Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3628

Appeals MA17-5-2 and MA17-132

City of Ottawa

June 27, 2018

Summary: This appeal deals with an access request made to the City of Ottawa (the city) for non-conformance reports issued in 2015 and 2016 relating to below-standard construction of Phase 1 of the city's light rail transit project. The city located records responsive to the request and granted access in part, claiming the application of the mandatory exemption in section 10(1) (third party information), as well as the discretionary exemption in section 11 (economic interests). Both the requester (the appellant) and a third party (the third party appellant) appealed the city's decision to this office. The third party appellant raised the application of sections 10(1) and 7 (advice or recommendations), while the appellant raised the possible application of the public interest override in section 16. During the inquiry of this appeal, the city reversed its position, claiming that no exemptions applied to the records. In addition, the third party appellant no longer claimed the application of section 7. As a result, only the exemption in section 10(1) and the public interest override in section 16 are at issue, as well as a preliminary issue regarding the scope of the request raised by the appellant during the inquiry.

In this order, the adjudicator finds that the city appropriately located records that were responsive to the request. She finds that the records are exempt from disclosure under section 10(1), but that the public interest override applies to some of the records, which are to be disclosed to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a) and 16.

Orders and Investigation Reports Considered: PO-3633.

Cases Considered: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII).

OVERVIEW:

[1] The City of Ottawa (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information related to the city's Light Rail Transit (LRT) project. After consultations with the city, the requester confirmed that the request was for the following information:

> All non-conformance reports issued in 2015, 2016 referencing below standard construction on the phase one LRT project (Tunney's Pasture to Blair Stations) including in connection with the Rideau Street sinkhole.

[2] In response to the request, the city located records that were responsive to the request. Before making its decision, the city notified a third party to obtain its view regarding disclosure of the records. The third party objected to the disclosure of any records relying on the mandatory exemption in section 10(1) (third party information) of the *Act*. The third party also argued that the records are exempt under the discretionary exemption in section 7 (advice or recommendations).

[3] After considering the third party representations, the city issued a decision to the requester, advising that it had decided to grant access to all of the non-conformance reports issued in 2015 and 2016, but not to any associated attachments.[1]

[4] The city subsequently located additional records and again notified the third party to obtain its view regarding disclosure of these records. Again, the third party objected to the disclosure of any records relying on the mandatory exemption in section 10(1) of the *Act*, as well as the discretionary exemption in section 7.

[5] The city then issued a second decision letter to the requester, advising that it was granting access, in part. The city denied access to non-conformance reports NCR-461, NCR-435, NCR-380 and NCR-243. The city advised that it was claiming the application of sections 10(1) and 11 (economic and other interests) to these records.

[6] The requester, now the appellant, appealed the city's decision to withhold any of the records. As a result, appeal file MA17-5-2 was opened.

[7] The third party, now the third party appellant, also filed an appeal to this office of the city's two decision letters to disclose any of the records to the appellant. As a result, appeal file MA17-132 was opened.

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[1] The decision letter did not specify which exemption was relied upon in withholding the attachments.

[8] The two appeals were mediated together. During mediation, the city confirmed its decision that a portion of the records should be withheld, and the third party appellant maintained its position that the records should be withheld in their entirety.

[9] The appellant advised the mediator that the records relate to matters that involve the construction of the City's Light Rail Transit service. He stated that there have been concerns about construction safety. As a result, he believes there is a public interest in access to the information and he asked that the public interest override at section 16 of the *Act* be added to the issues in his appeal. He also advised the mediator that he was not seeking access to any portions of the records containing personal information.

[10] The two appeal files then moved to the adjudication stage of the appeals process, where an adjudicator conducts an appeal. I am the adjudicator in this matter and I provided the city, the appellant and the third party appellant with the opportunity to provide representations.

[11] After the issuance of the Notice of Inquiry but prior to providing its representations, the third party appellant wrote to this office to advise that it had thoroughly reviewed the records, and was providing its consent to disclose a number of records, listed in an attachment to its letter, which it referred to as Appendix A. The city then disclosed those records to the appellant. Consequently, these records are no longer at issue.

[12] In response to the Notice of Inquiry, all of the parties provided representations. Portions of both appellants' representations were withheld, as they met this office's confidentiality criteria. While they will not be re-produced in this order, I did take them into consideration.

