



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER MO-2249-I**

**Appeal MA-020252-2**

**City of Toronto**



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## **INTRODUCTION:**

This appeal involves a request for information pertaining to a complex commercial project using the City of Toronto's water supply in a contained loop to cool certain buildings in the downtown core. Various levels of government were involved in approval processes and environmental assessments were conducted. The request for information pertaining to the project that led to this appeal was very wide in scope and thousands of pages of responsive records were identified by the City of Toronto. Because of the number of records at issue and the multiple exemptions claimed for many of them, my determination on whether information in a record is exempt from disclosure under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) is set out in a lengthy and detailed index that will be sent to the City of Toronto, Enwave District Energy Limited (Enwave) and the appellant. A copy of the index will be provided to any of the third parties (other than Enwave), upon request.

## **BACKGROUND:**

In early 1991, the former Municipality of Metropolitan Toronto (Metro) identified the concept of Deep Lake Water Cooling (DLWC) as a strategic priority. DLWC involves extracting water from the cold depths of a body of water, circulating it through a hydraulic system and using the absorbed cool temperature to chill buildings. The buildings that utilize the system use heat pumps. DLWC serves as an alternative to traditional air-conditioning or using large chillers to cool water in a circulating hydraulic system.

A number of other DLWC projects had been suggested to Metro before the one that is the subject of this appeal.

In 1981, a large scale DLWC project was proposed in a study paid for by the Central Mortgage and Housing Corporation. Apparently due to the magnitude of the project, however, investors could not be attracted.

In 1988, Eastern Powers Developers (EPD), submitted a preliminary concept proposal for a smaller scale project to cool buildings in the Toronto railway lands, but it was never implemented.

In 1996 the Toronto District Heating Corporation (TDHC), which had some district cooling clients, made a proposal to develop a DLWC project, by way of a joint venture with Metro. TDHC was a corporate entity that had been established in 1980 as a non-profit utility under the *Toronto District Heating Corporation Act*. Metro had representatives on the TDHC Board. Under the legislation, TDHC was deemed not to be a local board of Metro except for the purposes of the Ontario Municipal Employees Retirement System.

The TDHC proposal involved integrating new infrastructure with existing Metro water infrastructure. This proposal was more limited in scope than previous proposals and involved TDHC providing a new deep water intake at no cost to Metro. At around the same time another group of companies proposed a second competing method for DLWC. Both proposals were considered by Metro.

After some deliberation, Metro determined that it would proceed with a more detailed investigation of the TDHC proposal. Accordingly, Metro authorized TDHC to proceed with a pre-design study to confirm the viability of this project. Commencement of the construction of the project was conditional upon the successful completion of an environmental assessment. The environmental component of the DLWC project was important, because the proposal would make use of Metro's source of drinking water for cooling and involved potential disruption of fish habitats in Lake Ontario.

Metro became part of the amalgamated City of Toronto (the City) by the enactment of the *City of Toronto Act, 1997*.

The City and TDHC then jointly retained a main consultant to conduct the pre-design (which consisted of two phases) and environmental assessment work (two were ultimately conducted). Other consultants were hired to perform parts of the pre-design and environmental assessment work. In the course of the pre-design study, different design options and construction materials and methods were considered.

In July of 1999, TDHC was restructured as a share capital corporation, having two shareholders. One is the City. In March 2000, TDHC changed its name to Enwave District Energy Limited. At about that time, another lake source cooling system operated by Cornell University in Ithaca, New York, which used an intake into Cayuga Lake to draw cold water for circulation through its cooling system, became operational.

In January 2002, the City and Enwave entered into an Energy Transfer Agreement which set out the terms for the construction of the new water intake pipes, upgrades to certain City pumping stations and the use of the City's water infrastructure for the project. The agreement sets out the compensation that Enwave pays the City for cooling energy transferred through the DLWC system.

In designing and constructing the DLWC project, there were various water quality and temperature studies, design changes, geotechnical studies, engineering analyses, construction cost estimates and public consultations undertaken. The DLWC infrastructure included the expansion and winterization of the John Street Pumping Station, the construction of the intake pipes into Lake Ontario and the construction of a water main linking the Toronto Island Distribution system to the mainland network. Significant amounts of money, from a variety of sources, were committed to finance this infrastructure. The project itself was completed in 2004 and the system became operational at that time.

## **NATURE OF THE APPEAL**

The request at issue in this appeal is very broad in scope. Specifically, the City received a two-part request under the *Act*, for:

- (a) Any policy, procedure, or governing document relating to the City of Toronto's bidding process (i.e. requests for proposals) in force in 1988.
- (b) Documentation relating to the City of Toronto's plans to build a deep lake water cooling project in conjunction with Enwave including any correspondence, reports, drawings, agreements, plans, or other documentation exchanged between the City of Toronto and Enwave relating to such project between 1988 and the present date.

In the representations he provided to this office during the adjudication of the appeal, the requester identifies the following three reasons for making the request:

- environmental and safety concerns;
- concerns about how the DWLC project has been funded, and specifically how tax revenues have been allocated to the project; and
- whether the City was in a conflict of interest position when it awarded the DWLC project to Enwave, and whether it followed the proper rules and policies for tendering projects of this nature.

The City identified records responsive to the request and its initial decision letter advised that access was being granted to two environmental reports. The City also provided the requester with an index of records listing, the initial decision letter said, over 10,000 other responsive records. In addition, the City invited the requester to review the index and advise the City if access was sought to all the records; or if he would be identifying specific records that were sought. The City explained in the letter that after this was done, the City would determine which exemptions it might be claiming to deny access to some, or all, of the identified records. Under section 21 of the *Act*, the City then notified Enwave that an access request had been received and asked for its position on the release of records.

The requester (now the appellant) filed an appeal with this office indicating that the City had not replied to the access request within the requisite time frame under the *Act*. Under section 22(4) of the *Act*, failing to respond to a request for access to a record within the statutory time frame results in a "deemed refusal" to provide access, which gives rise to a right of appeal. Accordingly, this office opened file MA-020252-1, and sent a Notice of Inquiry to both the appellant and the City.

The City issued its final decision letter. In the final decision letter, the City relied on the exemptions in sections 10 (third party information) and 11 (economic interests of an institution) of the *Act*, as the grounds for its decision to deny access. As a result of the City issuing a final decision letter, appeal file MA-020252-1 was closed.

In its final decision letter, the City refers globally to sections 10 and 11 as the relevant exemptions, and does not specifically identify the parts of section 10 and 11 it is relying upon. The letter does, however, use language that corresponds to the specific exemptions at sections 10(1)(a) and (c) and 11(a) and (g) of the *Act*.

The appellant then appealed the City's decision to deny access and the current appeal file (MA-020252-2) was opened.

During mediation of this appeal, the City advised that it was still in the process of determining which exemption it was claiming for each of the withheld records. It also advised that it was continuing to gather records responsive to the first part of the request. It stated that once it had compiled the records, a decision would be made regarding access to records responsive to that part of the request. The appellant maintained that he should be provided with access to all the withheld records and took issue with the sufficiency of the City's index of records.

Mediation did not resolve the appeal and the matter moved to the adjudication stage. The mediator's report identifies the exemptions at 10(1)(a) and (c) and 11(a) and (g) of the *Act* as the basis for the City's decision to deny access to the withheld records.

After the matter was moved to the adjudication stage, this office sent a Notice of Inquiry to the City and Enwave. In the Notice of Inquiry, representations were invited from the City and Enwave on the application of the exemptions at sections 10(1)(a), (b) and (c) and 11(a), (b), (c), (d), (e), (f), (g), (h) and (i) of the *Act*.

The Notice of Inquiry also contained the following order of former Assistant Commissioner Tom Mitchinson, regarding an index of records:

While the City has provided indices of the records at issue, it has not set out in detail which exemption applies to each of the records. I require the City to provide me with amended indices, which describe each individual responsive record, and to clearly identify which exemption claim is being applied to each record. In the event that the record contains third party information, the City should identify the third party whose interests are affected by the specific record. These indices should be provided to this office at the same time as the representations.

The City then sent a second index of records to this office. The City also identified a number of entities whose interests could be affected by disclosure. It explained that except where the third party is one of the two proponents of an alternative DLWC system, TDHC/Enwave is the

affected third party where the section 10(1) mandatory exemption is claimed. The City also identified five other third parties whose interests are affected by disclosure of a specific record, which it described as “Enwave’s consultants”.

A short time thereafter, the City provided its representations. These were accompanied by yet another version of its index of records. In its representations, the City advised that, after a further review, it was now prepared to disclose some of the records that it had withheld. However, the City’s representations spoke only to the application of the mandatory exemptions at section 10(1)(a) and (c) and the discretionary exemptions at section 11(c) and (d). In addition, the City also advised that it was relying on the mandatory exemption at section 14(1) of the *Act* (personal privacy) to deny access to a number of the records that it asserted contained personal information. The City further asked that a portion of its representations not be shared with the appellant due to confidentiality concerns.

Enwave did not file any representations at this time. Instead, it took issue with the sufficiency of the City’s index of records. Its position appeared to be that the issue of the sufficiency of the index had to be resolved before it could file its submissions.

Former Assistant Commissioner Mitchinson then sent a letter to the City stating that it had failed to comply with his earlier order regarding the preparation of an index of records. The letter directed the City’s attention to *Practice Direction 1* of this office, which sets out how an index of records should be prepared. The City was given a fixed date to comply.

The City sent a further index of records to Enwave and this office. Although Enwave raised concerns about its sufficiency, former Assistant Commissioner Mitchinson determined that this latest index of records complied with his order, and allowed Enwave an extension of time to deliver its representations in response to the Notice of Inquiry. Enwave then provided its representations.

In its representations, Enwave raised the possible application of the discretionary exemptions at sections 8(1)(e) (endanger life or physical safety of a person), 8(1)(l) (facilitate the commission of an unlawful act) and 13 (disclosure could threaten the safety or health of an individual). These exemptions were not claimed by the City. In addition, Enwave asked that none of its representations be shared with the appellant, due to confidentiality concerns.

After receiving Enwave’s representations, former Assistant Commissioner Mitchinson considered the confidentiality concerns of the City and Enwave. He determined that, in accordance with this office’s practice direction on the sharing of representations, the majority of the representations of both parties ought to be shared with the appellant.

A Notice of Inquiry, along with the non-confidential portions of the representations of the City and Enwave, was then sent to the appellant. In the Notice of Inquiry the appellant was invited to address Enwave’s raising of the discretionary exemptions at sections 8(1)(e), 8(1)(l) and 13 and to provide representations on the application of the mandatory exemptions at sections 10(1)(a),

(b), (c) and the discretionary exemptions at 11(c) and (d) of the *Act*. The appellant filed representations in response. In his representations, the appellant addressed the matters raised in the Notice of Inquiry and also claimed the application of the “public interest override” provision in section 16 of the *Act*. In addition, he stated:

- a) except for information relating to the expenditure of public funds, there is no desire to see Enwave’s specific financial data relating to cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. The appellant therefore would agree to have the specific references to such items deleted from the documents prior to disclosure;
- b) likewise, with respect to any documents containing personal information (i.e. addresses, telephone numbers, hourly wages and so on), the appellant has no desire to see such information and, once again, would be agreeable to having the specific references deleted from the documentation and, once again, would be agreeable to having the specific references deleted from the documentation prior to being disclosed.

The appellant also asserted that access should be granted by default because of the City’s conduct, including the manner in which it addressed the request for information and the state of its index of documents. In my opinion, however, the City’s actions in processing the request and the state of its index of documents were addressed in former Assistant Commissioner Mitchison’s interim rulings. I will not revisit them here.

The appellant agreed to share all of his representations, except for a portion that might disclose his identity.

Former Assistant Commissioner Mitchinson determined that the representations of the appellant raised issues to which the City and Enwave should be given an opportunity to reply. Accordingly, he forwarded the relevant and non-confidential representations of the appellant, along with separate covering letters, to the City and Enwave inviting representations in reply. Both filed reply representations.

In its reply representations the City pointed out that all responsive records that were not destroyed in accordance with its records retention and destruction policy had been located and identified. In addition, the City confirmed that it did not claim the application of the section 8(1)(e) and (l) or 13 exemptions that Enwave raised. It advised that it had no comment in that regard other than to state that disclosing the City’s plans and drawings would jeopardize the security of its water facilities. The City submits that it would then have to re-evaluate its current security measures and to take “costly steps” to ensure that new or additional protections were in place.

Shortly thereafter, the City forwarded to the appellant a copy of a portion of a 1988 User Manual for the Purchasing and Supply Department that it identified as being responsive to the first part

of his request. The City waived any fee for the photocopying of the portion of manual. The City advised that, if desired, the appellant could attend to view the entire manual at the City's offices.

Then, in a further attempt to narrow the issues, this appeal was returned to mediation. At this second mediation the appellant confirmed that he was not seeking any information that qualified as "personal information" and fell under the exemption at section 14(1) of the *Act*. Accordingly, an effort was made to identify and remove this information from the responsive records. Perhaps because of the volume of records, however, it appears that some personal information in the records was missed. Therefore, before the City discloses a record in accordance with this order, it must ensure that it has identified and severed any personal information that is exempt under section 14(1). In the event that a dispute arises with respect to any severance of this nature, I remain seized of the matter to determine that issue.

Also at the second mediation, Enwave agreed to disclose to the appellant and the City a "list of records on which Enwave takes no position". Furthermore, the City agreed that certain records, as indicated by the notation "NEA" (meaning "no exemption applied") on its index, could be released to the appellant.

Some records for which the City claimed that no exemption applied, and upon which Enwave took no position, were released to the appellant. A further portion of the records was subsequently provided to the appellant. Thereafter, a revised index of records was created by the City setting out the records that the City believed remained at issue. Although it would have been helpful in adjudicating this appeal, the City did not provide this office with a copy of the records it disclosed to the appellant.

The appellant remained dissatisfied with the City's access decisions. After the appellant compared the newly revised index with the former index of records, and with the records that had been released, he forwarded a letter to this office indicating that:

- some documents listed in the revised index had already been produced;
- documents that had not been listed in the earlier index appeared in the revised index;
- notwithstanding Enwave indicating that it took no position on certain documents that had appeared in the earlier index, those documents were not provided to the appellant.

