



Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2566

Appeal MA08-379

St. Thomas Holding Inc.



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NATURE OF THE APPEAL:

The appellant made the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the City of St. Thomas (the City) for:

...information related to the acquisition of [named company] and [named company] by the St. Thomas Holding Inc., owner and operator of St. Thomas Energy Services Inc. (STESI).

- The financial terms related to the acquisition of [named company] and [named company] by St. Thomas Holding Inc.
 - Purchase price of [named company] and [named company]
 - Financial instrument(s) to secure the purchase
 - Project ROI at time of acquisition

- The most recent balance sheet of [named company] and [named company]

In response, the City transferred the request to St. Thomas Holding Inc. (STHI) under section 18(3) of the *Act* on the basis that STHI has a “greater interest” in the requested records.

STHI provided the following background of the matter, which I provide here, in aid of the discussion below.

STHI is a corporation which was created following the reorganization of Ontario electricity sector in the 1990’s. As part of that restructuring, the entity which distributed electricity in and around the city of St. Thomas, the St. Thomas Public Utilities Commission, was incorporated with a single shareholder which is currently the Corporation of the City of St. Thomas (the City).

The changes to the electrical sector in Ontario also created some latitude for corporations such as STHI to sell and purchase businesses or part of businesses which might create greater efficiencies and opportunities. Effectively, STHI operates in a manner which is analogous to a private sector corporation. It competes with other similar companies in the marketplace and its mandate is to both preserve and create value for its shareholder which, in this case, is the City...

In or about the fall of 2007, STHI purchased all of the shares of two companies located in Tillsonburg, Ontario...the shares were purchased from [named individual #1], [named individual #2] and [named Trust], which jointly owned 100% of the shares of the [named companies]. The business of the [named companies] involves the purchase, sales, servicing and maintenance of transformers. The [named companies] have been developing a growing interest in the servicing and installation of infrastructure which supports green energy initiatives such as wind power.

STHI located the records that are responsive to the request. It then issued a decision letter to the appellant, granting him partial access to these records. It denied access to most of the records pursuant to the exemptions in section 11(c) and (d) (economic and other interests) of the *Act*. In addition, it cited the definition of “personal information” in section 2(1) of the *Act*, and stated that it was severing the personal information of certain individuals from the records. This amounts to a claim that the mandatory exemption in section 14(1) (personal privacy) of the *Act* applies to this personal information.

The appellant appealed STHI’s decision.

During mediation, STHI provided the appellant with an Index of Records setting out the records at issue and the exemptions claimed by STHI. Upon receiving the index, the appellant confirmed that the issue of reasonable search is not an issue in the appeal.

Further, STHI disclosed the documents in Record 1(b) to the appellant, except for the names of two individuals. The appellant informed the mediator that he is not seeking access to the names of these two individuals. Consequently, Record 1(b) is not at issue in this appeal.

Finally, the appellant confirmed with the mediator that he believes that disclosure of the requested records, is in the “broader public interest.” Accordingly, the public interest override in section 16 of the *Act* was added as an issue in the appeal.

As the file was not resolved at mediation, it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations from STHI, the appellant and two affected persons (individuals whose interests may be affected by the outcome of the appeal). Representations were shared in accordance with Section 7 of the IPC’s *Code of Procedure and Practice Direction* 7. The file was then transferred to me to conclude the inquiry.

RECORDS:

RECORD	DESCRIPTION	EXEMPTION CLAIMED
1(a)	Share Purchase Agreement dated November 15, 2007	11(c), 11(d), 14(1)
1(c)	Valuations prepared August 16, 2007 by Graham Scott Enns LLP	11(c), 11(d), 14(1)
2	Financial Statements for [named company] and [named company]	11(c), 11(d), 14(1)

DISCUSSION:

PERSONAL INFORMATION

In order to determine which sections of the *Act* may apply, it is necessary to decide whether the record contains “personal information” and, if so, to whom it relates. That term is defined in section 2(1) as follows:

“personal information” means recorded information about an identifiable individual, including,

- (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
- (c) any identifying number, symbol or other particular assigned to the individual,
- (d) the address, telephone number, fingerprints or blood type of the individual,
- (e) the personal opinions or views of the individual except where they relate to another individual,
- (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
- (g) the views or opinions of another individual about the individual, and
- (h) the individual’s name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information [Order 11].

