Information and Privacy Commissioner,
Ontario, Canada

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

# ORDER MO-4179

Appeal MA20-00032

City of Toronto

March 29, 2022

**Summary:** The requester filed a request under the *Act* with the city for records relating to the Quayside development project, which was cancelled in May 2020. The city located a number of records responsive to the request and notified a number of affected parties, including the appellant, of the request. After reviewing the affected parties' representations, the city issued a decision granting the requester full access to the records relating to the appellant. The appellant appealed the city's decision to the IPC, claiming the application of the mandatory exemption in section 10(1) (third party commercial information) to the information relating to it. During the inquiry, the requester raised the possible application of the public interest override in section 16, namely a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the third party commercial information. In this decision, the adjudicator upholds the city's decision, in part. The adjudicator finds that some of the records are exempt from disclosure under section 10(1)(a), that the public interest override does not apply, and that these records should not be disclosed to the requester. As for the remaining responsive records, the adjudicator agrees with the city that they are not exempt under section 10(1) and orders the city to disclose them to the requester.

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

**Orders and Investigation Reports Considered:** Orders MO-1450, MO-1513, and MO-2462

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

## OVERVIEW:

[1] In 2017, the appellant won a competition to design a new mixed-use community in Quayside on Toronto's Eastern Waterfront, in partnership with the Waterfront Toronto Revitalization Corporation (Waterfront Toronto). In this order, I will identify this development project as the Quayside project. The appellant states its total investment was expected to be $2.9 billion.

[2] Following the announcement, the appellant and Waterfront Toronto began negotiating a series of agreements, contracts and plans, including a Plan Development Agreement that they entered into in July 2018 and the appellant's Master Innovation Development Plan. The appellant states this was the first step in the process, which would have ended in a vote by the municipal, provincial and federal governments.

[3] Ultimately, after negotiations and discussions with Waterfront Toronto and the municipal, provincial and federal governments, the appellant decided to withdraw from the Quayside project on May 7, 2020. The appellant states that a final contract was never signed.

[4] A media requester filed an access request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) with the City of Toronto (the city) for all communications between five named entities regarding the development of the Quayside neighbourhood or any projects relating to its development. The requester advised they sought records created between June 1, 2018 to January 7, 2019.

[5] The city located records responsive to the request and notified a number of parties whose interests may be affected by the disclosure of the records under section 21 of the *Act*. The appellant is one of the affected parties the city notified. The city issued an access decision to the parties granting the requester full access to the records relating to the appellant.

[6] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (the IPC). The appellant claims the records relating to it are exempt under section 10(1) (third party commercial information) of the *Act*.

[7] During mediation, the requester confirmed their interest in pursuing access to the records relating to the appellant. The appellant maintained its objection to the city's decision to disclose the records to the requester.

[8] No further mediation was possible and the appeal transferred to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry under the *Act*. I am the adjudicator in this appeal and I began my inquiry by inviting the appellant to submit representations in response to the Notice of Inquiry, which summarizes the facts and issues in the appeal. The appellant submitted representations. I then invited the city and the requester to submit representations in response to the Notice of Inquiry and the appellant's representations, which were shared in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The city and the requester

submitted representations. I then sought and received reply representations from the appellant in response to the city and the requester's representations.

[9] In the discussion that follows, I uphold the city's decision, in part. I find some of the records are not exempt under section 10(1). As a result, I uphold the city's decision to disclose these records and order it to disclose them to the requester. However, I find the remainder of the records are exempt under section 10(1)(a) and are not subject to the public interest override in section 16 of the *Act*, and should not be disclosed to the requester.

## RECORDS:

[10] There are 391 pages of records at issue. The records consist of email correspondence, slide decks, development plans, and other documents relating to the Quayside development project. All page references in this order reflect the page numbers printed on the *bottom right hand corner* of the records that the city provided to the IPC.[1] I note that the records both predate and postdate the Plan Development Agreement.

## ISSUES:

A. Does the mandatory third-party commercial information exemption at section 10(1) apply to the records?

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

## DISCUSSION:

### Issue A: Does the mandatory third-party commercial information exemption at section 10(1) apply to the records?

[11] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[12] The appellant claims the records at issue are exempt under sections 10(1)(a), (b), and/or (c) of the *Act*. These sections state,

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[1] I note the page numbers run into the thousands on the records. However, the city's entire numbered records package includes all of the responsive records it identified in response to the original request, many of which do not relate to the appellant and are, therefore, not at issue in this appeal.

