April 12, 2012

Norma Thorney
Assistant Registrar
Information and Privacy Commissioner Ontario
Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
M4W 1A8.

Dear Ms. Thorney,

Re: Public Access to the information under the Municipal Freedom of Information and Protection of Privacy Act (1990)
Institution File Number: FOI 2012-31
IPC File Number: MA 12 -106

Attention: J. Firebrace, Analyst,

Nature of the Appeal and Background

I applied under the Municipal Freedom of Information and Protection of Privacy Act (*Act*) 1990 to access the records of an expense account submitted by employees;
(1) Mr. Nick Benkovich, Director, Water and Wastewater Services
(2) Mr. Gary Comin, Supervior (III), Water and Wastewater Services
(3) Mr. Drew Peloquin, Supervisor (II), Water and Wastewater Services
(4) Mr. Richard Dixon, Maintenance Compliance Officer, Water and Wastewater Services
(5) Mr. Kevin Fowke, Director, Human Resources and Organizational Development.

of the City of Greater Sudbury (Institution) for the purpose of seeking reimbursement for expenses incurred by these employees in their employment from 2005 to 2011.

In addition I requested a categorized detail expense list as follows. (Highlighted years are not required)

Individual	Amount reimbursed $						
	2005	2006	2007	2008	2009	2010	2011
Mr. Nick Benkovich,							
Mr. Gary Comin							
Mr. Drew Peloquin							
Mr. Richard Dixon,							
Mr. Kevin Fowke,							

(Exhibit 01)

The City also cashed the $5.00 application fee (Exhibit 02) and did not issue a receipt or a letter of acknowledgement.

I received a reply from Ms. Caroline Hallsworth, Executive Director, Administrative Services / City Clerk, dated February 21, 2012 declining access to the information. Ms. Hallsworth stated that the associated requests are excluded pursuant to sec. 52(3) of the Municipal Freedom of Information and Protection of Privacy Act. Ms. Hallsworth further stated that the City of Greater Sudbury was also in the opinion that if these records were not excluded as Sec 52(3), the City of Greater Sudbury would exercise its rights to apply other pertinent sections of the Act, including but not limited to section 4(1) b of MFIPPA and Section 5.1 Regulation 823 under MFIPPA (Exhibit 03).

I appealed to the Information and Privacy commissioner of Ontario seeking access to the information. IPC File number assigned as **MA 12- 106.**

On April 4, 2012, I received another letter, "Revised Noticed of Decision" in response to the appeal which declined access to the information (Exhibit 04).

A. It stated that records associated with this request are excluded pursuant to Sec. 52 (3) of the Act.

B. Ms. Hallsworth further stated that the City of Greater Sudbury is also of the opinion that if these records were not excluded pursuant to sec. 52 (3) of the Act, the City of Greater Sudbury would exercise its rights to apply other pertinent sections of the Act, including but not limited to 4(1) b of MFIPPA and Section 5.1 Regulation 823 of MFIPPA.

C. Ms. Hallsworth stated that the records also contain information that would be excluded under section 14(2) f, 14(2) h;

D. Ms. Hallsworth stated that the records also contain information that would be excluded under section 14(3) f;

E. Ms. Hallsworth stated that the records also contain information that would be excluded under section 11d

F. Ms. Hallsworth stated that the records also contain information that would be excluded under section 10.

Ms. Caroline Hallsworth, stated that there were "**approximately 550 pages**" of records responsive to my request. Ms. Hallsworh denied access to the information quoting various sections of the MFIPPA. Further, Ms. Hallsworh was unable to provide clear and definite legal explanation for the refusal of access to the information. Ms. Hallsworh provided only a vague reply.

Nature of Records Requested:
Refers to Section 52 (4) of the *Act*,
Exception

52 (4) This *Act* applies to the following records:

1. An agreement between an institution and a trade union.
2. An agreement between an institution and one or more employees which ends in a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
3. An agreement between an institution and one or more employees resulting from negotiations about employment-related matters between the institution and the employee or employees.
4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 83.

The *Act* applies for 52 (4) (4)

An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment. 1995, c. 1, s. 83.

Therefore, my request has clearly met the scope of the *Act* and the City of Greater Sudbury must disclose all information as requested.