The appellant's letter enclosed a table that indicated which documents fell into the listed categories. In the letter, the appellant requested that the matter be returned to the adjudication stream.

Although mediation had resolved some of the issues remaining in the appeal it did not fully resolve it and the file was returned to the adjudication stream. After a detailed review of the

records and the issues raised in this appeal, I decided to invite a number of third parties identified in the records to make submissions on the application of the mandatory exemptions at sections 10(1)(a) and (c) of the *Act*. Thirty two Notices of Inquiry were sent to these parties, only six of whom provided submissions in response to the Notices. One of the third parties consented to the release of the information relating to it; another third party only objected to the release of any of its unit pricing information, and yet another simply adopted Enwave's position on non-disclosure. The three remaining third parties that filed representations, including the principal shareholder of Enwave, objected to the release of any of their information.

In making my determinations in this appeal, I have considered both the confidential and non-confidential representations of all of the parties and the contents of the records themselves.

## **RECORDS**

The records at issue consist, in part, of the City's Water and Waste Water Services working files and include handwritten notes, emails, fax cover sheets and correspondence, agendas, reports, memoranda, drawings, diagrams, notices, budgets, newsletters, webpages, progress certificates, invoices, cheques, logistical charts, geotechnical and marine surveys, temperature and water quality charts, pumpage charts, brochures, draft agreements, agreements and related documents.

In the decision that follows, I have occasionally divided records into certain categories. It should be noted however that not all the records at issue neatly fit into one category and sometimes contain different types of information. In making my determinations in this appeal, I have considered all the information in a particular record at issue. Furthermore, in making my determinations in this appeal, I have considered each individual record on its own, in relation to other records and also in relation to the DLWC project as a whole.

One of the challenges presented in the adjudication of this appeal was the amount of information at issue, which was found in the more than 10,000 records the City identified as responsive to the two-part request.

The index of records attached to this order is 64 pages. For the most part, the description of a record in the index follows the City's description in the indices it provided to Enwave and the appellant. I have set out on the accompanying index the exemption(s) that the City claimed is/are applicable, the position that Enwave takes regarding the record and my determinations.

On the index:

- I have used "NEA" to indicate where the City has applied no exemption.
- I have used "OBJ" when Enwave objects to disclosure of a record and "TNP" where Enwave takes no position. I have not set out the positions of the other third parties on disclosure but considered them in making my determinations in this appeal. If I am not

sure of the positions of Enwave and/or the City, I have left it blank and treated it as if there was an objection to disclosure of the record.

- In an effort to remove records that were disclosed to the appellant in the course of mediation, or that the appellant is no longer pursuing, I have compared the City's second to last index with its final index and carefully reviewed the appellant's letter dated September 15, 2004. If a record in the City's second to last index is not listed on the final index and the appellant makes no comments about it, I have presumed that it has been disclosed to the appellant. Those records have been noted as "PD" on the index.
- Where the appellant has indicated that he has received a record that still appears on the City's final index, I have also noted that record as "PD".
- Where a record contains personal information, but appears on the City's final index, I have identified that record as "PI".
- Where a record has been listed on the City's second to last index and could not be located by me amongst the records that the City provided, I have indicated that the City must provide a new decision letter regarding the record.

My disposition with respect to any record that may contain exempt personal information is set out above. I will not be adjudicating upon any of the records I have identified as being "PD". Where I have adjudicated upon a record and determined that it should be disclosed, I have used the letter "D". Where I have determined that a record should be withheld, I use the letters "WH".

#### **RAISING OF EXEMPTIONS BY AN AFFECTED PARTY**

The *Act* contains both mandatory and discretionary exemptions. A mandatory exemption indicates that a head "shall" refuse to disclose a record if the record qualifies for exemption under that particular section. A discretionary exemption uses the permissive "may". In other words, the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the affected party seeks to rely on several exemptions not claimed by the City, namely parts of sections 8 and 13. The City chose to only rely on parts of section 10 and 11.

Section 8 of the *Act* contains what are referred to as "law enforcement exemptions". Three of those discretionary exemptions read:

- (1) A head may refuse to disclose a record if the disclosure could reasonably be expected to,
  - (e) endanger the life or physical safety of a law enforcement officer or any other person;

- (i) endanger the security of a building or the security of a vehicle carrying items, or of a system or procedure established for the protection of items, for which protection is reasonably required; or
- (l) facilitate the commission of an unlawful act or hamper the control of crime.

Section 10(1) is a mandatory exemption that relates to information supplied by a third party. Section 10(1) reads, in part:

- (1) 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; or
  - (c) result in undue loss or gain to any person, group, committee or financial institution or agency.

Section 11 of the *Act* contains discretionary exemptions that relate, for the most part, to the protection of economic interests of an institution. Sections 11(a), (c), (d) and (g) provide:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person.

Section 13 of the *Act* is a discretionary exemption that pertains to health and safety. It provides that:

A head may refuse to disclose a record whose disclosure could reasonably be expected to seriously threaten the safety or health of an individual.

In its initial representations, the City argued that the potential disclosure of technical information, maps, charts and drawings relating to the City's water filtration plant and pumping and distribution infrastructure could endanger the security of these facilities. This was especially so in light of the events of September 11, 2001.

Instead of invoking the application of the exemptions in section 8 and 13, however, the City considered the issue from a section 11 perspective. The City submitted that if such records were disclosed it would be forced to re-evaluate its current security provisions and would be required to take costly steps to ensure the additional and necessary physical protection of its plant and pumping infrastructures. The City submits that this could reasonably be expected to prejudice its economic interests or its competitive position, or be injurious to its financial interests within the meaning of sections 11(c) and/or (d) of the *Act*.

Enwave took a different tack. In its representations, Enwave set out its concerns surrounding safety and law enforcement and asserted that, in all the circumstances, the exemptions in sections 8(1)(e) and (l) and 13 of the *Act* should apply to the information in some of the records. In summary, Enwave's position is that public disclosure of these records could compromise the safety and security of Toronto's water supply, facilitate the commission of criminal acts and threaten the health and safety of members of the public.

The appellant's position is that given the procedural history of the matter, the statutory rules and the appeal framework, Enwave should only be permitted to raise or address the application of the exemptions set out in the City's original decision letter and the mediator's report.

As discussed above, in its reply representations, the City confirmed that it did not apply either of sections 8(1) or 13 to the records at issue. The City offered no comments other than to reiterate that, given the current world situation, the security of its water filtration infrastructure is of paramount concern. The City states that disclosure of plans and drawings would force it to re-evaluate its current security measures and to take costly steps to ensure that new or additional protections were in place. The City submits that denying access to the withheld records pursuant to sections 10(1) and 11 of the *Act* was appropriate in the circumstances of the appeal.

In its reply, Enwave submits that:

- it is appropriate and fair to consider the exemptions even though they were not raised by the City;
- it has a statutory right under the *Act* to have all its representations considered;
- alternatively, in conducting an inquiry under the *Act*, the Commissioner has the discretionary power to consider all of its representations;
- there is no prejudice to the appellant; and
- the exemptions it seeks to raise relate to the protection of the public.

In support of its position Enwave relies on Orders M-419 and P-1362.

### ***Analysis and Findings***

In Order PO-1705, former Assistant Commissioner Mitchinson dealt with an affected party raising the possible application of discretionary exemptions in the context of the *Freedom of Information and Protection of Privacy Act (FIPPA)*, the provincial equivalent of the *Act*. He wrote:

During mediation, the third party raised the application of the sections 13(1) and 18(1) [the provincial equivalent to section 11 of the *Act*] discretionary exemption claims for those records or partial records Hydro decided to disclose to the requester. The third party also claimed that Hydro had improperly considered, or neglected to consider, these discretionary exemptions in making its access decision.

This raises the issue of whether the third party should be permitted to raise discretionary exemptions not claimed by the institution. This issue has been considered in a number of previous orders of this Office. The leading case is Order P-1137, where former Adjudicator Anita Fineberg made the following comments:

The *Act* includes a number of discretionary exemptions within sections 13 to 22 [of *FIPPA*, the equivalent of sections 6 to 16 of the *Act*] which provide the head of an institution with the discretion to refuse to disclose a record to which one of these exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would

only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The *Act* also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 21(1) [the equivalent of section 14(1) of the *Act*] and 17(1) [the equivalent of section 10(1) of the *Act*] of the *Act* respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected person could raise the application of an exemption which has not been claimed by the head of an institution. Depending on the type of information at issue, the interests of such an affected person would usually only be considered in the context of the mandatory exemptions in section 17 or 21(1) of the *Act*.

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

On several occasions, the issue of raising the discretionary exemptions in sections 8(1) or 13 was put to the City which indicated each time that it is only relying on the mandatory exemption in section 10(1) and the discretionary exemptions in section 11 of the *Act*. As the City has done, I find that the concerns raised by Enwave with respect to the safety and security of the infrastructure can, if necessary, be addressed in the section 11 analysis.

Enwave's concerns about its "informational assets" and its commercial interests are considered under my analysis of the section 10(1) mandatory exemption, which has been identified as the appropriate exemption for this purpose. [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. My disposition with respect to section 14(1) personal privacy mandatory exemption is set out in my discussion about the nature of the appeal, above.

With respect to the additional discretionary exemptions on which Enwave seeks to rely, I am not satisfied that this qualifies as the "most unusual of cases [where] an affected person could raise

the application of an exemption which has not been claimed by the head of an institution.” Discretionary exemptions all indicate that the head “may refuse to disclose....” In other words, as discussed earlier, the legislature expressly contemplates that the head of the institution is given the discretion to claim, or not claim, these exemptions. In this case, the City has exercised its discretion against claiming these additional discretionary exemptions, and there is no evidence that it considered improper or irrelevant factors in doing so. In my view, for the reasons set out above, including my determination that the safety and security of the City infrastructure can be addressed in the section 11 analysis, Enwave has not provided sufficient evidence in this case to support a finding that compelling circumstances exist that would justify the extraordinary approach of permitting an affected party to claim a discretionary exemption when the head has elected not to do so.

In all the circumstances, therefore, I will not consider the application of the section 8(1)(e) and (l) and 13 discretionary exemptions raised by Enwave.

#### **LATE RAISING OF DISCRETIONARY EXEMPTIONS BY AN INSTITUTION**

A related issue is the appellant’s objection to the City relying on the discretionary exemptions at sections 11(c) and (d) of the *Act*, when its original decision letter and the mediator’s report referred only to sections 11(a) and (g). I observe that while the City’s original decision letter quoted the language of sections 11(a) and (g), there is no reference to those sections in its representations. However, the City’s representations do include extensive submissions on the application of sections 11(c) and (d).

The City responds by stating that it did not raise additional exemptions, but rather clarified the exemptions it believed were more appropriate, given the developments in the DLWC project from the time the City received the request. The City asserts that the clarification has caused no delay; nor has the appellant been prejudiced. The City points out that the appellant was given a full opportunity to comment on the City’s representations regarding the application of the sections 11(c) and (d) discretionary exemptions.

#### ***Analysis and Findings***

Section 11.01 of this office’s *Code of Procedure* provides:

In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

In Order PO-2113, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions, after the expiration of the time period prescribed in the Confirmation of Appeal:

In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In its decision letter, the City referred globally to section 11 as an applicable exemption. However, it did not particularize the subsections of section 11 it relied upon. The decision letter does, however, use language that corresponds to the specific exemptions at sections 11(a) and (g) of the *Act*. As noted above, the mediator's report indicates that the issue of denial of access remains in dispute and identifies the exemptions at 11(a) and (g) of the *Act* as being at issue in the appeal.

In light of the language used in its decision letter, I do not give great credence to the City's argument that the letter invoked the application of all of section 11, including sections 11(c) and (d). However, even if it was established that the City raised the section 11(c) and (d) discretionary exemptions outside the 35-day time limit, I have concluded that the City ought to be allowed to rely upon them in the circumstances of this appeal, for the reasons that follow.

Unlike many other cases that considered the late raising of discretionary exemptions by an institution, this appeal involves a considerable volume of records, which would make it more difficult to identify, with particularity, the parts of section 11 that apply. Although somewhat inelegant, the City's process has resulted in the application of the parts of section 11 that are typically claimed in appeals of this nature. By proceeding in this fashion, the City has actually focused the issues. Finally, because the appellant had ample time and opportunity to respond, I find that any prejudice to him is not significant. I will, therefore, allow the City to rely on the section 11(c) and (d) discretionary exemptions.

#### **ENWAVE AS A SEPARATE PARTY**

The appellant alleges that Enwave is not an entity that is separate from the City. As a result, the appellant argues that the City cannot rely on the application of exemptions that relate to a request for access to information of a third party, i.e. the section 10(1) mandatory exemption. I do not agree.

Enwave's predecessor corporation TDHC was established as a corporate entity by statute. Its successor, Enwave is, and remains, a corporate entity although its shares are held by the City and another shareholder. TDHC was a separate contracting party to the cost sharing agreement dated December 7, 1998. Enwave was a separate contracting party in the Energy Transfer Agreement. Furthermore, the volume of documentation and the negotiation processes that the City and Enwave engaged in during the genesis of the DLWC project, through its pre-design and design stage, the Energy Transfer Agreement, up to and including the completion of the project, in my view, supports a finding that the City and Enwave are separate entities.

Although both TDHC and its successor Enwave had close business ties with the City, and the City is one of only two shareholders of Enwave, based upon the representations in this appeal and my review of the records, and in all the circumstances, I do not view TDHC and its successor Enwave as having a relationship to such a close degree with the City that the third party information provisions in section 10(1) of the *Act*, should not apply.

