance to the appellant's competitors in preparing their bids, the appellant's previous work on the tunnel project already provides it with a significant advantage if a re-tendering process ever takes place. I find, therefore, that disclosure of the information in this record could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 72 – Correspondence regarding subcontractor's intent to claim for costs; and Record 78 – Correspondence regarding tunnel

Record 72 contains three pages, including a fax from the contract administrator to the City, a letter from the appellant to the contract administrator, and a letter from the tunnel subcontractor to the appellant. Record 78 is a one-page fax from the appellant to the tunnel subcontractor. This City's decision is to disclose these records in full to the requester.

The appellant states that these records provide valuable technical and logistic information regarding the problems that the appellant faced on the original tunnel project and what steps it took to alleviate those problems. It further states that these records provide technical information about the soil conditions that any new competitor could expect to face in constructing the tunnel, if the project is re-tendered. As a result, the appellant submits that disclosure of the information in these records would be "of great assistance" to any competitor in determining its methodology and costs for the project when preparing its tender.

I do not find these submissions persuasive. As noted above, more than two years after the tunnel project ground to a halt, the City has not initiated a re-tendering for the project, and it is not clear if and when such a process will take place. In my view, therefore, the appellant's arguments amount to speculation of possible harm, which is not sufficient to discharge the burden of showing that the harms contemplated in sections 10(1)(a) or (c) of the *Act* could reasonably be expected to occur if the information in these records is disclosed.

Moreover, as previously mentioned, even if the City decides to re-tender the tunnel project, it will have an obligation to be open and transparent with potential bidders as to the reasons why the original tunnel failed. Although the information in Records 72 and 78 might provide some assistance to the appellant's competitors in preparing their bids, the appellant's previous work on the tunnel project already provides it with a significant advantage if a re-tendering process ever takes place. I find, therefore, that disclosure of the information in these records could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to these records, which means that they do not qualify for exemption under section 10(1) of the *Act*.

Record 94a – Claim for additional work completed to reopen street intersection; and Record 95a – Claim for dewatering system removal

Record 94a contains two pages, including a fax from the appellant to the contract administrator and an attached claim for work completed. Record 95a also contains two pages, including a fax

from the appellant to the contract administrator and an attached claim for dewatering system removal. The City's decision is to disclose these records in part to the requester.

The appellant states that the claims set out in these two records set out in the detail "the exact mark-ups allowed on the project." With respect to Record 95a, it further states that this record also reveals its wage structure. It submits that disclosure of this information could prejudice its competitive position because it provides information about its profit margins that would enable competitors to provide lower bids on the re-tendered tunnel project and other City projects. It further asserts that although the City has decided to withhold portions of the claim documents, disclosure of the remaining information would still be "unfairly prejudicial."

The City submits that the appellant's concerns about the possible disclosure of mark-up information is unnecessary, because "it was the City's intent all along to disclose the invoices in Records 94a and 95a with that specific mark-up information severed out."

I have reviewed both records and find that the disclosure of the cover faxes from the appellant to the contract administrator could not reasonably be expected to result in the harms contemplated in sections 10(1)(a) or (c) of the *Act*. However, I find that disclosure of the specific mark-up figures and other costs in the attached claim documents could reasonably be expected to prejudice significantly the appellant's competitive position [section 10(1)(a)], if this information is disclosed. In particular, the appellant's competitors could use this information to underbid the appellant on other projects. In short, I find that the appellant has satisfied Part 3 of the three-part test with respect to this financial information, which means that it qualifies for exemption under section 10(1) of the *Act*. Consequently, I will order the City to sever this information from Records 94a and 95a.

However, I find that disclosure of the subtotal, GST total and grand total on each claim document could not reasonably be expected to prejudice significantly the competitive position of the appellant [section 10(1)(a)] or result in an undue gain for the appellant's competitors [section 10(1)(c)]. In my view, these bottom-line figures on their own are insufficiently detailed to be of any meaningful use to the appellant's competitors. In short, the appellant has not satisfied Part 3 of the three-part test with respect to this information, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 111a – Correspondence regarding opening of street intersection

This record is a one-page fax from the appellant to the contract administrator. The City's decision is to disclose this record in full to the requester.

