Order on Application by Infrastructure Ontario for Confidentiality

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Overview

The moving party, Infrastructure Ontario ("IO"), applies for confidentiality orders with respect to two categories of documents:

- Category 1: Procurement Documents; and
- Category 2: Advice to Government.

IO, through its counsel, proposes to withhold entirely approximately 2,300 Category 1 and 2 Documents from public disclosure. In practical terms, such an order would mean that none of these documents would be available to the other participants in the Inquiry, or the public. IO would permit other participants' counsel to view the documents only with a confidentiality undertaking and, even then, on a "counsel's eyes only" basis.

These reasons explain why IO's application for confidentiality orders is dismissed. In summary, IO's position is meritless and runs counter to the fundamental purposes of this Inquiry. There is no legal basis to support the sweeping claims of confidentiality asserted by IO regarding documents that go to the core of the Commission's mandate. The granting of the orders sought would substantially and adversely impact the Commission's ability to investigate thoroughly the matters it was created to review. Further, it would unjustifiably deny the public access to critical information. IO's position belies and is antithetical to the Commission's truth-seeking function.

IO's Position

IO asks the Commissioner to make confidentiality orders under ss. 10(4) and 14(3) of the *Public Inquiries Act*, *2009*, S.O. 2009 c. 33, Sched 6. (the "Act") preventing disclosure of documents. It argues that the Commissioner's discretionary power to impose limits on the disclosure of confidential documents under these sections is governed by the discretionary test for a sealing order set out in *Sherman Estate v. Donovan*, 2021 SCC 25**,** at para. 38, and *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 53. Under that test, the party seeking the order must satisfy the court that:

1. Court openness poses a serious risk to an important public interest;
2. The order sought is necessary to prevent this serious risk to the identified interest because reasonable alternative measures will not prevent this risk; and
3. As a matter of proportionality, the benefits of the order outweigh its negative effects.

Applying this test, IO argues that the Category 1 and 2 Documents described below should be withheld entirely from the Participant Database and the public hearings.

a) *Category 1: Procurement Documents*

The Category 1 Documents that IO seeks to withhold are broadly defined as "Procurement Documents." In support of this submission, IO argues:

> During the procurement for the OLRT Project, commercially sensitive information was exchanged in confidence and with the expectation of confidence between the proponents, the City of Ottawa, and IO in its advisory role. Commercially confidential information was exchanged in, among other things, the proponents' bids and proposals, Commercially Confidential Meetings (CCM), Requests for Information (RFI), Design Presentation Meetings (DPM), and in the evaluation of bids and proposals by the sponsor. Confidential information, including budgetary information and risk assessment advice,

> was also shared between the City of Ottawa and IO in its advisory role.
>
> As a result, IO has in its possession and has produced to the Commission documents that contain confidential information related to each Proponent and the City of Ottawa. IO has also produced to the Commission documents that contain commercially sensitive information of vehicle contractors, as well as bidders for other procurements required to facilitate the OLRT1 Project procurement, including procurements for Financial Advisors and the Independent Certifier. IO executed confidentiality agreements with each of these parties concerning the information exchanged.

IO makes two arguments in support of its position that the Category 1 Documents should be withheld.

First, IO argues that it has an obligation under the Broader Public Sector Procurement Directive, the IO Procurement Policy, and its own confidentiality agreements to continually increase confidence in IO's procurement processes, including by safeguarding confidential information submitted by proponents. IO submits that protecting commercially sensitive information and preserving confidentiality agreements are important public interests of the kind protected by the *Sherman/Sierra Club* test.

Second, IO submits that it has an ongoing statutory and common law duty to protect confidential business information supplied by a third party during the procurement process, including after the award of a contract. IO cites the obligation of public institutions to protect scientific, technical, commercial, and financial information under the *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31 ("*FIPPA*"), and the specific obligation under s. 18(1) of *FIPPA* to protect confidential information that could prejudice Ontario's economic or financial interests or one of its institutions.

Taken together, IO submits that disclosure of the Category 1 Documents would harm each of the proponents and the Province of Ontario's financial and commercial interests. It says that project proponents submitted commercially confidential information with the expectation that confidentiality would be maintained. This includes pricing, designs, and other proprietary innovations. According to IO, the public release of this information would undermine the expectation of confidentiality governing all other current and future public procurements and, therefore, the integrity of the public procurement process as a whole because future proponents may be unwilling to share similar information.

