Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3659

Appeal MA16-425-2

Town of Iroquois Falls

September 17, 2018

Summary: An individual submitted a 14-part request to the town under *MFIPPA* for information relating to the town, its councillors and mayors (past and present), the town's community development team, various northern Ontario municipal associations and two identified forestry companies. The town issued a decision, claiming that 11 parts of the request were frivolous or vexatious under section 4(1)(b) and Regulation 823 and refusing to process them. In response to the other three parts of the request, the town disclosed one record and denied access to another based on sections 10(1)(a) (third party information) and 11(c) (economic and other interests) of *MFIPPA.*

The adjudicator upholds the town's refusal to process parts 1-9, 12 and 13 of the request as frivolous or vexatious because the request is part of a pattern of conduct that would interfere with the operations of the institution under section 5.1(a) of Regulation 823. In the result, the adjudicator imposes limitations and conditions on the processing of requests and appeals from the appellant in relation to the town. The adjudicator does not uphold the exemption claims relied on to deny access to the record (a pre-feasibility review), and she orders the town to disclose it. Finally, as the issue of reasonable search respecting part 10 of the request remained outstanding pending the determination of the frivolous or vexatious issue, the inquiry to consider that issue would continue upon confirmation from the appellant that he wishes to proceed and subject to the conditions imposed by this order.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(1)(b), 10(1) and 11(c); Regulation 823, section 5.1.

Orders and Investigation Reports Considered: Orders M-850, MO-3335, MO-3406, MO-3494, PO-1707 and PO-3154.

Cases Considered: *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner,* 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

OVERVIEW:

[1] This order addresses the issues raised by an individual's appeal to this office regarding the decision of the Town of Iroquois Falls (the town) in response to the following 14-part request for records submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*):

1. Based upon correspondence from the Town of Iroquois Falls, dated May 27, 2016, the attachment from Resolute Forest Products,[1] [identified individual], dated June 13, 2013, I too would like to receive copies of receipts requested by [Resolute], as noted in his letter.

2. I would like a copy of all Resolute and/or Abitibi-Bowater and/or Abitibi Consolidated contributions to the Town of Iroquois Falls and/or Iroquois Falls Development Team [CDT],[2] in the ten year period, 2005 to 2015.

3. I would like a copy of all [three named companies in item 2] receipts given by Town of Iroquois Falls and/or [CDT], in this ten year period, 2005 to 2015.

4. Based upon the Fax cover page, and letter, sent March 6, 2014 by [named individual] of the [CDT] to Resolute, I request the document and confirmation of the telephone fax report detailing it was sent from [specified phone number] at that date and time.

5. As noted in both letters to Resolute from [named individual with CDT], she copied the Chair, [named individual, a former town councillor] on both letters. I would like a copy of both [of his] confirmation letters/records.

6. I request all correspondence, records, memo's, agenda's, emails, briefing notes, minutes and other forms of communications for Former Mayor …, EDT Chair, Former Councillor [named in 5, above] and Former Councillor … and all last term past Councillors and Mayor … and all current Councillors with regards to the CDT.

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[1] Resolute FP (Forest Products) Canada Inc. (Resolute).

[2] The request refers to both the Iroquois Falls Community Development Team and the Iroquois Falls Development Team, but it is the same entity, and I will refer to it as the CDT in this order.

7. Furthermore, I request all correspondence, records, memo's, agenda's, emails, briefing notes, minutes and other forms of communication for, Former Mayor …, EDT Chair Former Councillor … and Former Councillor … [named in 6, above] and all last term past Councillors and Mayor … and all current Councillors with regards to [Resolute], FONOM,[3] NEOMA[4] and Mayor's Task Force.

8. [The former] Mayor … was addressed originally, on the June 21, 2013 letter from [Resolute official identified in 1, above], nothing else has been noted in over two years, I request all emails, briefing notes, meeting minutes, agendas scheduling notes, memos, text, mobile messages and other forms of communications over these financial contributions, where's the original request and thank you's for the funds, approvals, requirement and determination of funds?

9. With the attached information of May 27, 2016, and it's attached six pages, why is there no other [CDT] documentation for 2013-2014 than these six pages? Why was there a committee, a hired Co-ordinator, a Chair and no meetings or minutes, except these six pages? Please provide the by-laws, correspondence, minutes, etc. regarding [CDT] obligations to Town of Iroquois Falls for record-keeping, reporting and communicating to Council.

10. [Named consultant] was contracted for $80,000, for two separate contracts or studies and without an open and competitive tender, please provide the documentation as to why there was no open and competitive tender per town policy, contrary to the By-law for the purchase of goods and services - #3057-09.

11. [Same named consultant] produced two reports for the Town of Iroquois Fall; I would like to view those two reports.

12. Mayor/Councillor …, Former Mayor …, [CDT, two councilors named in 6, above] documented schedules, meetings with external third parties for 2013, 2014, 2015 and 2016.

13. All Town of Iroquois Falls documents, Mayor and Council, correspondence and records from December 1, 2014 to present day [July 18, 2016] which include the term 'Iroquois Falls Community Development Team', and/or [NEOMA] and/or Mayor's Task Force and/or Resolute.

14. Abitibi Commons - please define the project partnership between Riversedge Development and the Town of Iroquois Falls – documented agreement please.

[2] The town issued an interim access decision advising the requester that it was

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[3] Federation of Northern Ontario Municipalities.
[4] North Eastern Ontario Mayors' Association.

denying access to records responsive to parts 1-9, 12 and 13 of his request under section 20.1(1)[5] of the *Act* and "until such time as a decision is issued … for Appeal MA16-248."[6] For part 10 of the request, the town referred the requester to two publicly available municipal by-laws on its website. For part 11 of the request, the town claimed a time extension under section 20 of the *Act* to consult with "external individuals" regarding the responsive records. Finally, for part 14 of the request, the town advised the requester that no responsive records exist and referred him to previous correspondence from the town.

[3] The town subsequently issued a final access decision reiterating its earlier position on parts 1-10 and 12-14 of the request. Regarding part 11, the town denied access to the Pre-Feasibility Review, in its entirety, under section 11(c) (economic and other interests) of the *Act*, but granted access to a slideshow presentation summarizing the Pre-Feasibility Review.

[4] The requester (now the appellant) appealed the town's decision to the IPC, which opened an appeal and appointed a mediator to explore resolution. During mediation, the town issued a revised decision claiming the mandatory third party information exemption in section 10(1)(a) as an additional reason for denying access to the record. The town also advised that the views of several third parties were being sought, in accordance with section 21(1)(a) of *MFIPPA*.[7] Following this notification, the town subsequently issued a second revised decision advising the appellant that it was maintaining its denial of access to the report under sections 10(1)(a) and 11(c) of the *Act.*

[5] The appellant wished to pursue access to the withheld record. He disputed the claim of frivolous or vexatious and also asserted that further responsive records exist. No further mediation was possible and the appeal was transferred to the adjudication stage for an inquiry. I began my inquiry by sending a Notice of Inquiry outlining the issues to the town to seek representations. Further, given the implications of the frivolous or vexatious issue, I concluded that I would not address the reasonableness of the town's searches at this stage of the inquiry because searches for records responsive to parts 1-9, 12 and 13 have not been conducted. I received representations from the town addressing the frivolous or vexatious issue, as well as the exemptions claimed for the record. I provided a complete copy of the town's representations to the appellant, along with a Notice of Inquiry, and invited him to submit representations, which he did.

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[5] Section 20.1(1) of *MFIPPA* sets out the required content of a notice of refusal to grant access on the basis that a request is frivolous or vexatious. The provision being relied upon by the town is actually section 4(1)(b) of *MFIPPA*, as discussed below.

[6] Appeal MA16-248 involved the same institution and requester.

[7] Section 21(1)(a) of *MFIPPA* states that: "A head shall give written notice in accordance with subsection (2) to the person to whom the information relates before granting a request for access to a record, (a) that the head has reason to believe might contain information referred to in subsection 10 (1) that affects the interest of a person other than the person requesting information; …"

[6] I also decided to provide an opportunity to Resolute to make submissions on the section 10(1) issue.[8] Accordingly, I sent a Supplementary Notice of Inquiry to Resolute to seek representations. In response, Resolute adopted the submissions it had made when the town notified it under section 21(1)(a) of the *Act.*

[7] In this order, I uphold the town's decision not to process parts 1-9, 12 and 13 of the request on the grounds that they demonstrate a pattern of conduct that would interfere with the town's operations for the purpose of section 5.1(a) of Regulation 823. I impose limits and conditions on the appellant's requests to the town under the *Act* and any resulting appeals to this office. I do not uphold the town's decision to deny access to the Pre-Feasibility Review under section 10(1)(a) or section 11(c), and I order the town to disclose the record. Finally, I defer consideration of the town's search for records responsive to part 10 of the request, pending confirmation from the appellant that he wishes to proceed with this part of the request in light of the conditions imposed on his *MFIPPA* activities in relation to the town by this order.