[13] In its representations, the city advised that it was no longer relying on the exemption in section 11, and that it was now of the view that section 10 did not apply to any of the records.

[14] The third party appellant indicated in its representations that it was no longer claiming the discretionary exemption in section 7 in its appeal. Consequently, the issues of whether a third party can claim a discretionary exemption and whether section 7 applies to the records are no longer at issue in appeal MA17-132. In addition, the third party appellant provided its consent to disclose further records to the appellant. In particular, the third party appellant consented to disclose records it listed in an attachment to its representations that it referred to as Appendix B in full, and records listed in Appendix C, in part, but that the records listed in Appendix D should be withheld in their entirety.

[15] As a result, the city issued a revised decision letter to the appellant, disclosing the records listed in Appendix B in full, and in Appendix C in part, to the appellant. As a

result, the records in Appendix B and portions of the records in Appendix C are no longer at issue.

[16] In his representations, the appellant advised that he believes there are additional records. The city responded to the appellant's statement, which I consider as a preliminary issue, below.

[17] I have decided to issue one order, disposing of both appeals. In sum, the issues remaining are: the preliminary issue regarding whether there are additional records responsive to the request; the application of the mandatory exemption in section 10 (third party information) to the remaining records at issue; and the possible application of the public interest override in section 16.

[18] For the reasons that follow, I find that the appellant narrowed the scope of the request prior to filing the appeal, and that the city appropriately identified responsive records, based on the narrowed request. I find that the mandatory exemption in section 10(1) applies to the records remaining at issue, but that the public interest override in section 16 applies to the non-conformance reports, but not the attachments to those reports.

RECORDS:

[19] The records at issue consist of non-conformance reports (NCR's) and the attachments to those reports. In particular, the remaining records at issue are:

- the withheld portions of the records listed in Appendix C of the third party appellant's representations, which consist of attachments; and
- all of the records listed in Appendix D of the third party appellant's representations, consisting of non-conformance reports and their attachments.

ISSUES:

Preliminary Issue: What is the scope of the request?

A. Does the mandatory exemption at section 10(1)(a) apply to the records?

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

Preliminary Issue

[20] The appellant submits that there are additional non-conformance reports for 2015 and 2016 beyond those processed by the city. In his view, there should be 297

reports, despite the fact that the third party appellant refers to only 181 reports. In other words, the appellant submits that there are 116 non-conformance reports that were "not processed and hidden" by the city, and that there should, therefore, be an additional 116 non-conformance reports that are responsive to his request.

[21] The city submits that, as reflected in the revised Mediator's Report, the appellant had narrowed the scope of his request prior to filing his appeal, and the records were then retrieved and deemed responsive based on the narrowed version of the request. The records at issue relate to Phase 1 of Ottawa's Light Rail Transit system, named the Confederation Line. The city submits that at the conclusion of mediation, the issue of reasonable search was not identified as an issue in the appeal. The city submits that should the appellant wish to re-formulate his request to receive all non-conformance reports that fall within a range of non-conformance report numbers, he may submit a new access request under the *Act*.

[22] In response, the appellant states that the city wrongly concluded that he narrowed his request and referred to the revised Mediator's Report to make this claim. The appellant states that the focus of his access request was changed prior to filing his appeal, after a discussion with a city manager and that the manager unilaterally narrowed the request. The appellant states that he felt "misled and tricked," as he never agreed to limit the number of non-conformance reports, and was never given an explanation as to why some non-conformance reports were missing, nor was he advised that he would not receive all of the non-conformance reports.

[23] The appellant's original request states, as follows:

> I am applying under the FOI Act for the following 2015, 2016 records, that focus on relevant briefings, reports, audits, memos, financial statements in reference to the phase one LRT project, that
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> > • Very specifically contain and/or review concerns or allegations of below standard, faulty, rushed and/or shoddy construction and engineering work on the phase one LRT project, including in connection with the Waller and Nicholas Street sinkholes.
> >
> > • Describe, review and assess significant financial over payments or other irregularities, conflict of interest situations or any connections with illegal enterprises or groups, and has resulted in complaints, resignations and investigations, including by the Integrity Commissioner.
>
> Please as well provide informally other records released or to be released on the LRT project.