[2] *Boeing Co. v. Ontario* (*Ministry of Economic Development and Trade*), [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

[3] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
> >
> > (c) result in undue loss or gain to any person, group, committee or financial institution or agency;[4]

[13] For section 10(1) to apply, the party arguing against disclosure, in this case, the appellant, must satisfy each part of the following three-part test:

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

### *Part 1 of the section 10(1) test: type of information*

[14] The appellant submits the records contain its commercial, financial and technical information. The IPC has described these types of information protected under section 10(1) as follows:

> *Technical information* is information belonging to an organized field of knowledge in the applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. Technical information usually involves information prepared by a professional in the field and describes the construction, operation or maintenance of a structure, process, equipment or thing.[5]
>
> *Commercial information* is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to

[4] Paragraph (d) refers to labour relations information.
[5] Order PO-2010.

> commercial or non-profit organizations, large or small.[6] The fact that a record might have monetary value now or in the future does not necessarily mean that the record itself contains commercial information.[7]
>
> *Financial information* is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

I agree with and adopt these definitions for the purposes of this appeal.

[15] The appellant states that the documents were part of an ongoing commercial negotiation to design a neighbourhood in Quayside on Toronto's Eastern Waterfront. Specifically, the appellant submits the records at issue include the following types of commercial information:

- The appellant's negotiating position on matters of a commercial nature, including data governance and privacy.
- The appellant's client information, including the retention of specific individuals to support the development of modeling scenarios and other parts of the plan.
- The appellant's draft business proposals and designs for public spaces, including its proposals for Parliament Gateway, Silo Park, Parliament Slip and Quayside.
- The appellant's draft business proposals on mobility, including its proposals for transit backbones, widespread cycling and walking, freight transit and integrated transportation management.
- The appellant's draft business proposals related to sustainability, including blueprints for climate positive communities, plans for fossil fuel free thermal grids, and plans for stormwater management.
- The appellant's draft business proposals related to data governance including a plan contained in the records.
- The appellant's draft business proposals related to autonomous vehicles.
- "Aspects of" the appellant's communications strategies, including its government relations strategies, its stakeholder engagement strategies and its marketing strategies.
- The appellant's analysis, methods and modelling, its research approaches and problems, revenue model and methods for designing public spaces.

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[6] Order PO-2010.
[7] Order P-1621.
[8] Order PO-2010.

The appellant states that the records at issue contain its proprietary and commercial information that has been developed over a number of years and at significant cost.

[16] In addition to commercial information, the appellant submits the records contain financial information, such as a reference to hourly rates for its staff or contractors. Finally, the appellant submits the records contain technical information, including architectural renderings and design images created by professionals it retained.

[17] The city states the records contain a variety of information ranging in depth and detail, such as correspondence regarding the organization of meetings and phone calls; slide decks regarding the overall vision for the project, including plans for transportation and neighbourhood building; and details regarding the management of the project, such as details about data sharing.

[18] The city submits the appellant was a partner with the city on this project. As such, the city argues, none of the information at issue could be considered *proprietary* to the appellant. The city states the information contained in the records relates to the development of Quayside on lands owned by Waterfront Toronto, which is also a partner of the city. The city submits the records do not reveal financial information or labour relations information. Further, the city submits the information does not "appear to be truly scientific, commercial, or technical information belonging to [the appellant], given that much of the information regarding the plans for the neighbourhood was in the public sphere at the time."

[19] The requester submits that, based on the appellant's descriptions of the records, it is not clear the records contain commercial, technical or financial information. Specifically, the requester states that information relating to "data governance and privacy" does not clearly qualify as *commercial information*. The requester states that commercial information must relate to the buying, selling or exchange of merchandise or services. In addition, the requester submits that the "client information" referred to in the appellant's representations does not appear to be equivalent to a client or customer list. As such, the requester argues, it is not clear how this client information would meet part one of the three-part section 10(1) test.

[20] The requester also submits that the appellant's characterization of some of the records as *business proposals* should be assessed with a high degree of scrutiny because of the public nature of the Quayside project. The requester also questions whether the "communications strategies" identified by the appellant would relate to the buying, selling or exchange of merchandise or services. The requester states the appellant was not selling its wares in a competitive marketplace. Rather, the Quayside project was a "unique and contentious public-private infrastructure and development project that related to the design and governance of a significant area of the City of Toronto."

[21] Finally, the requester questions whether the information identified as *financial* or *technical* information by the appellant would fit within the meaning of those terms in section 10(1) of the *Act*.

[22] In its reply representations, the appellant maintains the records contain commercial, financial and technical information relating to it. The appellant asserts that the records contain business proposals it created as part of the project and the IPC has repeatedly found that business proposals constitute *commercial information*.[9] The appellant notes the IPC has extended this principle to emails, memos and presentations that identify or contain details about business proposals. The appellant also maintains that the information revealing its negotiating position or its marketing and communication strategy is *commercial information* and cites Orders MO-1450 and MO-1513.