(A) However, Ms. Caroline Hallsworth, Executive Director, Administrative Services/City Clerk on behalf of the City of Greater Sudbury declined access to the information saying that the information requested are excluded pursuant to sec. 52 (3) of the *Act.*

My View, Discussion and Representation:

Section 52 (3) of the *Act* states as follows

Subject to subsection (4), this *Act* does not apply to records collected, prepared, maintained or used by or on behalf of an institution **in relation** to any of the following:

1. Proceedings or anticipated proceedings before a **court, tribunal** or other entity relating to **labour relations** or to the employment of a person by the institution.
2. **Negotiations or anticipated negotiations** relating to labour relations or to the **employment of a person** by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
3. **Meetings, consultations, discussions or communications** about labour relations or **employment-related matters** in which the institution has an interest. 1995, c. 1, s. 83.

The term "in relation to" means "for the purpose of, as a result of, or substantially connected to" [Order P-1223].

The term "labour relations" refers to the collective bargaining relationship between an institution and its employees, as governed by collective bargaining legislation, or to analogous relationships [Order PO-2157, *Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)*, [2003] O.J. No. 4123 (C.A.)].

The term "employment of a person" refers to the relationship between an employer and an employee. The term "employment-related matters" refers to human resources or staff relations issues arising from the relationship between an employer and employees that do not arise out of a collective bargaining relationship [Order PO-2157].

Section 52 (3) (1): Court or tribunal proceedings:

For section 52 (3) to apply, the institution must establish that:
1. the record was collected, prepared, maintained or used by an institution or on its behalf;
2. this collection, preparation, maintenance or usage was in relation to proceedings or anticipated proceedings before a court, tribunal or other entity; **and**
3. these proceedings or anticipated proceedings relate to labour relations or to the employment of a person by the institution.
(Cited on Order PO-2613)

Was the record collected, prepared, maintained or used by the City of Greater Sudbury or on its behalf?

In reference to a letter dated April 04, 2012 (Exhibit 04) Ms. Hallsworth admitted that "**approximately 550 records"** exist. The City of Greater Sudbury was not able to provide the specific number of records related to this appeal. This concluded that the City of Greater Sudbury has collected, but not maintained, records for employees seeking reimbursement for expenses incurred during their employment.

Therefore information requested; seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury cannot be

excluded pursuant to sec 52 (3) of the *Act.* The information requested meets the scope of the *Act* and the City of Greater Sudbury should disclose all of the information requested.

Was the record collected, prepared, maintained or used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity?

As identified above, the term “in relation to” means “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

The word “proceedings” means a dispute or complaint resolution process conducted by a court, tribunal or other entity which has the power, by law, binding agreement or mutual consent, to decide the matters at issue [Orders P-1223, PO-2105-F].

For proceedings to be “anticipated”, they must be more than a vague or theoretical possibility. There must be a reasonable prospect of such proceedings at the time the record was collected, prepared, maintained or used [Orders P-1223, PO-2105-F].

The word “court” means a judicial body presided over by a judge [Order M-815].

A “tribunal” is a body that has a statutory mandate to adjudicate and resolve conflicts between parties and render a decision that affects the parties’ legal rights or obligations [Order M-815].

“Other entity” means a body or person that presides over proceedings distinct from, but in the same class as, those before a court or tribunal. To qualify as an “other entity”, the body or person must have the authority to conduct proceedings and the power, by law, binding agreement or mutual consent, to decide the matters at issue [Order M-815].

The reimbursement records were collected but not maintained is not used by the City of Greater Sudbury in classification grievances brought forward by employees and/or bargaining agents, in relation to the following proceedings or anticipated proceedings:

1. Proceedings before arbitrators and labour relations boards, including the Ontario Labour Relations Board and Grievance Settlement Board; and
2. Court proceedings in the form of judicial review applications

In Order P-1223, the Office of Information and Privacy Commissioner considered the term "anticipated proceeding" and found that "to fall within the definition of this term, there must be a reasonable prospect of such proceedings at the time of the preparation of the record - the proceedings must be more than just a vague or theoretical possibility."

As noted above, the term “in relation to” has previously been defined as “for the purpose of, as a result of, or substantially connected to” [Order P-1223].