#### **SCOPE OF THE REQUEST**

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

- (1) A person seeking access to a record shall,
  - (a) make a request in writing to the institution that the person believes has custody or control of the record;
  - (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and

. . . . .
- (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

As set out above, the appellant narrowed the scope of the request by removing information that meets the definition of "personal information" and is exempt under section 14(1), from the scope of the appeal. The appellant further narrowed the request by indicating that, except for information relating to the expenditure of public funds, he was not seeking access to Enwave's specific financial data relating to cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

Enwave sought to narrow the scope of the request even further. It took the position that certain records that predate the amalgamation of the City under the *City of Toronto Act, 1997* also did not fall within the scope of the request, which asks for "documentation relating to the City of Toronto's plans to build a deep lake water cooling project in conjunction with Enwave." Enwave submits that these records relate to the Municipality of Metropolitan Toronto, not the post amalgamation City of Toronto. The appellant's position is that this is a technical argument that should not be accepted. The appellant submits that in accordance with sections 4 and 5 of the former *City of Toronto Act, 1997* [that act was recently replaced by the *City of Toronto Act, 2006*] the City stands in the place of the former Municipality of Metropolitan Toronto and the City has all the rights and obligations of the former Municipality of Metropolitan Toronto. The appellant further submits that the City identified records that predated amalgamation as responsive to the request and that there would be no prejudice to proceeding as if the request covered these records. The appellant submits that to proceed otherwise would be a waste of resources as he would simply resubmit his request and Enwave and the City would make the same submissions that were made in this appeal.

### *Analysis and Findings*

I agree with the arguments regarding the scope of the appeal put forward by the appellant. In my view interpreting the request in the manner suggested by Enwave would unduly limit its scope and I interpret the term “the City of Toronto”, as used in the request, as including the former municipality. Any other approach would be unduly technical. As well, I note that the City identified responsive records that predate amalgamation and full submissions were made upon them by all the parties. There is no prejudice to any of the parties in addressing them in this appeal. If for some reason the scope of the appeal is in doubt, I interpret it to include responsive records that predate the amalgamation of the City.

### **SEARCH FOR RESPONSIVE RECORDS**

Where an appellant claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records within its custody or control [Orders P-85, P-221, PO-1954-I]. Although an appellant will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist. The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to show that it has made a reasonable effort to identify and locate responsive records within its custody or control [Order P-624].

A reasonable search is one in which an experienced employee expending reasonable effort conducts a search to identify any records that are reasonably related to the request (see Order M-909).

### *Representations of the Appellant*

The appellant states that when his representations were filed he had still not been provided with any records responsive to the first part of the request. Furthermore, in his view, there should be more responsive records that fall within the time period from 1988 to 1994. In support of this submission the appellant points out the statement in the City’s own representations that “a number of studies [relating to DLWC] were conducted in 1992 and 1993.” In addition, the appellant submits that a request for proposal dated March 31, 1988, relating to the feasibility of an earlier DLWC concept, invited bidders to contact a City representative for details of previous studies and preliminary costing of the concept. He submits that this supports a conclusion that additional records exist for the earlier time period. The appellant asserts, meanwhile, that none of these previous studies or preliminary costing documents is identified by the City in its index of records. Finally, the appellant asserts that the excerpts from the User Manual for the Purchasing and Supply Department, which the City identified as responsive to the first part of the request, do not expressly address the bidding process or requests for proposal. The appellant’s position is that this record is not responsive to the first part of his request.

*Representations of the City*

In its initial representations, the City identified the 1988 User Manual as being responsive to the first part of the request. The City invited the appellant to review the entire manual at its offices. The City also offered to copy the entire manual for a fee if the appellant wished.

In its reply representations, the City recounted its records retention and destruction policy as well as the City by-laws that governed the retention of documentation relating to earlier DLWC activities. The City submits that as no other DLWC project reached fruition, it is likely that most records were destroyed as soon as any proposal was completed, or when the department head believed that the documentation was no longer useful. The City further explains that during the course of this appeal it again contacted a number of departments for documentation.

The City states that the Manager, Operational Support, Toronto Water Supply confirmed that all records relating to the DLWC project, including some that were previously held in the City Archives, had been identified as responsive to the request and were included in the index of records. The City therefore concludes that it has located all responsive records that remain in existence.

*Analysis and Findings*

The City has consistently identified the 1988 User Manual as being responsive to the first part of the appellant's request. I am not satisfied that the appellant has provided sufficient evidence or submissions to refute that contention, and I agree with the City that it is responsive. I find that the City has made a reasonable effort to identify and locate records responsive to the first part of the request that are within its custody or control.

In light of the sheer volume of records that were identified, coupled with the City's explanation of its efforts to locate the documents and my being advised of the City's records retention and destruction policy, it would seem at first glance that the City conducted a reasonable search for records responsive to the second part of the appellant's request. And that would have been my conclusion had it not been the case that one critical document is missing from the indices and the mountain of paper the City provided to this office, namely, the three way cost sharing agreement dated December 7, 1998 between the City, TDHC and the main consultant with respect to the pre-design and environmental assessment of the DLWC project. This agreement is referred to in Enwave's representations and portions of it are reproduced. Drafts of the agreement are included in the responsive records provided by the City. Curiously, however, a complete unsevered final version was not produced by the City as a responsive record.

I cannot accept that a reasonable search was conducted when this most crucial document was not located and identified. I will therefore order the City to conduct a further search for documentation relating to the three way cost sharing agreement dated December 7, 1998 between the City, TDHC and the main consultant with respect to the pre-design and environmental assessment of the DLWC project, including a complete unsevered final version of the agreement.

### THIRD PARTY INFORMATION

Both the City and Enwave rely on exemptions that address the potential for economic or competitive harm. Section 10(1)(a) and (c) of the *Act* focuses on the harm to businesses or other organizations that provide information to institutions. Sections 11(c) and (d) refer to the harm to the economic or financial interests of the institution. A similar process of analysis often takes place when considering the application of sections 10(1)(a) and (c) and 11(c) and (d). The exemptions function in a similar fashion, but are intended to protect the interests of different parties, *i.e.*, private sector business entities and public sector institutions, respectively.

Sections 10(1)(a) and (c) of the *Act* read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization; or
- (c) result in undue loss or gain to any person, group, committee financial institution or agency.

Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, PO-2371, PO-2384, MO-1706].

For section 10(1) to apply, the City and/or Enwave and/or a third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) and/or (c) of section 10(1) will occur.

### **Part 1: Type of Information**

Previous orders have defined “trade secret”, “scientific information”, “technical information”, “commercial information” and “financial information” as follows:

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

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

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

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

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

### *Representations of the City*

The City submits that a number of records contain “technical” and “scientific” information as well as “commercial” and “financial” information. The City submits that certain records contain the proprietary information of Enwave and/or of the consultants they have engaged in relation to the development of the DLWC. In addition, the City submits that there are several records containing the proprietary information of other organizations. I will treat these claims as an assertion that the records contain information that meets the definition of a “trade secret”. The City submits that the technical and engineering reports and assessments, work proposals, maps and charts, pre-design studies, invoices, purchase orders, scope of work reports, water pressure and stress tests, water intake alternatives and sampling memoranda fall within the scope of section 10(1).

In its submissions in support of the application of the sections 11(c) and (d) exemptions, the City submits that the information contained in the records provides the foundation and strategies for the development of the DWLC delivery system, for determining its selling price and for the capital investment required for the present project, as well as for any future undertakings using this technology.

### *Representations of Enwave*

Enwave states that it has spent several years and a considerable amount of money on research, engineering and scientific design drawings, plans and specifications for the DLWC project. Enwave argues that information generated during the pre-design and environmental assessment of the DLWC project is proprietary to the City and Enwave. It asserts that much of this work product consists of trade secrets and technical, scientific and commercial information that would be unique and not known to its competitors in the cooling industry.

In support of its position, Enwave relies on clauses 4(d), (e), and (f) of the December 7, 1998 agreement between the City, TDHC and the main consultant. These clauses from the agreement were disclosed to the appellant in the course of the exchange of representations. Those contractual provisions read:

- (d) All original written material including programs, card decks, tapes, disks, listings and other documentation created and prepared for Toronto and TDHC pursuant to this Agreement and paid for via the fees for services as contemplated by the Agreement shall, together with the copyright therein, belong exclusively to Toronto and TDHC and upon completion or other termination of this Agreement a copy of each shall be delivered to the [Commissioner of Works and Emergency Services] and TDHC.

- (e) All proprietary rights in, connected with or arising out of, the ideas, concepts, know-how, or techniques relating to computer data or programming developed during the course of this Agreement and related to the Services by the consultant, and paid for via the fees for the services as contemplated by the Agreement including its employees, agents and subcontractors, or by the Consultant and employees of Toronto and TDHC jointly shall be the exclusive property of Toronto and TDHC, and shall be treated as trade secrets to which Toronto and TDHC alone are entitled, with the concomitant duty of confidentiality and non-disclosure.
- (f) The consultant shall have no right to, and shall not disclose or use any material or other matter which is the property of Toronto and TDHC, or in which Toronto and TDHC has proprietary rights, pursuant to this Agreement including subsections (a), (c) and (d) of this section and acknowledges that such materials or other matter and the information contained therein are the property of Toronto and TDHC having been secretly developed for their sole use. Any documents, data or other information obtained from Toronto or prepared by the Consultant shall be disclosed only to those of the Consultant's employees, agents or subconsultants who have a "need to know" for purposes of assisting the Consultant in the performance of the services. The Consultant shall refrain from disclosing or in any way making known such documents, data or information to other parties or to the public without the Commissioner's and TDHC prior written consent, unless required to do so by law.

Enwave refers to clause 4(g) of the same agreement in support of its position that it had a reasonably held expectation of confidentiality. That provision reads:

Any reports or other documentation delivered to Toronto by the Consultant or TDHC shall become the property of Toronto and may be subject to disclosure under the terms of the Municipal Freedom of Information and Protection of Privacy Act (the "Act"). Although Toronto can in no way be responsible for the interpretation of any of the provisions of the Act, if TDHC believes that any part of the reports or other documentation delivered to Toronto reveals any trade secret, intellectual property right, or any scientific, Technical, Commercial, financial or other similar information belonging to TDHC and TDHC wishes Toronto to attempt to preserve the confidentiality of the trade secret, intellectual property right or information, the trade secret, intellectual property right or information must be clearly and specifically designated as confidential. Toronto shall provide notice to TDHC that a request for disclosure has been made and shall give TDHC the opportunity to prevent disclosure in accordance with the terms of the "Act". In the event that TDHC prevents disclosure, TDHC will be required to indemnify and save harmless Toronto from and against all losses,

liability, costs, charges, claims, damages, expenses or liens that may arise as a consequence of TDHC exercising their right to prevent disclosure.

In its representations addressing its position that information was supplied “in confidence” (addressed in more detail below), Enwave refers to a confidentiality clause it says is contained in all the agreements with its consultants. Enwave also submits that in order to minimize the risk of disclosure of any details about the DLWC project, the involvement in the planning and development was strictly limited to a small team of employees. Furthermore, it says that persons working on the project are advised that they must maintain the confidentiality of the project details.

Enwave further submits that the release of the initial TDHC proposal, and the records comparing it to another competitive proposal, would disclose financial and technical information as well as trade secrets. This, Enwave submits, includes project feasibility and a “blueprint” for the TDHC proposal. Enwave submits that by extension this would provide a “blueprint” for the entire DLWC project itself. Enwave submits that this represents its expensive “learning curve.”

Enwave also relies on Orders P-974 and P-1347 in support of its position that certain records contain “scientific” and “technical information.” It also argues that Order P-41 stands for the proposition that a research study investigating the economic feasibility of developing a particular commercial operation is “commercial information.”

#### *The Representations of the Third Parties*

The existence of a confidentiality clause in their contracts with Enwave was confirmed by two of the third parties who provided representations. One of the third parties who objected to disclosure submitted that:

Our contract [with Enwave] had a very restrictive confidentiality clause that was mutually binding and survives the completion of the contract. This project involved work with a high degree of risk and therefore the contract and relationships between the parties was different than most contracts. All parties shared information relating to costs, productions, methods, labour relations, design and other proprietary information that would not normally be revealed.

Another objecting third party submitted that when it provides engineering and design calculations and drawings to a client, the client does not own the drawings or engineering process. It further submitted that it explicitly specifies to its clients that proprietary information techniques, methodologies and drawings that may be provided are to be held in strict confidence.

Although one of the third parties did not object to the disclosure of their information, they adopted the position of Enwave, stating:

From [this affected party's] perspective we do not require protection of trade secrets nor suffer any potential loss from disclosure, however we did use information provided by Enwave that we are aware that they consider to be proprietary and confidential. Accordingly we support Enwave's position, and by association, that of the City of Toronto, to protect any records they deem necessary to protect.

The other main shareholder in Enwave (also a third party who filed representations) asserts that its two page agreement with the City regarding the DLWC project (a record at issue in the appeal) contains commercial and financial information. It submits that the terms of its shareholding agreement with the City demonstrate that the information in the record was supplied in confidence.

The two remaining third parties that filed representations took a different position. One of them had no objection to any of its information being made public. The other only objected to the release of any of its unit price information.

#### *Representations of the Appellant*

In addition to his other arguments set out in more detail below, the appellant submits that by not clearly itemizing those records that it alleges contains "proprietary information of Enwave", the City has failed to establish the application of section 10(1). The appellant also submits that Enwave has taken no position over some of the documents that the City alleges are subject to the section 10(1) exemption. This, the appellant says, should mean these records ought to be disclosed by default. Finally, the appellant submits that since only Enwave was contacted in connection to the request, records that relate to other entities should also be disclosed by default.

#### *Analysis and Findings*

At the request stage of the appeal, the City did not canvass other entities, such as contractors or suppliers, about their position regarding disclosure, as is mandated by section 21(1) of the *Act*. Section 10(1) is a mandatory exemption. The City's failure to notify third parties that may be affected by disclosure does not result in disclosure by default. In the course of adjudicating this appeal I asked for representations from 32 third parties and received submissions from six of them.

#### *Records that Relate to the DLWC Project but do not Contain Section 10(1) Information*

Having reviewed the records at issue, I find that, some of them, while related to the project, do not contain information that is sufficiently related to "the buying, selling or exchange of merchandise or services" or "relating to money and its use or distribution" to qualify as "financial" or "commercial" information for the purposes of section 10(1), nor contain information that would otherwise fall within another aspect of the section 10(1) definition. Examples of this type of record include some of handwritten notes, emails, meeting agenda or

internal communications, templates or standard reference lists that the City identified as responsive to the request, which lack any detail or reveal only matters of a purely administrative nature. This information is not exempt under section 10(1)(a) or (c). I will address the issue of whether disclosure of this type of information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

*Records Containing Information that Qualifies as a Trade Secret*

I do find, however, that some of the records at issue contain detailed and consolidated information representing an acquired body of knowledge, experience and skill relating to the development of certain novel techniques, methods and processes unique to the construction of parts of the DLWC project, which is part of the project “learning curve.” In this sense the information qualifies as a “trade secret.”