The meaning of “about” the individual

To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official

or business capacity will not be considered to be “about” the individual [Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F, PO-2225].

Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual [Orders P-1409, R-980015, PO-2225].

Effective April 1, 2007, the *Act* was amended by adding sections 2.1 and 2.2. These amendments apply only to appeals involving requests that were received by institutions after that date. Section 2.1 modifies the definition of the term “personal information” by excluding an individual’s name, title, contact information or designation which identifies that individual in a “business, professional or official capacity”. Section 2.2 further clarifies that contact information about an individual who carries out business, professional or official responsibilities from their dwelling does not qualify as “personal information” for the purposes of the definition in section 2(1).

The meaning of “identifiable”

To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed [Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.)].

Representations

The resolution of this issue turns on whether the information at issue is about identifiable individuals in their personal capacity or in their business capacity. STHI submits that the information at issue consists of both, and includes recorded information relating to employment history and information relating to financial transactions in which the individuals have been involved, thereby qualifying as their personal information as that term is defined in section 2(1). STHI submits:

To the extent that the disputed records set out information that relates to the ongoing employment or consulting agreements between the parties, it is submitted that it is about the [named individual’s] in their personal capacities.

To the extent that the disputed records set out information that relates to the purchase price at the time of the transaction, or the value of the [named companies] (e.g. the requested balance sheets) it is submitted that this is information that is about [named individual #1] and [named individual #2] in their personal capacities.

STHI submits that once the [named individuals] agreed to sell their shares in the [named company] and commenced taking the proceeds of the sale, they were acting in a “personal” rather than a “business” capacity. This was not a transaction about the ongoing operation of a business by the [named individuals]. It was not a partnership, joint venture, sale of a portion of the shares etc. The

[named individuals] were selling 100% of their business and taking the proceeds in their personal capacities.

...

In this regard, we note that the personal circumstances of these individuals is such that the disclosure of their business information is de facto of a “personal nature” given their status within a moderately sized community.

Finally, STHI submits that it is reasonable to expect that the named individuals would be identifiable through the disclosure of the responsive information. The named individuals are widely known within the local community.

The adjudicator received representations from the two affected persons who also submit that the information regarding the purchase price is their personal information. The two affected persons note that they continue to work for the companies despite selling all their shares to STHI. They submit that the records at issue include information which describes their finances, income assets, liabilities, net worth, bank balances, financial history or activities and creditworthiness.

The appellant argues that any financial information in the records relates to a business transaction and not a personal transaction. Further, the appellant submits that it is generally known in the community who the owners of the two companies are and there is information on the companies’ website and in its public literature about who they are. The appellant concedes:

By extension, it is reasonable to conclude that the sale of these two privately owned companies, by whatever financial mechanism deployed, would create a financial transaction involved [the named affected parties].

Previous orders have examined the distinction between personal information and business/professional information, and Order PO-2225 sets out this office’s current approach to the distinction. In that order, former Assistant Commissioner Tom Mitchinson addressed the issue of whether the name of an individual who operates a business is that individual’s personal information or business information. The information at issue in that order was the names of non-corporate landlords who owed money to the Ontario Rental Housing Tribunal.

In his analysis, the former Assistant Commissioner posed two questions that help to illuminate the distinction between information about an individual acting in a business capacity as opposed to a personal capacity:

...the first question to ask in a case such as this is: *“in what context do the names of the individuals appear”*? Is it a context that is inherently personal, or is it one such as a business, professional or official government context that is removed from the personal sphere?