On order PO-2613 , Frank DeVries DeVries, Adjudicator stated as follows. In his view *meeting this definition requires more than a superficial connection between the creation, preparation, maintenance and/or use of the records and the labour relations or employment-related*

proceedings or anticipated proceedings. For example, the preparation of the record would have to be more than an incidental result of the proceedings, and would have to have some substantive connection to the actual conduct of the proceedings in order to meet the requirement that preparation (or, for that matter, collection, maintenance and/or use) be "in relation to" proceedings. This interpretation would also apply under sections 52(3) 2 and 3, which require that the collection, preparation, maintenance and use of the records be "in relation to" either negotiations or anticipated negotiations, or to meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest. (emphasis added)

The requested records; seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury were not maintained and used in relation to proceedings or anticipated proceedings before a court, tribunal or other entity.

Therefore the requested information can not be excluded pursuant to section 52 (3) of the *Act.* The City must fully disclose the requested information.

Section 52(3) (2) negotiations:

For section 52 (3) (2) to apply, the institution must establish that:

1. The records were collected, prepared, maintained or used by an institution or on its behalf;
2. This collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution; **and**
3. These negotiations or anticipated negotiations took place or were to take place between the institution and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[Orders M-861, PO-1648]

Was the record collected, prepared, maintained or used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution?

The requested records; seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from City of Sudbury were not used in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution.

Therefore the requested information can not be excluded pursuant to section 52 (3) of the *Act.* The City must fully disclose the requested information.

Section 52(3) (3): Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest:

The phrase "labour relations or employment-related matters" has been found to apply in the context of:

- a job competition [Orders M-830, PO-2123]
- an employee's dismissal [Order MO-1654-I]
- a grievance under a collective agreement [Orders M-832, PO-1769]
- disciplinary proceedings under the *Police Services Act* [Order MO-1433-F]
- a "voluntary exit program" [Order M-1074]
- a review of "workload and working relationships" [Order PO-2057]
- the work of an advisory committee regarding the relationship between the government and physicians represented under the *Health Care Accessibility Act* [*Ontario (Minister of Health and Long-Term Care) v. Ontario (Assistant Information and Privacy Commissioner)* , [2003] O.J. No. 4123 (C.A.)]

The phrase "in which the institution has an interest" means more than a "mere curiosity or concern", and refers to matters involving the institution's own workforce [*Ontario (Solicitor General) v. Ontario (Assistant Information and Privacy Commissioner)* (2001), 55 O.R. (3d) 355 (C.A.) S.C.C.A. No. 507]

The requested records; seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from City of Sudbury does not meet any one of the above criteria.

Therefore the requested information can not be excluded pursuant to section 52 (3) of the Act.

Conclusion:
This concludes that the requested information seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from City of Sudbury can not be excluded pursuant to sec 52 (3) of the Act.

The City of Greater Sudbury must fully disclose the information as requested.

(B) Ms. Hallsworth is in opinion the City of Greater Sudbury has the right to apply Section 4(1) (b) of MFIPPA and Section 5.1 of Regulation 823

My View, Discussion and Representation:

Section 4 (1) (b) states the following
the head is of the opinion on reasonable grounds that the request for access is frivolous or vexatious

Section 5.1 of Regulation 823

Ahead of an institution that receives a request for access to a record or personal information shall conclude that the request is frivolous or vexatious if,

(a) the head is of the opinion on reasonable grounds that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution; or

(b) the head is of the opinion on reasonable grounds that the request is made in bad faith or for a purpose other than to obtain access. O. Reg. 22/96, s. 1.

Frivolous or Vexatious

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. (Cited in Order MO 2436).

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.] (Cited in Order MO 2635).

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*** (Cited in Order MO 2635).

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. (Cited in Order MO 2635).

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*. (Cited in Order MO 2635).

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

Pattern of conduct

As noted above, section 5.1 of Regulation 823 requires the head of an institution to conclude that a request is frivolous or vexatious if the head is of the opinion, on reasonable grounds, that the request is part of a pattern of conduct that amounts to an abuse of the right of access or would interfere with the operations of the institution.

Accordingly, the affected party (City of Greater Sudbury) must establish that the request is part of a "pattern of conduct."

A "pattern of conduct" requires **recurring incidents of related or similar requests on the part of the requester** [Order M-850].

I submitted **only one (1) request** to the access the information. Therefore there are no recurring incidents of related similar requests.

Therefore affected party City of Greater Sudbury has failed to establish and cannot be proven that the request is part of a "pattern of conduct."