In Order P-561 former Assistant Commissioner Glasberg discussed the meaning of “trade secret” in relation to the construction of the Rogers Centre (formerly SkyDome). Enwave relies on the conclusion of the former Assistant Commissioner in support of its argument that information in the records is part of Enwave’s valuable “learning curve” and should not be disclosed. After reproducing the definition of “trade secret” described above, the former Assistant Commissioner wrote:

The records which fall into Groups 1, 5 and 6 contain the results of quality control testing undertaken on the components of the roof structure. In some cases, drawings and sketches also accompany these reports which describe certain repair work carried out once the testing had been completed. Collectively, these records also document a number of unique construction processes and techniques which were developed during the course of the project. The Group 7 records relate to the development of a testing process for the roof seals. This testing protocol was devised specifically for this construction project. Finally, the Group 4B records consist of inspection reports undertaken at the construction site at an early stage in the project which document the completion of certain elements of this structure.

In my view, the disclosure of the information contained in the five record groupings would reveal a series of novel construction and testing techniques developed during the construction of the SkyDome structure.

A number of court decisions have held that, where Party X has used his or her skill and knowledge base to produce a result which another party could only obtain independently through the investment of comparable time and effort, the courts will protect the proprietary interests of Party X in the information relating to the development of the product. That result will be achieved through the application of principles of fairness to prevent other parties from making use of the information to the detriment of Party X. (See in this regard *Lac Minerals v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.);

*Pharand Ski Corp. v. The Queen in right of Alberta* (1991), 80 Alta. R.L. (2d) 216 (Q.B.).

I have carefully reviewed the information contained in Groups 1, 4B, 5, 6 and 7. I find that this information represents an acquired body of knowledge, experience and skill relating to the development of certain techniques, methods and processes unique to the construction of the SkyDome structure. I further find that this knowledge base, which may be described as a learning curve, confers proprietary rights on its owners.

It will now be necessary for me to determine whether this learning curve constitutes a trade secret according to the definition which appears on page 5 of this order. In my view, this learning curve embodies elements of a method, compilation or process which are contained in a device, product or mechanism. On this basis, I find that the first aspect of the definition of a trade secret has been met. I further conclude that the information which collectively makes up this learning curve may be used in the architectural, engineering or construction trades and is not generally known in these trades. On this basis, the next two components of the test have been established.

For information to be categorized as a trade secret, it must also have economic value from not being generally known. In my view, the information contained in the five record groupings would, if disclosed, provide competitors with a knowledge base which the builders of SkyDome took many years to develop. I further conclude that this information could be used by such competitors to the detriment of the original construction group. For this reason, I find that the information contained in the five record groupings has economic value from not being generally known.

Finally, in order to qualify as a trade secret, the information in question must be subject to efforts which are reasonable in the circumstances to maintain its secrecy. This is the fifth and last component of the definition. Based on my review of the records, it appears that the relevant reports were circulated amongst a construction management group which consisted of the architects, the engineers, the general contractor, the sub-contractors, the fabricators and the quality control inspectors. I would also point out that only one report, which is a Group 6 record, contains an express provision which states that the terms of the document are to be kept confidential.

The courts have held that, in the absence of express provisions relating to confidentiality, an implicit expectation of confidentiality may nonetheless be implied from the relationship between the parties. In addition, the law may impose a duty of confidence based on the reasonable expectations of the parties in a particular business relationship. In this respect, the Supreme Court of Canada

decision of *Lac Minerals v. International Corona Resources Ltd.*, to which I have referred earlier, has approved the principle enunciated in the case of *Coco v. A.N. Clark (Engineers) Ltd.*, [1969], R.P.C. 41 that an obligation of confidence will be placed on the recipient of information:

... where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other.

As indicated previously, the information at issue was circulated to a number of members of the construction group. The question is whether this distribution of the reports suggests that the efforts taken to maintain the secrecy of the proprietary information were sufficient. In order to address this issue, it is important to recognize that the construction of a structure as complex as SkyDome requires the interplay of many construction professions and trades. In this respect, it is unrealistic to assume that a single firm, which has acquired or otherwise developed specific proprietary information, could complete a major construction project without sharing this information with other participants.

In my view, the fact that information of this nature comes into the possession of a number of firms involved in a construction project does not affect its confidential character, provided that the information was (1) imparted to the other participants in confidence and (2) has not become the subject of general knowledge in the trade. In addition, in the circumstances of this case, and based on an analogy to patent law, I find that the proprietary information in question can be owned jointly by a number of parties.

In addressing the subject of confidentiality, the appellant points out that, pursuant to an arrangement with the previous head of SkyDome, she met with the President of one of the companies involved in this appeal to discuss the results of tests undertaken on the roof structure. The appellant indicates that she filed her current access request shortly after this meeting took place. In my view, the fact that such a meeting took place does not, in and of itself, demonstrate that the parties have waived any inherent confidentiality rights which they retain in the records.

In their representations, a number of the affected persons have maintained that, in the construction trade, information such as that contained in the records is inherently confidential. One party states, in this respect, that:

The information supplied was implicitly in confidence. It is implicit in the construction of a major evolutionary construction project that construction aspects including inspection and testing

[of the] parts of the roof would be held in confidence by all relevant parties involved.

SkyDome, for its part, states that all of the records "... were supplied to the institution in the utmost confidence and were never intended to be made public".

Based on the evidence before me, I am satisfied that both SkyDome and the affected persons took efforts which were reasonable in the circumstances to maintain the secrecy of the information contained in Records 1, 4B, 5, 6 and 7.

On this basis, I find that each element of the five part test to define a trade secret has been made out and, therefore, that the first element of the section 17(1) [the provincial equivalent of section 10(1)] test has been established.

In considering the arguments of the City, Enwave and the affected parties regarding the nature of the information in the records and the novelty of the DLWC project, I have kept in mind that while utilizing the local water infrastructure is novel, the concept of using a body of water as a heat sink is not unique. For example, in the year 2000 Cornell University in Ithaca, New York, began operating its Lake Source Cooling System. The Cornell project uses Cayuga Lake as a heat sink to operate the central chilled water system for its campus and to provide cooling to the Ithaca school district.

Furthermore, in Order P-561 Assistant Commissioner Glasberg did not rule that all of the records relating to the construction of the entire SkyDome project were part of the learning curve. Rather, he determined that some components of the project fell into that category. In my view, the general concept of the DLWC project, without further detail, would not qualify as a trade secret. Where, however, a record consolidates discrete types of detailed information into a template for the project, and otherwise satisfies the requirements of a trade secret as set out in Order PO-2010, I accept that the information in those records could fall into the "learning curve" category of a trade secret. While at first glance some records would appear to meet the test, this is not always the case.

For example, at paragraph 64 of the initial affidavit that Enwave filed, the affiant explains the difference between the Phase 1 Engineering Background Report dated May 1998 and the Phase 11 Report prepared in 2000, as follows:

The Phase I Report was prepared as a companion to the report of the Environmental Assessment of the [DLWC project]. It contains conceptual information about integrating City water infrastructure into the DLWC [project], and had to be prepared in order to meet the requirements of the *Environmental Assessment Act*, R.S.O. 1990, c. E.18. The more detailed Phase II Report, kept separate from the Phase I Report, was only prepared and completed once the Environmental Assessment was approved so that all information contained in the Phase II Report would always remain confidential between the parties.

In a supplementary affidavit the affiant confirms that the Phase 1 Engineering Background Report dated May 1998 was made publicly available.

Therefore, while the Phase I Engineering Background Report contains a great deal of technical and design information, the affiant acknowledges that it was prepared in order to meet the requirements of the *Environmental Assessment Act* and made publicly available. In this way, the Report and the contents did not maintain the level of confidentiality required to meet the standard of a Trade Secret. Nor, for that matter, could it be argued that disclosure of all or part the Phase 1 Report would cause any of the section 10 or 11 harms alleged. The DLWC Preliminary Draft Report dated July 24, 1997 is, in essence, an earlier version of the Phase I Engineering Background Report. Its contents were essentially revealed when the Phase I Engineering Background Report was made publicly available. I therefore make the same finding with respect to the DLWC Preliminary Draft Report dated July 24, 1997.

I do find, however, that other records do meet the threshold of being a Trade Secret. In this category, therefore, I include the following records:

- TDHC Chill Plant Control Sequence dated October 18, 1995
- A third party Geophysical Investigation Draft Report dated December 1998
- Toronto Memorandum dated May 21, 1999
- A third party Temperature Report dated February 23, 2000
- Draft Pre-Engineering Report (unannotated and annotated versions) dated August 2000 Volume 1 (and sections contributed to it),
- Draft Pre-Engineering Report (annotated) dated September 2000 Volume 1 (and sections contributed to it)
- DLWC Pre-Engineering Report Option 3 Modifications (unannotated and annotated versions) dated September 29, 2000
- Third party Raw Water Pump Station Modifications, including drawings
- Third party Draft Surge Analysis Reports
- Certain records pertaining to intake options
- Third party report on gasketing dated February 16, 2001

I make the same finding about a number of Critical Path Analyses that contain sufficient detail and consolidated information to qualify as part of the “learning curve”, certain documentation relating to the assessment and review of construction proposals and suggested methods, some project meeting notes, emails and some records relating to the above-noted items.

Finally, in my view, the balance of the records contain information that qualifies as scientific, technical, commercial or financial under section 10(1) of the *Act*.

## **Part 2: supplied in confidence**

In order to satisfy part 2 of the section 10(1) test, the City and/or Enwave and/or an affected party must establish that the information was “supplied” to the City “in confidence”, either implicitly or explicitly.

### ***Supplied***

The requirement that information be supplied to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706]. Information may qualify as “supplied” if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be “supplied” [Orders MO-1706, PO-2371 and PO-2384].

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)* [2005] O.J. No. 2851 (Reasons on costs at [2005] O.J. No. 4153) (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not “supplied” would not apply, which may be described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where “disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution.” The “immutability” exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

### ***City Reports or Analyses that Predate the DLWC Concept***

Some records described in the City’s index are in the nature of reports or analyses conducted by the City itself. Hence, it could not be said that this information was supplied by Enwave, or any of the contractors hired by Enwave and/or the City in creating the DLWC project. I conclude that this type of record does not meet the “supplied” component of the part 2 test.

*The Three-Way Agreement dated December 7, 1998 between the City, TDHC and the Main Consultant*

In my opinion, the information in the unsigned versions and/or drafts of the three-way agreement dated December 7, 1998 between the City, TDHC and the main consultant also do not meet the “supplied” threshold. As indicated in a letter dated October 29, 1998, the City prepared a first draft of the three-way agreement. Furthermore, a memorandum from a City solicitor indicates that a subsequent amendment to the three-way agreement was also initiated by the City. The City sent correspondence setting out changes to the drafts. Furthermore, in my view, information in these records simply represent agreed upon essential terms of the agreement, which I consider to be the product of a negotiation process. Therefore, in my view, the information in these records does not meet the definition of “supplied” for the purposes of this part of the part 2 test. I am therefore not satisfied that the information in these records was supplied by a third party, as required by section 10(1). I deal with whether disclosing the information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

*Two Page Agreement between the City and Enwave’s Other Shareholder*

As discussed above, the other shareholder of Enwave objected to the disclosure of an agreement it made with the City. While the representations filed by Enwave’s other shareholder discusses the issue of confidentiality in great detail, the “supplied” aspect of the test is not addressed. In my view, the information in the two page agreement simply represents agreed upon essential terms, which I consider to be the product of a negotiation process. Therefore, in my view, the information in the two page agreement does not meet the definition of “supplied” for the purposes of this part of the part 2 test. I will deal with whether disclosing the information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

*The January 2002 Energy Transfer Agreement*

One of the main records at issue in this appeal is the January 2002 Energy Transfer Agreement (ETA) entered into between the City and Enwave. The City’s index lists many drafts of this agreement that were reworked in various exchanges. This suggests that the drafts represent many stages of the “give” and “take” of the negotiation process between the City and Enwave. The drafts also contain a number of clauses which could be viewed as “standard” or boilerplate clauses. In addition, I have not been provided with sufficient evidence to make a determination as to the original source of any specific contract term that appears in the various drafts to support a finding that any of this information was “supplied” to the City. Furthermore, a summary of the substance of many of the terms of the ETA appear to be found in Clause No. 10 of Report No. 12 of the Environment and Public Space Committee adopted at a City meeting held on September 24 and 25, 1997. Therefore, in my opinion, except perhaps for the length of the intake pipe which enters Lake Ontario (which was subsequently disclosed in the course of the revision to the Class B Environmental Assessment – and in accordance with the second part of this test was therefore not supplied in confidence) and the site plan that was attached as a schedule to the agreement (dealt with in the section 11(c) and (d) discussion below), the ETA contains

information that simply represents agreed upon essential terms of the agreement, which I consider to be the product of a negotiation process. Therefore, in my view, the information in the ETA (other than the site plan which I deal with below) does not meet the definition of “supplied” for the purposes of this part of the part 2 test. I will also deal with whether disclosing the information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

*Agreement with Named Contractor dated May 1, 2002.*

I have not been provided with evidence that any of the terms of the agreement with a named contractor dated May 1, 2002, was supplied by any entity other than the City. Furthermore, in my view, the information in this agreement represents agreed upon essential terms of the agreement, which I consider to be the product of a negotiation process. As a result, I do not find that the information in this agreement was “supplied” within the meaning of section 10(1) of the *Act*. I will also deal with whether disclosing the information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

*Records related to the Agreements Discussed Above*

My findings above also apply to the various records related to the agreements, including correspondence, memoranda and emails. I deal with whether disclosing this information could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

***In Confidence***

In order to satisfy the “in confidence” component of part 2, 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 [Order PO-2043].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:

- communicated to the City 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 party prior to being communicated to the City;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure [PO-2043].