IO further notes that many Category 1 Documents relate to third parties who do not have standing in the Inquiry to make submissions to protect their confidential information, including unsuccessful project proponents. On this basis, IO submits that it has a heightened obligation to protect the confidential information of non-participants.

b) Category 2: Advice to Government

The second category of documents IO seeks to withhold is broadly titled "Advice to Government." In support of this submission, IO argues:

> During the OLRT Project procurement and implementation phases, IO provided ongoing advice and recommendations to the Province of Ontario, including confidential budgetary submissions to the Treasury Board Secretariat and Management Board of Cabinet. Category 2 Confidential Documents contain advice to government and budgetary information applicable to public procurements and are exempted from public disclosure under *FIPPA*. Disclosure of the Category 2 Confidential Documents to the public and other participants would harm the Province's interests and the public interest in an open, effective and neutral public service. [Citations omitted.]

Framework & Applicable Law

a) *Public Inquiries & The Open Court Principle*

Public inquiries are conducted in accordance with the open court principle. Both the Supreme Court of Canada and the Court of Appeal for Ontario have emphasized the public's heightened interest in open hearings in a public inquiry as opposed to other court proceedings.[1] The open and public nature of the hearing helps to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.[2]

Section 10(1) of the Act provides the Commission with broad powers to compel witnesses and information disclosure. Under s. 10(3) of the Act, the Commission may require the production of information that is considered confidential or inadmissible under another Act or regulation, and that information shall be disclosed to the Commission for the purposes of the public inquiry. Under s. 10(4), the Commission may impose conditions on the disclosure of information at a public inquiry to protect the confidentiality of that information. The Privilege and Confidentiality Claims Process applicable to this Inquiry is set out in Procedural Order 2.

In this case, the Commission was established by Order-in-Council 1859/2021 (the "OIC") to investigate the "commercial and technical circumstances that led to the OLRT1

[1] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 30; *Phillips v. Nova Scotia (Commission of Inquiry into the Westray Mine Tragedy)*, [1995] 2 S.C.R. 97; *Episcopal Corporation of the Diocese of Alexandria-Cornwall v. Cornwall Public Inquiry*, 2007 ONCA 20 at para. 42 and 48-49.
[2] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 30.

breakdowns and derailments." Pursuant to s. 3 of the OIC, the Commission is specifically authorized and directed to inquire into, among other things:

(a) The decisions and actions that were taken in determining:
    i. The procurement approach the City selected for the OLRT1 Project;
    ii. The selection of the Rideau Transit Group ("Concessionaire"); and
    iii. The award of the alternative financing and procurement ("**AFP**") contract for the OLRT1 Project to the Concessionaire;
(b) Whether the City-led procurement process had an impact on the technical standards applied for the OLRT1 Project and the design, building, operation, maintenance, repair and rehabilitation of the OLRT1 Project.

IO advised the City of Ottawa and the Province of Ontario on numerous facets of the procurement process, including the selection of the procurement approach. A proper and public investigation of the matters set out in the OIC requires consideration of IO's advice to the City and Province.

b) *Interaction between the Act and FIPPA*

IO asserts that it is bound to protect the confidentiality of Category 1 and Category 2 Documents as a public institution under *FIPPA*. However, the Act is clear that the obligation to make disclosure under the Act takes priority over obligations in any other Act, which overrides IO's obligations, if any, under *FIPPA*. Thus, under s. 10(3) of the Act, the Commission "may require the provision or production of information that is considered confidential or inadmissible under another Act or a regulation and that information shall be disclosed to the commission for the purposes of the public inquiry." Pursuant to s. 64 of the *Legislation* Act, *2006*, S.O. 2006, c. 21, Sched. F, this provision must be "interpreted as being remedial and shall be given such fair, large and liberal interpretation as best ensures

the attainment of its objects."[3] As discussed above, the objective of a public inquiry is to "clear the air" through public hearings and to restore public confidence not only in the institution or situation investigated but also in the process of government as a whole.[4] Moreover, s. 10 of the OIC establishing the Commission provides the Commission with the powers described in s. 10(3) of the Act. To the extent that there is a conflict between the obligations under *FIPPA* and the Act, the Act prevails.

