



## Order on Application by the City of Ottawa for Confidentiality

June 10, 2022

**Counsel for the moving party:** Peter Wardle, Singleton Reynolds

### **Overview**

The moving party, the City of Ottawa (the “City”), applies for a confidentiality order preventing the disclosure of approximately 1,600 documents, in whole or in part, to the public and the other participants in the Inquiry.

The City’s documents are highly relevant to the issues at the core of the Commission's investigative mandate, and their production outweighs the City’s concerns for alleged confidentiality and loss of strategic advantage. Further, the City has failed to articulate any appreciable harm that would result from releasing this information. At its essence, the City’s application is a series of broad claims to suppress documents, wholly unsupported by any compelling factual or legal basis for doing so. Further, in its application, the City has repeatedly understated the scope of the Commission’s mandate. The application must be rejected. To do otherwise would prevent the Commission from carrying out its mandate.

The City has also made more targeted claims of confidentiality regarding Stage 2 Budget Documents and Terms Sheets (as defined below). Those documents must also be publicly disclosed. However, counsel is granted an opportunity to suggest specific redactions within ten days of the release of this order.

### **The City’s Position**

The City applies for a confidentiality order under ss. 10(4) and 14(3) of the *Public Inquiries Act, 2009*, S.O. 2009 c. 33, Sched 6 (the “Act”) and argues that the test for such an order 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, a party seeking such an order must establish three prerequisites:

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.

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Applying this test, the City argues that four categories of documents should be entirely withheld from the participant database and public hearings:

- a) Documents containing commercially confidential information relating to the procurement process (the “Procurement Documents”);
- b) Documents produced in the City’s internal Risk, Actions, Issues, and Decisions analysis (the “RAID Documents”);
- c) Documents containing the findings of Transportation Research Associates (“TRA”) with respect to the return to service (the “TRA Documents”); and
- d) Submissions to the Independent Certifier (“IC”) and all decisions of the Independent Certifier (“IC Documents”).

The City also applies to redact or otherwise protect the following documents:

- e) Documents containing capital budget information for Stage 2 of the OLRT Project (the “Stage 2 Budget Documents”); and
- f) Any document that is identified as a Term Sheet (the “Term Sheets”).

Each category is discussed separately below.

a) *Procurement Documents*

The City describes its confidentiality claim over the Procurement Documents in the following terms:

These documents contain commercially confidential information both in the confidential proposals provided by the three proponents, as well as in the nature of the City’s evaluations of these proposals. The disclosure of this information risks divulging not only commercially confidential information belonging to the City and the proponents (which information would not be shared amongst the proponents) but also risks undermining the confidential nature of the RFP process itself. As noted by [Infrastructure Ontario (“IO”)] Policy, “all participants to the evaluation process of an IO procurement must treat information in bidder proposals with appropriate regard for their confidential nature, including following any instructions given to them by IO procurement staff” (IO Policy, Section 5.2). It bears noting that the other two proponents (Ottawa Transit Partners and Rideau Transit Partners) are not participants in the OLRT Public Inquiry and cannot make any confidentiality claim over their confidential proposals.

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The City has identified 565 Procurement Documents to be withheld from disclosure. Broadly speaking, the Procurement Documents relate to (i) the City's decision to use a design-build-finance-maintain model, (ii) the Request for Proposals, and (iii) the Project Agreement entered into between the City and Rideau Transit Group ("RTG" or the "Concessionaire").

The City submits that there is no reasonable alternative to fully withholding the Procurement Documents. Moreover, the City claims that the Commission's mandate is to inquire only into the "commercial and technical circumstances that led to the OLRT1 breakdowns and derailments" and argues that the Procurement Documents are not critical to the overall mandate of the Commission because they do not speak directly to questions of "breakdowns and derailments."

#### *b) RAID Documents*

The City submits that the RAID Documents contain its internal assessment of various risks arising during the OLRT1 Project and the City's assessment of various actions, issues, or decisions in relation to those risks. It has identified 911 RAID Documents.

Without claiming litigation privilege, the City argues that disclosing the RAID Documents would put the City at a legal and commercial disadvantage vis-à-vis the Concessionaire, RTG, in existing and future disputes. It claims that the release of the RAID Documents could result in RTG "obtaining an unfair insight into the City's view of its risks on the Project, thereby giving details not otherwise known by RTG for any additional claims by RTG against the City." The City submits that disclosure would compromise its position in disputes currently before the Superior Court, including those that remain at the IC stage but could later be appealed to the Superior Court.