In Order P-561 former Assistant Commissioner Irwin Glasberg explained how an implicit expectation of confidentiality can arise. As reproduced above, he wrote:

The courts have held that, in the absence of express provisions relating to confidentiality, an implicit expectation of confidentiality may nonetheless be implied from the relationship between the parties. In addition, the law may impose a duty of confidence based on the reasonable expectations of the parties in a particular business relationship. In this respect, the Supreme Court of Canada decision of *Lac Minerals v. International Corona Resources Ltd.*, to which I have referred earlier, has approved the principle enunciated in the case of *Coco v. A.N. Clark (Engineers) Ltd.*, [1969], R.P.C. 41 that an obligation of confidence will be placed on the recipient of information:

... where information of commercial or industrial value is given on a business-like basis and with some avowed common object in mind, such as a joint venture or the manufacture of articles by one party for the other.

#### *Representations of the City and Enwave*

Enwave refers to the above-noted clauses of the three-way agreement dated December 7, 1998 between the City, TDHC and the main consultant in support of its position that there was an expectation of confidentiality. In their representations, the City and Enwave also point out that section 7.23 of the ETA provides that, subject to the *Act*:

...the parties agree, unless otherwise required by law, to keep the terms and conditions of this Agreement, all related agreements and the scope and contents of the [pre-engineering] Report (including all engineering and financial data contained therein) (collectively, the “Confidential Information”), confidential and will not disclose any such Confidential Information to any person other than the parties’ investors, lenders, partners and professional advisors; provided, however, they may disclose the terms and conditions of this Agreement to such persons only to the extent necessary in connection with this Agreement and the matters contemplated hereby or where such disclosure is necessary in order to obtain the agreement of those persons who are required to execute this documents necessary to consummate the transactions contemplated hereby. Except as may be otherwise required by law, prior to disclosing any Confidential Information in accordance with this section, the disclosing party must first obtain from the permitted recipient an undertaking in writing, for the benefit of the parties hereto, providing that the permitted recipient agrees to maintain the confidentiality of such Confidential Information.

The City submits that this confidentiality provision extended to all of the information that Enwave or its various consultants provided. The City further submits that only its staff requiring

knowledge of this information have access to it. The City also states that since another project was then being contemplated, the information contained in the records will continue to be treated in full confidence. The City asserts that confidentiality was never waived. The City also states that the proposals that were supplied by entities other than Enwave regarding earlier versions of the DLWC project have also always been treated in confidence.

Enwave submits that, because of the unique nature of the DLWC project and the financial investment it has made, it has consistently taken steps to implicitly and explicitly ensure the confidentiality of its research, development, costing and design data.

In support of its claim that the information in the records was explicitly to be held in confidence, Enwave refers to a confidentiality clause it says is contained in all the agreements with its consultants. This was confirmed in the representations filed by two of the third parties. Enwave also submits that in order to minimize the risk of disclosure of any details about the DLWC project, the involvement in the planning and development was strictly limited to a small team of employees. Furthermore, it says that persons working on the project are advised that they must maintain the confidentiality of the project details.

Relying on the reasoning in Order P-561, Enwave submits that there was also an implicit understanding that certain information relating to the DLWC project was confidential. Enwave submits that this flows out of the nature of the particular record or the expectation of confidentiality that arises from the business relationship between TDHC/Enwave and the City, or both.

#### *Representations of the Appellant*

The appellant takes issue with the assertion that any of the information in any of the records was supplied in confidence either explicitly or implicitly.

With respect to the information in earlier DLWC proposals provided by entities other than Enwave, the appellant submits that there is no evidence that the City received any of this information "in confidence".

The appellant submits generally that inadequate steps were taken to maintain the confidentiality of any of the information at issue and that there is enough information about the DLWC project in the public domain to enable a sophisticated competitor to design a competing system. In support of this last submission the appellant refers to an article in the Canadian Consulting Engineering Magazine dated December 2001, press reports from 1998, and excerpts from Enwave's website, all of which the appellant included with his representations.

#### *Reply Representations of Enwave*

To counter the appellant's last submission, Enwave asserts in reply that only general descriptions of the DLWC project concept have been publicly disseminated.

Enwave refers to a quote from Robert Dean's book, *The Law of Trade Secrets* (Toronto: Carswell Company Ltd., 1998) at page 114, to support its position that the release of some design elements does not result in a waiver of confidentiality. He wrote:

Where only the features of a device or plan are published (or available to the public) rather than the whole plan of the completed device which would allow immediate replication, that information would not be in the public domain.

### ***Analysis and Findings***

In making my determinations on the issue of whether information was supplied with an explicit or implicit expectation of confidentiality, I have carefully considered the appellant's submission that other key information about the methodology and the design and construction of the DLWC project are in the public domain. I do not agree with this submission. Based on my review of the records and the other evidence before me, including the materials he provided, the information that is in the public domain regarding the project is not nearly as specific or detailed as that which I have found or determine below, to be part of the project "learning curve".

I have noted above the express statements of confidentiality that are contained in some of the agreements at issue. In addition to the boilerplate confidentiality notices that often appear on facsimile cover pages or contained under an email signature line, some records contain what I view to be explicit indications of confidentiality. For example:

- In the proposal of the main consultant dated February 1998, there is a notation that it considers the information in the proposal to be confidential and does not consent to the release of the information, except to persons within the City's employ.
- Notations of confidentiality appear in a letter from TDHC to its solicitors dated February 17, 1999 and on a document entitled "City Water Pumps Estimated Energy Cost" attached to the letter. A copy of the letter and attachment appears to have been provided to the City.
- A notation of confidentiality also appears in a letter from TDHC to the City dated February 19, 1999 with the "City Water Pumps Estimated Energy Cost" and a portion of the June 1998 pre-design report attached and also marked as confidential.
- On internal City draft memoranda dated September 20, 1999 and November 16, 1999 there is an indication that the fee and supporting calculations in the record is to remain confidential.
- Finally, a letter from the City to Enwave dated October 22, 2001, is also marked confidential.

I accept that the information in these records was supplied with an explicit expectation of confidence, and that the expectation was reasonable, in the circumstances. Furthermore, I find that communications and exchanges leading up to the proposal from the main consultant dated February 1998, or relating to it that contains confidential information originating with the main consultant, or would reveal the substance of that information, would be covered by that expectation of confidentiality.

In my view, however, the failure to make any notation on other records in accordance with clause 4(g) of the three-way agreement dated December 7, 1998, demonstrates the absence of explicit steps to treat the information in those records consistently in a manner that indicates a concern for its protection from disclosure, prior to being communicated to the City. Therefore, while I accept that the wording of the express indication in clause 4(g) of the three-way agreement could apply prospectively, there is nothing in it to suggest that prior information is covered. Therefore, except for the type of information relating to the “learning curve”, which can be subject to an implicit expectation of confidence due to its nature, or other information that I find to have been otherwise supplied with an implicit expectation of confidentiality, I do not accept that this type of provision has a broad retroactive effect, as suggested by the City.

I will now discuss the information that I do not find to have been supplied with an explicit or implicit expectation of confidentiality.

#### *Records Containing Information Downloaded from Websites*

The City’s index of records has also identified information that was downloaded from publicly available websites. I am not satisfied that these records would qualify for exemption under sections 10(1)(a) and (c), because they do not meet the confidentiality requirement in these exemptions. I will consider whether disclosing this could reasonably be expected to cause the harms contemplated by sections 11(c) and/or (d), below.

#### *Early Unsuccessful DLWC Proposals*

Enwave asserted that the earlier unsuccessful DLWC proposals were submitted in confidence. Yet, in a letter from one of the earlier proponents dated March 27, 1988 (Box 3, file 1 page 31) there is a statement that the proponent “had some concerns with respect to confidentiality since the proposals were available to the public and we were questioned by the City’s consultants about the novel concept at a public meeting.” Furthermore, there is no indication on the copy of the proposal that it was provided in confidence. Based on the stated expectation of the proponent, I would not have expected there to be one.

Similarly, the second earlier proposal also has no notation of confidence nor is there any evidence that it was supplied with any expectation of confidence. I note that this proposal is discussed in various promotional type materials prepared in support of the proposal. These records were also withheld.

In my view, these early unsuccessful DLWC proposals, along with the other information that is found in the City's files relating to the proposals, were not submitted with an implicit or explicit expectation of confidentiality.

*Documentation set out in the Terms of Reference for the DLWC Pre-Design Study*

In the terms of reference for the pre-design study are listed a variety of reports, studies and documentation that a proponent is to review before submitting its proposal. In my view there can be no valid claim of confidentiality over these materials as they were made widely available.

*Records Containing General Contract Specifications*

Also at issue were a number of records that contained some general contract specifications which, in my view, are more in the nature of general contract requirements than actual contractual terms. An example of this type of record is a document entitled "section 01010 General". I am not satisfied that this type of record was provided explicitly or implicitly in confidence to the City.

*Product Brochures and Product Specifications*

The City's index of records contains product brochures and specifications. Some of these take the form of website extracts. In Order MO-1559 former Assistant Commissioner Mitchinson accepted that it would be "illogical to conclude that [publicly available] product details, which form the basis of differentiating among competing similar products, would be treated confidentially by either manufacturers or suppliers." Therefore, unless the information in the brochure is part of the project learning curve, no expectation of confidentiality applied to them, or if it did, it was lost when the record became public.

*Proposals Received after the Formation of the Main DLWC Consulting Agreement*

Two proposals at issue dated July 25 and 26, 2002 were submitted under the City's request for proposal number 9117-02-7278. That request for proposal provides that all correspondence, documentation and information provided to staff of the City in connection with the request for proposal is subject to the *Act*, and that a proponent should identify any information it wishes to be kept confidential. The request for proposal also provides that any information in the proposal material which is not specifically identified as confidential will be treated as public information. Neither of the two proposals have any such notation. I conclude, therefore, that they were not submitted with any explicit or implicit expectation that the information in them would be held in confidence.

Yet another proposal at issue appears to have been received in March 2002. I presume that this other proposal was submitted under the same type of terms as were found in request for proposal number 9117-02-7278. Again there is no notation of confidentiality on this proposal. I conclude,

therefore, that it was not submitted with any expectation that the information in it would be held in confidence.

*Invoices and Progress Payment Certificates with Supporting Documentation*

In Order PO-1705, former Assistant Commissioner Mitchinson was not persuaded, in the absence of evidence to the contrary, that there is any inherent expectation of confidentiality in the submission of invoices by various suppliers to government institutions for the payment of goods and services. At issue in this appeal are invoices and supporting documents for the payment of goods and services relating to the various stages of the DLWC project. In my opinion, insufficient evidence has been tendered to establish that these invoices and supporting documents for the payment of goods and services relating to the various stages of the DLWC project, including those invoices and supporting documents attached to various progress payment certificates, were provided with an explicit or implicit expectation of confidence.

*Environmental Assessments, Certificates of Approval and Related Records*

Records created in the context of an environmental regulatory scheme, like those that regulated the construction of the DLWC project, have been found to be subjected to a “diminished expectation of confidentiality” [Orders MO-2004 and PO-2558]. The appellant seeks disclosure of copies of the 1998 Schedule B Class Environmental Assessment and the 2000 Revised Schedule B Class Environmental Assessment conducted as a result of an alteration to the project, some in draft form. This information was, for the most part, released to the public or discussed in a public forum in the course of the environmental assessments. Emails and documentation that were exchanged between the City, Enwave and others that are found in the records mirror the materials that were provided to the public or were exchanged without any expectation of confidentiality, linked as they were to the public consultation process. In my view, none of the information in these materials were supplied “in confidence” within the meaning of that part of the section 10(1) test.

Also at issue are portions of an Environmental Assessment pertaining to the main Treatment Plant’s new outfall. Again, this information would have been released to the public or discussed in a public forum in the course of an environmental assessment. In my view, none of these materials have the quality of confidence to satisfy that part of the section 10(1) test.

As well, there are copies of Certificates of Approval issued by the Ministry of the Environment which are available to the public on payment of a fee. In my view, the information contained in this type of record was not supplied to the City with a reasonably-held expectation of confidentiality as contemplated by the second part of the section 10(1) test.

*Records Relating to Communications with Members of the Public or Special Interest Groups*

In my view, the letters exchanged with members of the public or special interest groups in the context of the public consultations regarding the project are also not subject to any implicit or

explicit expectation of confidentiality. The very step of going to the public contradicts any sense that confidentiality was to be maintained. In my view, none of the documents that fall under this category should be withheld.

*Source Materials Listed in the 1998 Environmental Assessment, Cornell University Report and Lakebed Mapping Papers*

As in many engineering reports, source materials are listed as references in the first volume of the 1998 Schedule B Class Environmental Assessment. One of these is a paper by F.M Boyce and others which was prepared for Environment Canada and is dated February 1981. I have not been provided with sufficient evidence to establish how this material can be viewed as confidential, especially since it is cited in the main report. As a result, I am not satisfied that it was provided explicitly or implicitly in confidence. I make the same finding with respect to a Report prepared for Cornell University, which while not cited in the Environmental Assessment Report, could not be viewed as having been provided either implicitly or explicitly in confidence. The same can be said of two papers relating to lakebed mapping, one dated 1971 and the other 1993, each of which appear to be available from public sources.

*Records Relating to the Challenge to the First DLWC Environmental Assessment*

One of the unsuccessful proponents for the construction of the DLWC initiated a challenge to the first environmental assessment. The City sought to withhold correspondence relating to the matter that it exchanged with the unsuccessful proponent. In my view, there could be no suggestion that the records that document this challenge were submitted with any expectation of confidence. Therefore, any correspondence relating to the matter that was exchanged with the unsuccessful proponent would not qualify under this part of the section 10(1) test.

*Records Pertaining to Emissions Trading*

The City has also claimed that information in records that pertain to emissions trading qualifies for exemption under section 10 of the *Act*. This includes a paper prepared for the City in 1998, minutes of a meeting, an email and notes. The City claimed that sections 10 and 11 applied to the paper and the notes and that section 11 applied to the rest. However, I find that City employees created the notes at issue and there is no indication that the information in the notes, the paper, the meeting minutes or the email was provided implicitly or explicitly in confidence by some outside source.