Bad faith

As noted above, section 5.1 of Regulation 823 requires the head of an institution (City of Greater Sudbury) to conclude that a request is frivolous or vexatious if the head is of the opinion, on reasonable grounds, that the request is made in bad faith or for a purpose other than to obtain access.

"Bad faith" has been defined as:

> The opposite of "good faith", generally implying or involving actual or constructive fraud, or a design to mislead or deceive another, or a neglect or refusal to fulfil some duty or other contractual obligation, not prompted by an honest mistake as to one's rights, but by some interested or sinister motive. ... "bad faith" is not simply bad judgement or negligence, but rather it implies the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will [Order M-850].

Applying the definition of bad faith referred to above, Ms. Hallsworth on behalf of City of Greater Sudbury unable to provide evidence to support a finding of bad faith on the part of the appeal.

Purpose other than to obtain access

Where a request is made for a purpose other than to obtain access, the institution need not demonstrate a "pattern of conduct" [Order M-850]. A request is made for a purpose other than to obtain access if the requester is motivated not by a desire to obtain access, but by some other objective [Order M-850].

In Order MO-1924, Senior Adjudicator John Higgins provided extensive comments on when a request may be found to have a purpose other than to obtain access. In that case, Ms. Hallsworth on behalf of City of Greater Sudbury the institution may argue that the objective of obtaining information for use in litigation or to further a dispute between an appellant and an institution (City of Greater Sudbury) was not a legitimate exercise of the right of access.

In rejecting that position, Senior Adjudicator Higgins stated:

> This argument necessitates a discussion of whether access requests may be for some collateral purpose over and above an abstract desire to obtain information. Clearly, such purposes are permissible. Access to information legislation exists to ensure **government accountability and to facilitate democracy** (see *Dagg v. Canada* (*Minister of Finance*), [1997] 2 S.C.R. 403). This could lead to requests for information that would assist a journalist in writing an article or a student in writing an essay. The *Act* itself, by providing a right of access to one's own personal information (section 36(1)) and a right to request correction of inaccurate personal information (section 36(2) indicates that requesting one's personal information to ensure its accuracy is a legitimate purpose**. Similarly, requesters may also seek information to assist them in a dispute with the institution, or to publicize what they consider to be inappropriate or problematic decisions or processes undertaken by institutions.** (Cited in Order MO 2635).

To find that these reasons for making a request are "a purpose other than to obtain access" would contradict the fundamental principles underlying the *Act*, stated in section 1, that "information should be available to the public" and that individuals should have a "right of access to information about themselves". In order to qualify as a "purpose other than to obtain access", in Adjudicator, Steven Faughnan's view, the requester would need to have an improper objective above and beyond a collateral intention to use the information in some legitimate manner. (Cited in Order MO 2635).

The affected party; Ms. Hallssworth on behalf of the City of Greater Sudbury has not provided sufficient evidence to support a finding that my request was made for a purpose other than to obtain access. It can be concluded that my appeal was not made in bad faith.

Conclusion

The affected party; Ms. Hallsworth on behalf of the City of Greater Sudbury has failed to meet the **threshold of establishing on reasonable grounds**, that the access request is made in bad faith or for a purpose other than to obtain access.

Therefore the affected party's; Ms. Hallsworth on behalf of the City of Greater Sudbury, "frivolous or vexatious" arguments are invalid whether they are considered in the context of the *Act*, or in the context of abuse of process at common law.

It can be concluded that the requested information, seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury can not be excluded pursuant to Section 4 (1) (b) of MFIPPA and Section 5.1 of Regulation 823 under MFIPPA.

Therefore the City of Greater Sudbury must fully disclose the information requested.

(C) Ms. Hallsworth stated that the records also contain information that would be excluded under section 14(2) f, 14(2) h
Which states as follows

> 14 (2) f the personal information is highly sensitive;
>
> 14 (2) h the personal information has been supplied by the individual to whom the information relates in confidence

My View, Discussion and Representation:

Sections 14(2), (3) and (4) of the *Ac*t provide guidance in determining whether the disclosure of personal information would result in such an unjustified invasion of privacy.

Criteria re invasion of privacy

14 (2) a head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether,

(a) the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

(b) access to the personal information may promote public health and safety;

(c) access to the personal information will promote informed choice in the purchase of goods and services;

(d) the personal information is relevant to a fair determination of rights affecting the person who made the request;

(e) the individual to whom the information relates will be exposed unfairly to pecuniary or other harm;

(f) the personal information is highly sensitive;

(g) the personal information is unlikely to be accurate or reliable;

(h) the personal information has been supplied by the individual to whom the information relates in confidence; **and**

(i) the disclosure may unfairly damage the reputation of any person referred to in the record. R.S.O. 1990, c. M.56, s. 14 (2).