In any event, to interpret *FIPPA* in a manner that restricts the Commission's powers under section 10 of the Act runs contrary to the purpose of *FIPPA* itself. *FIPPA* creates a general right of access to records in the custody of or under the control of a public institution unless an exemption or exception applies.[5] Indeed, the right of access to information created by *FIPPA* generally prevails over the confidentiality provisions in other Acts; in other words, it grants access where access would otherwise be withheld.[6]

Application of the Law

a) *Category 1 Claims*

IO describes the rationale for a confidentiality order over Category 1 Documents as follows:

> In order to protect the integrity of the public procurement process, it is of the utmost importance to protect the confidentiality of the evaluation process, the commercially sensitive information of the bidders, and government information, including budgetary and risk assessments (which may also be relevant to future procurement processes). [Emphasis added.]

[3] See also *Rizzo & Rizzo Shoes Ltd. (Re)*, [1998] 1 S.C.R. 27.
[4] *Canada (Attorney General) v. Canada (Commission of Inquiry on the Blood System in Canada – Krever Commission)*, [1997] 3 S.C.R. 440 at para. 30.
[5] *FIPPA*, s. 10, s. 12-22.
[6] *FIPPA*, s. 67.

This rationale fails on the second and third steps of the *Sherman/Sierra Club* test.

I accept that on the first step of the *Sherman/Sierra Club* test, the protection of commercially and financially sensitive information submitted by procurement proponents is an important public interest.[7] Moreover, to the extent IO is bound in its various agreements to maintain the confidentiality of information relating to the procurement process, the integrity of those confidentiality agreements has also been recognized by the Supreme Court as an important public interest.[8]

On the second step of the *Sherman/Sierra Club* test, IO has the onus of establishing that reasonable alternative measures will not prevent a serious risk to an important public interest. In its submissions, IO makes this assertion:

> IO submits that there is no reasonable alternative to withholding the Category 1 Confidential Documents, which would reduce the risks identified above. Partial disclosure of the documents would not ensure the protection of commercially confidential information or the expectation of confidentiality held by the parties to a public procurement.

In my view, a bald assertion that partial disclosure or redaction is insufficient to protect confidentiality does not meet IO's onus. In that regard, I observe that, unlike IO, other participants provided the Commission with details of what precisely was confidential in their documents. IO elected not to do that and instead simply asserted a broad claim that everything in this category of documents is confidential. In any event, in the review of the

[7] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 59.
[8] *Sierra Club of Canada v. Canada (Minister of Finance)*, 2002 SCC 41, at para. 55.

Category 1 Documents, there is no indication that any potentially sensitive information is inextricable from other relevant information.

On the third step, the Commission must consider whether the benefits of the order outweigh its negative effects. The negative effects of withholding the Category 1 Documents outweigh the benefits for two reasons.

First, the Category 1 Documents are directly probative of issues within the Commission's mandate. IO's principal justification for withholding these documents is that disclosure would compromise the integrity of the procurement system by publicizing information that the parties disclosed in confidence. However, as noted above, the Commission was appointed to address concerns about the integrity of the public procurement system, and the Commission is explicitly directed to examine the OLRT1 procurement process under s. 3 of the OIC.

The public has a reasonable expectation that the Commission will make specific findings on the procurement approach the City selected, the selection of the Concessionaire, the award of the AFP contract, and whether the procurement process adopted by the City had an impact on the technical standards applied. If Category 1 Documents are withheld from the public, the Commission will be impaired in its ability to lead relevant documents, question witnesses, justify its conclusions with precision and, ultimately, fulfill its mandate. Indeed, a public investigation of and report regarding the procurement process should *increase* the integrity of future public procurements.

Second, IO has not identified the specific harms that IO, the City, the Province, or the proponents will suffer if the Category 1 Documents are made public. Instead, IO identifies

two broad categories of harms: 1) the harm to proponents of revealing proprietary pricing, designs, and innovations; and 2) the harms to the City and the Province in future public procurement processes if proponents are unwilling to share confidential information.

The purported risk of harm to project proponents is minimal and avoidable. There is no indication that the financial, technical, or proprietary information submitted by the proponents over ten years ago remains sensitive today. In any event, specific financial and technical details can be redacted, as other participants have proposed.

