Appeal No. MA 13-352-2

Information and Privacy Commissioner of Ontario

Between

Appellant

-and-

City of Greater Sudbury
Institution

In the Matter of Appeal No. MA 13-352-2 Under
the Municipal Freedom of Information and Protection of Privacy Act

Appellant Representations

[01] I, XXXXX (Appellant) submitted the Freedom of Information Request to the City of Greater Sudbury (City) under Municipal Freedom of Information and Protection of Privacy Act (*Act*) In the light of representation of the City, Appellant submits representation with reference to the City's submissions. **Appellant submits City should disclose the both records in question**.

[02] Issues:

Issues A: What is the impact of section 223.22 of the Municipal Act; 2001 on the record responsive to item 1?

The request in item 1 is for:
A copy of a report prepared by the [named] city auditor general and provided to [a named individual] on or about July 2011 regarding matters with [a named numbered company].

The city responded by stating access was denied to the record responsive to item 1 on the basis of section 223 of the Municipal Act 2001.

Section 223.22 of the Municipal Act 2001 reads:

(1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

- (a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

- (b) under the Criminal Code (Canada).

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

(4) This section prevails over the Municipal Freedom of Information and Protection of Privacy Act

Section 53(1) of the Act may also be relevant to this issue. It states:
This Act prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

[03] What is the impact of section 53(1) of the Act and section 223 of the Municipal Act;. 2001 on the record requested in item 1 namely, a City Auditor General "draft" report?

BACKGROUND

December 1, 2007 — December 31, 2007
A review of the revenue processes is initiated at Greater Sudbury Transit by the city's external auditor, KPMG. Some months later, it was discovered that the 1211250 Ontario Inc. owed more than $800,000. This loss of public funds never recovered. This discovery was made upon the City's development on reporting and monitoring procedures related to ride card and pass inventory. This information was kept secret and not available to the public until July 2011, new Auditor General hired for the City.

[04] There was a speculation about 1.1 millions dollars were missing from transit ticket contract. On or about July 11, 2011, Auditor General Brian Bigger started audit on Transit Ticket sales contract between City and 1211250 Ontario Inc (Company). City's legal service department denied access to the records. City Solicitor Jamie Canapini argued they were covered by solicitor-client privilege, were the property of city council and advised them not to turn them over to the auditor. Bigger's office spent $20,000 on outside legal advice in an attempt to gain access to the documents.

[05] Finally Auditor General prepared "Report" (hereinafter referred to as the " Report") and submit to the Mr. Doug Nadorozny, Chief Administrative officer. City's administrators delays in getting back to him with comments, caused his plan to present the "Report" at the August 9, 2011, Audit Committee to fall through.

[06] The deadline for the City to sue Tony Sharma (Owner of the company) to get its money back is quickly approaching. On August 30, 2011, Bigger informed Mayor Marianne Matichuk, an emergency meeting is held the next day, to discuss the matter.

[07] More than a month ago, the two-year deadline for the city to sue Sharma has expired. On October 11, 2011, Bigger finally gets to present his "Report" to the Audit Committee.

[08] ARGUMENTS

I do not agree with the City's submissions quoting report as "Draft Report." It is a "Report" and auditor general office paid $20,000 to gain access the records to prepare the "Report." There is no any valid reason if it is a draft report, delaying, Auditor General to present the report to Audit committee.

The City states

> that the "Record" in question, virtue of the proper interpretation of section 223.22(2) of the Municipal *Act*, the public has no right to examine "Draft Report" as of what may or may not become future Report by the Auditor General.

[09] In order to address the issue, I will raise this question.

- **Is that Auditor General Report a "Draft Report?"**

[10] BURDEN OF PROOF

In my view, completely **new issue** raise in this appeal. The record is in question whether "Draft Report" or "Report".

[11] I would submit that issue in this appeal is to gain access to the **"Record"** whether it is "Draft" or "Report" submitted to Chief Administrative officer Doug Nadorozny by the Auditor General which refer as "Report." (city referred as a Draft Report).

[12] It seems City is seeking onus to prove requested record is a "Report." However, City did not submit any reasons outlining why thus report is considered as a "Draft." Audit committee members in the course of their duties assisting the Auditor General, contents and context of the report will remain same. Therefore, report in question under the *Act* naturally becomes "Record."