14(2) has a two pronged approached. In order to established 14 (2) (a); (b) ; (c) ; (d) ; (e) ; (f) ; (g); (h) it has to establish that **the disclosure may unfairly damage the reputation of any person referred to in the record (14 (2) (i)).**

Further clarification can be summarized as follows.

<table>
<tr><td>14 (2)</td><td rowspan="9">AND</td><td rowspan="9">(i)
the disclosure may unfairly damage the reputation of any person referred to in the record.</td></tr>
<tr><td>a;</td></tr>
<tr><td>b;</td></tr>
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<tr><td>f;</td></tr>
<tr><td>g;</td></tr>
<tr><td>h;</td></tr>
</table>

Ms. Hallsworth on behalf of the City of Greater Sudbury stated that that the personal information found in the record is "highly sensitive" pursuant to section 14(2) (f) of the *Act*. In order for personal information to be characterized in this fashion, the parties relying on this proposition must establish that the disclosure of the information would cause excessive personal distress to the affected person (Order M-173).

Previous orders issued by the Commissioner's office have held that the applicability of section 14(2) (i) is not dependent on whether the damage or harm envisioned by this clause is present or foreseeable, but whether this damage or harm would be **"unfair"** to the individual involved. (Cited in Order M-251)

Ms. Hallsworth on behalf of the City of Greater Sudbury did not establish that the disclosure may unfairly damage the reputation of any person referred to in the record.

Therefore the requested information seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury can not be excluded pursuant to Section 14 (2) f and 14 (2) h.

The City of Greater Sudbury must fully disclose the information requested.

(D) Ms. Hallsworth stated that the records also contain information that would be excluded under section 14(3) f of the *Act.*

Section 14 (3) f states the following

> describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

My View, Discussion and Representation:

Natural Justice Theory:

- Any reimbursement from the City of Greater Sudbury should cover **actual and natural expenses** and should also not count as individual income, assets or liabilities, net worth, bank balances or creditworthiness. All the employees named on Appeal No. MA 12 -106 paid salary for their service rendered.
- Ms. Hallsworth stated that the records would be excluded under Section 14(3) f of the *Act* since its describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;
- Referring to Ms. Hallsworth statement, employees named on appeal No. MA 12-106 acquired income, assets, liabilities, net worth, bank balances by reimbursing expenses from the City of Greater Sudbury. This conduct was not inadvertent or mere error in judgment. It was flagrant and deliberate.
- I believe that respect for taxpayers means respect for the law. Further I believe that our democratic rights also come with an obligation. I believe it is the duty of all the City of Greater Sudbury citizens to ensure that our city officials follow the rules and standards set out by our laws.
- **Therefore the City of Greater Sudbury must disclose all information requested.**

For Section 14 (3) Presumed invasion of privacy has Limitation. This limitation expressed under Section 14 (4) of the Act.

Section 14 (4) Limitation;
Despite subsection 14 (3), a disclosure does not constitute an unjustified invasion of personal privacy if it,

> (a) discloses the classification, salary range and benefits, or employment responsibilities of an individual who is or was an officer or employee of an institution;
>
> (b) **discloses financial** or other details of a contract for personal services between an individual and an institution; or
>
> (c) discloses personal information about a deceased individual to the spouse or a close relative of the deceased individual, and the head is satisfied that, in the circumstances, the disclosure is desirable for compassionate reasons. R.S.O. 1990, c. M.56, s. 14 (4); 2006, c. 19, Sched. N, s. 3 (2).

Refer to 14 (4) (b) individuals (employees) noted on Appeal No. MA 12 – 106 must **disclose "financial or other details of a contract for personal services** between the institution and the employees. The reimbursements come under the category of **financial** since it is pertaining to monetary receipts and expenditures. Therefore employees' reimbursements can not be excluded.

Conclusion:
The requested information seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury can not be excluded pursuant to Section 14 (3) f.

The City of Greater Sudbury must fully disclose the information requested.