[23] Based on my review of the records, I find that some of them contain *commercial information* within the meaning of section 10(1) of the *Act*. Specifically, I am satisfied the appellant's commercial information can be found in the slide decks relating to the appellant, its work and the plans, strategies and development of the Quayside project (pages 50-101, 408-421, 755-802, 1179-1204, 1362-1402, 1503-1515, 1885-1956, and 2328-2331), draft plans (pages 226-229 and 2174-2186), modelling analysis (181-192), drawings with plans for the project (pages 892-911), and what appears to be an internal briefing note (pages 1780-1783). In addition, I find the emails that contain the descriptions of the appellant's research approaches and problems (pages 266-271, 278-282, and 1970-1977) contain commercial information because they describe the services the appellant intended to provide to the city and/or Waterfront Toronto in conducting the research required.

[24] I also find some of the records contain *technical information* such as drawings and designs relating to the structures and plans for the Quayside project.

[25] I accept the city's submission that some of the information regarding the plans for the Quayside neighbourhood is already in the public sphere and I address this issue below.[10] However, the fact that some information is in the public sphere has no bearing on whether the records before me contain the types of information covered by section 10(1). Upon review, I find the information before me constitutes *commercial information* relating to the appellant because it relates to the services it intended to provide to Waterfront Toronto and the city in the development of this project.

[26] Therefore, I find that pages 50-101, 181-192, 226-229, 266-271, 278-282, 408-421, 755-802, 892-911, 1179-1204, 1362-1402, 1503-1515, 1780-1783, 1885-1956, 1970-1977, 2174-2786, and 2328-2331 contain commercial or technical information.

[27] However, I find the remainder of the records[11], amounting to approximately 45 of the 391 pages at issue, do not contain any of the types of information set out in section 10(1) of the *Act*. These records consist of email chains relating to meetings and workshops, agendas, questions regarding the project, news releases, and generic

[9] The appellant refers to Orders MO-1450 and MO-1851-I.
[10] See paragraph 70 and my discussion on the public interest override.
[11] Specifically, pages 3-4, 49, 102, 145, 169-180, 224-225, 405-407, 750-754, 915-917, 1029-1030, 1087, 1130, 1178, 1403, 1432, 1730, 1732, 1779, 1881-1884, 2173, 2327, 2405-2406, and 2584-2585.

administrative information. The information in these records is of a generic nature and would not, if disclosed, reveal commercial, technical or financial information or other informational assets relating to the appellant. Therefore, I find that these email records do not contain any of the types of information mentioned in section 10(1) and uphold the city's decision to disclose them to the requester.

### *Part 2 of the section 10(1) test: supplied in confidence*

[28] The requirement that the information must have been *supplied* to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[12] 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.[13]

[29] With regard to the *in confidence* requirement, the party arguing against disclosure (in this case, the appellant) must show that it expected the information to be treated confidentially and that its expectation is reasonable in the circumstances. This expectation must have an *objective* basis.[14]

[30] Relevant considerations in deciding whether an expectation of confidentiality is based on reasonable and objective grounds include whether the information

- was communicated to the city on the basis that it was confidential and that it was to be kept confidential,
- was treated consistently by the appellant in a manner that indicates a concern for confidentiality,
- was not otherwise disclosed or available from sources to which the public has access, and
- was prepared for a purpose that would not entail disclosure.[15]

[31] The appellant states the records at issue are private-sector documents it prepared, such as draft business proposals. The appellant states the city was not involved in the preparation of the records, nor was it responsible for incurring expenses relating to their creation.

[32] The appellant submits the documents were part of confidential negotiations between itself and Waterfront Toronto and would, if disclosed, reveal the substance of those negotiations. The appellant states that it and Waterfront Toronto agreed to keep the documents confidential by way of formal agreements and policies. The appellant

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[12] Order MO-1706.
[13] Orders PO-2020 and PO-2043.
[14] Order PO-2020.
[15] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

refers to Schedule H of the Plan Development Agreement between the appellant and Waterfront Toronto, which protects the confidentiality of the commercial information of the appellant.

[33] The appellant states the documents were provided to only a limited number of city officials on a need-to-know basis. The appellant states the records were not widely disseminated and were provided to the city in confidence, both implicitly and explicitly. The appellant notes that a number of the documents, such as the analysis document at pages 181-192, are marked "Proprietary and Confidential" on each page. In addition, the appellant states the records include references to its intellectual property rights.

[34] The appellant submits the records relate to the negotiation of a series of agreements, contracts and plans. While the appellant did not specifically identify the agreements, contracts and plans in its representations, it states the documents describe its commercial negotiating position at various points in time, over a two-year period. The appellant acknowledges the final version of the Master Innovation and Development Plan is publicly available; however, the appellant affirms its commercial negotiating positions as described in the draft documents are not.

[35] The city confirms the records were directly supplied to it by the appellant. The city acknowledges a number of the records are explicitly identified to be proprietary and confidential and submits that those records satisfy part two of the section 10(1) test. However, the city did not identify which records were, in its view, supplied in confidence.