[13] Therefore City's position based on MO-2876-F does not support as valid argument when considered the merit of this appeal. (see background of the appeal)

[14] However, if the [Commissioner] were to have jurisdiction over this matter, which is not admitted, but actively denied, I suggest that as a result of the language of section 223.22 of the Municipal *Act* the burden of proof would of necessity lie on the parties attempting to gain access to the documents in question. However, for the reasons that follow, I do not agree that section 223.22 of the *Municipal Act* , which is set out in full below, has the effect of creating an onus on requesters to prove that it does not apply.

[15] Although section 223.22 is not strictly applicable as assigning an onus of proof where an institution relies on a confidentiality provision in another statute, rather than an exemption under the *Act*, I believe that this section still provides assistance in assessing the question of onus. In my view, section 223.22 indicates an intention on the part of the Legislature that, where a record is in the custody or under the control of an institution such as the City, the onus of proving non-accessibility under the *Act* rests with the institution. This is consistent with the purpose of the *Act* in section 1(a) (i) to "provide a right of access to information under the control of institutions in accordance with the principle that … information should be available to the public."

[16] In this context City's argument (it seems) that the burden of proof in this case falls on the appellant is without merit and unsustainable in law.

[17] Section 4(1) of the *Act* stipulates that "[e]very person has a right of access to a record or part of a record under the custody or control of an institution unless …" the record is exempt under sections 6 to 15 or the request is frivolous or vexatious. This is the primary section establishing that the *Act* applies to the record holdings of institutions. There are several other sections setting out instances where the *Act* either does not apply (section 52), or records are not accessible because of a prevailing confidentiality provision (section 53). As noted above, the City relies on section 53 in conjunction with section 223.22 of the *Municipal Act.*

[18] Based on section 53 of the *Act* and section 223.22 of the *Municipal Act*, the City seeks to prove that records which would otherwise be accessible under the *Act*, as stipulated by section 4(1), are in fact not accessible because of a prevailing confidentiality provision. The City thus seeks to oust the accessibility of records under the *Act*, which would otherwise be subject to the access scheme established under the *Act* for records under the City's custody or control.

[19] It is also unfair, unreasonable, and contrary to the purpose of the *Act*, cited above, for the City to suggest that requesters have the onus of disproving that section 223.22 of the *Municipal Act* applies to records they have requested. To discharge such an onus, a requester would need:

(1) detailed knowledge of the City's record holdings;
(2) knowledge of the precise nature of what records exist in the City's record holdings that may be responsive to his or her request, and
(3) knowledge of where copies of such records would be located within the City's records.

[20] This information would rarely, if ever, be known to a requester. As noted in *Dow Chemical of Canada v. Pritchard*, [1970] O.J. No. 829 (H.C.J.), the onus of proving information that is peculiarly within the knowledge of a party rests with that party, in this case, the City.

[21] Seen in that light, it is clear that section 4(1) of the *Act* establishes a positive right of access on which members of the public are entitled to rely. The City wishes to remove the requested record from that positive right. In my view, the law of evidentiary burdens would place the onus of proof to accomplish that objective on the City. Failure by the City to establish the application of section 223 of the *Municipal Act* will have the result that the City does not succeed on this point, and the *Act* would be found to apply. (See *The Law of Evidence in Canada* by John Sopinka, Sidney N. Lederman and Alan W. Bryant (Markham: Butterworths, 1992) at p. 57.)

[22] PREVAILING CONFIDENTIALITY PROVISION

Section 53(1) of the *Act* states as follows:

> This *Act* prevails over a confidentiality provision in any other Act unless the other Act or this Act specifically provides otherwise.

In this case, the City relies on the "confidentiality provision" in section 223.22 of the *Municipal Act.* This section states:

Section 223.22 of the Municipal Act 2001 reads:

(1) The Auditor General and every person acting under the instructions of the Auditor General shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of his or her duties under this Part.

(2) Subject to subsection (3), the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,

- (a) in connection with the administration of this Part, including reports made by the Auditor General, or with any proceedings under this Part; or

- (b) under the Criminal Code (Canada).

(3) A person required to preserve secrecy under subsection (1) shall not disclose any information or document disclosed to the Auditor General under section 223.20 that is subject to solicitor-client privilege, litigation privilege or settlement privilege unless the person has the consent of each holder of the privilege.