*Information about the DLWC Project found in City Reports or City Council Proceedings*

Some of the records at issue consist of all or parts of reports to City Council or one of its committees, along with reports and clauses adopted by, or submitted to City Council, City Council agendas or drafts of these records. Many of the terms of the agreements that were withheld and the general elements of the methodology and the design and construction of the DLWC project itself are found in the various reports provided to public work committees and/or

are found in City Council proceedings that are accessible or available to the public. In my view, there can also be no valid claim of confidentiality over this information. As Council agendas, reports to City Council or committees and reports and clauses adopted by, or submitted to City Council as well as Council proceedings (unless in camera) are dealt with in a public forum, I am not satisfied that the information contained in those records was submitted explicitly or implicitly in confidence. I draw the same conclusion with respect to any drafts of these records.

*Maps or Diagrams that are, or were, Otherwise Publicly Available*

Another category of records are maps or diagrams that are, or were, otherwise publicly available. An example of this is a map of Lake Erie publicly available to mariners. In my view, there can also be no valid claim of confidentiality over this information.

*Records Relating to Signage at the John Street Pumping Station*

The City has also claimed that section 10(1) applies to exempt information relating to proposed signage at the John Street Pumping Station. In my view, none of this information can reasonably be said to be subject to an expectation of confidentiality.

In my analysis above, I determined that some information did not qualify as being supplied in confidence under section 10(1) of the *Act*. Whether the release of that information could reasonably be expected to cause the harms alleged under sections 11(c) and or (d) is addressed below.

I will now address whether releasing the information that I have found to be supplied in confidence could reasonably be expected to cause the harms alleged under section 10(1).

**Part 3: Harms**

As the application of sections 10(1)(a) and (c) has been claimed in this appeal, in order to discharge their burden of proof under part 3, the City and/or Enwave or an affected party must demonstrate that disclosure “could reasonably be expected to” lead to one or more of the harms in sections 10(1)(a) or (c). They must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not enough to satisfy this part of the test (*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)).

The failure to provide detailed and convincing evidence of a section 10(1)(a) or (c) harm will not necessarily defeat an exemption claim where this office can infer such harm from other circumstances. Only in exceptional cases, however, would this office make such an inference based on materials other than the records at issue and the evidence provided by a party in discharging its onus (Order PO-2020).

In Order PO-2435, Assistant Commissioner Brian Beamish was dealing with an allegation that harm could reasonably be expected to occur if a bid for services under a request for proposal was revealed. In addressing the allegation he accepted that the disclosure of the information could provide the competitors of the contractors with details of contractors' financial arrangements with the government and might lead to the competitors putting in lower bids in response to future request for proposals. He then wrote:

However, in my view, a distinction can be drawn between revealing a consultant's bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

#### *Representations of the City*

The City and Enwave both requested that certain portions of their representations be kept confidential. Although I considered both the confidential and non-confidential representations when making my determinations, the following contains a summary of the non-confidential portions.

The City states that Enwave is in direct competition with multi-national corporations to provide cooling systems for the City's downtown core. The City submits that disclosure of the information would:

- Allow Enwave's competitors to use the information to target the same customers and potential investors;
- Enable Enwave's competitors to undermine its competitive position by undercutting margins or providing other financial incentives, thereby compromising Enwave's potential to attract investors;
- Lead to a loss of capital investments, sales revenue and Enwave's status as a leader in DLWC;
- Allow Enwave's competitors and other interested parties to duplicate the DLWC system or similar competitive systems at no cost;
- Jeopardize Enwave's ability to negotiate and enter into partnerships to provide DLWC and undermine Enwave's ability to enter into negotiations with prospective consultants to these partnerships.

The City submits that disclosing the information provided by Enwave and its consultants would reasonably result in prejudice to Enwave's financial and commercial interests, or cause Enwave undue financial loss within the meaning of sections 10(1)(a) and (c).

Finally, the City submits that releasing information relating to the earlier DLWC proposals could also potentially harm the competitive and financial interests of those unsuccessful proponents.

*Representations of Enwave*

Enwave submits that disclosing the information relating to the earlier DLWC proposals would allow competitors to design their own competing cooling projects, slow the DLWC project or structure their own future proposals to Enwave's detriment.

Enwave submits that it faces significant competition in the cooling market and at the time of filing its representations there were upcoming deep lake water cooling projects for which Enwave intended to compete. Enwave refers to two types of competition: similar types of deep lake water cooling projects and manufacturers and suppliers of conventional stand alone building chillers (basically large air conditioning units). Enwave submits that since contracts for chillers have a 30 to 40 year lifespan, it is important to establish a DLWC foothold before a potential client contracts for a chiller. Enwave also alleges that the City would be unable to support the development of two deep lake water cooling projects if there is competition from cooling systems based on chillers.

Enwave acknowledges that the City has designated it as the district energy provider in the downtown core, but asserts that this is no guarantee of security. Enwave's position is that policies established by one particular City Council may not be adopted by a subsequent one.

Enwave argues that, given the unique nature of the DLWC project, and the significant time, money, skill and energy expended, it has earned a competitive advantage in deep lake water cooling technology and in the development of run and control sequences in chiller plants. Enwave says that disclosing the information in the records would allow a competitor to "catch up" to Enwave and "piggy-back" on its initiative at no cost.

Enwave further submits that the release of information in the records would also allow a competitor to estimate the entire cost of the DLWC project. This would allow the competitor to set a price point that could undercut any future bid by Enwave for lake water cooling projects. Enwave submits that because a competitor would not have to make the same investment of time and money, any gain would be "undue". In the same way, Enwave submits that disclosure would allow competitors to remedy any flaw that may exist in their own designs for DLWC, at no cost.

In its representations, Enwave specifically identifies an entity it believes would use information in the records to criticize Enwave's existing DLWC project, design their own competing proposal or structure future proposals in other areas that may compete with Enwave.

*Representations of the Third Parties*

One of the third parties that objected to disclosure simply stated that if their information is disclosed it would be prejudicial to their ongoing and future work. No detail of what that work was, or how it would be affected, was provided. Another third party submitted that if their designs were disclosed, used at another location and failed, they would have considerable liability exposure. No specific example of this having ever occurred was provided. The third party that consented to the release of all of its information except for unit pricing, submitted that this was because it wanted to keep that information out of the hands of its competitors.

The other shareholder in Enwave also made submissions on the harm that would occur if its two page agreement with the City was disclosed.

*Representations of the Appellant*

In his representations, the appellant challenges the assertion that Enwave will suffer competitive harm if the information is released. The appellant further submits that there are currently enough details in the public domain to enable a sophisticated competitor to design a competing system.

The appellant says that he is not a direct competitor of Enwave and has no desire to see Enwave's financial information relating to its cost accounting methods, pricing practices, profit and loss data, overhead and operating costs. As discussed above, he had no objection to this information being removed from the scope of this request.

The appellant further submits that, in any event, a competitive system could not be built without the City's permission, since the City controls the water supply. The appellant suggests that the City would presumably refuse to grant permission to any competitor who misuses competitive information.

*Reply Representations of Enwave*

Enwave submits in reply that even with the severances suggested by the appellant, there would be enough information in the records which could "easily" be used by a competitor to infer and deduce costing and other financial information about the DLWC project. As an example, Enwave points to the Phase II Pre-Engineering Report which it says contains extremely detailed technical and scientific information that would provide a competitor with a "blueprint" of the DLWC project.

Enwave also disagrees with the appellant's proposition that a competitor could not undertake a competitive DLWC project because the City controls the water supply. It submits as follows:

- The City does not have any contractual or other obligation that would prohibit the City from accepting proposals from Enwave's competitors on future cooling projects.

- The City is not the only potential customer that Enwave may have in the future. It is quite possible that Enwave may be competing for a share of the cooling market in other jurisdictions and even other countries.
- Enwave's main competition is not from another district energy system but from individual building cooling systems comprised of mechanical chillers. These could be supplied by multinational chiller manufacturers and have an expected life of over 30 years. A price point lower than Enwave's could be offered by these potential suppliers if the records are disclosed.

### *Analysis and Findings*

It must be recognized that the risk of competitive harm lessens with the passage of time and, except as they may be viewed as part of the "learning curve" that may be utilized on other similar projects, plans, drawings and design details are, by their nature, project specific.

As I considered the submissions of the parties on the harms component of the test, I also reflected on the harm to Enwave as a result of the disclosure of a step-by-step methodology when such a methodology was initially set out in the document inviting bids on the pre-design phase of the project. It strikes me that, with the exception of records containing detailed information about the "learning curve" relating to the DLWC project, the methodology of the project and its steps to completion are already in the public domain through the documents inviting bids, various public presentations that were given, the available literature on the topic, the environmental assessment process and reports, public briefings and public council meetings. In my view, whatever "harm" that could occur by releasing many records has already taken place.

I also do not accept that Enwave faces any real competitive threat from another deep lake water project on the scale of the one that is currently in place in the City of Toronto. Enwave has succeeded in its endeavour and proven that the technology works. This involved a great expense on the part of Enwave and the City. As set out above, the affidavit Enwave filed acknowledges that the City could not support the development of district cooling systems for two deep lake water cooling projects in competition with cooling systems based on stand alone chillers. The deponent recognizes the novelty of the project himself. He states that the DLWC project is to his knowledge, at the time, the first and only deep lake water cooling project ever undertaken in Canada. He says that, as of the date of his affidavit:

In fact, there are less than a dozen significant deep lake water cooling projects world wide and Enwave has developed the only one in the world which integrates the operation of local water infrastructure with a district cooling system based on a deep water cooling source.

The key to the DLWC project's affordability and viability was the use and integration of the City's water infrastructure into the project. These resources are engaged in the current project. To develop a competing project, in addition to the cost of constructing an intake source into Lake

Ontario, a competitor would have to duplicate the water infrastructure that is currently being used. This would negate the cost savings of using the City's own infrastructure, which was one of the keys to the viability of the DLWC project. In my view, as a result of the novelty of the project and its use of existing City water infrastructure, I find that Enwave has no real viable competitor that could provide a similar DLWC service in the City.

With respect to competition from chillers, the assertions of harm made by Enwave are, in my view, entirely speculative and not persuasive. As set out in Enwave's representations, the competition from chillers has to do with competing on the basis of energy cost to the final consumer, the end user. In making an informed business decision an end user will compare the cost of cooling a building by the use of deep lake water cooling from Enwave to the cost of using a chiller. The decision will be based on a comparison of the rates or costs for each, one supplied by Enwave, the other by a chiller vendor. There could be no withholding of the rate by Enwave. Enwave would have to supply its rate to enable an end user to compare the options. Furthermore, a chiller manufacturer would be more interested in beating Enwave's cost of energy to the end user, rather than what Enwave has to pay the City under the ETA. I am not satisfied that the City or Enwave have established that the end user's decision would be impacted by the release of any information that is the subject of this appeal.

I do accept, however, that releasing records containing information about the DLWC "learning curve" could reasonably be expected to cause Enwave competitive harm. I have listed those types of records earlier in the decision and will not reproduce them here. I will now address other records that were withheld.

*Initial DLWC Proposal from TDHC*

One of the withheld records is the joint venture proposal from TDHC that the City received in August 1996. In my view, at that time the DLWC project was at an early conceptual stage, and had not reached the level of detail and consolidation that is found in the other records that I have found to contain detailed information about the DLWC project "learning curve". I am not satisfied that any of harms alleged under section 10(1) would occur if it is released.

*Initial Proposal from Main Contractor dated February 1998 and Related Records*

I make the same determination with respect to the initial proposal from the main contractor dated February 1998 and related records. Although I concluded that the Draft Phase 11 Pre-Engineering Reports satisfies the harms test because it is part of the DLWC project "learning curve", I do not view the initial proposal from the main contractor dated February 1998, or related records, in the same way. Although the proposal has some detail, it is at the initial stage and in my view, does not contain detailed information about the DLWC project "learning curve." After removing any personal information from the record, or related records, I am not satisfied that releasing it could reasonably be expected to cause the type of harms alleged under section 10(1).

*Other Proposals that are dated or Contain Little Detail*

There are other similarly dated proposals that were withheld. An example of this type of record is a fee proposal from an unsuccessful proponent for the pre-design work for DLWC dated February 16, 1998. Another is a submission dated August 10, 1999 regarding Zebra Mussel Monitoring Services. Also at issue is an attachment to a proposal from an engineering company dated September 21, 1999. The information in the attachment is promotional and not substantive in nature. In my view, these records are quite dated, contain little detail and/or do not contain information about the DLWC project “learning curve.” I am not satisfied that releasing these records could reasonably be expected to cause the type of harms alleged.

*Records relating to the Review and Assessment of Proposals or Tenders (Scoring)*

Records relating to the review and assessment of the initial DLWC project proposals and certain subsequent construction proposals and/or tenders are also at issue. In my view, disclosing the analysis and scores for deciding the award for the project planning and design could not reasonably be expected to cause the harms alleged. Much time has passed since these proposals were made and the analysis and scoring does not reveal information that is part of the “learning curve”. I draw the same conclusion with respect to the analysis of the tenders for the Geotechnical investigation as set out in a letter from the main consultant dated May 3, 2000.

*Co-operative Arrangements*

A category of records at issue relate to invitations to discuss co-operative arrangements with an unsuccessful proponent and a power utility. Included in this category are records that contain strategies to deal with these overtures. In my view, in light of the time that has passed, and my not being satisfied that the release of the information in these records would impact any possible future negotiations, I am not satisfied that the harms alleged could reasonably be expected to occur if they are released.

*Various Reports (including a 1991 Pre-Design Report for the Island Filtration Plant)*

There are a number of reports that the City sought to withhold. One is a 1991 pre-design report prepared for the Island Filtration Plant Winterization. In my view that report is now dated, and I am not satisfied that any of the harms alleged would occur if it is released.

The City further seeks to withhold a shoreline stability and sedimentation report prepared in 1999 for the Toronto and Region Conservation Authority. The shoreline report relates only peripherally to the DLWC project and contains no design particulars for it. I am not satisfied that any of the harms alleged would occur if it is released.

*Water Quality, Water Temperature and Pump Capacity Measurements and Related Records*

Another category of records at issue contain information relating to the measurement of water temperature and water quality, as well as records relating to these items. The water temperature measurements were, for the most part, taken in or about 1988 to 1999. The water quality tests were done from 1998 to 2000. In my view these simple tests do not reveal part of the project “learning curve”, are particular to the sites or locations that were investigated and are dated. The City also seeks to withhold pump pressure and capacity measurements. In my view while detailed, the information in these records is also not part of the project “learning curve”. I am not satisfied that disclosure of the information in these records could reasonably be expected to cause the type of harms alleged.