RECORDS:

[8] The sole record at issue is a 64-page "Pre-Feasibility Review" prepared by a consultant for the town in April 2015 to identify options for the re-purposing of the (decommissioned) Iroquois Falls Newsprint Mill.

ISSUES:

A. Are parts 1-9, 12 ad 13 of the appellant's request frivolous or vexatious?

B. Does the mandatory exemption for third party information in section 10(1) apply to the record?

C. Does the discretionary exemption for economic and other interests in section 11(c) apply to the record?

DISCUSSION:

Background

[9] The town provided background information about the Iroquois Falls Community Development Team (CDT) that it claims is relevant to 11 of the 14 parts of this request for records about the CDT or members of council who served on the CDT board.

[8] Based on information in the file, the town's consultant apparently did not object to disclosure of the Pre-Feasibility Review.

Specifically, the town explains that the CDT was incorporated in July 1999 and operated as a legal entity separate from the town. According to the town, the CDT's constitution provided for two members of council being appointed to the board, but its operations were overseen by the board, not the town. The town maintains that as a separate legal entity, the CDT was not obliged to maintain its records in accordance with town guidelines, nor was it subject to compliance with MFIPPA. The town adds that the CDT relied on municipal grants to operate and when those grants ceased in 2015, the CDT board dissolved operations. It was in this context that the town took the CDT's records for storage and this is why the town controls access to them for MFIPPA purposes.

A. Are parts 1-9, 12 and 13 of the appellant's request frivolous or vexatious?

[10] The town declined to process parts 1-9, 12 and 13 of the request under section 4(1)(b) of *MFIPPA*, which provides that:

> Every person has a right of access to a record or a part of a record in the custody or under the control of an institution unless,
>
> > the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious.

[11] Section 5.1 of Regulation 823 under the *Act* elaborates on the meaning of the terms "frivolous" and "vexatious":

> A head of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,
>
> > (a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or
> >
> > (b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access.

[12] Section 4(1)(b) provides institutions with a summary mechanism to deal with frivolous or vexatious requests. This discretionary power can have serious implications for the ability of a requester to obtain information under the *Act* and it should not be exercised lightly.[9]

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[9] Order M-850.

[13] On appeal to this office, the burden of proof rests on the institution to provide sufficient support for its decision to declare a request frivolous or vexatious.[10]

[14] When I sought representations from the town, I noted the reference to Appeal MA16-248 in the town's access decision in this appeal and the fact that Adjudicator Cathy Hamilton had issued her decision in the former appeal. In Order MO-3406,[11] Adjudicator Hamilton did not uphold the town's decision that the request there was frivolous or vexatious. In that order, the adjudicator alluded to evidence filed by the town regarding other, similar access requests by the appellant. The request in this appeal is one of those "similar requests." I asked the town to consider what impact the findings in Order MO-3406 may have on this appeal and to respond with submissions accordingly.

Representations

[15] The town's representations begin with a statement summarizing the request, which it characterizes as "contain[ing] 14 separate requests for documents, targeting over a decade's worth of electronic and hard copy records from over 16 different custodians." Referring to Order MO-3406, the town acknowledges the adjudicator's finding that the town's evidence on the frivolous or vexatious issue in that appeal was not sufficient to establish either a pattern of conduct that would amount to an abuse of the right of access or significant interference with the town's operations. Observing that the decision in Order MO-3406 does not bind me in this appeal, the town indicates that it has marshalled additional evidence to support its position.

Pattern of conduct that amounts to an abuse of the right of access

[16] The town relies on the following factors in support of its position that the request at issue in this appeal is part of a pattern of conduct that amounts to an abuse of the right of access:

1. The number of requests is excessive by reasonable standards, particularly given the small size and limited resources of the town;

2. The request is excessively broad in some respects and unusually detailed in others;

3. The request is remarkably similar to previous requests; and

4. The request is intended to accomplish some objective other than to gain access – specifically, the request is a fishing expedition intended to harass and disturb as part of the appellant's vendetta against the town.

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[10] Order M-850.
[11] Order MO-3406 was issued in March 2017.

[17] The town refers to Order MO-3406, where the adjudicator observed that in determining whether a pattern of conduct exists, the focus should be on the cumulative nature and effect of the requester's behaviour. Here, the town submits that the effect of the number of requests cannot be considered in isolation from their nature and scope.

[18] Regarding the number of requests, the town submits that they are excessive by reasonable standards, because between December 2015 and March 2017, the appellant submitted seven *MFIPPA* requests, each consisting of multiple parts. The town submits that the appellant's seven requests actually represent 48 requests over a 15-month period. The town submits that the volume of the appellant's requests is amplified by their broad scope and provides the following outline of them:

- December 2015 – requested one specific CDT item and there were no responsive records;
- February 2016 (MA16-120-2)[12] – requested nine items related to an Asset Purchase Agreement and former [decommissioned] mill site property;
- February 2016 – requested two items: CDT audited financial statements and bank statements for 2010 to 2015, which were disclosed;
- March 2016 (MA16-248)[13] – requested nine items pertaining to the CDT, a named forestry company and NEOMA and its Mayors' Task Force, including:
    - CDT meeting minutes for 2013-2014;
    - Clarification of a difference in total year end accounting totals in a specific year;
    - General records of all communications between four forestry company employees to the former mayor and two former councillors from March 31, 2013 to December 1, 2014, including but not limited to emails, voicemails, notes, minutes, agenda, calendar invitations, scheduling notes, memos and text and mobile messages;
    - All communication from the former mayor and the town regarding the Mayors' Task Force, NEOMA from March 1, 2013 to December 1, 2014;
    - All correspondence received by the mayor and the town from the Mayors' Task Force and NEOMA from 2013 and 2014 including emails, voicemails,

[12] Resulting in Order MO-3494.
[13] Resulting in Order MO-3406.

notes, minutes, agenda and calendar invites, scheduling notes, memos and mobile messages; and

- All financial statements and minutes related to the Mayor's Task Force over a specified time period including emails, voicemails, notes, minutes, agenda and calendar invitations, memos, texts and mobile messages.

- June 2016 – requested nine items pertaining to or related to the CDT.

- July 2016 – this request – identifies 14 separate sets of records related to the CDT, two forestry companies (former mill site owners, current mill site owners) and the NEOMA and its Mayors' Task Force.

- March 2017 – requested four items related to a town committee and other committees.

[19] The town argues that the "sheer volume of requests – 48 in the span of just over a year – is beyond what is reasonable." In support of its opinion that the appellant's conduct demonstrates an abuse of the right of access and that the request is excessively broad, the town relies on part 7 of this request as an example.[14] The town notes that this is only one of 14 parts, and

> Yet it captures any form of electronic or hard copy record in the custody of sixteen (16) custodians over an undefined period of time, pertaining broadly to a named corporation, two named organizations, and a committee. To give some context, and by way of example, [the] former Mayor… was involved with Council for seventeen (17) years. Given that the appellant has failed to narrow the scope to certain types of records or certain issues, the breadth of this request would require the Town to locate and review literally all his [the former mayor's] records for *any reference* to [the named forestry company], FONOM, NEOMA, and the Mayor's Task Force…

[20] According to the town, other parts of this request are "just as broad and/or unreasonable in scope." The next example given is part 6, which the town notes is similar in wording to part 7, except that it relates to any record regarding the CDT, and it captures documents from 16 custodians over 17 years. Item 12, says the town, seeks "all schedules for four (4) separate custodians over a four (4) year period to reflect, generally, any meeting with undefined 'external third parties'." The town also considers

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[14] As set out above, item 7 states: "Furthermore, I request all correspondence, records, memo's, agenda's, emails, briefing notes, minutes and other forms of communication for, Former Mayor …, EDT Chair Former Councillor … and Former Councillor … [named in 6, above] and all last term past Councillors and Mayor … and all current Councillors with regards to [Resolute], FONOM, NEOMA and Mayor's Task Force."

parts 8, 9, 12 and 13 of the request to be "over-broad."