The appellant submits that this record contains technical information regarding the issues faced by the appellant on the original tunnel project. It submits that this information would be "of great interest" to any of the appellant's competitors once the City initiates a re-tendering process for the project.

I do not find this submission persuasive for the same reasons that I applied to similar records above. More than two years after the tunnel project ground to a halt, the City has not initiated a re-tendering for the project, and it is not clear if and when such a process will take place. Even if the City decides to re-tender the tunnel project, it will have an obligation to be open and transparent with potential bidders as to the reasons why the original tunnel failed.

Although the information in this record might provide some assistance to the appellant's competitors in preparing their bids if the City decides to re-tender the project at some point, the appellant's previous work already provides it with a significant advantage. I find, therefore, that disclosure of the information in this record could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 125 – Correspondence regarding completion of open-cut section across street

This record includes a two-page letter from the appellant to the contract administrator and a one-page spreadsheet that lists additional costs incurred by the appellant due to the delay in constructing the tunnel. The City's decision is to disclose this record in part to the requester.

The appellant submits that paragraph 1 of the two-page letter contains a detailed description of the methodology that it used on the original tunnel project. It submits that this technical information would be of interest to its competitors once the City issues a re-tender for the project, and that disclosure would therefore harm its competitive position.

I do not find this submission persuasive for the same reasons that I applied to similar records above. The City has not initiated a re-tendering for the project and even if it does, the appellant's previous work already provides it with a significant advantage. I find, therefore, that disclosure of the information in the two-page letter, including paragraph 1, could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)]. In short, the appellant has not satisfied Part 3 of the three-part test with respect to this information, which means that it does not qualify for exemption under section 10(1) of the *Act*.

The appellant further states that the attached spreadsheet would be of "enormous value" to its competitors, because it would provide them with valuable costing information for numerous services and equipment (including trailers, pumps, trench boxes, snow fences, etc.). In addition, it states that disclosure of this document would provide its competitors with the list of prices charged by the appellant or its subcontractors for various services, including demobilization, re-mobilization, street cleaning and excavating. The appellant submits that this information provides valuable information about its profit margins and could assist its competitors in their efforts to underbid it on future projects.

In its representations, the City states that to effect disclosure of Record 125, it would agree to withhold the line-by-line totals for the costing and pricing information, but would not agree to withholding the subtotal, GST total and grand total on this spreadsheet.

I have reviewed the financial information on the spreadsheet and agree with the appellant that disclosure of the specific costing and pricing information could reasonably be expected to significantly prejudice its competitive position, if this information is disclosed. In particular, the appellant's competitors could use this information to underbid the appellant on other projects. In short, I find the appellant has satisfied Part 3 of the three-part test with respect to this information, which means that it qualifies for exemption under section 10(1) of the *Act*. Consequently, I will order the City to sever this information from the spreadsheet.

However, I find that disclosure of the subtotal, GST total and grand total on the spreadsheet could not reasonably be expected to prejudice significantly the competitive position of the appellant [section 10(1)(a)] or result in an undue gain for the appellant's competitors [section 10(1)(c)]. In my view, these bottom-line figures on their own are insufficiently detailed to be of any meaningful use to the appellant's competitors. In short, the appellant has not satisfied Part 3 of the three-part test with respect to this information, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 133 – Correspondence regarding tunnel section

This record is a three-page letter from the appellant to the contract administrator. The City's decision is to disclose this record in full to the requester.

The appellant states that this record includes detailed information relating to the original tunnel project, including the conditions of the site, the names of local tunneling contractors who provided quotations, and various types of tunnel boring machines that these contractors proposed to use on the project. The appellant submits that once the City re-tenders the tunnel project, disclosure of this information would assist any competitor in preparing its proposed methodology for construction of the new tunnel and determining its likely costs. It asserts that this would clearly constitute an "undue gain" for its competitors.

I do not find this submission persuasive for the same reasons that I applied to similar records above. More than two years after the tunnel project ground to a halt, the City has not initiated a re-tendering for the project, and it is not clear if and when such a process will take place. Even if the City decides to re-tender the tunnel project, it will have an obligation to be open and transparent with potential bidders as to the reasons why the original tunnel failed.