*Applications for Funding, Permits and Approvals*

In addition, the City has relied on section 10(1) to withhold information in applications to federal and provincial bodies for approvals or funding, as well as permits and reports from federal, provincial and City bodies for work related to the project. The City also sought to withhold records containing information relating to a requested easement. Some of the withheld approvals date back to 1976. In my opinion, unless it qualifies as part of the project learning curve, releasing the information contained in the applications relating to the permits, easement and approvals or, for that matter, the permits, approvals and reports themselves could not reasonably be expected to result in the harms alleged.

*Proposal and Workplan for Revisions to Class B Environmental Assessment*

Also at issue is a March 15, 2000 proposal and work plan for the revisions to the Class B Environmental Assessment, and related records. The records include costing for the steps proposed. In my view, the discussion of the approaches to be taken with respect to the challenge, along with any revisions to the Class B Environmental Assessment request were project and temporally specific. I am not satisfied that releasing these records could reasonably be expected to cause the type of harms alleged.

*Exchanges between the City and the Main Contractor Regarding Challenge to First Environmental Assessment*

The City also seeks to withhold exchanges amongst the City and its main contractor relating to the challenge to the first Environmental Assessment initiated by one of the unsuccessful proponents. Ultimately the challenge was withdrawn. In my view, these records are quite dated, and I am not satisfied that releasing them could reasonably be expected to cause the type of harms alleged.

In conclusion, with the exception of the information in the records that I have found to be part of “learning curve”, and subject to the City’s severing of any information not sought by the appellant that might remain in a record at issue, I find that the parties have failed to provide

detailed and convincing evidence to establish a reasonable expectation of harm under sections 10(1)(a) and (c) if the records at issue in this appeal are released.

### **PREJUDICE TO THE ECONOMIC INTERESTS OF AN INSTITUTION**

As set out above, the City claimed that the exemptions in sections 11(c) and (d) of the *Act* apply to certain records. Those sections state:

A head may refuse to disclose a record that contains,

- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980, vol. 2* (Toronto: Queen's Printer, 1980) (the Williams Commission Report) provides the following description of the rationale for including a "valuable government information" exemption in the *Act*, which is helpful in considering the application of the exemptions in sections 11(c) and (d) in the context of this appeal:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute. . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions . . . on a charge back basis. . . . In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 11(c) or (d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the City must provide "detailed and convincing" evidence to establish a

“reasonable expectation of harm.” Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

*Representations of the City*

The City submits that the DWLC project competes with other cooling technologies available from major multi-national companies in the downtown core. The City submits that its success depends upon sufficient financing in the form of capital investments and long term cooling agreements signed with a sufficient number of customers. The City submits that as a shareholder in Enwave and a partner in the DWLC project, the current and future customers of Enwave and any potential capital investors attracted by the project, are also the customers and funding sources of the City. In the same way, the City says, anything that negatively influences Enwave’s share price or impacts the project, affects the City.

Similar to its arguments under the section 10(1)(a) and (c) harms portion of its representations, the City submits that:

If the records at issue, which are working files, were to be disclosed, the information they contain could be used by the City's (and Enwave's) competitors in various ways to undermine the City's ability to compete in providing cooling service to existing and new buildings in the downtown core. The City's competitors could, for example, use financial information contained in the records ... to undercut margins, or offer other monetary "incentives" to interested clients or investors. With the activity schedules and implementation plans, the City's competitors could also hit the market place to promote their own cooling systems at strategic times that could harm the City's marketing efforts. Any loss of customers and revenue would be injurious to the City's economic, competitive and financial interests.

Furthermore, the technical and scientific information and other information relating to the City's DWLC delivery system, including information relating to the infrastructure ... could be used directly by current competitors or others to duplicate, develop or design similar systems or to perfect their own systems, again resulting in harms to the City's financial and other interests.

The City further points out that there are other organizations interested in developing DWLC technology. In the confidential portions of its representations that were not shared with the appellant, the City identifies some of these other entities. It then goes on to explain how disclosing records relating to the DWLC project could impact negatively on the City's ability to negotiate future partnership agreements with other parties should other projects of this nature materialize in the future.

The City also expresses its concern that the disclosure of the technical information and maps, charts and drawings relating to the City's filtration plant and pumping infrastructures could endanger their physical security, particularly in light of the events of September 11, 2001. The City submits that if such records were to be disclosed, it would be forced to reevaluate its current security provisions and to take costly steps to ensure the additional and necessary physical protection of its plant and pumping infrastructures. Such steps, it says, would be injurious to the City's financial interests.

*Representations of Enwave*

Enwave's representations essentially mirror those of the City.

In support of the submission that disclosure could reasonably be expected to cause harm to the City's financial interests, Enwave gives the example of an individual or entity receiving the information and publicly disseminating only certain potentially harmful portions but withholding other helpful information, such as the steps Enwave took to alleviate any potential harm. Enwave also submits that any disclosure that would impinge on the security of the water infrastructure must be avoided. Enwave points to section 5.09 of the ETA and its preamble as evidence of the acknowledgment of the importance of the preservation of the safety and security of the City's water supply.

*Representations of the Appellant*

The appellant submits that the City has not provided the required "detailed and convincing" evidence of harm necessary to establish the sections 11(c) and (d) exemption claims.

The appellant also submits that the City is not in the business of providing cooling services and it does not have competitors who could "undercut" the City's profit margins. The appellant submits that the City is a government body, and is accountable to its taxpayers as to the expenditure of public monies. Referencing Order MO-1248 of this office, the appellant submits that decisions regarding the expenditure of public funds should be open to public scrutiny.

*Reply Representations of the City*

In its reply representations, the City disputes the appellant's characterization of its role in providing cooling services:

The City submits that together with its partner Enwave, it is in fact providing a cooling service. The City further submits that the *Act*, in particular section 11, recognizes that public institutions are sometimes involved in conducting business and do compete with other public or private sector entities. Section 11 provides for the discretion of institutions to refuse disclosure of information where it is reasonably expected that such disclosure could prejudice the institution's economic interests or competitive positions. This issue has been addressed in

many IPC orders including P-1190, which has been quoted in the City's original representations.

This project was not one involving the competitive bid process where the City might look to awarding a contract to the proponent offering the most economic price to provide a service. The City has entered into a specific agreement with Enwave to provide deep lake water-cooling to a number of interested and potential clients. The City has an obligation to ensure that the City's and its taxpayers' interests are well served by the terms and conditions of the agreement.

The City acknowledges that the appellant is not interested in developing a competing DLWC proposal, but states that disclosure to a requester under the *Act* constitutes "disclosure to the world".

### ***Analysis and Findings***

As I have found some records to be exempt under section 10(1) it is not necessary for me to consider whether they also qualify for exemption under sections 11(c) and (d). As a result, in this part of my decision, I will only be dealing with the records that I have not previously found to qualify for exemption under section 10(1) of the *Act*.

I will first address Enwave's assertion that harm could reasonably be expected to result from the selective disclosure of information by a recipient. I find this allegation to be highly speculative. This presumes that an individual, or an entity, would be motivated to harm Enwave (and/or the City) and would take the additional step of releasing potentially "harmful information" and withholding "helpful information." This also assumes that Enwave (and/or the City) would not be able to release the "helpful information" to counter such an initiative. I find that this allegation is highly speculative and not persuasive. No factual basis is offered to suggest that it could reasonably be expected to occur.

The City's position on harm to its economic interests if information is disclosed are very closely tied to those regarding sections 10(1)(a) and (c). For essentially the same reasons cited above, with some exceptions, I am not persuaded that there is a reasonable expectation of harm under sections 11(c) and (d) of the *Act*. The exceptions are those records that I have found to be part of the DLWC project "learning curve" or that fall within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information. Examples of the type of record containing this information are diagrams of the City's water infrastructure, and information regarding chemical delivery to treatment plants. I address this in more detail below.

*Records that Relate to the DLWC Project but Lack any Detail or Reveal only Matters of a Purely Administrative Nature*

As discussed above, some of the records the City seeks to withhold include handwritten notes, emails, meeting agenda or internal communications, templates or standard reference lists that the City identified as responsive to the request, which lack any detail or reveal only matters of a purely administrative nature. I find that disclosure of this type of information could not reasonably be expected to cause any of the harms contemplated by sections 11(c) and/or (d) as alleged by the City.

*Brochures and Records Containing Information Downloaded from Websites*

Unless it contains information that qualifies as part of the project “learning curve” (or falls within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information, as discussed in more detail below), I make the same finding with respect to the records that are product brochures or product specifications or contain information downloaded from publicly available websites.

*Reports or Analyses that Predate the DLWC Concept*

At issue are reports or analyses that are dated, and/or do not contain information about the project “learning curve” and/or simply relate to the project in a peripheral way. An example of this is the January 2, 1975 report on the design of the air chamber at the John Street Pumping Station and the 1991 pre-design report prepared for the Island Filtration Plant Winterization. The reports predated the DLWC proposal from Enwave. Subject to the City’s identification and severance of any personal information that may remain in these records, as well as any information that falls within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information, as discussed in more detail below, I am not satisfied that any of the harms alleged could reasonably be expected to occur if these records are disclosed.

*Initial DLWC Proposal from TDHC*

The initial DLWC proposal from TDHC is dated. It does not contain information that amounts to the DLWC project “learning curve”, nor contains the type of information whose disclosure could reasonably be expected to cause any of the harms contemplated by sections 11(c) and/or (d) as alleged by the City.

*The Three-Way Agreement dated December 7, 1998 between the City, TDHC and the Main Consultant*

I make the same finding with respect to the the three-way agreement dated December 7, 1998 between the City, TDHC and the main consultant.

*Other Proposals that are dated or Contain Little Detail*

There are other dated proposals, both successful and unsuccessful, that were withheld.

The DLWC was a major undertaking and the figures quoted at the time must have reflected the scope of the project and the time when the proposals and/or tenders were made or the contracts were drafted and/or entered into. The DLWC project specific contracts, other than the ETA, that are found in the records at issue, have been completed. I am not satisfied that there is sufficient evidence before me to establish that any ongoing negotiations have reached a stage where releasing drafts or copies of these records or other exchanges relating to these records could reasonably be expected to cause the sections 11(c) and/or (d) harms alleged.

*Records Relating to the Review and Assessment of Proposals or Tenders (Scoring)*

In my view, the records relating to the review and assessment of the proposals and tenders at issue and/or their ranking or scoring, are project specific, dated, contain little detail and/or do not contain information about the DLWC project “learning curve”. I am not satisfied that disclosing them would cause the harms alleged.

*Two Page Agreement between the City and Enwave’s Other Shareholder*

In its representations, Enwave’s other shareholder alleges that disclosing the information in the two page agreement would reasonably be expected to give a competitor an unfair insight into Enwave’s business strategy and planned business structure. This would give such a competitor an undue advantage in creating its own business strategy and plans. In my view, for the reasons I set out in the harms portion of the section 10 analysis, allegations of competitive harm, in the circumstances, are speculative in nature. Furthermore, the record at issue was created some time ago and as noted earlier the DLWC project was completed in 2004. I am not satisfied that any of the harms alleged could reasonably be expected to occur if this record is disclosed.

*The January 2002 Energy Transfer Agreement*

In the section 10(1) discussion above, I considered whether releasing information relating to the ETA could reasonably be expected to negatively impact the City. I note that Clause No. 10 of Report No. 12 of the City’s Environment and Public Space Committee contains a summary of terms for the ETA. To this I would add that commercial customers expect a mark up for processing and delivery costs over and above what the City may charge Enwave. Furthermore, as discussed above, a chiller manufacturer would be more interested in meeting and/or beating Enwave’s cost of energy to the end user, rather than what Enwave has to pay the City under the ETA. I am not satisfied that the City has established that the end user’s decision could reasonably be expected to be impacted by the release of any information that is the subject of this appeal. I am therefore not satisfied that disclosing the drafts of the ETA that are at issue or the records related to it (other than the site plan addressed under the section 11(d) discussion below) could reasonably be expected to cause the sections 11(c) and/or (d) harms alleged.

*Invoices and Progress Payment Certificates with Supporting Documentation*

Also at issue in this appeal are invoices and supporting documents for the payment of goods and services relating to the various stages of the DLWC project. These are costs incurred over the life of the project and the receipts are dated prior to the date of the request. Although there is some fear that releasing certain information could reasonably be expected to cause harm, I am not satisfied that this is the case. I also do not accept that releasing this information would reveal information about the “learning curve” relating to the DLWC project. As a result, I am not satisfied that the alleged section 11(c) and/or (d) harms alleged could reasonably be expected to occur if this information is released.

*Co-operative Arrangements*

Similarly, the records relating to co-operative arrangements with an unsuccessful proponent and a power utility, as well as related records, are project specific, dated, contain little detail and/or do not contain information about the DLWC project “learning curve.” I am not satisfied that releasing the information contained in those records could reasonably be expected to cause the section 11(c) and/or (d) harms alleged.

*Information about the DLWC Project Found in City Reports or City Council Proceedings*

Some of the records at issue consist of all or parts of reports to City council or committees, reports and clauses adopted by, or submitted to City council, City council agenda or drafts or exchanges relating to the information in these records. I am not satisfied that releasing the information contained in those records (except for information that may fall within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information, as discussed in more detail below) could reasonably be expected to cause the section 11(c) or 11(d) harms alleged.

*Maps or Diagrams that are, or were, Otherwise Publicly Available*

The City also seeks to withhold maps or diagrams that are, or were, otherwise publicly available. An example of this is a map of Lake Erie available to mariners. I am not satisfied that release of these records, which are, or were, available to public could reasonably be expected to cause the type of section 11(c) and/or (d) harms alleged.

*Records Relating to Signage at the John Street Pumping Station*

The City is withholding information relating to proposed signage at the John Street Pumping Station location. I am not satisfied that releasing this information could reasonably be expected to cause any of the section 11(c) and/or (d) harms alleged.