(4) This section prevails over the *Municipal Freedom of Information and Protection of Privacy Act*

[23] Section 223.22 appears in Part V.1 of the *Municipal Act*. Part V.1 is also entitled, "Transparency and Accountability" and contains provisions pertaining to the City's Integrity Commissioner and Ombudsman, as well as the Auditor General.

[24] City admits

> " He (Auditor General) is responsible ……accountable and promoting transparency, accountability and trust municipal operations" (please see City's representation para 7).

[25] Based Section 223.22 , the City goes on to argue that the Commissioner is expressly prohibited from:

- including records of the City's Auditor General
- having access to records of the Auditor General in relation to the request and
- making any order in relation records of the Auditor General

Even City provided representation; nothing in the representations is to be construed as an acceptance of the Commissioner's jurisdiction.

[26] City recognizes importance of open and transparent governance. However, the City is of the position, that section 223.22 of the *Municipal Act* excludes a auditor general report stating that "public has no right to examine" ….(please see City's representation para 13), no Commissioner's jurisdiction… [Emphasis added.]

[27] Although the City characterizes the records it seeks to include within section 223.22 of the *Municipal Act* as a "draft report" for "need to know basis" its representations do not provide any detailed explanation of what the scope of this provision is, nor do they describe **precisely** which part of the records would be affected.

[28] Notwithstanding the apparent focus of the City's representations on records "of the Auditor General," the City appears to be of the view that copies of any records that have any connection at all to the investigation, anywhere in the City's record holdings, fall under section 223.22 of the *Municipal Act*. This is apparent from the City's blanket refusal to respond to the request, and its position that commissioners' office has no jurisdiction to conduct an inquiry in this appeal.

[29] The purposes of the *Act* are also important and are expressly set out in section 1. They include the important principles that information under the control of institutions "should be available to the public" and "decisions on the disclosure of information should be reviewed independently of the institution controlling this information."

[30] In *Dagg v. Canada (Minister of Finance),* [1997] 2 S.C.R. 405, the Supreme Court of Canada has clearly recognized that the overarching purpose of access to information legislation is to facilitate democracy. Justice LaForest (dissenting on other grounds) stated:

> The overarching purpose of access to information legislation, then, is to facilitate democracy. It does so in two related ways. It helps to ensure first, that citizens have the information required to participate meaningfully in the democratic process, and secondly, that politicians and bureaucrats remain accountable to the citizenry. (para. 61)
>
> Rights to state-held information are designed to improve the workings of government; to make it more effective, responsive and accountable. Consequently, while the *Access to Information Act* recognizes a broad right of access to "any record under the control of a government institution" (s. 4(1)), it is important to have regard to the overarching purposes of the Act in determining whether an exemption to that general right should be granted. (para. 63)

Therefore section 223.22 of Municipal Act outlined above does not apply for the records in question. The *Act* does not prevails over a confidentiality provision

[31] CUSTODY AND CONTROL

In reference to City's representation record in question is characterized as "need to know basis" for limited number of individuals and done so under the control and direction of the Chief Administrative Office. (Please see City's representation para 15). City admits record is in question now becomes under the control of Chief Administrative office and no longer control by the auditor general. If it is under control of Auditor General , he has directly report to the council not to the chief administrative office. (Please see City's representation para 7). In this context record is in question under the control of the City's Clerk. Therefore, provisions section 223.22 of the *Municipal Act* no longer apply. Section 53(1) of *Act* does not prevail.

[32] In my view whether record is in question under control of chief Administrative Office or Auditor General, there are strict limitations apply.

[33] In analyzing these arguments, it is also important to consider that the application of the *Act* is established by section 4(1). As already stated, this section indicates that "every person has a right of access to a record or part of a record in the custody or under the control of an institution unless …" the record is exempt under section 6 to 15, or the request is frivolous or vexatious.

[34] Section 4(1) is the primary jurisdictional provision within the *Act*, and also sets primary boundaries for the Commissioner's jurisdiction in appeals under section 39, which confers authority on the Commissioner to determine an appeal of "any decision of a head under this *Act*". Based on that authority, the Commissioner clearly has the authority to determine the issue of custody or control under section 4(1) (see, for example, *Ontario (Criminal Code Review Board) v. Doe* (1999), 47 O.R. (3d) 201 (C.A.) and *David v. Ontario (Information and Privacy Commissioner)*, [2006] O.J. No. 4351 (Div. Ct.)).