[24] In subsequent communications between the city and the appellant, the appellant agreed to narrow the request to the following information:

- All non-conformance reports issued in 2015, 2016 referencing below standard construction on the phase one LRT project (Tunney's Pasture to Blair Stations) including in connection with the Rideau Street sinkhole.

[25] At the outset, I note that it is not necessary in every case for an issue such as the scope of the request/responsiveness of the records to be raised during the mediation of an appeal. In other words, this issue can be raised during the adjudication stage of the appeals process, which is what the appellant has done, and which I am allowing him to do. However, based on my review of the parties' representations, including some made by the appellant that met this office's confidentiality criteria, I am satisfied with the city's explanation that the records at issue are the non-conformance reports issued in 2015 and 2016 that relate to below standard construction of phase one of the LRT project, that these records reasonably relate to the appellant's revised request and that the city appropriately identified the records responsive to the request. In other words, I find that the records at issue are the only ones that are responsive to the revised request. From the material before me, I have no reason to conclude that there are other non-conformance reports for the time frame set out in the request that relate to below standard construction of phase one of the LRT project.

[26] The appellant is free to widen the scope of his request by submitting a new access request to the city, should he choose to do so.

[27] I will now determine whether the records at issue are exempt from disclosure under section 10(1) of the *Act*, which was claimed by the third party appellant.

Issue A: Does the mandatory exemption at section 10(1)(a) apply to the records?

[28] The city's and the appellant's position is that section 10(1) does not apply to the records; conversely, the third party appellant claims that section 10(1)(a) applies to exempt the records from disclosure.

[29] Section 10(1)(a) 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;

[30] Section 10(1) is designed to protect the confidential "informational assets" of

businesses or other organizations that provide information to government institutions.[2] 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.[3]

[31] 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

[32] The type of information relevant in this appeal and listed in section 10(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[4]

Representations

[33] The third party appellant submits that the records constitute both technical information and trade secrets within the meaning of section 10(1). It goes on to argue that the city employee licensed to open non-conformance reports is a licensed engineer, and the members of the third party appellant's quality team responding to the reports were typically the engineer of record or third party experts.

[34] The third party appellant further submits that the attachments to the non-conformance reports address the resolution to the non-conformance, and include

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[2] *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.) (*Boeing Co.*).
[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[4] Order PO-2010.

engineering reports as well as dozens of detailed technical drawings. The third party appellant states:

> Numerous NCRs and attachments outline the unique challenges faced and solutions developed by [the third party appellant] when constructing the LRT in the Ottawa environment. This includes detailed information regarding surveying techniques developed by [the third party appellant], the specific mixes of concrete developed and used, and methods for dealing with the water table. In particular, a significant element of [the third party appellant's] learning curve had to do with managing the issues of concrete temperature caused by the unique concrete mixes developed by [the third party appellant] in response to the conditions on site.

[35] The city submits that the records contain technical information. The appellant's representations do not address this part of the three-part test.

Analysis and findings

[36] I am satisfied upon my review of the parties' representations and the records themselves that they contain technical information prepared by professionals in the field of construction, and that this information directly relates to the construction of Phase 1 of the city's LRT, thus meeting the definition of "technical information" for the purposes of the first part of the three-part test in section 10(1). It is, therefore, not necessary for me to determine whether the records contain "trade secrets."

Part 2: supplied in confidence

[37] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[5]

[38] 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.[6]

[39] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[7]

[40] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the

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[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] Order PO-2020.

information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.[8]

Representations

[41] The third party appellant submits that the majority of the non-conformance reports and attachments were generated by it, although a small number were opened by the city and subsequently responded to by the third party appellant. All responses to the reports were supplied by the third party appellant and its expert consultants to the city.[9]

[42] In addition, the third party appellant argues that the information it supplied to the city was done so in confidence. The project agreement between the city and the third party appellant includes a clause that any information related to the performance of the project will not be disclosed by the parties to the agreement, should it be exempt from disclosure under section 10(1) of the *Act*. Further, the third party appellant submits that:

- the city was given access to the non-conformance reports and their attachments with the expectation that the information would remain confidential;
- the system through which the records are accessed is password-protected, and the city was given access to only a single account, in order to minimize the potential for disclosure. By providing this password protected system, it was explicitly communicated to the city that the information was to be kept confidential; and
- the records are not accessible to the public in any way, and were prepared for the purpose of internal safety conformance. As internal records, the non-conformance reports and attachments would not ordinarily be disclosed to the public.