[21] The town argues that other parts of this same request are unusually detailed, such as part 4, which requires a telephone fax report for a record sent on March 6, 2014, or part 5, which seeks documented confirmation that a former councillor received a specific document. The town notes that if these items are not attached to the original document, this will require the town to search through files record-by-record to try to locate them. The town argues that in the context of its small population and resources, this request "can be seen as nothing other than an abuse of the right of access."

[22] With respect to similarities to previous requests by the same appellant, the town submits that part 7 of this request "is almost identical" to Items 4, 6, 7 and 8[15] of the request that was dealt with in Appeal MA16-248 as it specifically targets all records and communication between certain actors regarding NEOMA and the Mayors' Task Force.

[23] In the town's view, the request reflects a fishing expedition lacking in clearly defined plan or purpose. The town refers to part 12 of the request and argues that once the appellant receives the requested schedules, he will follow up by making further requests for records related to "any external third parties" that are identified. The town claims that the appellant's activities respecting these people and organizations is "general knowledge within the community." Further, the appellant's "well-documented vendetta against the individuals and organizations noted in his request," coupled with the breadth of the request supports the town's position that the appellant's motive is "to harass or unduly encumber the town, or to somehow embarrass the town or individuals named in his request."

[24] According to the town, it has received "innumerable emails" from the appellant over the years, including well over 100 in the past year alone. The town states that the tone of the emails is "often condescending." The emails are sometimes marked as "official requests, complaints or correspondence, and other times, he simply 'jabs' at the town or particular individuals." The town states that the appellant has demonstrated similar behaviour in the local media. The town provided copies of several "sample" news items, emails and notes, drawing my attention in particular to the appellant's comment that "If you do not send it to me, I will request under the act to view the complete financial files at the Town Hall." The town submits that this email, and others like it, provide evidence that "the appellant treats requests for information under the Act as threats to be wielded against the municipality" and a means of compelling certain behaviour when he is dissatisfied.

Pattern of conduct that interferes with the town's operations

[25] The town also maintains that the appellant's requests are frivolous or vexatious

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[15] Elsewhere in the town's representations, it compares only parts 4, 6 and 7 of the request in Appeal MA16-248 to part 7 of the request in this appeal.

because they unduly interfere with its operations. The town explains that it is a small municipality (population 4,537 in 2016) and that the closure of the paper mill at the end of 2014 created budgetary pressures that continue to this day. Specifically, there are only three staff members, including the CAO, in the department to deal with all administrative responsibilities, including those under the *Act*. These other responsibilities include:

- preparing agendas and minutes of meetings;
- researching, drafting and enforcing policies and by-laws;
- preparing marriage licenses;
- managing five cemeteries;
- managing human resources for the town, including hiring, training, accommodation, discipline and benefits;
- coordinating accessibility, economic development, emergency management, and health and safety within the municipality;
- handling land acquisition/disposition and planning;
- overseeing major projects including construction and development;
- managing insurance and legal matters; and
- responding to requests and inquiries from the public.

[26] The town submits that the appellant's many requests over the preceding 15 months have been "extremely burdensome to the town's administration." The town describes the steps taken to process each request as follows:

1. Staff must locate the necessary files and given that over a decade of electronic and hard copy files must be searched, this would take "an inordinate amount of time." Further, since parts of the request seek "essentially any written document" from numerous individuals, such as part 7 with 16 identified individuals, staff will have to contact all the potentially affected individuals and engage them in searching for responsive records in various formats, including electronic and paper. Where the appellant has requested emails, text messages and voicemail messages from many different parties, it will be necessary to coordinate with third party service providers to obtain records. Respecting CDT records, the town notes its existence as a separate legal entity and the fact that the records were only provided to the town upon its dissolution for storage and safekeeping. The records in file boxes and cabinets are not organized according to the town's systems and, in this context, "not knowing if a particular record even exists, or

how it may be filed, has made the searches to date extremely time consuming." The town quantifies this effort, based on previous requests with the same appellant, as taking from 10 minutes to two hours per item, although it indicates that some parts, such as the CDT-related ones, may take longer.

2. Upon completion of the task of locating records, the CAO will have to "review every single hard copy and electronic document to determine whether it is responsive."

3. After determining responsiveness, the CAO will have to spend additional time to determine whether any exemptions apply and whether any third parties notices need to be sent and to issue decisions in accordance with the *Act.* Considering how the various exemptions and third party notifications apply to every record responsive to the 14 part request "will require significant manpower" and will result in an added burden to the small administrative staff employed by the town, given their other responsibilities to the town and public.

[27] The town argues that "there is an absolute burden and interference with the operations of the municipality associated with responding to the appellant's requests." The town explains that its previous efforts responding to requests from the appellant have shown that the second and third levels of review, above, can take a full day of work or longer, even when the staff member is entirely devoted to the task. The town then describes the projected time that it anticipates having to take with the estimated records that are responsive to the request in another appeal (MA16-248), including the number of days spent printing, reading through and preparing those records. The town observes that many of the tasks that administrative staff have to complete are time-sensitive, such as the preparation of agendas for Council meetings, and these tasks simply cannot be put on hold to respond to "an overly broad, frivolous and vexatious request" under the *Act.* Further, the town submits that it does not have the capacity to lose an entire staff member on a regular basis to answer what it views as 48 requests in 15 months.

[28] In closing, the town submits that the significant commitment of time and financial resources required to respond to the appellant's requests, if not recognized by this decision as frivolous or vexatious, will render the town ineffective in delivering services to other members of the public. As the suggested remedy if its decision to refuse to process parts of the request is upheld, the town asks that the appellant be limited to one active request per year and one appeal (to the IPC) for each request.

[29] After receiving a copy of the town's representations, the appellant provided a response in which he set out the 11 parts of the request the town refused to process.[16] For each of these parts individually, the appellant claims that "no reason given for

[16] As noted above, "… and until such time as a decision is issued by the Adjudicator for Appeal MA16-248," which was addressed by Adjudicator Hamilton in Order MO-3406.

frivolous or vexatious, per The Act … 20.1(1) (b) the reasons for which the head is of the opinion that the request is frivolous or vexatious; … [emphasis in original]." The appellant then refers to the statement in Order MO-3406 regarding the burden of proof resting on the institution to substantiate its decision to declare a request to be frivolous or vexatious. Additionally, for each part of the request refused in this appeal, the appellant sets out provisions 2 and 3 of Order MO-3406 where the adjudicator did not uphold the town's frivolous and vexatious decision and ordered it to issue an access decision in relation to parts 3 to 6 of the request in that appeal.

[30] Interspersed with the appellant's representations are comments and references to appendices corresponding to some parts of the request. For example, for part 1, the appellant provides a copy of the identified June 2013 letter from Resolute's CEO to the CDT, apparently as the basis of his request for a copy of the referenced tax receipt. These attachments appear to be provided in support of his assertions about the existence of responsive records, rather than a rebuttal of the town's frivolous or vexatious position on parts 1-9, 12 and 13. Generally, however, the appellant asserts that the town has not provided sufficient reasons to satisfy the onus and must answer his request, since he is "simply gathering supplemental information and more detailed material." The appellant cites Order MO-3150, where the adjudicator described the "strong public accountability purposes served by the Act and the need to ensure that citizens have the information required to participate meaningfully in the democratic process," taken from *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner,*[17] as quoted from by Adjudicator Hamilton in Order MO-3406.

[31] Additionally, the appellant questions whether this process is "another indicator for a financial penalty for the appellant for answers?" This comment appears to arise in response to the town's submissions on the resources required to process the parts of his request in Appeal MA16-248 for which Adjudicator Hamilton did not uphold the town's frivolous or vexatious claim. The appellant's comments suggest that he considers that cost estimate provided in relation to that request to be unreasonable, particularly given his view that this information should be public as a matter of course.

Analysis and findings

[32] For the following reasons, I find that the evidence establishes that the request at issue in this appeal demonstrates a pattern of conduct on the appellant's part that would interfere with the town's operations under section 5.1(a) of Regulation 823. For the following reasons, therefore, I uphold the town's decision to refuse to process parts 1-9, 12 and 13 of the request under section 5.1(a) of Regulation 823.