[35] For these same reasons, I also conclude that while section 53(1) may limit the application of the *Act* based on a confidentiality provision in another statute, any record in the **custody** or under the **control** of an institution, whether or not it is covered by a confidentiality provision that prevails over the access and disclosure provisions of the *Act*, nevertheless remains subject to the processes established under the *Act* for determining these questions.

[36] Section *223.22 of Municipal Act* is a confidentiality provision which, if applicable, prevails over the *Act*, to the extent that the relevant statutory provisions are in conflict, and nothing more. Section 223.22 does *not* state that it **ousts** the **City's custody or control** of the Auditor General's records.

[37] I would submit following that may support or contradict a finding of custody and/or control:

- Was the record created by an officer or employee of the institution? [Order P-120]
- What use did the creator intend to make of the record? [Orders P-120, P-239]
- Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record? [Order P-912, upheld in *Ontario (Criminal Code Review Board) v. Ontario (Information and Privacy Commissioner)*
- Is the activity in question a "core", "central" or "basic" function of the institution? [Order P-912]
- Does the content of the record relate to the institution's mandate and functions? [Orders P-120, P-239]
- Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement? [Orders P-120, P-239]
- If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee? [Orders P-120, P-239]
- Does the institution have a right to possession of the record? [Orders P-120, P-239]
- Does the institution have the authority to regulate the record's use and disposal? [Orders P-120, P-239]

- Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
- To what extent has the institution relied upon the record? [Orders P-120, P-239]
- How closely is the record integrated with other records held by the institution? [Orders P-120, P-239]
- What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances? [Order MO-1251]

[38] I also consider it significant, in relation to custody and control, that the Auditor General reports to City council, as noted in section 223.6 of the *Municipal Act*. This is a significant indicator that the City has control over the Auditor General's activities and records. Therefore section 223.22 of *Municipal Act* outlined above does not apply the records in question.

[39] "NEED TO KNOW BASIS"

City's argument is clear to me now. The issue with the City; neither "Draft Report" nor the "Report". What content of records "need to know" by the public (appellant). City released edited version of the records and this can be considered as their sinister attempt to keep public in the dark.

[40] The fact that the application of section 223.22 of the *Municipal Act is* within the Commissioner's power to determine, in the context of an access appeal, simply adds a necessary layer of review and accountability where a member of the public seeks access to a record for which the City relies on that section. Therefore "Need to Know" principle as proposed by the City denounced and should provide full access to the records are in question. In this context City' initial position is contrary to the accountability and transparency (see City's submission para 7). This double standard **"Need to Know"** representation without merit and unsustainable in law. Therefore section 223.22 of Municipal act outlined above does not apply the records in question.

[41] SCOPE OF SECTION 223.22 OF THE *MUNICIPAL ACT*

Assessment of this issue requires detailed analysis of the relevant statutory provisions and their constituent wording. This section sets out the basic confidentiality provision relied on by the City, which I reproduce again here:

> The Auditor General and every person acting under the "**instructions"** of the Auditor General shall preserve secrecy with respect to all "**matters"** that come to his or her knowledge in the course of his or her duties under this Part.

Thus this section applies to:

- the Auditor General; and
- every person acting under the Auditor General's *instructions*.

[42] Other than the Auditor General, the only other City staff members affected by this provision are those acting under the Auditor General's "*instructions*." A further limit on the reach of this section arises from the stipulation that a person who is required to preserve secrecy must do so in relation to "*matters*" that come to his or her knowledge "*in the course of his or her duties under this Part*".

[43] These are significant limitations on the reach of this provision, and the meaning of each must be considered. I do not agree with City's bold position outline in its representation Para 8.

[44] In order for a person to be found to act under the Auditor General's "instructions," the Auditor General would be required to possess the authority to "instruct" that person. In my view, this would apply to the Auditor General's staff, or any other person to whom, by statutory authority or the terms of reference of an investigation, the Auditor General would have the power to issue binding directives. For persons other than the Auditor General's own staff, I conclude that the most relevant authority to "instruct" for the purposes of section 223.22 (1) of *Municipal Act* would entail the power to compel the individual to provide information.