*Environmental Assessments and Related Records*

The environmental assessments for the DLWC project were conducted in a public forum and have been completed. It was an extensive process. Based on the evidence and submissions before me, unless it contains information that qualifies as part of the project “learning curve” (or falls within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information, as discussed in more detail below), I am not satisfied that the release of information related to the environmental assessments, the challenge to the initial environmental assessment, related correspondence or emails, or records relating to planning and strategic execution, could reasonably be expected to cause the section 11(c) and/or (d) harms alleged.

*Records Relating to the Challenge to the First DLWC Environmental Assessment*

I make the same determination with respect to records relating to the challenge to the initial environmental assessment.

*Records Pertaining to Emissions Trading*

I make the same determination with respect to records relating to records relating to emissions trading.

*Records Relating to Outside Entities that Expressed interests in the DLWC Project*

I also make the same finding with respect to correspondence exchanged with outside entities who expressed an interest in the project (such as the Monroe County Water Authority in Rochester, New York).

*Various Reports (including a 1991 Pre-Design Report for the Island Filtration Plant)*

There are a number of reports that the City sought to withhold. Among them is a 1991 pre-design report prepared for the Island Filtration Plant Winterization. In my view that report is now dated, I am not satisfied that any of the harms alleged would occur if it is released.

The City further seeks to withhold a shoreline stability and sedimentation report prepared in 1999 for the Toronto and Region Conservation Authority. The shoreline report relates only peripherally to the DLWC project and contains no design particulars for it. I am not satisfied that any of the harms alleged would occur if it is released. I draw the same conclusion with respect to other papers produced by the City as well as some of the contractors that also fall under this category. For example, except for a proposed plant layout diagram that is found at the end of the report, which falls within 11(d), in my view, the balance of the information contained in the 1971 report prepared by the main contractor, is dated to the point where its release could not reasonably be expected to cause any of the section 11(c) and/or (d) harms alleged. I make the same finding with respect to the generalized information regarding the number of trucks on the

Leslie Street Spit during a particular time period and two papers relating to lakebed mapping, one dated 1971 and the other 1993, each of which appear to be available from public sources.

*Water Quality, Water Temperature and Pump Capacity Measurements and Related Records*

Another category of records at issue contain information relating to the measurement of water temperature and water quality, as well as information relating to these items. The water temperature measurements were, for the most part, taken in or about 1988 to 1999. The water quality tests were done from 1998 to 2000. In my view these simple tests do not reveal part of the project “learning curve”, are particular to the sites or locations that were investigated and are dated. The City also seeks to withhold pump pressure and capacity measurements. In my view while detailed, the information in these records is also not part of the project “learning curve.” I am not satisfied that disclosure of the information in these records could reasonably be expected to cause the type of harms alleged.

*Applications for Funding, Permits and Approvals*

In addition, the City has relied on section 11(c) and/or (d) to withhold information in applications to federal and provincial bodies for approvals or funding as well as permits and reports from federal, provincial and City bodies for work related to the project. The City also sought to withhold records containing information relating to a requested easement. Some of the withheld approvals date to 1976. In my opinion, unless it contains information that qualifies as part of the project “learning curve” (or falls within section 11(d) because the City could reasonably be expected to expend monies to ameliorate any safety risk that arises from disclosure of the information, as discussed in more detail below), releasing the information contained in the applications relating to the permits, easement and approvals, or for that matter, the permits approvals and reports themselves could not reasonably be expected to cause the section 11(c) and/or (d) harms alleged.

*Information that Qualifies for Exemption Under Section 11(d)*

In Order PO-2461, Senior Adjudicator John Higgins was satisfied, in the circumstances of that appeal, that the release of a set of drawings for the City of Toronto, Toronto Animal Services, South Animal Centre (Horse Palace Exhibition Place) could reasonably be expected to threaten the security of a building. In my view, if there is a threat to the security of a building or to the safety of the City’s water infrastructure, through, for example, the release of detailed information relating to chemical delivery to the treatment plants, or plans and drawing of the City’s drinking water infrastructure, it could reasonably be expected to cause the City to expend monies to ameliorate the risk. In light of the events of September 11, 2001, increased vigilance is the norm, not the exception. Hence, releasing some of the detailed drawings, maps and diagrams of the City’s water infrastructure and/or buildings, the detailed information and charts pertaining to the chemical delivery and storage at the various water treatment plants, the site plan which was to be attached as an appendix to the ETA and the exchanges and documentation relating to

contingency planning would have the same result. I therefore conclude that this type of information would qualify for exemption under section 11(d).

With respect to the other information over which the section 11(c) and/or (d) exemption was claimed, I find that the City has not provided me with a reasonable basis for its contention that disclosure of the remaining information could reasonably be expected to cause harm under sections 11(c) and/or (d).

### **Sections 11(a) and (g) of the Act**

As discussed above, the City's position with respect to section 11 evolved over time. Initially, the City relied on sections 11(a) and (g). As the appeal progressed through adjudication, the City came to rely upon the exemptions in sections 11(c) and/or (d) of the *Act*. As discussed above, an institution often claims the section 11(c) and/or (d) exemptions when records are created in a commercial setting.

As noted earlier, the City made no submissions on the application of sections 11(a) or 11(g) in its representations. By making no submissions on these exemptions the City has effectively failed to satisfy the evidentiary burden it bears under section 42 of the *Act*. In any event, the records that could have been subject to 11(a), I have found to be part of the DLWC project "learning curve" and qualify for exemption. Furthermore, the City has not identified any record that contained information "including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person" as required by section 11(g). This makes sense, as the DLWC project that was the subject of the records was completed in 2004. I find, therefore, that sections 11(a) and (g) do not apply.

### **PUBLIC INTEREST IN DISCLOSURE**

In his representations, the appellant raises the possible application of the "public interest override" at section 16 which reads:

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

In order for section 16 to apply, two requirements must be met: first, a compelling public interest in disclosure must exist; and secondly, this compelling public interest must clearly outweigh the purpose of the exemptions (Order P-1398, upheld on judicial review in *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S.C.C.A. No. 134 (note)).

In Order P-984, Adjudicator Holly Big Canoe discussed the first requirement referred to above:

“Compelling” is defined as “rousing strong interest or attention” (Oxford). In my view, the public interest in disclosure of a record should be measured in terms of the relationship of the record to the *Act*’s central purpose of shedding light on the operations of government. In order to find that there is a compelling public interest in disclosure, the information contained in a record must serve the purpose of informing the citizenry about the activities of their government, 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.

If a compelling public interest is established, it must be balanced against the purpose of any exemptions which have been found to apply. Section 16 recognizes that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption [See Order P-1398].

In Order PO-2014-I former Assistant Commissioner Mitchinson also explained that in certain circumstances the public interest in non-disclosure of records should be considered. Although that appeal dealt with the equivalent provision in *FIPPA*, it is equally applicable here. He wrote:

This responsibility to adequately consider the public interest in both disclosure and non-disclosure of records in the context of a section 23 finding was also pointed out by the Divisional Court in *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636. Before upholding my decision to apply the public interest override in section 23 and order the disclosure of certain peer review reports on the operation of Hydro facilities, the court in that case stated that it needed to first satisfy itself that “.. in deciding as to the existence of a compelling public interest [I took] into account the public interest in protecting the confidentiality of the peer review process”. Once satisfied that I had, the court upheld my section 23 finding.

In my view, the issue of whether there is a compelling public interest in disclosure of records is highly dependent on context. Certain key indicators of compellability can be identified, but each fact situation and each individual record must be independently considered and analysed on the basis of argument and evidence presented by the parties.

#### *Representations of the Appellant*

In his representations the appellant stresses the importance of subjecting the expenditures of the City to public scrutiny and that, again referring to Order MO-1248, “government institutions must be accountable to the public they serve and that decisions regarding the expenditure of public funds should be open to public scrutiny.”

The appellant submits that in light of the events that took place in Walkerton, Ontario there should be no secrecy when it comes to assuring citizens that their water supply and related resources are safe. The appellant submits that because the City's drinking water is involved in the DLWC project, disclosure would enable him to consider the safety and viability of the system. Finally, the appellant submits that, unlike in Order P-561, Enwave and the City have not provided evidence about the type of stringent and extensive inspections that former Assistant Commissioner Glasberg had before him in that appeal. As a result, the appellant submits that the information must be disclosed.

#### *Representations of the City*

The City submits that substantial and detailed information about the DLWC project has been provided through public consultations and meetings. Furthermore, the City states that the documentation it has already disclosed to the appellant, which includes the environmental assessment reports, sufficiently addresses any public interest that may exist under section 16 of the *Act*.

#### *Representations of Enwave*

Enwave submits that the safety of the proposed additions and upgrades to the City's water infrastructure have already been the subject of a review process under the *Water Resources Act* (which was approved by the Ministry of the Environment), environmental assessments and public consultations under the *Environmental Assessment Act*. In particular, Enwave points to the Phase 1 Environmental Assessment Report, which concluded that the project could be constructed in a manner that protects the environment while maintaining the quality and security of the City's water supply. Enwave submits that this demonstrates that the safety of the DLWC project and of the water supply has already been publicly addressed. Enwave submits in the result that there is no compelling safety concern or other matter raised by the appellant that should allow section 16 to override the applicable exemptions.

#### *Analysis and Findings*

While I acknowledge the appellant's concerns about the maintenance of the safety of the City water supply, I also note that the DLWC project went through a rigorous environmental analysis. The City was cognizant of the importance of informing the City's residents and others of the nature of the project and its constituent elements. Accordingly, the City conducted public forums and issued press releases and newsletters in order to inform the public about the project. The volume of tests conducted and the manner in which the ETA was drafted demonstrate that integrity of the water supply was constantly monitored and was an integral part of the design of the project. Based upon my review of the documentation, there does not appear to exist any evidence to suggest that the manner in which the DLWC project was designed and constructed, or the constituent elements of the project, have raised a public concern about the safety of the City's water delivery system as a result of the DLWC project. Unlike the appeal under

consideration in Order PO-1774, I have not been provided with any evidence of any issues of uncertainty surrounding the integration of the City's water infrastructure into the project.

I have addressed any concerns about the information relating to the security of buildings and the City's water infrastructure by determining that they qualify for exemption under section 11(d). In my view, there is no compelling public interest that would override the application of those exemptions to the records which I have applied them to, and there is, in fact, a compelling public interest in non-disclosure of that information.

As well, as a result of the analysis in this decision, I will order disclosure of a substantial amount of additional information about the project, and in my view, further disclosure is not required to satisfy the public interest identified in section 16.

Therefore, I conclude that there is no compelling public interest in the disclosure of any of the remaining information that I have found to be exempt under the *Act*.

## **EXERCISE OF DISCRETION**

### **Introduction**

The section 11(c) and (d) exemptions are discretionary and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, I may determine whether the City failed to do so.

I may also find that the City erred in exercising its discretion where, for example:

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In all these cases, I may send the matter back to the City for an exercise of discretion based on proper considerations [Order MO-1573].

### **Relevant considerations**

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

- the purposes of the *Act*, including the principles that
  - information should be available to the public

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

*Representations of the Appellant*

The appellant's position is that due to the manner in which the City addressed his request for access to information, this office should exercise discretion in favour of disclosure. As discussed in Order MO-1573, this office does not have the power to substitute its discretion for the discretion of the institution in denying access. Rather, if I find that the institution failed to properly exercise its discretion, my power is limited to referring the matter back to the institution for an exercise of discretion based on proper principles.

In his representations, the appellant listed the following alleged acts or omissions as the basis for his belief that the City failed to properly exercise its discretion:

- the City's delay in addressing the request;

- the City's refusal to make a decision on the request, and only making one after an order of this office;
- the "vague and confusing" index of documents;
- the refusal to provide an electronic copy of the index of documents as a courtesy;
- that many documents relating to the request "which are clearly in existence", have not been disclosed in the index of documents;

In his representations the appellant also alleged that the City was in a conflict of interest and that its motivation in denying access to the requested information is the desire to preserve a contract that was entered into without public tender. Finally, the appellant asserts that the deponent of the affidavit filed by Enwave opposes the disclosure of documents that the deponent has not seen.

#### *Representations of the City*

Without specifically addressing the issue of the manner in which it exercised its discretion, the City sets out the factors it considered in denying access to the information it withheld. Some of those considerations were contained in its confidential representations, which I am unable to reproduce in this order.

#### *Analysis and Findings*

The issues of a timely decision and the sufficiency of the index of records the City provided are purely procedural matters that were addressed in previous orders in this appeal. The quality of the indices was also addressed by previous order. I ascribe many of the alleged acts or omissions to the wide scope of the request, the large number of records that were responsive to the request and the sheer volume of records that were generated by a project of this magnitude. I am also not satisfied that the appellant has established that the City was in a conflict of interest to a sufficient degree so as to influence its exercise of discretion. In any event, this office has now conducted an independent review of the City's decision as contemplated by the *Act*.

In my opinion, based upon my review of the representations and the records, the City appropriately exercised its discretion not to disclose documents that I have not ordered disclosed. I will not, accordingly, disturb its exercise of discretion on appeal.

#### **ORDER:**

1. My determination on whether information in a record is exempt from disclosure under the *Act* is set out in a detailed index that will be sent to the City, Enwave and the appellant. A copy of the index will be provided to any of the third parties (other than Enwave), upon request. If a record does not qualify for exemption under the *Act*, as

indicated on the index, I order the City to disclose the record to the appellant by sending him a copy by **February 5, 2008** but not before **January 31, 2008**.

2. Where I have indicated on the detailed index that a record contains personal information that is exempt under section 14(1), the City must sever any exempt personal information from the record prior to disclosing it to the appellant. In the event that a dispute arises with respect to any severance of this nature, I remain seized of the matter to determine that issue.
3. I order the City to conduct further searches for documentation relating to the three way cost sharing agreement dated December 7, 1998 between the City, TDHC and the main consultant with respect to the pre-design and environmental assessment of the DLWC project, including a complete unsevered final version of the agreement.
4. If, as a result of the further searches, the City identifies any additional records responsive to the request, and where I have indicated on the detailed index that a new decision letter is required, I order the City to provide a decision letter to the appellant regarding access to these records in accordance with the provisions of the *Act*, considering the date of this order as the date of the request.
5. In order to verify compliance with the terms of this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant, upon my request.

Original signed by: \_\_\_\_\_  
Steven Faughnan  
Adjudicator

\_\_\_\_\_  
November 29, 2007