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[8] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[9] The city was able to access the third party appellant's documents through the third party appellant's electronic database.

[43] The city submits that the records were supplied by the third party appellant to it in confidence. The appellant's representations do not address whether the information was supplied in confidence by the third party appellant to the city.

Analysis and findings

[44] I have reviewed the records and the representations of the parties, and I am satisfied, on an objective basis that all of the information in the records was supplied in confidence by the third party appellant to the city, meeting the second part of the three-part test in section 10(1). Although some of the non-conformance reports were opened by the city, I am satisfied that the information contained in them was supplied by the third party appellant to the city. This finding applies equally to those non-conformance reports opened by the third party appellant. Concerning whether the information was supplied in confidence, I find that there was an implicit expectation of confidentiality between the third party appellant and the city with respect to the information in the records at issue. In making this finding, I have taken into consideration the project agreement between the third party appellant and the city, which includes a provision that any information related to the performance of the project will not be disclosed by the parties,[10] and the fact that the password-protected system limited access to the information in the records.

Part 3: harms

[45] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[11]

[46] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[12]

[47] In applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1).[13]

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[10] Should this information be exempt under section 10(1) of the *Act*.
[11] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[12] Order PO-2435.
[13] *Ibid*.

Representations

[48] The third party appellant takes the position that the disclosure of the records would prejudice its competitive position under section 10(1)(a) of the *Act*. The third party appellant submits that the information at issue, which consists of technical information and/or a record of its "learning curve," represents trade secrets. The third party appellant states that in Order P-561, former Assistant Commissioner Glasberg discussed the meaning of a "trade secret" in relation to the construction of the then SkyDome. This office found that in the context of a large and complex project, the records documenting the learning curve of the contractor, that is, its unique construction and testing processes and techniques developed over the course of the project, constituted trade secrets within the meaning of the *Act*. The third party appellant goes on to argue that in Order P-561, this office found that the disclosure of the learning curve (i.e. the records) could be used by competitors to the detriment of the original construction group and the learning curve was, therefore, exempt from disclosure.

[49] In this case, the third party appellant states that numerous non-conformance reports and attachments outline the unique challenges faced and solutions developed by it during the construction of the Ottawa LRT, including detailed information regarding surveying techniques, the specific mixes of concrete developed and used, as well as methods for dealing with the water table. In particular, a significant amount of the learning curve had to do with managing the issues of concrete temperature caused by the unique concrete mixes developed by the third party appellant in response to the conditions on-site. The third party appellant states:

> The Records outline an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to [its] approach to the construction of the LRT project. This knowledge base makes up a learning curve that competitors simply do not have.

[50] The third party appellant further submits that the disclosure of the non-conformance reports and their attachments could reasonably be expected to allow its competitors a window into processes and techniques whose development required a significant investment in terms of time and resources. This would, the third party appellant argues, negate any competitive advantages that it could derive from its development of these proprietary techniques and processes, allowing its competitors a "head start." In addition, the third party appellant states that Phase 2 of the LRT project is currently in the Request for Proposals stage, and a third phase is contemplated. The third party appellant submits that the disclosure of the records could reasonably be expected to prejudice its competitive position respecting Phases 2 and 3 of the LRT project.

[51] The city submits that it is not reasonable to expect that disclosure of these

records would result in the harms contemplated in section 10(1).

[52] The appellant submits that the third party appellant's main argument is that the records are their "informational assets," which are part of their unique construction and testing procedures. The appellant argues that light rail projects are fairly commonplace, including the construction techniques. In addition, the appellant states that the third party appellant has argued that some of the records are exempt because they use a password protected system. The appellant submits that the use of password protected systems is a fairly common practice.

[53] In addition, the appellant submits that the third party appellant has failed to establish how the disclosure of the records will be used by competitors to "destroy their profits," or that the disclosure of the records would cause the third party appellant to refrain from bidding on a second or third phase of the city's LRT project.

[54] Lastly, the appellant argues that the fact that a number of the records have been disclosed to him (Appendices A, B and C, in part) does not mean that the remaining records are exempt from disclosure under section 10(1).