[45] Section 223.20 (1) of *Municipal Act* provides assistance in determining the "persons" who, in addition to the Auditor General's own staff, may be considered to act under the Auditor General's "instructions."

[46] The City, its local boards and the city-controlled corporations and grant recipients referred to in subsection 223.19 (3) shall give the Auditor General such information regarding their powers, duties, activities, organization, financial transactions and methods of business as the Auditor General believes to be necessary to perform his or her duties under this Part.

[47] Given the reference in section 223.20 (1) to "the City", I conclude that in this case, in addition to the Auditor General's own staff, other City staff who are required to give information to the Auditor General in relation to the information listed in that section act under the Auditor General's "instructions" for the purposes of section 223.22. This would also be the case for local boards and city-controlled corporations, but no such entities are involved here. Information in the

hands of City grant recipients would likely not have the potential to be accessible under the *Act* unless the grant recipient is an institution in its own right.

[48] To summarize, the following individuals may, depending on the facts, be seen as "acting under the Auditor General's instructions":

- the Auditor General's own staff;
- a local board, or a city-controlled corporation, or a grant recipient, who comply with instructions from the Auditor General to provide information regarding their powers, duties, activities, organization, financial transactions and methods of business.

[49] However, it is also significant that section 223.22 limits its secrecy requirement to all "matters" that come to a person's knowledge "in the course of his or her duties" under Part V.1 of the *Municipal Act*

[50] As discussed in more detail below, the mere fact that a City staff member acts under the Auditor General's instructions when providing information would not require that individual to preserve secrecy with respect to information that came to their attention during the course of their ordinary work, which for most City staff would *not* involve duties under Part V.1. Also, secrecy is required in relation to "matters", a term which, in my view, has a more specific connotation than "information," as explored in more detail in the discussion below.

[51] Accordingly, I now turn to a detailed examination of these other terms found in section 223.22 (1).

"Matters"

In *Black's Law Dictionary*, 8th ed., by Bryan A. Garner (St. Paul, Minn.: West, 2004), "matter" is defined as follows:

> 1. A subject under consideration, esp. involving a dispute or litigation; … 2. Something that is to be tried or proved; an allegation forming the basis of a claim or defense…. (p. 999)

The following entries from the definition in the *Oxford Concise Dictionary*, 6th ed., by J.B. Sykes (Oxford University Press, 1976) may also be helpful in understanding its meaning:

> 3. (Logic) Particular content of proposition, distinguished from its form. 4. Material for thought or expression" subject of a book speech, etc. … 7. Affair, thing to be done or considered, esp. of a specified kind….

[52] From these definitions, I conclude that "matters" appears to include a reference to person's knowledge of the fact that a particular issue or complaint is under consideration by the Auditor General, and/or the particulars of that complaint, and to ancillary information derived solely in that context. It is a more specific term than "information." In my view, it does not include information that came to a person's attention during the course of their everyday work, whether or not that information was later provided to the Auditor General.

[53] "In the Course of Duties under Part V.1"

The requirement that a "matter" must have come to the knowledge of the Auditor General or the person acting under his or her instruction "in the course of his or her duties under" Part V.1 of the *Municipal Act* provides a further limitation on the reach of this section.

[54] As already discussed, information provided pursuant to section 223.20 (1) above, is subject to the confidentiality requirement in section 223.22 where this information is in the hands of the Auditor General or a person acting under his or her "instructions." But this is to be distinguished, in my view, from information in the hands of a staff member of the City that such a person receives in the course of his or her normal duties, which later becomes the subject of a request for information by the Auditor General. In my view, such information (as opposed to knowledge of the "matter" of the investigation or complaint) would *not* be caught by section 223.22 because it did not come to the staff member's knowledge "in the course of duties under" Part V.1 of the *Municipal Act* as the section requires.

[55] Moreover, imposing the non-disclosure obligation on original information in the hands of such staff members would, in many instances, render them unable to perform their day-to-day functions to which the original information relates. Where applicable, this analysis would also apply to staff of another institution under the *Act* that is compelled to provide information to the Auditor General under section 223.20 (1), such as a local board or city-owned corporation.

[56] With respect to the nature of "duties" under Part V.1, I conclude that providing information when "instructed" to do so by the Auditor General would be a duty under Part V.1, but as already noted, if the information came to the knowledge of the staff member as part of his or her everyday work, and not in connection with Part V.1 of the *Muunicipal Act*, the information itself would not be caught by section 223.22 in the hands of the staff member. Only information about

the Auditor General's investigation that was acquired by the staff member as a consequence of being instructed or asked to provide information to the Auditor General would be covered.