The analysis does not end here. I must go on to ask: *“is there something about the particular information at issue that, if disclosed, would reveal something of a*

personal nature about the individual”? Even if the information appears in a business context, would its disclosure reveal something that is inherently personal in nature?

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

The first issue I must address is whether the affected persons, at the time that they sold their shares in the companies to STHI, were doing so in their “business” or “personal” capacity. I have reviewed the representations of the parties and the content of the record to assist in my determination of what capacity the affected persons made the sale of their companies and find that the affected persons were acting in a business capacity, rather than their personal capacity. The Share Purchase agreement, the Valuation and the Financial Statements, in which the affected persons are named, include the terms and conditions for the sale of the two named companies to STHI. I conclude that the affected persons, as sole shareholders of the vendor companies, along with the named trust, were acting in a business capacity in selling all their shares to STHI.

Accordingly, with respect to the first question posed in Order PO-2225 (“in what context does the name of the individual appear?”), I find that the names of the affected persons appear in a professional or business, not a personal context.

However, that is not the end of the analysis. I must go on to ask the second question posed in Order PO-2225: “is there something about the particular information at issue that, if disclosed, would reveal something of a personal nature about the individual”?

Based on my review of the information, relating to the affected persons contained in the records, I am satisfied that portions of all the records contain the affected persons’ “personal information”. Although the affected persons sold their shares to the STHI as business owners, the actual purchase price and other financial information in the record, reveals information that is personal to the two affected persons. The payment amount and schedule for the sale reveal financial transactions in which the affected persons have been involved as private individuals. The appellant concedes that the affected persons are the owners of the named companies and that these companies are privately owned. He also concedes that there has been a financial transaction in the sale of the companies to the STHI. Accordingly, I find that because of the fact that the affected persons are the owners and sole shareholders of the companies, the financial transaction in the sale of the companies directly relates to their personal finances. I find the following pages of the records contain information relating to financial transactions in which the affected persons have been involved and as such, their personal information:

- Share Purchase Agreement – Article 2
- Valuations – Page 3, August 16, 2007 letter, Exhibits 1(a), (b) and (c) – information next to affected person’s name, Exhibit 9 – information next to affected person’s name

Page 3 of August 14, 2007 letter – information under Results of Operation and Financial Position headings, Schedule 3 – information next to identifiable individual’s name

Page 3 of August 14, 2007 letter relating to [named company] – information under Results of Operation heading

STHI also takes the position that, with respect to other information in the record, to the extent that it contains employment information about the affected persons, is also the personal information of the affected persons. I agree. I note that this is the case in portions of Article 5 of the Share Purchase Agreement, and the employment contracts which are included with the Financial Statements. These records contain discrete references to employment information relating to the affected persons which qualify as their personal information. Accordingly, I find that these portions of the records also contain the personal information of the appellants.

The remaining portions of the Share Purchase Agreement (Record 1(a)), the Valuation (Record 1(c)) and the Financial Statements (Record 2) do not contain the affected person's "personal information". The Valuation and Financial Statements contain information about the businesses as a going concern, and their worth, including their assets and liabilities. Disclosure of the affected persons' names with this information would not reveal something of a personal nature of the affected persons. The remaining articles of the Share Purchase Agreement include: Interpretation, Representations and Warranties, Covenants of the parties, indemnification procedure, guarantee and general terms. The affected persons' names are not found in any of these articles and I find that disclosure of this information would not reveal something of a personal nature of the affected persons.

From my review I also find the records, in particular Schedule 3.01 (vv) of the Financial Statements, contain employment information relating to other identifiable individuals who were employed in the two named companies. This information relates to their age, their position, salary and length of service. I find that this is personal information within the meaning of paragraphs (a), (b), and (c) of the definition of that term in section 2(1) of the *Act*.

In summary, I find that portions of the records contain the personal information of the affected persons and other identifiable individuals within the meaning of that term in section 2(1) of the *Act*. I will proceed to consider whether section 14(1) applies to exempt this information from disclosure.