Analysis and findings

[55] In order for me to find that the exemption in section 10(1) applies, the third party appellant must establish that harm could reasonably be expected to occur in the event of disclosure. As noted above, the party resisting disclosure must provide sufficient evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and the seriousness of the consequences.14

[56] In Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner), 15 the Supreme Court of Canada addressed the meaning of the phrase could reasonably be expected to in two other exemptions under the Act,16 and found that it requires a reasonable expectation of probable harm.17 As well, the Court observed that the reasonable expectation of probable harm formulation . . . should be used whenever the could reasonably be expected to language is used in access to information statutes.

[57] In order to meet that standard, the Court explained that:

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[14] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[15] 2014 SCC 31 (CanLII).
[16] The law enforcement exemptions in sections 14(1)(e) and 14(1)(l) of the *Act*.
[17] See paras. 53-54.

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence *well beyond* or *considerably above* a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and *inherent probabilities or improbabilities or the seriousness of the allegations or consequences* . . .

[58] This is the standard of proof that I will apply in this appeal.[18]

[59] As previously stated, the records consist of the attachments to the non-conformance reports listed in Appendix C and the non-conformance reports plus the attachments listed in Appendix D. Each non-conformance report is approximately four pages, and sets out a description of the event leading to the non-conformance, the cause, the proposed treatment or action plan, and the response to the proposed disposition. The attachments consist of various technical reports, photographs and technical drawings, and are generally more detailed than the non-conformance reports themselves.

[60] Having reviewed the representations of the parties and the records, I accept the third party appellant's argument that there is a reasonable expectation of probable harm that is well beyond or considerably above a mere possibility of harm to the third party appellant, as contemplated in section 10(1)(a), should the information at issue be disclosed. In particular, I accept the third party appellant's argument that a competitor could reasonably be expected to prejudice the third party appellant's competitive position by using or adopting the technical information in the records in competing in the bidding process for Phases 2 and 3 of the LRT. In particular, I find that a competitor could use this information, not for the purpose of highlighting the third party appellant's non-conformance issues, which, in my view, would not prejudice the third party appellant's competitive position, but rather for the purpose of incorporating the technical information into its own construction practices. This potential adoption and use of the technical information could be used to directly compete against the third party appellant for the purpose of securing the contract for Phases 2 and 3 of the Ottawa LRT or other LRT projects, thus meeting the threshold of the harms contemplated in section 10(1)(a).

[61] As a result, the third part of the three-part test is met and I uphold the third party appellant's exemption claim in section 10(1)(a). I find that the records met the test for exemption from disclosure under section 10(1)(a). However, as set out below, I

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[18] See also Order PO-3116, in which I noted that there is nothing in the *Merck Frosst* decision that necessitates a departure from the requirement that a party provide sufficient evidence of harm in order to satisfy its burden of proof under section 17(1) (the *Freedom of Information and Protection of Privacy Act,* which is the provincial equivalent to section 10(1) of the *Act*).

find that the public interest override in section 16 of the *Act* applies to some of the records at issue.

Issue B: Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of the section 10(1) exemption?

[62] 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.

[63] 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.

[64] 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.[19]

[65] 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.[20] 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.[21]

[66] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".[22]

[67] Any public interest in *non*-disclosure that may exist also must be considered.[23] A public interest in the non-disclosure of the record may bring the public interest in

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[19] Order P-244.
[20] Orders P-984 and PO-2607.
[21] Orders P-984 and PO-2556.
[22] Order P-984.
[23] *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.).

disclosure below the threshold of "compelling".[24]

[68] A compelling public interest has been found to exist where, for example:

- public safety issues relating to the operation of nuclear facilities have been raised;[25] or
- disclosure would shed light on the safe operation of petrochemical facilities[26] or the province's ability to prepare for a nuclear emergency[27]

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

- another public process or forum has been established to address public interest considerations;[28]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations;[29]
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter;[30] or
- the records do not respond to the applicable public interest raised by appellant.[31]

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

[71] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[32]

Representations

[72] The appellant states that he intends to shed light on the construction aspect of

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[24] Orders PO-2072-F, PO-2098-R and PO-3197.
[25] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[26] Order P-1175.
[27] Order P-901.
[28] Orders P-123/124, P-391 and M-539.
[29] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[30] Order P-613.
[31] Orders MO-1994 and PO-2607.
[32] Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

the LRT project, which is the city's most expensive project that operates with significant provincial and federal funding and, consequently submits that there is a compelling public interest in the disclosure of the records. The appellant goes on to state:

> It is my submission that the NCR reports offer data on the quality and safety of LRT construction. There has been widespread public interest in the LRT project, a project meant to safely transport many residents who pay for it and use it. There has been widespread media coverage of its development, including on labour safety violations, and Ministry of Labour orders and fines. To say the public is disinterested in the effect of construction for its future safety or for those working on it is patently wrong.