[36] The requester submits the appellant has not discharged its burden of showing that the records were *supplied to the city in confidence*. The requester states the appellant does not rely on a confidentiality agreement between itself and the city; rather, the appellant only refers to a schedule of a Plan Development Agreement between itself and Waterfront Toronto. The requester claims this schedule is not binding on the city, does not govern the appellant's disclosure of its information to others, including the city, and is not evidence to demonstrate that the information at issue was *supplied in confidence* to the city. The requester also disputes whether the confidentiality provision in Schedule H of the Plan Development Agreement applies to all of the records at issue.

[37] The requester also submits any *confidential* and *proprietary* markings on the records are not determinative of any expectation of confidentiality between the appellant and the city. The requester submits the appellant should have provided clearer evidence to show it provided the records to the city on the basis that they were confidential and were to be kept confidential.

[38] In its reply representations, the appellant maintains the records were supplied in confidence to the city. The appellant takes issue with the requester's argument that the information at issue was not supplied in confidence to the city because the city was not a party to the Plan Development Agreement. The appellant refers to Order MO-1213, in which the adjudicator found that even though the City of London was not a party to the

contract between a taxicab company and the University of Western Ontario Students' Council, the contract had been supplied in confidence to the City of London.

[39] In any case, the appellant notes the city conceded that some of the documents were supplied to it in confidence. Furthermore, the appellant confirms the city is bound by Schedule H of the Plan Development Agreement as a signatory to an earlier Memorandum of Understanding between the City of Toronto, Toronto Waterfront and the City of Toronto Economic Development Corporation, 2006 (the MOU). The appellant submits the MOU requires the city to communicate with Waterfront Toronto and to ensure the protection of privacy and confidentiality of commercially sensitive information. The appellant acknowledges the MOU predates the Plan Development Agreement and therefore does not refer to the Plan Development Agreement or any arrangements between the appellant and the city directly. Nonetheless, the appellant submits the MOU provides that discussions between the city and Waterfront Toronto shall respect the confidentiality of commercially sensitive information. Specifically, the appellant refers to section 18.2 of the MOU, which requires the city to "maintain the confidentiality and security of all material and information which is the property of other parties and in the possession or under the control of the other parties pursuant to the MOU."[16]

[40] I have reviewed the records that remain at issue. These records consist of PowerPoint presentations about the Quayside project, emails concerning specific research subjects and the appellant's approach to them, and other briefing documents regarding the project. I note a number of these records, such as the plan at pages 226-229 and 2174-2186 and the slide deck at pages 1363-1402, are in draft form. Furthermore, the majority of these documents are clearly marked as *confidential* or *proprietary* to the appellant, though I agree with the requester that these markings are not, on their own, determinative of the issue.

[41] However, in light of the context of the specific circumstances before me and upon review of the records that remain at issue, I find there are a number of factors that, when combined, strongly support a finding that the information was supplied to the city in confidence. Specifically, I find that Schedule H of the Plan Development Agreement and the confidentiality requirements in the city's MOU with Waterfront Toronto and the City of Toronto Economic Development Corporation must be considered together with the confidentiality markings on the documents, and the following additional factors:

- the city acknowledges that some of the records at issue were supplied to it explicitly in confidence, and
- the information was shared with the city and Waterfront Toronto during the process of negotiations and discussions regarding the Quayside project before a final agreement was signed (which never transpired).

[16] "Memorandum of Understanding between the City of Toronto, City of Toronto Economic Development Corporation and Toronto Waterfront Revitalization Corporation", section 18.2.

[42] I acknowledge that some of the records predate the signing of the Plan Development Agreement. However, the Plan Development Agreement is only one factor to consider in determining whether the records were supplied in confidence. The other contextual circumstances I have outlined above lead me to conclude that the records remaining at issue were supplied in confidence, most importantly the fact that the parties were still in the negotiation phase of this large, novel and controversial project. In my view, in this context, there was an implicit or explicit expectation of confidentiality that had an objective basis.[17] The records were supplied to the city as part of a working relationship during the discussion and negotiation process, in relation to this project. In these circumstances, I find that the appellant had a reasonable expectation of confidentiality.

[43] Therefore, based on my review of the records and the parties' representations, I am satisfied that the records remaining at issue were *supplied in confidence* by the appellant to the city, thereby meeting the second requirement for the application of section 10(1) of the *Act*.