As I have found that portions of records do not contain the personal information of the affected persons, I will consider whether the exemptions in sections 11(c) and (d) apply to this information.

PERSONAL PRIVACY

Where a requester seeks personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) to (f) of section 14(1) applies.

If the information fits within any of paragraphs (a) to (f) of section 14(1), it is not exempt from disclosure under section 14. The affected persons, who were given notice of the appeal, do not

consent to the disclosure of the personal information relating to them, in the records. In the circumstances, it appears that the only exception that could apply is paragraph (f).

The factors and presumptions in sections 14(2), (3) and (4) help in determining whether disclosure would or would not be an unjustified invasion of personal privacy under section 14(1)(f).

If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14. Once established, a presumed unjustified invasion of personal privacy under section 14(3) can only be overcome if section 14(4) or the “public interest override” at section 16 applies. [*John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767]. In the present appeal, section 14(4) does not apply and I will consider the appellant’s public interest argument below.

STHI submits that the presumption at section 14(3)(f) applies such that disclosure of the personal information is presumed to constitute an unjustified invasion of the affected persons’ privacy. STHI states that the records describe the affected persons’ finances, income, assets, liabilities, net worth, bank balances, financial history or activities or creditworthiness. Based on my finding that the records also contain personal information about the employment of the affected persons and other identifiable individuals, I find that section 14(3)(d) is also relevant. Sections 14(3)(d) and (f) state:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information,

- (d) relates to employment or educational history;
- (f) describes an individual's finances, income, assets, liabilities, net worth, bank balances, financial history or activities, or creditworthiness;

The appellant again argues that the information is not personal to the affected persons. The appellant states:

The requested information relates to the companies; the disclosure of this information is not “an unjustified invasion of privacy”, it is considered to part of the due process of mergers and acquisitions in both the private and public domain.

The appellant provides an example of a local businessman who sold his privately owned business to a corporation and the amount of that sale was disclosed as evidence that the amount of the sale is public information.

In reply, STHI submits that the appellant’s example is not helpful in the present appeal and states:

It is true that when a public company enters into a material transaction (such as a significant acquisition), it is required to disclose the details of that transaction to its shareholders and the public by virtue of applicable securities legislation and

stock exchange rules. In the example given by the appellant, BFI Canada Inc. (now called IESI-BFC Ltd.) is a public company which trades on The Toronto Stock Exchange under the stock symbol "BIN". A \$200 million dollar acquisition would clearly be material to it (its total market capitalization at the moment is around \$1.3 billion) and would therefore have to be disclosed in some detail.

A transaction between private entities (such as [named companies] acquisition by STHI, none of which are publicly traded companies such as BFI) is simply not subject to the reporting requirements established under securities legislation and stock exchange rules for public companies.

Based on my review of the parties' representations and the information in records, I find that disclosure of the affected persons' personal information is presumed to constitute an unjustified invasion of their personal privacy under sections 14(3)(d) and (f). The personal information in the Share Purchase Agreement and the Valuation includes information relating to the affected persons' finances, income, liabilities, financial history and/or activities, as well as employment history, flowing from the sale of the two companies. In addition, I find that disclosure of the employment history related to the employees of the two companies that is included in the Financial Statements records is also presumed to constitute an unjustified invasion of their personal privacy under section 14(3)(d) of the *Act*.

As stated above, once I have found that a presumption applies in section 14(3), it cannot be rebutted by one or more factors or circumstances under section 14(2) [*John Doe*, cited above]. As I find that disclosure of this information is presumed to constitute an unjustified invasion of identifiable individuals' privacy, this information is exempt under section 14(1), subject to section 14(4) and my finding on the appellant's public interest argument addressed below.

While the Share Purchase Agreement and the employment contracts in the Financial Statements includes personal information relating to the affected persons, I find that sections 14(4)(a) and (b) do not apply. The affected persons' employment contracts are with the named companies and not STHI, and thus section 14(4) does not apply. Thus, I must only consider whether there is a compelling public interest that overrides the section 14(1) exemption.