[33] Section 5.1(a) of the Regulation provides that a request is frivolous or vexatious if it is part of a "pattern of conduct that amounts to an abuse of the right of access or

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[17] 2009 ONCA 20 (CanLII) (reversing [2007] O.J. No. 2441).

would interfere with the operations of the institution." It must first be shown that there is a pattern of conduct, a phrase whose meaning has been explored in past orders, such as Order M-850. In that order, former Assistant Commissioner Tom Mitchinson concluded that a "pattern of conduct" requires recurring incidents of related or similar requests on the part of the requester (or with which the requester is connected in some material way)." As I noted above, the cumulative nature and effect of a requester's behaviour may also guide the determination of the existence of a "pattern of conduct."[18]

[34] I have considered whether the appellant's access requests amount to a pattern of conduct, and I am satisfied that they do. I accept that over a seven-month period, the appellant submitted six access requests, with 44 parts in total, that were related or similar to one another. This finding does not include the last request mentioned by the town, which the appellant submitted after the access decision in this appeal, because it could not form part of the town's decision-making for it. Regardless, I conclude that the appellant's requests amount to "recurring incidents of related or similar requests on the part of the requester" as contemplated by past orders of this office, including Order M-850. Based on my review of the attachments to the town's representations, a number of which consist of email communications from the appellant, I am also satisfied that the cumulative nature and effect of the appellant's other contacts with the town and its staff are suggestive of a "pattern of conduct." The frequency and volume of the appellant's communication with town staff, and its tone, are also relevant factors to consider. I accept the town's evidence that the appellant sent the town approximately 100 emails in the year leading up to the inquiry in this appeal. Based on the emails from the appellant to town staff provided to me, I also accept that many of his communications demonstrate a demanding, condescending and, on occasion, demeaning tone. In my view, the tenor of these communications cannot be mistaken for mere assertiveness. Accordingly, I find that the evidence establishes a "pattern of conduct" within the meaning of the term in section 5.1(a) of Regulation 823.

[35] The next part of my review considers whether the 11 parts of the request identified by the town as frivolous or vexatious demonstrate a pattern of conduct that constitutes "an abuse of the right of access" or "would unreasonably interfere with the operations of the town."

[36] The concept of "abuse of the right of access" in the first component of section 5.1(a) of the Regulation has been associated with a high volume of requests, taken together with other factors. Certain factors that are specific to the case under consideration may be relevant in deciding whether a pattern of conduct amounts to an abuse of the right of access.[19] Generally, however, Order M-850 and subsequent orders have settled on the following main factors to consider in determining whether the

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[18] Order MO-2390.
[19] Order MO-1782.

established pattern of conduct constitutes "an abuse of the right of access:"

- the number of requests – whether the number is excessive by reasonable standards;

- the nature and scope of the requests – whether they are excessively broad and varied in scope or unusually detailed, or, whether they are identical to or similar to previous requests;

- the timing of the requests – whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings; and

- the purpose of the requests – whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. For example, are they made for "nuisance" value, or is the requester's aim to harass the government or to break or burden the system.[20]

[37] I have adopted this framework in my analysis of the circumstances in the appeal before me.

[38] Beginning with the number of requests, I have considered whether six requests, over a seven-month period, is excessive by reasonable standards.[21] The question of whether each of the 44 parts related to these six requests themselves constitute separate requests was a point of argument by the town. Clearly, the town considers each part to amount to a separate request and has made representations on that basis. The appellant does not comment. Some of the appellant's multi-part requests may leave that impression, but I am not satisfied that each part equals a separate request. The town treated each of the six requests as a single request: it opened one file and issued one access decision for each of them, not 44 decisions for the 44 parts. In any event, past findings of an "excessive number of requests" for the purpose of section 5.1(a) have typically been based on a volume of requests that numbered in the dozens, hundreds or even thousands.[22] Six access requests for information relating to CDT activities is not, in my view, excessive by reasonable standards.

[39] There is ample evidence, however, that the nature and scope of components of the appellant's multi-part request in Appeal MA16-425-2 are "excessively broad." Moreover, I agree that some parts bear striking similarities to the appellant's previous requests to the town. While some parts may be limited to certain individuals, many individuals are named and the unspecified timeframes or subject matter are relevant considerations. The town specifically compares parts 4, 6 and 7 (and possibly, part 8) of

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[20] Orders M-618, M-850, MO-1782, MO-2289, MO-2390, MO-2436 and PO-3121.
[21] As noted above, the seventh request mentioned by the town was submitted after the town issued its decision in relation to this request, and I am not considering it in this analysis.
[22] See, for example, Orders M-850, MO-1782 and MO-2436.

the request in Appeal MA16-248 to part 7 of the request here, and I accept that there is considerable overlap to them. The unlimited timeframe of parts 6 and 7 of the request in this appeal, in particular, provides a basis for differentiating the situation from Appeal MA16-248, where the appellant's requests did not meet the frivolous or vexatious threshold. I note that parts 4, 6 and 7 of the request in Appeal MA16-248 were limited to 2013 and 2014, unlike parts 6 or 7 here, which seek *all* records related to numerous identified individuals, companies or organizations with no stated timeframe. I accept the town's evidence that the breadth of these two parts would require the town to locate and review the records of 16 individuals, including the former mayor, for *any reference* over a 17-year period to the CDT (part 6) or to Resolute, FONOM, NEOMA, and the Mayor's Task Force (part 7). I also conclude that parts 6 and 13 overlap in their scope. Searches for part 6 records could reasonably be expected to identify at least some of the same records requested by part 13. Similarly, the records sought by part 12 of this request relate to four individuals over a four-year period. While there is a limit to the timeframe, there is no such limit to the subject matter and, as the town argues, this means "any meeting with external third parties."

[40] I accept that the overbroad scope of certain parts of the request that are the result of the appellant not identifying a specific subject matter, or timeframe, weighs in favour of a finding of a pattern of conduct that amounts to an abuse of process. I am also satisfied that the minutiae of several parts of the request could qualify them as "excessively detailed." As an example of this latter point, there is the "document and confirmation of the telephone fax report" regarding a specific March 2014 fax in part 4. I conclude that parts 1-9, 12 and 13 are excessively broad or excessively detailed, and I find that the nature and scope of parts 1-9, 12 and 13 of the appellant's request in this appeal constitutes a factor that would support a finding that a pattern of conduct exists that amounts to an abuse of the right of access.

[41] Another factor frequently considered in determining if a request is frivolous or vexatious is whether the timing of the requests is connected to the occurrence of some other related event, such as court proceedings. The town has not provided evidence that this is the case here, nor am I able to conclude that it is relevant in the circumstances of this appeal.

[42] I have also considered the purpose of the appellant's requests, that is, whether the requests are intended to accomplish some objective other than to gain access without reasonable or legitimate grounds. Clearly, the town views the appellant's actions as "a fishing expedition" and "vendetta." The town imputes a motivation to harass or disturb the town or individuals named in the requests. The town also refers to the potential of disclosure of the responsive records for additional criticism of the town, organizations or individuals in local media. It is evident that the town considers the appellant's requests a nuisance. Above, I accepted that the appellant's communication with the town staff is not always civil in tone and this contributed to the finding of a pattern of conduct. However, a requester's behaviour in another forum, including his or her media presence, has consistently been held not to constitute an abuse of the right

of access under the *Act.*[23] The question is whether the appellant's behaviour within the request process is such that it constitutes an abuse of the right of access. As stated, I have considered the town's evidence, much of which originated with the appellant own email correspondence with town staff, and I have also remarked on the town's description of its sometimes difficult history with the appellant over more than a decade. However, the case law discussed in Order M-850[24] provides "abuse of process" examples that include proceedings instituted without any reasonable ground and proceedings whose purpose is not legitimate, but is rather designed to harass, or to accomplish some other objective unrelated to the process being used. On the evidence here, I am not persuaded that the appellant has a purpose other than to obtain access. Generally, a requester's potential use of records disclosed under the *Act* to further an ongoing dispute with an institution is not considered a proper basis upon which to characterize a requester's purpose as one other than to obtain access.[25] In this context, the possibility that the appellant may put the records disclosed through this request to "target" additional records does not, by itself, mean that this request was made for a purpose other than to obtain access.

[43] Based on the balancing of the factors, I am not satisfied that the town's evidence establishes a pattern of conduct on the appellant's part that amounts to an abuse of the right of access. However, several factors that I found to weigh in favour of such a finding have relevance in my analysis of whether the appellant's request forms part of a pattern of conduct that would interfere with the town's operations.

[44] The town's claim is that parts 1-9, 12 and 13 of the appellant's request amount to a pattern of conduct that would "interfere with the operations of an institution." Accordingly, the question is whether processing parts 1-9, 12 and 13 of the request would obstruct or hinder the range of effectiveness of the town's activities.[26]

[45] Past orders, such as Order M-850, have acknowledged that interference is a relative concept that must be judged on the basis of the circumstances a particular institution faces. It may take less of a pattern of conduct to interfere with the operations of a small municipality than with the operations of a large provincial government ministry, and the evidentiary onus on the institution varies accordingly. In my view, this is a situation in which the circumstances of the institution are such that the appellant's pattern of conduct interferes with its operations. As noted, the town has previously questioned and challenged the appellant's conduct in making access requests.[27] While this office has not previously made a finding that the appellant's requests are frivolous or vexatious, the evidence has now accumulated to the point where such a finding is indicated in this appeal.