### *Part 3 of the section 10(1) test: harms*

[44] Parties resisting disclosure of a record cannot simply assert that the harms under section 10(1) are obvious based on the record. They must provide *detailed* evidence about the risk of harm if the record is disclosed. While harm can sometimes be inferred from the records themselves and/or the surrounding circumstances, parties should not assume that the harms under section 10(1) are self-evident and can be proven simply by repeating the description of harms in the *Act*.[18]

[45] Parties resisting disclosure must show the risk of harm is real and not just a possibility.[19] However, they do not have to prove that disclosure will in fact result in harm. How much and what kind of evidence is needed to establish the harm depends on the context of the request and the seriousness of the consequences of disclosing the information.[20]

[46] The appellant submits the information at issue is exempt from disclosure under sections 10(1)(a) and (c) of the *Act*. The appellant states it continues to pursue commercial projects with other public and private sector entities. The appellant submits that disclosure of the commercial information at issue that was supplied during an (ultimately unsuccessful) commercial negotiation between itself and Waterfront Toronto will hinder the negotiation of these new commercial projects. Specifically, the appellant submits the disclosure of the records will hinder these other projects by:

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[17] See Order P-1026, in which the adjudicator found that the records before her were supplied in confidence and noted that there is a public interest in organizations, such as the appellant in this case, being as "forthright as possible" with an institution in its negotiations.
[18] Orders MO-2363 and PO-2435.
[19] *Merck Frosst Canada Ltd. v. Canada* (*Health*), [2012] 1 S.C.R. 23. (*Merck Frosst*)
[20] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-4; *Accenture Inc. v. Ontario* (*Information and Privacy Commissioner*), 2016 ONSC 1616.

- Revealing the appellant's negotiating positions, tactics and strategies,
- Creating an expectation that other commercial projects by the appellant will incorporate similar terms and conditions as the Quayside project,
- Disclosing the appellant's risk tolerances on certain commercial terms and conditions, including those related to data governance and privacy.

For similar reasons, the appellant submits the disclosure of the records will reduce its ability to successfully negotiate future commercial agreements.

[47] The appellant also claims the disclosure of the records will significantly prejudice its competitive position. The appellant states the information at issue is specific commercial information including business proposals, communications strategies, client information and analysis, methods and modelling. The appellant states it invested millions of dollars in cultivating, creating and compiling this commercial information. The appellant states its initial budget for the first phase of negotiations was $50 million.

[48] The appellant submits the disclosure of the records will weaken its status as a *first-to-market company* in the urban innovation sector. The appellant claims this is not a hypothetical risk, referring to the fact that competitors engaged in a "calculated and sustained attack on the Quayside project." The appellant claims its competitors will use the information at issue, such as the analysis, methods and modelling, to develop competing projects.

[49] Finally, the appellant submits that the disclosure of the records would reveal its business plans, models and strategies, specifically those related to its integrated business model. The appellant submits it is unique in the way in which it integrates urban innovations and solutions across multiple sectors such as energy and mobility. The appellant states its competitors have generally focused on urban innovations and solutions in a single sector and would be likely to copy its integrated business model if its commercial information is released. In other words, the appellant submits the information at issue would, if disclosed, allow its competitors to unfairly leverage the appellant's efforts to its detriment.

[50] In addition to sections 10(1)(a) and (c), the appellant submits that section 10(b) applies to the records. The appellant submits the disclosure of the records will disincentivize third parties from supplying similar information to municipal governments in the future. The appellant states it is important for private-sector partners and investors feel able to trust that government officials will protect their commercial information. The disclosure of records contrary to formal agreements and policies would undermine the trust in this relationship.

[51] The requester claims the appellant did not provide sufficiently detailed evidence to establish a reasonable expectation of harm. The requester submits the appellant's representations contain "generalized or speculative assertions of harm" that "fall well short" of the evidence required. The requester suggests the appellant should have

provided affidavit evidence to support its claim that there is a reasonable expectation of harm.

[52] The requester notes the Plan Development Agreement and the Master Innovation Development Plan relating to the Quayside project are publicly available. As such, the requester argues, the appellant's negotiating positions, strategies and risk tolerance are always available. In addition, the requester submits the records are over three years old, having been prepared in 2018 and early 2019. The requester doubts that documents of this age relating to a particular project could be relied on in any meaningful way by competitors or by public and private entities that the appellant seeks to work with.

[53] The requester refers to Order MO-2462, in which the adjudicator considered whether the disclosure of records relating to the proposed restoration of the Guild Inn in Scarborough could reasonably be expected to result in the harms contemplated by sections 10(1)(a) or (c). In this case, the adjudicator described the records as containing "historical information about the site, project vision, financial projections, transportation considerations and restoration plans and drawings." The adjudicator found that section 10(1)(a) and (c) had no application to the records because he had not been provided with specific evidence regarding how the information at issue "would be of any value to competitors today as economic conditions, restoration strategies and techniques and the needs of public institutions have undoubtedly changed through the passage of time." Adopting this finding, the requester submits the appellant failed to provide specific evidence of how the information would be of any value to competitors or potential partners today such that there would be a reasonable expectation of significant prejudice to its competitive position.