Before I consider the appellant's public interest argument under section 16, I must consider whether the exemption in sections 11(c) and (d) apply to the records, which I have not found exempt under section 14(1).

ECONOMIC AND OTHER INTERESTS

STHI submits that section 11(c) and (d) apply to exempt the information I have not found exempt under section 14(1) of the *Act*. This is the remaining portions of the Share Purchase Agreement, the Valuation and the Financial Statements. Section 11(c) and (d) state:

A head may refuse to disclose a record that contains,

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

The 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*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) and/or (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), 41 O.R. (3d) 464 (C.A.)].

Section 11(c): prejudice to economic interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

STHI submits that it operates in a highly competitive marketplace and as such it purchases companies, like those which form the basis of the present request, to improve its position in this marketplace¹. STHI submits that disclosure of the information at issue, and in particular the

¹ STHI submits that the marketplace is highly competitive as it is the policy of the Ontario government to reduce the number of Local Distribution Companies through amalgamation and consolidation. Each Local Distribution Company is seeking to carve out its share of the marketplace through acquiring companies and other LDC's.

details of the structure of the transaction and the financial interests involved could reasonably be expected to prejudice its competitive position. STHI states:

The purchase of [named company] by STHI was undertaken to improve STHI's position in this volatile marketplace. Further STHI is in the process of undertaking other similar transactions in furtherance of this goal. Details about the structuring of the transaction and the financial terms would be of significant interest to other LDC's² as well as to other commercial entities with which STHI might negotiate similar transactions in the future.

...

The harm to STHI if the dispute records are disclosed is not merely speculative. Subsequent to the purchase of [named company], STHI has negotiated two further transactions using the same, or similar, transaction structure as those employed in the [named company] deal.³...

Finally, STHI, as part of its efforts to succeed in a highly competitive marketplace, continues to seek other potential opportunities. It is reasonably anticipated that STHI would utilize the same business structure for any such transaction and it is clear that disclosure of its financial arrangements in prior deals, including that involving [named company] would represent a significant prejudice to STHI's economic interest and competitive position as well as its financial interests.

The appellant submits that STHI's arguments are speculative at best.

Past decisions of this office have found, that the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution's economic interests, competitive position or financial interests for the purposes of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

Based on the representations of the parties, I find that disclosure of the remaining information that is not subject to the section 14(1) exemption could not reasonably be expected to prejudice the economic interests of STHI or its competitive position. STHI has not provided me with the kind of detailed and convincing evidence necessary to establish that disclosure of the remaining portions of the Share Purchase Agreement, the Valuation of the named companies or the Financial Statements of the named companies could reasonably be expected to prejudice its economic interests or competitive position.

STHI submits that had the records in the present appeal been disclosed, then its ability to negotiate a "commercially viable deal" with a subsequent company would have been negatively

²LDC's are Local Distribution Companies.

³ STHI provided examples of two transactions it negotiated. One negotiation appeared to be ongoing at the time STHI's representations were submitted, however, it appears to be now complete.

impacted. STHI does not indicate how or why this would occur, however. Accordingly, I find this argument to be speculative.

STHI is further concerned that disclosure of its Share Purchase Agreement will disclose financial details or the structuring of the transaction that would result in other companies attempting to negotiate for more favourable terms in any future negotiations STHI enters into. The result would be that STHI would be in the position of having to provide “enhanced terms and conditions as part of a “bidding’ process”. Again, the fact that STHI will be subject to a more competitive bidding process as a result of disclosure, does not necessarily result in prejudice to STHI’s economic interests or competitive position. I have not been provided with sufficient evidence to suggest that there will be bidding wars for the LDC’s, nor have I been provided with sufficiently detailed evidence that STHI’s Share Purchase terms are unique. Further, I conclude that the Valuation and the Financial Statements are unique to the named companies only and were created only as a result of the sale of the named companies. It is not clear to me how disclosure of this information will result in the anticipated harms set out in section 11(c), and thus I find that this exemption does not apply to the records.