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[23] Order MO-1427.
[24] For example, *Foy v. Foy* (No. 2), 1979 CanLII 1631 (ON CA).
[25] Order MO-1924.
[26] Order M-850.
[27] See Order MO-3406.

[46] Some of the town's concerns about the strain on its resources as a result of processing parts 1-9, 12 and 13 of the request could be addressed by the time extension and fee provisions in sections 20 and 45, which exist to relieve the burden of large or otherwise onerous requests. However, there are numerous tasks that must be completed to process this request that are not chargeable under the *Act*, and I have considered these in concluding that the appellant's request would interfere with the town's operations. For example, section 45(1)(b) does not include time for deciding whether or not to claim an exemption,[28] identifying records requiring severing,[29] identifying and preparing records requiring third party notice,[30] or re-filing and re-storing records to their original state after they have been reviewed and copied.[31] Similarly, section 45(1)(e) does not include time for responding to the requester or trying to manage his expectations[32] or comparing records in this request with those in another request for consistency.[33] I accept that many of the responsive records originated with the CDT, rather than the town itself, and that this contributes to the administrative burden of carrying out these tasks. I accept that the town has a small and diminishing population and associated tax base, and three staff members, including the CAO, in the department to deal with all administrative responsibilities, including those under the *Act*.

[47] In the context of the time sensitive nature of many other day-to-day activities required of the town's administrative staff, and the limited options open to the town for managing the additional workload required for responding to the appellant's request, I find that the effect of responding to this request as a whole, and parts 1-9, 12 and 13 in particular, surpasses being merely onerous and would obstruct or hinder the range of effectiveness of the town's activities. I am persuaded that responding to parts 1-9, 12 and 13 of the request, which target unspecified or lengthy timeframes, an excessively broad scope of records or numbers of individuals, and minutiae, would compromise the effectiveness of the town's operations in the manner contemplated by section 5.1(a) of Regulation 823.

[48] In sum, I find that parts 1-9, 12 and 13 of the request in this appeal fit within section 5.1(a) of the Regulation, and I uphold the town's decision to declare – and refuse to process – those parts as frivolous or vexatious under section 4(1)(b) of *MFIPPA.* This means there is no right of access to the records responsive to parts 1-9, 12 and 13 of the request under section 4(1) of *MFIPPA*.

[49] In light of this finding, it is not necessary to review the town's frivolous or vexatious claim under section 5.1(b) of the Regulation.

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[28] Orders P-4, M-376 and P-1536.
[29] Order MO-1380.
[30] Order MO-1380.
[31] Order PO-2574.
[32] Order MO-1380.
[33] Order MO-1532.

Remedy

[50] Where a request is found to be frivolous or vexatious, this office will uphold the institution's decision. In addition, this office may impose conditions such as limiting the number of active requests and appeals the appellant may have in relation to the particular institution.[34]

[51] Accordingly, I must determine the appropriate remedy in this case, given my finding upholding the town's decision that parts 1-9, 12 and 13 of the request are frivolous or vexatious. The town asked that the appellant be limited to one active request per year and one appeal (to the IPC) for each request. It is important to balance the remedy with the "strong public accountability purposes served by the Act and the need to ensure that citizens have the information required to participate meaningfully in the democratic process."[35] Based on the composite of the information available, I have decided to limit the appellant to one active *MFIPPA* request and one appeal with the town to this office at any time, and subject to certain other conditions. This order is to continue in effect unless or until this office varies the limitation, pursuant to an application by the appellant (or the town), as described in this order's provisions respecting the matter.

[52] I note that the appellant challenged the adequacy of the town's search for parts 1-10, 12 and 13 of this request. I deferred consideration of the reasonable search issue pending determination of the frivolous or vexatious claim by the town. Given my finding upholding the town's frivolous or vexatious decision respecting parts 1-9, 12 and 13, however, the issue of search remains outstanding for part 10, only. The appellant's activities under *MFIPPA* with the town are subject to the conditions imposed by this order, and he will have to decide whether to pursue the search issue in relation to part 10 of this request in the context of those conditions.

B. Does the mandatory exemption for third party information in section 10(1) apply to the record?

[53] The town and Resolute both rely on section 10(1)(a) as the basis for denying access to the Pre-Feasibility Review prepared for the town by its consultant. The town also refers to paragraphs (b), (c) and (d) in its representations, although it offers no submissions in support of section 10(1)(d). 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,

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[34] Order MO-1782.
[35] *Toronto Police Services Board v. (Ontario) Information and Privacy Commissioner*, 2009 ONCA 20; as cited in Orders MO-3406, MO-3150, PO-3325, and others.

> (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.

[54] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[36] 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.[37]

[55] For section 10(1) to apply, the town and/or Resolute must satisfy each part of the following three-part test:

1. the record must reveal information that is commercial or financial 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 the harms specified in paragraphs (a), (b), (c) or (d) of section 10(1) will occur.

[56] The town, the appellant and Resolute provided representations. As noted, I offered Resolute an opportunity to comment on the disclosure of the record at issue in the context of the mill site and assets having been purchased by another company several years ago.[38] Resolute responded by indicating that it maintains an interest as an

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[36] *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.).
[37] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[38] The application of section 10(1)(a) to other records related to this purchase (Asset Purchase Agreement and an Amendment to the Asset Purchase Agreement between Resolute and Abitibi Riversedge) was addressed in Order MO-3494, which I issued in September 2017, partly upholding the denial of access to portions of the agreements under section 10(1)(a).

affected party, and it adopted its submissions to the town from the notification stage as its current position in the appeal. I set out those initial submissions below the following summary of the appellant's representations.

[57] For the most part, the appellant's representations do not address the exemption claims. However, his representations contain the following related questions or assertions:

- Our community paid $80,000 for two reports. … 80% of the paper mill has been torn down now, so what does [the town CAO] intend to accomplish [by] withholding public reports?

- FYI 90%[39] of the paper mill is currently torn down; surely the public should be able view [sic] the [consultant's] public report that didn't do anything.

- These reports were paid for by Iroquois Falls residents. They should be of public knowledge, view and ownership. By denying public access, the town's CAO may be harming the future of the community.

Part 1: type of information

[58] The town claims that the record contains commercial, technical and financial information pertaining to Resolute's operations, including commercial terms and processes as well as technical information regarding "the company's operations and assets." Further, the town submits that "this information is not publicly available and is particular to Resolute's business operations… is used in [its] business and has economic value from not being generally known." Based on this wording, I understand the town to be making an additional claim that the record contains trade secrets.

[59] Resolute describes the record as a pre-feasibility report, which evaluates potential business opportunities relating to the mill and relates to the planning and execution of commercial operations between Resolute and the town. Referring to this as "the Business Opportunity," Resolute submits that the record contains commercial details and financial information pertaining to its operations, including commercial terms and processes which are distinct to Resolute. According to Resolute, these are distinctive informational assets that are not publicly available.

Findings

[60] As discussed in past orders, the types of information to which the town and Resolute refer are defined as follows:

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[39] The appellant refers to both 80% and 90% in the same document. Photographs that the appellant indicates are of the mill's demolition were included with his representations.

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.[40]

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.[41]The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[42]

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.[43]

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.[44]

[61] I have reviewed the record at issue, which is a Pre-Feasibility Review regarding the mill assets and potential future options prepared for the town by its consultant. Although the record was not created by an engineer, it is clear that it was prepared by a qualified professional who describes the current state of the assets remaining on site and various "return to operations" options for the town to consider, including reviews of the construction, operation or maintenance of structures, processes, and equipment. I

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[40] Order PO-2010.
[41] Order PO-2010.
[42] Order P-1621.
[43] Order PO-2010.
[44] Order PO-2010.

am satisfied that the record contains technical information as that term is used in section 10(1). Similarly, since the record contains reference to equipment purchase requirements and other servicing matters related to the repair or return to service options presented, as well as cost approximations for them, I am also satisfied that the record contains commercial and financial information under part 1 of section 10(1).

[62] Regarding the town's suggestion that the record contains information that constitutes a trade secret (of Resolute), I am not so satisfied. The record does not reveal information consisting of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism." Any discernible methodology in the record is that used by the consultant in preparing the review and appears to be largely dictated by the format of the requested review. In my view, essentially the same methodology would be followed by any consultant who is asked to conduct this particular type of review in this context.[45] I conclude that the record does not contain trade secrets.