Although the information in this record might provide some assistance to the appellant's competitors in preparing their bids if the City decides to re-tender the project at some point, the appellant's previous work already provides it with a significant advantage. I find, therefore, that disclosure of the information in this record could not reasonably be expected to prejudice

significantly the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 151 – Correspondence regarding completion of open-cut section across street

This record is a two-page letter from the appellant to the contract administrator. The City's decision is to disclose this record in full to the requester.

The appellant states that this record contains specific timing and scheduling dates which would be "of great interest" to its competitors once the City re-tenders the tunnel project. In particular, it asserts that disclosure of this information would enable the appellant's competitors to learn how quickly it is able to complete specific tasks. It further states that this record contains examples of the appellant's methods of operations and negotiation techniques, and submits that disclosure of this information would "significantly prejudice" its competitive position and provide its competitors with valuable insight into its business practices.

I do not find this submission persuasive for the same reasons that I applied to similar records above. The City has not initiated a re-tendering for the project and even if it does, the appellant's previous work already provides it with a significant advantage. I find, therefore, that disclosure of the information in this two-page letter could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Record 166a – Correspondence regarding tunnel shaft

This record is a one-page fax from the appellant to the contract administrator. The City's decision is to disclose this record in full to the requester.

The appellant states that this record contains technical details regarding the manner in which it solved specific problems on the job site. It further states that this information would be of interest to any of its competitors who plan to participate in the City's re-tendering process for the tunnel project. Consequently, it submits that disclosure of this information would result in "undue gain" for its competitors and "significantly prejudice" its competitive position.

I do not find this submission persuasive for the same reasons that I applied to similar records above. The City has not initiated a re-tendering for the project and even if it does, the appellant's previous work already provides it with a significant advantage. I find, therefore, that disclosure of the information in this one-page fax could not reasonably be expected to prejudice

significantly the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to this record, which means that it does not qualify for exemption under section 10(1) of the *Act*.

Records 179 and 180 – Correspondence regarding dewatering wells

Record 179 consists of a one-page letter from the appellant to the contract administrator, and a one-page email from the City to various parties involved in the project. Record 180 consists of a one-page fax from the appellant to the tunnel subcontractor and the same one-page email as in Record 179.

The appellant states that disclosure of these two records would serve to inform the appellant's competitors that there are wells that have not yet been de-commissioned. It submits that its competitors would likely incorporate this technical information into their proposals with respect the City's re-tendering for the tunnel project, which would reduce their expected costs and make their bids more attractive.

In its representations, the City states that it decided not to proceed with the decommissioning of the wells, and that this is information that was not provided by the appellant.

In my view, even if the City decides to re-tender the tunnel project, it will have an obligation to be open and transparent with potential bidders as to the reasons why the original tunnel failed. This would include providing potential bidders with information as to whether there are wells that need to be decommissioned. I find, therefore, that disclosure of the information in Records 179 and 180 with respect to the decommissioning of wells could not reasonably be expected to prejudice *significantly* the competitive position of the appellant [section 10(1)(a)] or result in an *undue* gain for the appellant's competitors [section 10(1)(c)].

In short, the appellant has not satisfied Part 3 of the three-part test with respect to these records, which means that they do not qualify for exemption under section 10(1) of the *Act*.

ORDER:

1. I uphold the City's decision to disclose the following records in their entirety to the requester: Records 21, 53a, 60, 72, 78, 111a, 133, 151, 166a, 179 and 180.

2. I uphold the City's decision to disclose Records 94a, 95a and 125 in part to the requester, but I order the City to withhold additional portions of these records that I have found are exempt. I have provided the City with copies of these records and have highlighted in green the additional portions that are exempt from disclosure. To be clear, the City must **not** disclose those portions of the records that are highlighted in green.

3. I uphold the City's decision to disclose to the requester those portions of Record 217 that are responsive to her request.

4. I order the City to withhold Record 25b in its entirety. To be clear, the City must **not** disclose this record to the requester.

5. I order the City to disclose the records identified in order provisions 1, 2 and 3 to the requester by **February 4, 2008** but not before **January 29, 2008**.

6. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records that it discloses to the requester.

Original signed by: December 28, 2007
Colin Bhattacharjee
Adjudicator