Similarly, the disclosure of the procurement documents will not, as IO submits, "undermine the expectation of confidentiality governing all other current and future public procurements." There is no indication that any participant or proponent will be tempted to withdraw from future tenders out of concern that their information could be made public in a subsequent public inquiry. In any event, the proponents are sophisticated parties who should recognize that when bidding on a public project, there is always the possibility that the public interest may require disclosure.

Finally, the passage of time is a relevant consideration. The City's procurement practices are the same as they were during the OLRT1 procurement process over ten years ago, or they are different. If practices are the same, it is in the public interest to know why they have not changed and what recommendations would improve them. Conversely, if the procurement process is different today, the Commission will not harm current and future procurements by revealing past practices.

For these reasons, IO's application for a confidentiality order with respect to the Category 1 Documents is dismissed.

b) Category 2 Claims

IO describes the rationale for a confidentiality order over Category 2 Documents as follows:

> During the OLRT Project procurement and implementation phases, IO provided ongoing advice and recommendations to the Province of Ontario, including confidential budgetary submissions to the Treasury Board Secretariat and Management Board of Cabinet. Category 2 Confidential Documents contain advice to government and budgetary information applicable to public procurements and are exempted from public disclosure under *FIPPA*. Disclosure of the Category 2 Confidential Documents to the public and other participants would harm the Province's interests and the public interest in an open, effective and neutral public service. [References omitted.]

I note that IO has not articulated claims of public interest immunity or other privileges over its advice to the government but rather describes them as confidentiality claims. This rationale fails for substantially the same reasons as above, with additional considerations.

IO's advice to the government during the design and implementation of the OLRT1 procurement process falls squarely within the Commission's investigative mandate. While such advice might sometimes be treated as confidential to preserve the integrity of the procurement process, there are serious public concerns about the procurement process employed in the OLRT1 project. Any limitation on the Commission's ability to use the Category 2 Documents at a public hearing and explain in a public manner what if any concerns there are with the procurement process would curtail the Commission's ability to make clear findings and specific recommendations.

The fact that documents containing advice to the government are generally exempt from public disclosure under s. 13(1) of the *FIPPA* is not a barrier to their public use by the Commission. First, section 13(1) of *FIPPA* is permissive, stating that a head "may" withhold records containing advice to the government. Second, there are numerous exceptions to s. 13(1) under s. 13(2), and a head is required to disclose advice to the government in certain circumstances.

Third, and in any event, the Commission may require the provision or production of information that is considered confidential or inadmissible under another Act or regulation, and that information shall be disclosed to the Commission for the purposes of the Inquiry. This power must be given a large and liberal interpretation in line with its remedial objectives.[9]

Based on the foregoing, it is evident that s. 13(1) of *FIPPA* does not create a barrier to the Commission's use of the Category 2 Documents. The question instead is whether the logic of the *FIPPA* exemption for government advice applies with equal force to justify a discretionary confidentiality order under s. 10(4) of the Act. It does not.

Advice to the government is exempt from disclosure under *FIPPA* to avoid "the intolerable burden to force ministers and their advisors to disclose to public scrutiny the internal evolution of the policies ultimately adopted."[10] This exemption reflects a concern that disclosure would compromise the ability of public servants to give full and frank advice to ministers and avoids the appearance of a partisan civil service.[11] However, that logic is

[9] *Legislation Act*, s. 64.
[10] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 44.
[11] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para 45.

not persuasive in the exceptional circumstances of a public inquiry, particularly where the Commission is explicitly directed to investigate "the decisions and actions that were taken in determining the procurement approach the City selected for the OLRT1 Project". Put simply, the fact that a document may be withheld under *FIPPA* does not support the proposition that it must be withheld in a public inquiry.

For these reasons, IO's application for a confidentiality order with respect to the Category 2 Documents is dismissed.

Disposition

The Commission is mandated to get answers for the people of Ontario regarding what happened on the OLRT1 Project and how we can prevent the problems from happening again. All participants should be committed to obtaining those answers, and it should be obvious to them that solutions will not be discovered if thousands of relevant documents are suppressed. Accordingly, IO's application for confidentiality orders covering Category 1 and 2 Documents is dismissed for the foregoing reasons.

C. William Hourigan, Commissioner