[63] Regardless, since I have concluded that the record contains information qualifying as technical, commercial, and financial information, I find that part 1 of the section 10(1) test is satisfied. I must now determine whether this information was "supplied in confidence," as required by part 2 of the section 10(1) test.

Part 2: supplied in confidence

[64] 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.[46] 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.[47]

[65] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[48]

Representations

[66] According to the town and Resolute, the report contains information that was directly supplied by Resolute to the consultant, who provided it to the town in confidence. Resolute notes that the town did not participate in the preparation of the report, but was an intervener limited to receiving and acknowledging the record's

[45] See Order PO-3734.
[46] Order MO-1706.
[47] Orders PO-2020 and PO-2043.
[48] Order PO-2020.

content which related to "a particular business opportunity between Resolute and a third private party," and the record was supplied by the consultant to the town solely for this purpose.

[67] The town and Resolute submit that "Resolute provided the information with a reasonable and explicit expectation of privacy" under the confidentiality agreement between the town and Resolute. Resolute refers to section 2 of that agreement under which the town and its consultant acknowledge that the information remains the property of Resolute and that it will be kept in strict confidence. The town submits that the agreement provided for disclosure only in very limited and prescribed circumstances that are not present in this situation. The town points to the narrow disclosure exceptions in the confidentiality agreement as evidence of Resolute's concern for the confidentiality of the withheld information. Resolute explains that the confidentiality agreement:

> … provides few exceptions which allow for unilateral disclosures of information provided by Resolute to Iroquois Falls in limited or prescribed circumstances, such as to an advisor or representative and only to the extent required for evaluating and implementing the Business Opportunity. … The record was clearly prepared for a purpose that would not entail public disclosure. In accordance with this, Resolute did not disclose the record or make it available on any registry or sources to which the public has access.

[68] Further, the town states that it communicated to Resolute that it would maintain the confidentiality of the information and it has always treated that information as confidential, based on the understanding that the information is not otherwise available from public sources.

[69] As stated, the appellant's position is essentially that since this record was created through the expenditure of public money, it ought to be made public.

Findings

[70] According to the engagement agreement between the town and its consultant, which is publicly available, the scope of the consultant's work was to "provide the Town a pre-feasibility review report to the best of [its] expertise and without prejudice outlining the current state of the Mill, its potential capabilities and forest resources to support potential new business economics."[49] This document makes it clear that the Pre-Feasibility Review was prepared *for the town.* Having said that, there is no dispute that the record was prepared by the consultant based on a review of the mill site and assets, then owned by Resolute, before he provided it to the town in accordance with the retainer.

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[49] https://iroquoisfalls.civicweb.net/filepro/documents/3458?preview=3465

[71] The parties opposing disclosure argue that the mill assets and the access given to the mill site to review them constitute information supplied by Resolute. On the face of the report, it is clear that the descriptive and analytical information in the Pre-Feasibility Review was compiled or prepared by the consultant and provided to the town. Resolute did not receive a copy of the record. However, as I noted above, information may qualify as "supplied" not only where it was directly supplied to an institution by a third party, but also where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[50]

[72] In my view, the record at issue here shares similarities with audit or inspection reports reviewing the operations or performance of an entity on behalf of an institution. Adjudicator Hamish Flanagan addressed this issue in Order MO-3335 where a daycare provider opposed disclosure of an investigation report prepared for the City of Toronto.[51] Adjudicator Flanagan discussed Order 16, which reviewed the meaning of "supplied" in the context of a report detailing an inspector's assessment of a meat packing operation under the *Meat Inspection Act*. In that decision, Commissioner Sidney Linden concluded that the information was not "supplied" by the third parties and, rather, that the institution had obtained the information itself through inspections required by statute.[52] Adjudicator Flanagan observed that factual information in an inspection report may not be supplied because it is obtained through independent inquiry by the auditor, rather than being supplied in confidence by the inspected entity. In Order PO-1707, for example, the fact that a third party provided access to its premises to enable ministry employees to conduct an investigation into its coke ovens was not sufficient to establish that the information in the resulting inspection reports qualified as supplied. However, Adjudicator Flanagan also noted (at paragraph 53 of Order MO-3335) that:

> Despite these considerations, which suggest information in an inspection report is commonly not supplied, the content rather than the form of the information is the important factor.[53] It is not simply that information is in an inspection or audit report that means that the information is not "supplied," but that such a report is generally comprised of either an inspector or auditor's judgment or information obtained by the inspector's own inquiry. …

[73] The adjudicator explained that some information in a report can qualify as

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[50] Orders PO-2020 and PO-2043.

[51] At paragraphs 50-55. Adjudicator Cathy Hamilton also discussed Order MO-3335 and the other decisions in reviewing access to DriveTest Centre audit reports in Order PO-3774. See also Order PO-2599 regarding access to Ministry of the Environment call centre performance audits.

[52] Relying on *Canada Packers Inc. v. Canada (Minister of Agriculture)* [1989] 1 F.C. 47; this decision considered section 20(1)(b) of the federal *Access to Information Act*, which is the equivalent of section 10(1) *MFIPPA.*

[53] *Merck Frosst Canada v. Canada (Health)*, 2012 SCC 3 (CanLII), at para. 157.

"supplied," even when most may not, and he went on to determine whether the constituent parts of the records at issue in that appeal were, in fact, supplied. In these situations, the institutions were under a statutory obligation to monitor or ensure compliance with a regulatory scheme, and the inspected parties were obligated to provide information under the same scheme, usually as a condition of receiving funds or maintaining a licence to operate. However, I conclude that the principles discussed in the decisions may apply here.

[74] In particular, I do not accept that the entire content of the Pre-Feasibility Review was "supplied" for the purpose of section 10(1) merely because Resolute provided access to the mill facility for the town's consultant to conduct his review. Based on my consideration of the record, I note that although reference is made to comments by mill personnel, there are many indications of the limitations imposed due to the lack of information made available about the mill's physical assets, processes and operations. Moreover, while some of the information may have been supplied by Resolute to the town's consultant, either directly or by the possibility of inference, neither Resolute nor the town provided detailed enough evidence to permit me to identify that particular information in the report. Rather, most of the record consists of facts compiled by the consultant, and the consultant's observations, assessment and analysis. Further, since no specific components of this record are identified by either the town or Resolute, there is no clear rationale for distinguishing these components. In this context, I am not persuaded that any of the record was supplied to the town by Resolute. The record therefore fails to satisfy part two of the three-part test under section 10(1).

[75] However, if any of the information in the Pre-Feasibility Review was "supplied" to the town by Resolute or by the town's consultant,[54] I am satisfied that such information was supplied "in confidence," given the evidence before me of the expectation of confidentiality in this appeal. Determining whether a party's expectation of confidence is based on reasonable and objective grounds requires consideration of all the circumstances of this appeal, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access

[54] The parties did not argue that the consultant "supplied" the information to the town, *per se.*

- prepared for a purpose that would not entail disclosure.[55]

[76] To support the confidentiality expectation, the town and Resolute rely on a confidentiality agreement that these two parties signed several months before the consultant conducted his review,[56] and they argue that none of the limited circumstances for permitting disclosure are present here. Looking beyond that document, I accept that Resolute's actions prior to permitting access to its mill facility by the town's consultant demonstrate a concern for protection from disclosure of the information gathered. The record itself is marked as being submitted "in confidence." Further, I accept that at the time the report was prepared, at least some of the information gleaned from the consultant's review of the mill assets may not otherwise have been available from sources to which the public has access.

[77] Based on the circumstances surrounding the preparation of the Pre-Feasibility Review and the representations provided, I accept that the "in confidence" component of part 2 is met for any information in the record that may have been supplied. However, as will be seen in my review of Resolute and the town's concerns about harm resulting from disclosure of the record below, part 3 of the three-part test under section 10(1) is not established on the evidence.