[57] Accordingly, I conclude that, in the hands of City staff (or staff of another institution under the *Act* compelled to provide information to the Auditor General under section 223.20 (1),, such as a local board or city-owned corporation), and who are not staff of the Auditor General, original information that remains in the hands of the staff member for the purposes of his or her ordinary tasks would not be subject to section 223.22, even if a copy has been given to the Auditor General. Further, the contents on the records in question solely collected and submitted (matter related Transit ticket sales between City and "Company") who are not staff of the Auditor General. Therefore section 223.22 of Municipal act outlined above does not apply for the records in question.

[58] EFFECT OF SECTION 223.22 (2)(a)

Even if information meets the requirements outlined above under section 223.22 (1), it may still be disclosed if one of the exceptions in section 223.22 (2) applies. Section 223.22 (2)(b) refers to disclosures mandated by the *Criminal Code*, and as that is unlikely to impact a request under the *Act*, I will not discuss it here.

[59] Section 223.22 (2)(a) refers to the Auditor General's reporting function and has potential relevance in this case and, likely, in many others. Repeated here for ease of reference, this section states:

> … the persons required to preserve secrecy under subsection (1) shall not communicate information to another person in respect of any matter described in subsection (1) except as may be required,
>
> in connection with the administration of this Part, *including reports made by the Auditor General*, or with any proceedings under this Part; …

[60] References to "administration of this Part" and "proceedings under this Part" would relate to the process adopted by the Auditor General in performing his or her duties. For example, evidence may be gathered and proceedings (e.g. akin to those under the *Public Inquiries Act* – see section 223.21 (2) may be conducted as needed.

[61] Moreover, any reading of the two statutes that takes their purposes into account provides additional support for this interpretation, as set out earlier in this representation. Both the *Municipal Act* and the *Act* are concerned with government accountability, which would appear to

be a particularly important function of the Auditor General, especially in his or her reporting function. In that context, and given the wording of the exception provided by section 223.22 of the *Municipal Act* an interpretation excluding reports of the Auditor General from the application of the *Act* is not tenable.

[62] The reference to the reporting function represents a clear legislative signal that reports of the Auditor General are not caught by this confidentiality provision. The *Act* does not prevails over a confidentiality provision

[63] Issue B: Does the mandatory exemption at section 10 apply to the withheld portions of Record 5?

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

(a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[64] Guide cited in the Notice of Inquiry

In my view, the analysis provided by Adjudicator is sufficient and does comply with mandatory exception section 10 of the *Act*. Therefore I am relying on same legal analysis and reproduce here.

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] OJ. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 P0-1805, P0-2018, P0-2184, M0-1706].

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

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

Part 1: type of information

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

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

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known,
and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order P0-2010].

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 P0-2010].

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 P0-2010].

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 P0-2010]. 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 P0-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- names, duties and qualifications of individual employees [M0-2164]
- an analysis of the performance of two employees on a project [M0-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 [C.A]

[65] Does the record reveal a trade secret or scientific, technical, commercial, financial or labour relations information?

Interestingly City states that “methodology” developed by the (KMPG LLP (hereinafter referred to as the “Firm”), was to conduct this review is trade secret. (Please see City’s representation para 30). Record is in question is not the “methodology” developed by the Firm. I requested KMPG’s final report regarding 1211250 Ontario Inc and /or interim report. Therefore City’s position to ensure confidentiality of the information quoting methodology (see City’s

representation para 30) against the requested record has no merit under section 10 of the *Act.* This is clearly established in PO-2010.

[66] I found that city's position regarding *commercial information* and *financial information* as valuable recommendations form the firm relating to appropriate ways of conducting its transit operations (see City's representation para 37). If the Firm provided the recommendation, appropriate ways to conduct City's transit operation it should be available to all employees and others in the City who involved conducting transit operation in order to maintain its healthy operation to prevent further financial losses. City's explanation does not fall within the section 10 of the *Act.* The definition is for purpose of the *Act* for *commercia*l *information* and *financial information* is very clear and PO-2010 is clearly applied.