Section 11(d): injury to financial interests

In support of its position that section 11(d) applies, STHI states:

To the extent that STHI’s position in the marketplace would be damaged by disclosure of the records in dispute, it would reduce the value of STHI for its shareholder, negatively impact its ability to access capital and potentially increase its cost of borrowing.

Based on my review of the record and STHI’s statement, I am unable to find that disclosure of the portions of the Share Purchase Agreement, the Valuation and the Financial Statements could reasonably be expected to be injurious to the financial interests of STHI. STHI provides nothing more than its bald statement that the harm in section 11(d) would occur if the records were disclosed.

For similar reasons above in my discussion of section 11(c), I find STHI’s arguments to be speculative. STHI has not provided me with detailed and convincing evidence necessary to establish that the harm enunciated in section 11(d) would occur. Accordingly, I find that the information is not exempt under section 11(d).

As no further exemptions were claimed for the information at issue and I find that sections 11(c) and (d) do not apply, I will order this information disclosed to the appellant.

PUBLIC INTEREST OVERRIDE

The appellant submits that section 16 of the *Act* applies as there is a compelling public interest in the disclosure of the record that clearly outweighs the purpose of the section 14 exemption.

Section 16 states:

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

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

Compelling public interest

In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act’s* central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074].

The word “compelling” has been defined in previous orders as “rousing strong interest or attention” [Order P-984].

The appellant submits that there is a compelling public interest in disclosure of the record for the following reasons:

- a passion for accountability and transparency from our municipal government
- a lack of public confidence in the governance of STHI
- the conflict between serving STHI versus the residents and taxpayers of the City of St. Thomas
- the scant information released by the Corporation of the City of St. Thomas
- a grave concern about the overall management capability of STHI

The appellant elaborates on each of the above subject matters in some detail. I have included only some of the appellant’s arguments.

Financial Statements

The construct of the Corporation of the City of St. Thomas 2008 Audited Financial Statements by its design, if not by intent, conceals information from the public; there is no transparency regarding St. Thomas Energy Inc., St. Thomas Energy Service In. [two named companies in request]. All financials are “consolidated” under STHI, and are extremely limited and guarded in their nature.

City Council

As mentioned the members of council are almost unchanged from 2003 and regrettably there exists an unparalleled resistance to change, a lack of accountability and an aversion to transparency by the current City Council and City Hall.

Lack of Adequate Control

Regarding the financial management of the City of St. Thomas, there have been repeated occurrences of lack of financial controls which has proven financially detrimental, failure to disclose public documents and lack of transparency in reporting.

The current council is opposed to having a Code of Conduct Policy for themselves like neighbouring municipalities, and has publicly ignored the suggestion to adopt such a policy.

Governance of STHI

Mayor Cliff Barwick and Alderman Tom Johnston, by electing to serve on the Board of Directors for STHI, established a significant and harmful conflict of interest. The conflict rests in placing the interests of STHI ahead of the people who elected them to serve our city...The interests of STHI and the interests of the residents, taxpayers and voters are not necessarily mutually compatible. The unhealthy conflict of interest serves only to further heighten the anxiety and concern over the management of the financial affairs of the City of St. Thomas amongst the public at large.

Finally, the appellant concludes that, the information meets the criteria for “compelling public interest” as:

- the records relate to the economic impact of the citizens of St. Thomas as the STHI is wholly owned by the Corporation of the City of St. Thomas and by extension, its citizenry
- it has not been demonstrated that the disclosure of the requested information will not harm the economic interests of STHI

- the behaviours, competencies, capabilities and intentions of the members of city council with respect to their role as shareholders and Directors of the STHI Board has come into question and scrutiny.