Part 3: harms

[78] To meet this part of the test, the town or Resolute 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.[57]

[79] The failure of a party resisting disclosure to provide such evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.[58]

[80] The need for public accountability in the expenditure of public funds is an important reason behind the need for sufficient evidence to support the harms outlined in section 10(1).[59] Parties should not assume that harms under section 10(1) are self-

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[55] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).
[56] A copy of the confidentiality agreement was provided to this office. It confirms that the town's agreement to its terms was a pre-condition for Resolute providing any "confidential information" to the town or granting the town's consultant access to the mill site for the purpose of conducting the review.
[57] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[58] Order PO-2020.
[59] Order PO-2435.

evident or can be substantiated by submissions that merely repeat the words of the *Act*.[60]

Representations

[81] The town claims that disclosure of the record could reasonably give rise to "one of the harms in paragraphs (a) to (d) of section 10(1)."[61] The town and Resolute both submit that disclosure of the "commercial terms and details" in the report that were provided by Resolute would significantly prejudice Resolute's competitive position because its competitors would have "an economic advantage when negotiating future contracts with third parties, … particularly regarding purchase price or obligations." Jointly, Resolute and the town suggest that disclosure would result in an undue gain for the appellant because of the opportunity provided for him to sell the information, which includes terms and processes that are distinct to Resolute. The claim is that the sale of the records to Resolute's competitors would permit them to copy its "internal processes for evaluating and implementing business opportunities," thereby resulting in compromise to Resolute's negotiating position, an impediment to future transactions, and the subsequent incurring of financial losses.

[82] The town then refers to the loss of a "major enterprise," the mill, and there being a strong public interest in its "business partners" being able to provide "full and frank disclosure" of information to the town with confidence that it will not be "unduly disclosed" to competitors.

[83] As noted above, the appellant's submissions suggest that this part of the test is not met because large parts of the mill have been demolished. In his view, this means that the pre-feasibility report did not accomplish anything and, therefore, has no inherent value to Resolute or any party, other than the public. The appellant suggests, conversely, that non-disclosure of the report could harm the community and that it should be disclosed accordingly, since it was funded by the town's taxpayers.

Analysis and findings

[84] The purpose of section 10(1) is to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.[62] Mere intent to maintain control over the information is not sufficient for it to qualify for exemption under section 10(1). There must be a demonstrable risk of harm that is well beyond the merely possible or speculative, although there need not be proof that such harm will

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[60] Order PO-2435.
[61] As noted above, however, the town does not provide any submissions on the application of paragraph (d) of section 10(1), which refers to "reveal[ing] information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute."
[62] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

result.[63] As past orders note, the difficulty of demonstrating a reasonable expectation of harm where the triggering event – disclosure – has not yet occurred must be acknowledged.[64]

[85] The engagement agreement under which the town retained the consultant to prepare the Pre-Feasibility Review is publicly available, as I noted previously.[65] Its terms provide context for my review of the harms component of section 10(1), and for emphasis, I will repeat a portion of it: the consultant was to "provide the Town a pre-feasibility report to the best of [its] expertise and without prejudice outlining the **current state** of the Mill, its potential capabilities and forest resources to support potential new business economics [emphasis added]." It was expressly conducted "at the Town's request … to facilitate an immediate high-level review of mill assets" given imminent deadlines related to demolition of components of the mill.

[86] Further background is publicly available. In Order MO-3494, I noted that Resolute had sold its Iroquois Falls mill and assets in October 2015 to Abitibi Riversedge Inc. (Abitibi).[66] The evidence before me in that appeal indicated that "the transaction involved Abitibi acquiring from Resolute the former mill site, certain 'largely non-functional' production equipment, the trestle bridge and parcels of vacant land outside the town."[67] The record at issue in this appeal – a high-level review of the mill's "current state" – consists of the town consultant's snapshot of the mill facility taken seven months before the asset purchase agreement at issue in MO-3494 was executed. Parts of the asset purchase agreement and its amending agreement that related to the town were disclosed by the town or were found not to be exempt under section 10(1)(a) in Order MO-3494.[68] I upheld the denial of access to other portions of the asset purchase agreement, based on evidence provided by Abitibi about the expectation of harm with disclosure of terms, obligations, some pricing and assets acquired.[69] Under the terms of that agreement, certain listed equipment and assets[70] that *may* have been in place at the time of the consultant's "snapshot" in the spring of 2015 were removed from the premises of the mill when it was sold by Resolute. This is why I sought

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[63] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.
[64] Order PO-3734.
[65] https://iroquoisfalls.civicweb.net/filepro/documents/3458?preview=3465
[66] Information drawn from the submissions of Resolute and Abitibi in that appeal.
[67] Order MO-3494 at paragraph 16.
[68] One of the agreement provisions disclosed by the town bound it (subject to its powers as a municipality), "not to use the property subject to the agreement to compete with Resolute in the production of pulp, paper and related products."
[69] Paragraph 44. At paragraph 55 of Order MO-3494, I acknowledged in particular "…the reasonableness of Abitibi's desire to protect from disclosure the structure of the agreements it uses to acquire environmentally challenged properties."
[70] The assets and equipment that formed part of the Asset Purchase Agreement – included or excluded – were not ordered disclosed, as I concluded that section 10(1) applied to these parts of the agreement between Resolute and Abitibi.

representations from Resolute in this appeal that specifically asked it to explain and support the nature of any continuing interest in the information in the record, or harm with disclosure, given the sale of mill and assets in October 2015. In response, Resolute adopted its December 2016 representations, which I will now address.

[87] In this appeal, the town and Resolute maintain that the record contains or would reveal "commercial terms or details" and "internal processes for evaluating and implementing business opportunities." Based on my review of this record, I disagree. In my view, it does not contain either "processes which are distinct to Resolute" or information related to the commercial terms or "purchase price" of any assets belonging to Resolute. This is not only because the assets no longer belong to Resolute. Any financial information in this record consists of cost estimates or approximations arrived at by the consultant for the repair and/or return to service of certain pieces of equipment then sited at the mill facility.

[88] Further, the record does not contain or reveal Resolute's "internal processes for evaluating and implementing business opportunities." Any suggestion of process or method inherent in the record stems from the consultant's application of the specific methodology for conducting a pre-feasibility study. As I noted in my discussion of the "supplied" element above, there are numerous caveats in relation to process, production and cost data contained in the report that are attributed to the provision, or non-provision, of information to the consultant during the review period. The mere listing of items does not amount to an "informational asset." Regardless, the facts and discussion of the mill equipment and assets are qualitative, rather than quantitative, due to the nature of the record – a *pre*-feasibility study.

[89] I have considered specifically that the express purpose of the creation of this record was to facilitate internal town discussions and consideration of operations given the imminent demolition of mill components planned at the time in question. Significant portions of this record consist of facts and observations regarding the pulp and paper industry, particularly in North America, but also the world, as relevant considerations in evaluating future options. Factual content appears as part of the qualitative assessment of the feasibility of identified options, because it includes descriptions of new products, technology, demand, available natural resource stock, trends, risks and capital investment requirements. The consultant has inserted photos and maps. In this context, therefore, I conclude that the record does not contain sufficiently specific detail about the private operations of any third party, including Resolute, that could support a finding of harm with disclosure and exemption under section 10(1).

[90] The situation in this appeal contrasts with Order PO-3154, which dealt with records related to the restructuring of General Motors Canada Limited (GMCL). Adjudicator Steven Faughnan upheld section 17(1) (the provincial equivalent to section 10(1) *MFIPPA*) in relation to records discussing GMCL's *Companies' Creditors*

Arrangement Act[71] filing. The adjudicator concluded that the records[72] would

> provide a complete template of GMCL's operation, including any weaknesses and strengths. This information, which covers a wide variety of topics ranging from financial to strategic, is very specific, extensive and detailed, the collection of which would allow GMCL's competitors to gain an insight into the business of GMCL and would provide a competitor with a competitive advantage that they would not have if the information were not revealed.

[91] Viewing the content of the Pre-Feasibility Review at issue here from this perspective, I reject Resolute's submission, and the town's, that disclosure of the record could reasonably be expected to permit competitors to copy its processes for production or any method of evaluating business opportunities, thereby leading to undue financial loss to the company as section 10(1)(c) contemplates.

[92] In view of my conclusion that the record contains neither commercial terms or details, such as purchase prices or obligations, nor processes, it follows that I must also reject the claim under section 10(1)(a) that disclosure could reasonably be expected to result in disadvantage to Resolute or advantage to Resolute's competitors in future negotiations. Although given an opportunity, Resolute did not submit evidence to support there being specific ongoing or upcoming negotiations that could be "significantly prejudiced" by disclosure of this pre-feasibility report done in relation to a mill facility in which it no longer has an ownership interest, under section 10(1)(a).