[73] The third party appellant states that the records have nothing to do with the activities of government, but rather pertain to technical information related to the construction of the LRT. The third party appellant goes on to argue that in cases where the compelling public interest was premised on public safety concerns, an override was only justified in unique circumstances dealing with particularly grave and specific concerns.[33]

[74] The third party appellant states:

> Vague concerns regarding construction safety do not rise to this level of compelling public interest. The Commission will only find that the public interest in terms of safety concerns overrides statutory exemptions when dealing with issues with the potential for widespread harm and devastation. Simply put, concerns relating to construction safety on the LRT project based on mere supposition do not rise to the level of concerns about nuclear or petrochemical safety.

[75] Further, the third party appellant submits that there is no nexus between any alleged labour safety issues and the records at issue. The third party appellant advises that it has reviewed the records and they are not relevant to any proceedings with the Ministry of Labour.

[76] In addition, the third party appellant submits that is has already disclosed a significant number of the requested records and such disclosure is sufficient to address any interest that the appellant or the public may have.

[77] Lastly, the third party appellant submits that the interest in the disclosure of the records at issue is not sufficient to override the purpose of the exemption in section 10(1) or the harm to it that will occur should the records be disclosed.

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[33] See, for example, Orders P-270, P-901 and P-1175.

[78] The city, while not addressing the possible application of the public interest override directly, advised in its representations that Phase 1 of the LRT is the largest infrastructure project ever having been awarded in Ottawa, at a cost of over 2.1 billion dollars.

Analysis and findings

[79] I find Order PO-3633 to be instructive to this case. In that Order, the access request was for non-conformance records with respect to area maintenance contracts for Ontario highways. The Ministry of Transportation (the ministry) was prepared to disclose the records, but a third party appealed the ministry's decision to this office. In that order, former Adjudicator John Higgins found that the provincial equivalent of section 10(1) did not apply to the records, as the three-part test was not met. However, he also determined that had he found the records to be exempt under the third party information exemption, he would have also found that the public interest override applied, mandating the disclosure of the records.

[80] The requester in the appeal before Adjudicator Higgins argued that the dissemination of the information in the records would benefit public health and safety, and would allow the public to understand how and whether area maintenance contractors were fulfilling their responsibilities to keep roads safe, as well as holding them and the government accountable.

[81] The appellant's position (the third party) was that disclosure of the records would not promote public safety as the deficiencies had been remedied. It also stated that the purpose of the public interest override is to inform the citizenry about the activities of government or its agencies, in order to enable them to make informed political choices. It further argued that the disclosure of the records "would not enlighten the public about the workings of government or its agencies," nor would it raise issues of public policy.

[82] Adjudicator Higgins disagreed with the appellant, stating:

> I disagree with the appellant's submission that disclosure of the records "would not enlighten the public about the workings of government or its agencies." Public safety is one of the government's major concerns. Non-compliance with the requirements of highway maintenance contracts could seriously threaten public safety. Accordingly, in my view, disclosure of records that show the extent of compliance, or otherwise, with highway maintenance contracts would shed light on an important operation of government, namely the need to maintain public highways in a manner that protects public safety.

[83] On the question of whether there was a compelling public interest in the disclosure of the records, Adjudicator Higgins found that although there was no

evidence of a "public outcry" demanding the disclosure of the records, "there are some matters that, almost by definition, rouse strong interest or attention," and that this was the case with the records at issue, due to their relationship to highway safety.

[84] I agree with the approach taken by Adjudicator Higgins, and I find that it applies equally here. I find that there is a compelling public interest in the disclosure of the records relating to the construction of the LRT in the city of Ottawa, including, but not limited to, whether certain construction and safety standards have or have not been met, and whether the third party appellant is meeting its contractual obligations to the city and, by inference, to future LRT users to construct a light rail transit system that is safe. I disagree with the third party appellant that the only safety issues that would rouse strong public interest or attention are those that have the potential for widespread harm and devastation, such as concerns about nuclear power or petrochemical safety. In my view, difficulties with the construction of the LRT does raise potential safety issues that could result in widespread harm.