[54] Similarly, the requester submits the appellant did not provide any concrete evidence to substantiate its concern that competitors could use the information at issue to unfairly leverage its efforts.

[55] The city submits the harms contemplated by section 10(1)(c) of the *Act* are unlikely to occur due to the fact that the records do not contain financial information. The city also submits the harms in section 10(1)(a) are unlikely to occur due to the "status" of the appellant, which is a part of a large international company.

[56] In its reply representations, the appellant maintains that disclosure of the records will significantly interfere with its current and future commercial negotiations. The appellant confirms it has a number of active projects and proposals in place. Furthermore, while the Master Innovation Development Plan is publicly available, the appellant states its commercial negotiating positions are not public.

[57] With regard to the age of the records, the appellant refers to Order MO-2997, in which the IPC upheld an institution's decision to not disclose records that were nine years old.

[58] The appellant also "forcefully rejects the assertion made by the requester (and

the institution) that the IPC should draw an adverse inference from the identity and/or the complexity" of its parent company. The appellant notes that the IPC has held that the exemption in section 10(1) can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small organizations.[21]

[59] The appellant reiterates that the urban innovation sector is extremely competitive, for both private companies and governments. Given this competitive market, the appellant submits that the innovation sector is dependent on exorbitant investments in research and development. The appellant refers to Order MO-1513, in which the IPC considered the application of section 10(1) to a Marketing Agreement between the city and the National Olympic Committee of Canada (the NOCC) as part of its 2008 bid to host the Olympic Games. During the inquiry, the NOCC submitted that it is in constant negotiation with existing sponsors, suppliers and licensees for renewal of their agreements and with prospective parties in unsold or new categories. As such, the NOCC submitted that disclosure of the terms in the Marketing Agreement would prejudice its negotiating position by providing such parties with information they would not otherwise be privy to.

[60] Upon review of the financial and commercial information in the Marketing Agreement, the adjudicator found that

> … their disclosure could reasonably be expected to result in significant prejudice to the contractual negotiations, current and future, of the NOCC. In my view, the disclosure of this information could reasonably be expected to enable current and future sponsors, suppliers and licensees to use the information to their own advantage in their negotiations with the NOCC, to the detriment of that organization.[22]

The appellant submits that I should adopt the same principles and apply section 10(1) to order the city to withhold the information that remains at issue.

[61] I have reviewed the parties' representations and the records that remain at issue. For the reasons set out below, I find the records remaining at issue are exempt under section 10(1)(a) of the *Act*. Specifically, I am satisfied the appellant provided me with sufficient evidence to demonstrate that the disclosure of the draft business proposals, analyses, and briefing notes could reasonably be expected to result in significant prejudice to the appellant's competitive position or interfere significantly with its contractual or other negotiations. I make this finding after considering the information that relates to the appellant's work and business in the records, such as technical drawings it created for the Quayside project and its own innovations in relation to integrating different areas such as mobility, sustainability and data governance in its urban development projects.

[62] As previously noted, in order for me to find that the exemption at section

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[21] Order MO-1513, citing Order P-493.
[22] Order MO-1513, page 7.

10(1)(a) applies in this case, the appellant must establish that the specified harm could reasonably be expected to occur in the event of disclosure. To do so, the appellant must provide sufficient evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[23]

[63] The requester states that the appellant must provide *detailed and convincing* evidence to support its section 10(1) claim. As I stated above, the law on the standard of proof is clear. In *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*),[24] the Supreme Court of Canada addressed the meaning of the phrase "could reasonably be expected to" in two exemptions under the *Act*,[25] and found that it requires a *reasonable expectation of probable harm*.[26] In addition, the Court observed that "the reasonable expectation of probable harm formulation… should be used whenever the 'could reasonably be expected to' language is used in access to information statutes."

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

> As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground; paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "*inherent probabilities or improbabilities or the seriousness of the allegations or consequences*"…[Emphasis added][27]

I agree with and adopt this principle for the purposes of this appeal.

[65] The requester also repeatedly suggests that the appellant ought to have provided affidavit evidence to support its section 10(1) claim. I disagree. While the appellant is required to provide detailed evidence sufficient to demonstrate there is more than a mere possibility of harm, it is not required to provide affidavit evidence. I refer to Order MO-1450, in which the adjudicator states,

> Generally, parties to an appeal are not required to and do not submit affidavit evidence with their submissions. There may be cases where the

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[23] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 52-54.
[24] 2014 SCC 31.
[25] The law enforcement exemptions in sections 14(1)(e) and (l) of the provincial *Act*.
[26] *Ontario* (*Community Safety and Correctional Services*) *v. Ontario* (*Information and Privacy Commissioner*), 2014 SCC 31 (CanLII) at paras. 53-54.
[27] *Ibid*. at para 54.