(E) Ms. Hallsworth stated that the records also contain information that would be excluded under section 11d

Economic and other interests

11. 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;

(b) information obtained through research by an employee of an institution if the disclosure could reasonably be expected to deprive the employee of priority of publication;

(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;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

(f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

(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;

(h) questions that are to be used in an examination or test for an educational purpose;

(i) submissions in respect of a matter under the *Municipal Boundary Negotiations Act* commenced before its repeal by the *Municipal Act, 2001*, by a party municipality or other body before the matter is resolved. R.S.O. 1990, c. M.56, s. 11; 2002, c. 17, Sched. F, Table; 2002, c. 18, Sched. K, s. 19.

Section 11 (d) of the *Act* states; information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

My View, Discussion and Representation:

The purpose of section 11 is to protect certain economic interests of institutions. 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) explains the rationale for including a "valuable government information" exemption in the *Act*: (cited on Order MO-2248).

To establish a valid exemption claim under section 11(d), an institution must demonstrate a reasonable expectation of injury to its financial interests (cited on Order MO-2248).

For sections 11(d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution 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), 41O.R. (3d) 464 (C.A.)].

Accordingly, in order to meet the requirements of the section 11 (d) exemption claims, the City of Greater Sudbury must provide **detailed and convincing evidence** sufficient to establish a reasonable expectation or probability of one or more of the harms described in either of these sections if the records are disclosed to me.

With respect to the applicability of sections 11(d), the City of Greater Sudbury claim of economic harm is exaggerated, false and misleading. In other words employees of the City of Greater Sudbury can not be involved with any economic interest with activities with the City of Greater Sudbury. In this context failing to disclose the reimbursements from the City of Greater Sudbury contravened in accountability and transparency of Part V.1 of Ontario Municipal *Act* 2001. Further Ms. Hallsworth on behalf of the City of Greater Sudbury did not explain how the employees' reimbursements from 2005 to 2011 affect the financial interest of the City.

The requested records should contain the amount of money issued as reimbursement to the employees by the City of Greater Sudbury, and nothing more. Therefore section 11 (d) of the *Act* does not apply.

Conclusion
Therefore the requested information seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 from the City of Sudbury can not be excluded pursuant to Section 11 d of the *Act.*

The City of Greater Sudbury must fully disclose the information requested.

(F). Ms. Hallsworth stated that the records also contain information that would be excluded under section 10.

The *Act* states as follows

Third party information

10. (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;

(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. R.S.O. 1990, c. M.56, s. 10 (1); 2002, c. 18, Sched. K, s. 18.

Consent to disclosure

(2) A head may disclose a record described in subsection (1) if the person to whom the information relates consents to the disclosure. R.S.O. 1990, c. M.56, s. 10 (2).

In my pinion refers to this appeal Section 10 (2) is not an issue raised by Ms. Hallsworth on behalf of City of Greater Sudbury.

My View, Discussion and Representation:

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.) 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 PO-1805, PO-2018, PO-2184, MO-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. (Cited on Order MO-2566)

Part 1: Do the records reveal information that is commercial or financial information?

The City of Greater Sudbury is in opinion expenses submitted by employees as described on Appeal MA 12-106 seeking and incurred reimbursement contain commercial and financial information within the meaning of section 10(1).

These terms have been defined in past orders as:
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).

The expense account submitted by employees of the City of Greater Sudbury seeking reimbursement incurred during their service from 2005 to 2011 should have only how much money they were reimbursed from the City of Greater Sudbury, nothing more.

Therefore, the requested information regarding Appeal No. MA 12-106 has no commercial or financial information to categorize under section 10 of the *Act.*

Therefore the City of Greater Sudbury must fully disclose the requested information.

Part 2: Was the information supplied to City of Greater Sudbury in confidence, either implicitly or explicitly?

Supplied:
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 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 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), cited above.

(See also Orders PO-2018, MO-1706, PO-2496, upheld in Grant Forest Products Inc. v. Caddigan, [2008] O.J. No. 2243 and PO-2497, upheld in Canadian Medical Protective Association v. John Doe, [2008] O.J. 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 MO-1706, PO-2384, PO-2435, PO-2497 upheld in Canadian Medical Protective Association v. John Doe, (cited above)

Therefore, an expense account submitted by employees as noted on Appeal No. 12-16 seeking reimbursements will not qualify as having been "supplied" for the purpose of section 10(1).