In response, STHI submits that the appellant's interest in the records is personal rather than private and submits that the appellant's two main contentions regarding the financial reporting and the governance of STHI are incorrect. STHI submits that while the appellant makes certain allegations about the City's financial statements, in its most recent audit, the auditors reported:

...the 2008 financial statements of the City "present fairly, in all material respects, the financial position of The Corporation of the City of St. Thomas as at December 31, 2008 and the results of its operations and changes in financial position for the year then ended *in accordance with Canadian generally accepted accounting principles*" (emphasis added). The appellant has provided no evidence to support his allegations which, respectfully, are simply wrong.

In conclusion with respect to the issues raised by the Appellant about the business aspects of the transaction, there is simply no evidence that there is anything improper, improvident or troubling about the deal, the manner in which it was structured, documented and reported or about the financial performance or business judgment of STHI (and any of its related entities).

Regarding the appellant's allegations about City Council, STHI submits that they are not relevant to the issue of whether the information at issue is of public interest. STHI states:

STHI is not in a position to comment on the Appellant's statements respecting financial controls on projects being carried out by the City or the Mayor's travel expenses. Needless to say those issues are not the subject of the request and involve the City directly and not STHI. The fact that the City is the shareholder of STHI does not mean that issues involving the City are relevant to the request being dealt with by the Adjudicator in this matter.

Similarly, the manner in which the City appoints members of City Council to the Board of Directors of STHI or the manner in which they may be remunerated are not relevant to the specific request that is before you. Further, or what it may be worth, we note that apparently there is no issue about that information being available to the public and, to the extent that the Appellant believes that there may be a compelling public interest in the manner in which the City exercises its rights as STHI's shareholders, the information is apparently available to him. But such information is fundamentally different than information respecting STHI's business decisions in the competitive sector of the marketplace in which it is operating.

Finally, STHI submits that the appellant has not presented evidence that there has been any media attention, public outcry or even mild curiosity about the subject matter of his request.

STHI states:

The appellant has clearly expressed his concern with respect to the activities and actions of STHI's shareholder, the City, but there is no evidence that there is any connection between those matters of concern to the Appellant respecting the City and the transaction which is the subject of the request.

Based on my review of the records and the representations, I find that section 16 of the *Act* does not apply. The appellant has not established that there is a sufficiently compelling public interest in the information I have found exempt under section 14(1). I agree with STHI's submission that the appellant's public interest argument, as detailed as it was, focuses on the City's financial statements, the City Council and the City's position as shareholder of STHI. The appellant did not provide me with sufficient evidence to establish that there is a compelling public interest in the disclosure of the personal information of the two owners of the named companies or in the transaction which is the subject of the appellant's request. Accordingly, I find that section 16 of the *Act* does not apply and the information is exempt under section 14(1).

ORDER:

1. I uphold STHI's decision to exempt the following information:

Share Purchase Agreement – Articles 2 and portions of 5

Valuation – Page 3, August 16, 2007 letter, Exhibits 1(a), (b) and (c) – information next to affected persons' names, Exhibit 9 – information next to affected person's name

Page 3 of August 14, 2007 letter – information under Results of Operation and Financial Position headings, Schedule 3 – information next to identifiable individual's name

Page 3 of August 14, 2007 letter relating to [named company] – information under Results of Operation heading

Financial Statements – Schedule 3.01(vv) – Employees of [named company], Agreement between named companies and management team and sales staff, Employment Agreement, Opinion of Purchaser's Counsel

2. I order STHI to disclose the remaining portion of the Share Purchase Agreement, the Valuation and the Financial Statements by providing the appellant with a copy of these records by **December 20, 2010** but not before **December 13, 2010**. I have enclosed with this order a highlighted copy of the records, highlighting the portions of the record that should not be disclosed. To be clear, the highlighted information should not be disclosed to the appellant

3. In order to verify compliance with order provision 2, I reserve the right to require STHI to provide me with a copy of the record sent to the appellant.

Original Signed by: _____

Stephanie Haly
Adjudicator

November 16, 2010