> submission of affidavit evidence is preferable and even essential to the fact-finding process, but in many appeals, including those in which section 10(1) of the *Act* is raised, written representations have been found to contain the evidence required to support the application of the exemption under consideration.[28]

I agree with and adopt this principle for the purposes of this appeal. In the circumstances of this case, the appellant has met its burden of proof without affidavit evidence.

[66] While the majority of the information at issue relates specifically to the appellant's plans for the Quayside project, I find the appellant provided sufficient evidence to demonstrate that the information at issue, including the commercial terms and strategies, tactics and other information could reasonably be used by its competitors to its detriment. Specifically, I accept the appellant's arguments that its competitors could reasonably be expected to prejudice the appellant's competitive position by using or adopting the commercial and technical information the appellant developed through the investment of time, experience and significant resources. Considering the nature of the information and the details provided in the records, I accept that a competitor could reasonably be expected to incorporate this type of information and the integration of different types of projects (i.e. mobility, sustainability, data governance) in its own practices, to the appellant's detriment.

[67] In addition, I accept that the potential adoption and use of the information at issue by a competitor could reasonably be expected to significantly prejudice the competitive position of the appellant in other negotiations, including those it may enter into with respect to obtaining the right to develop other integrated urban spaces. I find this to be particularly persuasive since the appellant has confirmed it is currently a party to a number of negotiations or engagements to develop similar urban innovation projects.

[68] I accept the appellant is a part of a large international corporation. However, this fact does not diminish the fact that the disclosure of the information at issue could reasonably be expected to be detrimental to its commercial and negotiating position.

[69] I also acknowledge a large volume of information relating to the Quayside project is publicly available, such as the Master Innovation and Development Plan. However, the fact that some information relating to the project is publicly available does not mean that all information relating to the project should be publicly available or that there is no reasonable expectation of harm from the release of the other remaining information that is not in the public realm.

[70] Therefore, I am satisfied that the records remaining at issue qualify for exemption under section 10(1)(a) of the *Act*. Given this finding, I do not need to consider whether these records are also exempt under section 10(1)(b) and/or (c).

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[28] Order MO-1450, page 16.

However, as the requester takes the position that the public interest override at section 16 applies to require disclosure, I will consider its application below.

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

[71] The requester takes the position that there is a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the exemption in section 10(1)(a).

[72] Section 16 of the *Act* states,

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

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

[73] The *Act* does not state who bears the onus to show that section 16 applies. The IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure that outweighs the purpose of the exemption.[29]

[74] In considering whether there is a *public interest* in disclosure of the records, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government.[30] In previous orders, the IPC has stated that in order to find a compelling public interest in disclosure, the information in the records must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.[31]

[75] A *public interest* does not exist where the interests being advanced are essentially private in nature.[32] However, if a private interest raises issues of more general application, the IPC may find there is a public interest in disclosure.[33]

[76] The IPC has defined the word *compelling* as "rousing strong interest or attention."[34] A compelling public interest has been found to exist where, for example,

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[29] Order P-244.
[30] Orders P-984 and PO-2607.
[31] Orders P-984 and PO-2556.
[32] Orders P-12, P-347 and P-1439.
[33] Order MO-1564.
[34] Orders M-773 and M-1074.

public safety issues relating to the operation of nuclear facilities have been raised,[35] or disclosure would shed light on the safe operation of petrochemical facilities[36] or the province's ability to prepare for a nuclear emergency.[37]

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

- another public process or forum has been established to address public interest considerations,[38]
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations,[39]
- there has already been wide public coverage or debate of the issue and the records would not shed further light on the matter,[40] or
- the records do not respond to the applicable public interest raised by the appellant.[41]

[78] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances. An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.[42]

[79] The appellant takes the position that the disclosure of the records will not further the public interest because the final version of the Master Innovation and Development Plan is publicly available. Moreover, the appellant states it has transparently disclosed over 5,000 pages of non-commercial documents regarding the Quayside project on its website.

[80] The requester claims there is a "clear relationship" between the records and the *Act*'s central purpose of shedding light on the operations of government. Specifically, the public ought to have access to the information provided by the appellant to the city to understand the degree of oversight carried out by the city during a "crucial period" for the Quayside project. The requester notes that the request covers the period shortly before the Plan Development Agreement was signed in July 2018 until just before the

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[35] Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario* (*Information and Privacy Commissioner*), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.
[36] Order P-1175.
[37] Order P-901.
[38] Orders P-123/124, P-391 and M-539.
[39] Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.
[40] Order P-613.
[41] Orders MO-1994 and PO-2607.
[42] Order P-1398, upheld on judicial review in *Ontario* (*Ministry of Finance*) *v. Ontario* (*Information and Privacy Commissioner*), [1999] O.J. No. 488 (C.A.).

first plans related to the Master Innovation and Development Plan were published in the media in February 2019.