Ms. Hallsworth, on behalf of the City of Greater Sudbury may believes that the "inferred disclosure" exception should apply in this instance and that the terms of the "earn-out" component can be characterized as "supplied", as disclosure of this information would disclose reimbursements. The inferred disclosure exception does not apply in the circumstances of this appeal.

Further Ms. Hallsworth, on behalf of the City of Greater Sudbury did not explain how disclosure of the earn-out component would permit accurate inferences to be made with respect to the underlying reimbursements supplied by the employees as described on Appeal No. 12-106 to City.

Therefore, the requested information on Appeal No. MA 12-106 has no commercial or financial information to categorize under section 10 of the *Act.*

Therefore the City of Greater Sudbury must fully disclose the requested information.

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 PO-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 PO-2043, PO-2371, PO-2497)

Again, I re-iterate the expense account submitted by employees of the City of Greater Sudbury seeking reimbursement incurred during their service from 2005 to 2011 should have only how much money they were reimbursed from the City of Greater Sudbury, nothing more.

Therefore reimbursement records were not supplied for the purposes of section 10(1), these records do not qualify for exemption under section 10(1) and should be disclosed to me in accordance with Order MO-2566.

Therefore, requested information on Appeal No. MA 12-106 has no commercial or financial information to categorize under section 10 of the *Act.*

Therefore the City of Greater Sudbury must fully disclose the requested information.

Part 3: Would disclosure of the records give rise to a reasonable expectation that one of the harms specified in paragraphs (a), (b) and/or (c) of section 10(1) will occur?

As the reimbursements records do not include the type of information set out in section 10(1)(d), therefore, it is necessary to consider the harms set out in sections 10(1)(a), (b) and (c).

To meet this part of the test, the institution (City of Greater Sudbury) 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.)]. (Cited on Order MA09-379)

The failure of a party (City of Greater Sudbury) 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 (City of Greater Sudbury) in discharging its onus [Order PO-2020]. (Cited on Order MA09-379)

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 PO-2435].

In addition Parties (City of Greater Sudbury) 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 PO-2435].

Section 10(1) (a): prejudice to competitive position

Disclosure of the records of reimbursements submitted by employees identified in the Appeal MA 12 – 106, could not reasonably affected and not interfere significantly to the City of Greater Sudbury businesses.

Therefore section 10(1) (a) does not apply to the commercial and financial information in the reimbursement records submitted by employees identified in the Appeal.

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

Ms. Hallsworth, on behalf of City of Greater Sudbury does not make the representations nor provide evidence that disclosure of the record could reasonably result in the harm set out in section 10(1) (b). In addition, identified details as commercial and financial information in the expense records submitted by employees of City of Greater Sudbury seeking reimbursement does not apply to the section 10 (1) (b).

Section 10(1) (c): undue loss or gain

Ms. Hallsworth's (on behalf of City of Greater Sudbury) argument on this harm is nothing more than speculation and Ms. Hallsworth has not been provided with detailed and convincing evidence to establish that disclosure of expense accounts submitted by employees of this appeal seeking reimbursement.

Finally the harms in sections 10(1) (a), (b) and (c) do not apply to exempt the information in the expense accounts submitted by employees of this appeal seeking reimbursement.

Therefore the City of Greater Sudbury must fully disclose the requested information.

My Final Conclusion:
My request to access information, Expense accounts submitted by
(1) Mr. Nick Benkovich, Director, Water and Wastewater Services
(2) Mr. Gary Comin, Supervior (III), Water and Wastewater Services
(3) Mr. Drew Peloquin, Supervisor (II), Water and Wastewater Services
(4) Mr. Richard Dixon, Maintenance Compliance Officer, Water and Wastewater Services
(5) Mr. Kevin Fowke, Director, Human Resources and Organizational Development.

to the City of Greater Sudbury (Institution) for the purpose of seeking reimbursement for expenses incurred by the employees in their employment from 2005 to 2011 is clearly within the scope of the *Act*.

Ms. Hallsworth's arguments are invalid and the City of Greater Sudbury must fully disclose the information requested.

Finally I request you to
(1) order the City of Greater Sudbury to release all information requested on this appeal or
(2) forward the matter to a mediator and/or adjudicator for hearing.

I look forward to hearing from you. You also can reach me 705 561 7615 at anytime.

Yours sincerely,

CC:

1. Caroline Hallsworth, Executive Director of Administrative Services/City Clerk of City of Greater Sudbury.