[93] I would like to address the town's concern about "undue disclosure" of the information of its business partners. I note that in assessing the application of section 10(1), I have considered the quality and cogency of the evidence presented and the nature of the information at issue. However, the strength of an affected party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability.[73]

[94] Specifically, section 1(a) of *MFIPPA* establishes a right of access to information under the control of institutions in accordance with the principles that information should be available to the public and that necessary exemptions from the right of access should be limited and specific. Based on the evidence before me, I find that neither the content of the Pre-Feasibility Review, nor the evidence provided by Resolute and the town, establish a reasonable expectation of the harms contemplated in sections

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[71] R.S., c. C-25, s. 1.
[72] The records consisted of "draft CCAA documentation and the discussion of this information set out in certain emails."
[73] This contextual framework was set out and discussed at paragraph 53 of Order MO-3494; see Orders PO-2987 and MO-2496-I.

10(1)(a) or 10(1)(c) occurring with disclosure of the record. Further, although the town made reference to section 10(1)(b), it provided no evidence to persuade me that similar information (in which it is in the public interest to provide) would not be supplied in the future. Since the evidence does not support such a finding, I conclude that the third part of the test for exemption under section 10(1) has not been met, and I find section 10(1) does not apply to the Pre-Feasibility Review. By definition, therefore, the disclosure of the record that would result from such a finding is not "undue," considering the important public accountability purpose of the *Act* in section 1(a).

[95] In light of my conclusion that section 10(1) does not apply to the Pre-Feasibility Review, it is not exempt from disclosure on this basis. I will now review the possible application of section 11(c) to it.

C. Does the discretionary exemption for economic and other interests in section 11(c) apply to the record?

[96] The town has also withheld the Pre-Feasibility Review under the discretionary exemption in section 11(c), which provides that:

> A head may refuse to disclose a record that contains,
>
> > information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[97] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[74]

[98] For section 11(c) to apply, the town 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.[75]

[99] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive

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[74] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.
[75] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

position.[76]

[100] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[77]

Representations

[101] The town describes the record as containing "relevant commercial, financial and technical information regarding potential future options for the site, as well as an asset review… [that] includes details of costs, investment requirements, and competitive analysis." The town argues that the Pre-Feasibility Review is exempt under section 11(c) because its disclosure could interfere significantly with the town's efforts and competitive position regarding potential economic development opportunities. The mechanism for this harm, as described by the town, is that potential business partners of the town would use the disclosed information to "leverage against the town in negotiations," thereby negatively affecting its financial and economic position. The town refers to other northern municipalities as potential competitors, arguing that they could also leverage the disclosed information in competing for business opportunities.

> The town is working to re-invent itself following the closure of the Resolute Forest Products mill, and the negative effect on the town's interests from disclosure of this report cannot be overestimated. Certainly, it is reasonable for the town to expect that some prejudice to its economic interests and competitive position would occur following disclosure of the report.

[102] In its representations on the exercise of discretion to claim section 11(c) to deny access to the record, the town submits that it considered that the appellant has not identified any particular significance to the information and that the information is "of high importance" to the town and Resolute.

[103] Related to section 11(c), the appellant questions how disclosure of a "public report" about a mill that is 80%[78] demolished could prejudice the town's economic or competitive interests. As noted under section 10(1), the appellant suggests that since the Pre-Feasibility Review did not accomplish anything, it has no inherent value to any party other than the public. Further, the appellant suggests that non-disclosure of the record may, in fact, harm the community's interests or potential development, but he does not elaborate on this concern.

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[76] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[77] Order MO-2363.
[78] Or 90%, as the appellant states elsewhere in his representations.

Analysis and findings

[104] Section 11(c) recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information where the consequences of doing so could reasonably be expected to result in prejudice to these economic interests or competitive positions.[79]

[105] To address the appellant's comment about inherent value, the application of section 11(c) does not, like section 11(a), require any sort of inherent value, only that disclosure could be expected to result in the described prejudice to the institution's competitive interests. However, as I noted above, to establish section 11(c), the town was required to provide evidence to establish a risk of harm with disclosure of this record that is well beyond the merely possible or speculative. In this appeal, I conclude that the town has failed to provide the requisite evidence to satisfy the onus.

[106] More persuasive evidence would have involved the identification of specific information or aspects of the Pre-Feasibility Review and linking disclosure of this information to the asserted harm to the town's economic interests or competitive position. For example, how could disclosure of the "relevant commercial, financial and technical information regarding potential future options for the site" reasonably be expected to prejudice the town's economic interests or competitive position, given the sale of the mill and assets and other developments since that sale in 2015?[80] The town refers to concerns about disclosure of "details of costs, investment requirements, and competitive analysis." Notably, the town committed, as an intervener to the October 2015 asset purchase agreement between Resolute and Abitibi "not to use the property subject to the agreement to compete with Resolute in the production of pulp, paper and related products."[81] The onus rested on the town to persuasively explain how disclosure of the information in the Pre-Feasibility Review at issue in this appeal might impact its competitive position or contractual negotiations in the relevant context. In my view, this non-compete commitment is relevant. Some variability in the market conditions of the forestry industry and other factors is to be expected, and I have considered this reality. However, the town did not point to any particular negotiations or transactions, either in existence or reasonably anticipated, that could reasonably have been expected to experience disadvantage were the record to be disclosed. The evidence offered simply does not support a finding that any such unspecified transactions could fall through or that new negotiations could be prejudiced by disclosure of the Pre-Feasibility Review.

[107] I am similarly unable to conclude from the town's evidence that disclosure of the

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[79] Orders P-1190 and MO-2233.
[80] At least up to the point that representations were requested from the town in 2017.
[81] See footnote 69, above and paragraph 27 of Order MO-3494 referring, generally, to the terms of section 12.1(a) of the Asset Purchase Agreement, and the corresponding schedule to the agreement, as modified by the Amending Asset Purchase Agreement of January 2016.

research, factual information and analysis regarding, for example, technological developments, industry conditions or cost estimates for repair or return to service of the mill equipment could reasonably be expected to prejudice the town's economic interests or competitive position. Exactly how the town's business partners and other northern municipalities could reasonably be expected to leverage this type of information to the town's disadvantage, if it is disclosed, in competing for business opportunities has not been explained or established for the purpose of section 11(c). Further, as past orders have held, the likelihood of greater public scrutiny occurring with disclosure does not, without more to connect them, establish a reasonable expectation of the harm section 11(c) of the *Act* is intended to prevent.[82]

[108] I would like to address the aspect of the town's submissions related to protecting the record because of its importance to the town and to Resolute, as well as the comment that the appellant has not identified particular significance to the information that would justify its disclosure.[83] As an institution under the *Act,* the town has certain rights and responsibilities which, in this context, means providing access to information under its control "in accordance with the principles that information should be available to the public" and that "necessary exemptions from the right of access should be limited and specific." To further that purpose, section 4(2) of *MFIPPA* obliges the town to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. Essentially, however, the town adopted Resolute's position that the entire report was exempt. It should be understood that the onus was on the town to identify and support the significance of the information in the Pre-Feasibility Review to its economic interests or competitive position, not on the appellant to demonstrate why the record should be disclosed.

[109] For all of these reasons, I find that the Pre-Feasibility Review is not exempt under section 11(c) of *MFIPPA.* Accordingly, there is no need for me to review the town's exercise of discretion in deciding to withhold the record under that exemption.

ORDER:

1. I uphold the town's decision under section 4(1)(b) of the *Act* that parts 1-9, 12 and 13 of the request are frivolous or vexatious.

2. Pursuant to my finding under section 4(1)(b), the appellant is limited to having one active access request with the town, and one active appeal with this office of a decision of the town, under *MFIPPA* at any given time, including any requests that are outstanding as of the date of this order. For greater specificity, this limitation includes the outstanding reasonable search issue respecting part 10 of

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[82] Orders PO-3707 and MO-3482-I.
[83] The public interest override in section 16 of *MFIPPA* was not argued in this appeal, although positions taken by the parties reflect related concerns.

this request in Appeal MA16-425-2, but does not include Appeal MA16-248-2 currently at the inquiry stage with another adjudicator.

3. I impose the following additional conditions and limitations on the appellant's requests:

    a. Any request under *MFIPPA* to the town shall not exceed six parts.

    b. Nothing in these terms shall limit the possibility of the town relying on the frivolous or vexatious provisions of *MFIPPA* in response to any request submitted to it by the appellant under this scheme.

4. At the conclusion of one year from the date of this order, the appellant or the town may apply to this office to seek to vary the terms of provision 2 of this order, failing which its terms shall continue in effect until such time as a variance is sought and ordered.

5. I do not uphold the town's decision to deny access to the Pre-Feasibility Review under sections 10(1) or 11(c), and I order the town to disclose it to the appellant by **October 23, 2018**, but not before **October 17, 2018**.

Original Signed by: September 17, 2018

Daphne Loukidelis
Adjudicator