[81] The requester states the Quayside project was highly publicized and garnered significant public attention and local, national and international coverage. Further, the collection, sorting and storing of massive amounts of digital data raised important privacy, intellectual property and governance issues in which there is a clear public interest.

[82] The requester submits there were concerns about the lack of government oversight and transparency regarding the Quayside project from the beginning. As such, the requester submits there is a compelling public interest in understanding in detail what information was provided to the city and the oversight role the city was able to perform in respect of the Quayside project. Although the Quayside project was cancelled, the requester submits the public ought to have access to the records so that it can evaluate the extent of the city's oversight of such an important, expensive and unique redevelopment project, especially since the city will likely engage in a similarly expensive, publicized, and large development project in the future.

[83] In response, the appellant submits the requester has not established there is a *compelling* public interest in the records. In any event, the appellant states the records at issue do not advance the public interest articulated by the requester. Specifically, the appellant states the records do not offer information on the degree of oversight carried out by the city. None of the records are government briefing notes or memoranda or contain any government evaluations of the agreements or plans created by the appellant. Rather, the appellant submits the documents are private sector documents that were developed by a private company using private funds.

[84] The appellant submits that the oversight documentation sought by the requester likely does not exist because the project was abandoned before the city began its evaluation of the Master Innovation and Development Plan.

[85] In any case, the appellant submits that the appellant has already disclosed over 5,000 pages of documents on its website and notes that Waterfront Toronto has also disclosed numerous documents on its website. In addition, the appellant states it disclosed hundreds of communications in publicly-available lobbyist registries.

[86] I have considered the parties' representations and the records at issue with a view to determining whether there is a compelling public interest in their disclosure that clearly outweighs the purpose of the exemption at section 10(1)(a). While sympathetic to the requester's arguments in favour of public transparency, I find that a compelling public interest has not been established in this case to justify the disclosure of the particular information that remains at issue. As a result, section 16 does not apply.

[87] As discussed above, in considering whether there is a *public interest* in the disclosure of the records, the first question to ask is whether there is a relationship between the records and the *Act*'s central purpose of shedding light on the operations

of government.[43] In this case, I agree with the requester that there is a public interest in the disclosure of records that relate to the amount of oversight by the city over such an expensive and innovative development project that was the subject of significant public scrutiny and controversy, particularly in relation to privacy and data management.

[88] However, I have reviewed the records remaining at issue and find that they do not speak to the public interest the appellant refers to. The records remaining at issue consist of slide decks regarding the overall vision for the project, including plans for transportation and building the neighbourhood, and details regarding the management of the project, such as details about data sharing. Upon review of the records, I am not satisfied that the records before me would reveal the degree of oversight the city had, or would have, over the Quayside project should it have continued. I am also not persuaded by the requester's claim that the information at issue could speak to the city's ability to oversee important and controversial development projects in Toronto in future development projects. The information that remains at issue is specific to the Quayside project and would not offer insight into the city's general practices regarding the oversight of similar future projects.

[89] Although the requester focuses on the city's oversight of the project in his public interest arguments, I have also considered whether there is a more general public interest in the disclosure of records relating to this large, novel and controversial project. I accept the requester's argument that the potential collection, sorting and storing of massive amounts of digital data raised important privacy, intellectual property and data governance issues in which there is a clear public interest. I note that the appellant, the city and Waterfront Toronto have already disclosed a large number of records, such as the Master Innovation Development Plan, that provide a significant amount of detail relating to the Quayside project that would address a number of the public interest concerns relating to the project.

[90] If the appellant's Quayside project had gone forward, a strong case could be made that there is a compelling public interest in the records that would outweigh the purpose of the section 10(1) exemption, due to the controversial, public and wide-reaching nature of the project. However, the project was cancelled and, in my view, there is limited public interest in proposed plans for developing a project that was ultimately cancelled, particularly given the significant amount of information relating to the project that is already in the public domain.

[91] Accordingly, I find that the public interest override at section 16 of the *Act* does not apply and the records remaining at issue are exempt from disclosure under section 10(1)(a).

[43] Orders P-984 and PO-2607.

## ORDER:

1. I order the city to disclose the following pages of the records to the requester by **May 3, 2022** but not before **April 28, 2022**: 3-4, 49, 102, 145, 169-180, 224-225, 405-407, 750-754, 915-917, 1029-1030, 1087, 1130, 1178, 1403, 1432, 1730, 1732, 1779, 1881-1884, 2173, 2327, 2405-2406, and 2584-2585.

2. I find the remainder of the records are exempt from disclosure under section 10(1) of the *Act*. To be clear, these records are **not** to be disclosed to the requester.

Original Signed by: March 29, 2022

Justine Wai
Adjudicator