[85] In other words, because the information in the records directly relates to the third party's appellant's conformance or non-conformance with construction standards, the manner in which the third party appellant remedied any non-conformance, and its connection to public safety, I find that the contents of the records rouse strong interest or attention, and that there is a compelling public interest in their disclosure. I also find that there is not a public interest in the non-disclosure of the records.

[86] I must now determine whether the compelling public interest in the disclosure of the records clearly outweighs the purpose of the exemption in section 10(1). As previously stated, the purpose of the third party information exemption is to protect the "informational assets" of private businesses from which an institution receives information in the course of carrying out its public responsibilities.[34]

[87] Referring again to Order PO-3633, Adjudicator Higgins found that the compelling public interest in the disclosure of the records at issue clearly outweighed the purpose of the third party information exemption. He noted that it appeared that the appellant's view was that the protection of its competitive position was more important than the public's right to know the extent to which it complied with its highway maintenance obligations. Adjudicator Higgins disagreed, stating:

> In my view, the opposite is true. The public's ability to assess the extent to which the appellant complies with its contractual highway maintenance obligations, and thereby promotes highway safety, is more important than the appellant's competitive position and reputation. Again, I find this to be the case whether the records demonstrate significant compliance or non-compliance with contractual road maintenance standards. The important

[34] *Boeing Co.*, see note 1.

> point is that the public should be able to determine whether road maintenance contracts are carried out in a way that protects public safety. Although the records are not a "report card" *per se*, they cast direct light on this subject.

[88] Once again, I adopt and apply Adjudicator Higgin's reasoning to some of the records at issue in this appeal. In my view, the public's interest in the construction of the LRT, including the ability to review any safety issues, outweighs the purpose of the exemption in section 10(1). In the circumstances of this appeal, the public should be able to determine if the construction of the LRT is carried out in a way that protects public safety.

[89] I make this finding, however, with respect to only some of the records. I find that the compelling public interest would be satisfied with the disclosure of only the non-conformance reports. As previously stated, the non-conformance reports (each one ranging from 4 to 5 pages in length) contain a description of the non-conformance, the proposed treatment or action plan, and the response to the proposed disposition. The disclosure of all of this information should provide the public with adequate information to assess whether the LRT is safely constructed.

[90] Conversely, I find that the compelling public interest in the disclosure of the attachments to the non-conformance reports does not outweigh the purpose of the exemption. In balancing the compelling public interest in disclosure against the purpose of the exemption in section 10(1), I find that denying access to the attachments is consistent with the purpose of the exemption. The attachments contain very detailed technical information, the disclosure of which met the harms test in section 10(1). I am satisfied that the disclosure of only the non-conformance reports will provide the public with sufficient information to assess whether the construction of the LRT is being carried out safely.

[91] In making this finding, I acknowledge that most of the non-conformance reports contain technical information. However, as stated above, I find that the compelling public interest in the disclosure of this information outweighs the purpose of the exemption in section 10(1). In sum, the public interest override mandates the disclosure of the non-conformance reports, which I list in Order Provision 1.

[92] As previously stated, any personal information that may be contained in these reports was removed from the scope of the appeal and should be severed from the records prior to disclosure.

ORDER:

1. I order the city to disclose non-conformance reports 224, 233, 235, 243, 247, 264, 265, 268, 272, 280, 286, 290, 307, 315, 317, 319, 322, 323, 327, 328, 335,

339, 340, 347, 350, 352, 355, 357, 358, 359, 368, 369, 373, 377, 379, 381, 387, 390, 395, 404, 409, 411, 413, 422, 423, 424, 431, 436, 442, 458, 460, 462, 465, 468, 470, 473, 474, 476, 479, 480, 481, 485 and 497 to the appellant by **August 2, 2018** but not before **July 30, 2018**. To be clear, only the non-conformance reports are to be disclosed, and not the attachments. Any personal information contained in the reports is to be withheld.

2. I uphold the third party appellant's appeal to withhold the attachments under section 10(1).

3. I reserve the right to require the city to provide this office with copies of the records it discloses to the appellant.

Original Signed by: June 27, 2018

Cathy Hamilton
Adjudicator