[67] Requested records has no what so ever *labour relations information* under *Act.*

[68] The record is in question does not reveal a trade secret or scientific, technical, commercial, financial or labour relations information as described under *Act.*

[69] Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order M0-1706].

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 P0-2020, P0- 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 the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* See also Orders P0-2018, M0-1706, P0-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] OJ. No. 2243 and P0-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] OJ. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders M0-1706, P0-2384, P0- 2435, P0-2497 upheld in *Canadian Medical Protective Association v. John Doe,* (cited above)].

In confidence

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order P0-2020].

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 institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Orders P0- 2043, P0-2371, P0-2497]

[70] Did the third party supply the information to the institution?

I found that City's explanation regarding this. In the City's representation stated Firm was retained by the city to provide financial advisory services (Please see City's representation para 26). City's all the services from cleaning of buildings to road maintenance, including all other consultancy services governed by City's contract awarding procedures and related by-law. City has no authority to acquire consultancy service without competitive bidding. The simple explanation to this, city retained Firm as contractor after successful competitive biding to provide financial advisory services. The advice provided by the Firm, the provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even

where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. Therefore 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) of the *Act.*

[71] I also found that City's representation misquoted in Para 39 stating that based on MO-2070. The records at issue in order MO-2070 contain information that the affected party provided to the City for the purpose of demonstrating the suitability of its product and services for the purposes sought by the City with respect to putting an alternative voting system in place. This information details the hardware and the software package that makes up the affected party's Electronic Vote Tabulation System, much of which have found to qualify as technical information and trade secrets belonging to the affected party. However, my appeal not requests to release such information but only the report generated by Firm regarding transit ticket contract between City and Company. Therefore it is not qualified as supplied for the purpose of the section 10(1) *Act.*

[72] Did the third party supply the information with a reasonable expectation of confidentiality? Was the expectation explicit or implicit?

I found very interesting legal argument in City's representation in para 45. It stated that the firm communicated the information to the City, under the terms and conditions which provided the confidentiality. The meaning of language does not qualify as confidentiality for the purpose of the section 10(1) *Act*. The report submitted by the Firm does not contained confidentiality information of the firm. But City wanted maintain secrecy and attempted preventing access to information does not qualified as confidence of the section 10 (1) *Act.*

[73] Part 3: harms

To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient *[Ontario (Workers/ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order P0-2020].

The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 10(1) [Order P0-2435].

Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the Act [Order P0-2435].

[74] FRIVOLOUS

City's position also that outlined on para 51, stating that " the expectation of harm must be reasonable but it need not be probable" meaning that the grounds for resisting disclosure must not be "frivolous or exaggerated." [**Note:** I am not aware exaggerated is the issue under any where in the *Act*. It seems City misquoted the word "vexatious."]

[75] I am very much concern about city's position and test validity of this representation below.

[76] The *Act* and Regulations provide institutions with a summary mechanism to deal with requests that an institution views as frivolous or vexatious. Previous orders have found that these legislative provisions "confer a significant discretionary power on institutions which can have serious implications on the ability of a requester to obtain information under the Act," and that this power should not be exercised lightly. (Order MO 2436).

[77] Adjudicator Steven Faughnan, stated that universal requirement in these provisions that the head (i.e., the head of an institution under the *Act*) must have formed an opinion that the request is frivolous or vexatious make it even more difficult for an affected party or appellant. In fact, based on the statutory wording, Adjudicator Faughnan believes this is an insurmountable hurdle. Adjudicator Faughnan found that the appellant is not entitled to rely on these sections, per se. [Emphases in original.] (Order MO 2635).

[78] However, Senior Adjudicator Higgins goes on to state that parties to an appeal are not precluded from arguing that a request under the *Act* is an abuse of process at common law. In this regard Senior Adjudicator Higgins endorsed the reasoning of former Commissioner Tom Wright in Order M-618, who considered a claim of abuse of process on the basis of common law principles, prior to the addition of the "frivolous or vexatious" provisions to the *Act* (Order MO 2635).

[79] Senior Adjudicator Higgins then went on to consider the application of the common law principles in the circumstances of PO-2490. However, because the common law principles are, to a significant extent, the foundation of the "frivolous or vexatious" provisions of the Act, he

referred to previous decisions in that regard, and other case law on the subject, in deciding this issue in Order PO-2490. (Order MO 2635).

[80] Higgins in Order PO-2490, because the principles that would apply to an allegation that a request is an abuse of process or "frivolous or vexatious" at common law are, to a significant extent, the foundation of the frivolous or vexatious provisions of the *Act.* (Order MO 2635).

[81] Therefore it is logical to consider previous decisions in that regard, and other case law on the subject, in deciding this issue. (Order MO 2635).

[82] The common law principle outline related to frivolous; City's position does not qualified for the section 10(1) of the *Act.*

[83] Section 10(1)(a): prejudice to competitive position

Could disclosure of the record significantly prejudice the competitive position of a person, group of persons or organization?

The record in question is KMPG's final report regarding 1211250 Ontario Inc and /or interim report. This record disclosure never prejudices the competitive position of a person, group of persons or organization.

[84] Could disclosure of the record interfere significantly with the contractual or other negotiations of a person, group of persons or organization?

Again**,** the record in question is KMPG's final report regarding 1211250 Ontario Inc and /or interim report. This record never interferes with contractual or other negotiations of a person, group of persons or organization.

[85] Interestingly, City never provided any representation for both important legal test questions above.

[86] Section 10(1)(b): similar information no longer supplied

(1) Could disclosure of the record result in similar information no longer being supplied to the institution?

(2) Is it in the public interest that similar information continues to be supplied to the institution? What is the harm that would result if similar information were no longer supplied to the institution?

[87] I will answer both questions together.

City's position stated in para 58, accounting firm have greater reluctance to provide such detailed information and would be discouraged to offer similar services in the future should this type of report be released. City representations in para 59, 60, 61, 62, is immature and does not qualified for purpose of the section 10(1) b of the *Act.*

[88] If Firm not provided accurate information future, it will be an issue with performance of the contractual obligation. The Firm is hired to provide accurate information at their best and also paid by the public funds. If Firm not met performance, it is an issue to deal with awarding contract to the firm. The firm can not maintain secrecy and supply substandard service with the City. Therefore city's representation does not qualified section 10(1) b of the *Act.*

[89] Section 10(1)(c): undue loss or gain
Could disclosure of the record result in undue loss or gain to any person, group, committee or financial institution or agency?

City's position finally articulated in para 56. It stated the loss of competitive position that could result from the disclosure of the report would likely results in undue loss to the Firm and its staff members because they are the persons who have honed the specific expertise to make themselves marketable to institutions seeing such advice. City argument is not qualified for section 10(1) C of the *Act.* In my view, this issue should rise as disclosing personal information of the individual who involved with preparing record. However the record is in question does not contained any individuals' personal information. I requested that the record; KMPG's final report regarding 1211250 Ontario Inc and /or interim report.

[90] Section 10 (1) (d) information supplied in a labour relations dispute

There is no reason to address this issue since requested report is not related labour dispute.

[91] Section 10(2): exception to the exemption

Section 10(2) states:

> A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure.

[92] Has the person to whom the information relates consented to disclosure?

In City's representation, para 64 states , Firm did not consent to the release of the report and fact objected to the release of the report.

[93] I object the City and Firm position. In my view Firm should consent to access to the records. In my view there is no any qualified reason for either City or Firm to object for section 10(2) of the *Act.* Regardless of the Firm and City's position requested records must be disclosed.

[94] Finally, Access to information legislation must be interpreted within the context of its purpose which is to facilitate democracy by ensuring that citizens have the information required to participate meaningfully in the democratic process and to hold politicians and bureaucrats accountable to the citizenry: see *Ontario (Ministry of Northern Development and Mines) v. Ontario (Assistant Information and Privacy Commissioner*) (2004), 181 O.A.C. 251 (C.A.), at para. 66, citing *Dagg v. Canada (Minister of Finance)*, [1997] 2 S.C.R. 403 at paras. 61-63.

Note: ***Additional Orders and Investigation Reports considered: MO 2684, P-1137, PO-2940, MO -2439 (findings are in line with John Higgins, Senior Adjudicator).***

[95] SHARING OF REPRESENTATIONS

Issue C: Do your representations contain confidential information that you do not want me to share with other parties to this appeal?

I am giving consent to share my representation with City an all other affected parties.

[96] ORDER SOUGHT

I Appellant, seeks to have decision to access to both records.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

(Appellant)

Date: March 09, 2014.