Finally, the City submits that the RAID Documents are not critical to the Commission's overall mandate to inquire into the "commercial and technical circumstances that led to the OLRT1 breakdowns and derailments."

#### *c) TRA Documents*

The City retained TRA after the September 2021 derailment to assess and advise on the return to service. It has identified 6 TRA Documents. It submits that the information in the TRA Documents is commercially sensitive and contains confidential information regarding the City's assessment concerning the derailments and RTG's return to service. Given the City's dispute with RTG over the derailments, the City submits that disclosure would prejudice the City's position in its ongoing litigation against RTG.

In addition, the City submits that these documents are not critical to the overall mandate of the Commission to inquire into the "commercial and technical circumstances that led

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to the OLRT1 breakdowns and derailments," particularly because the TRA Documents deal with the return to service post derailments, rather than the commercial and technical circumstances leading to the breakdowns and derailments.

*d) IC Documents*

The City submits that all submissions to the IC and all decisions of the IC contain commercially sensitive information relating to the various disputes between the City and RTG. It has identified 44 IC Documents. The City states that "public disclosure of these documents will prejudice the parties in the next steps relating to these claims."

The City further submits that the IC Documents are not critical to the overall mandate of the Commission and that there is no reasonable alternative to fully withholding the IC Documents identified by the City.

*e) Stage 2 Budget Documents*

The City submits that the Stage 2 Budget Documents contain commercially sensitive information relating to the capital budget for Stage 2 of the OLRT Project. It argues that this information is irrelevant to the Commission and remains confidential because Stage 2 is ongoing. The City proposes to redact the sensitive information before the Commission makes these documents public. It has identified 9 Stage 2 Budget Documents.

*f) Term Sheets*

In supplemental submissions dated May 9, 2022, the City asserts confidentiality over all Term Sheets containing commercially sensitive information. It submits that these documents "contain commercially confidential information as between the signatories, the public disclosure of which will disclose commercial negotiations and which can give the City's other contracting parties a competitive advantage in any future negotiations." The City does not specify whether it seeks to withhold the Term Sheets or redact certain portions.

## **Open Court Principle and the Mandate of the Commission**

*a) Public Inquiries and the Open Court Principle*

The relationship between public inquiries and the open court principle was considered in my order on the application by IO for a confidentiality order. I will not repeat that analysis here. However, there are a few points worth emphasizing.

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First, 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.<sup>1</sup>

Second, 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.<sup>2</sup>

Third, I have the power under s.10(3) of the Act to require the production of information that is considered confidential or inadmissible under another Act or regulation. That information must be disclosed to the Commission for the purposes of the public inquiry.

*b) Mandate of the Commission*

The Commission's broad mandate is found in the Order in Council ("OIC") that created this Inquiry. The language in that OIC is clear and straightforward. Yet, the submissions by the City on its application appear to suggest that the mandate is more limited and, on this basis, it should be permitted to withhold relevant documents. To clarify, the Commission is explicitly tasked with inquiring into, among other things, the following:

- (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.
- (c) Whether the AFP contract between the City and the Concessionaire ("Concession Agreement") was adequate to ensure that the design, building, operation, maintenance, repair and rehabilitation of the OLRT1 Project was carried out in accordance with all applicable laws and industry standards, including performance and safety;

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<sup>1</sup> [\*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.

<sup>2</sup> [\*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.

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- (d) Whether the Concessionaire and its subcontractors did carry out the design, building, operation, maintenance, repair and rehabilitation of the OLRT1 Project in accordance with applicable laws and industry standards; and
- (e) Whether the City's oversight of the Concession Agreement and the OLRT1 Project, including its audit, evaluation, inspection and monitoring of the OLRT1 Project, was adequate to ensure compliance with the Concession Agreement and any applicable laws and industry standards. The above includes an inquiry into the decisions that led to the declaration that the OLRT1 Project had reached substantial completion and any associated testing carried out to support such declaration.

## **Analysis of Claims**

### *a) Procurement Documents*

This argument fails for substantially the same reasons that the application by IO for a confidentiality order for procurement documents was rejected in my previous order, and this decision should be read in conjunction with those reasons. In addition to those reasons, I note the following.

On the second step of the *Sherman/Sierra Club* test, there is no indication that redaction or partial disclosure would not provide a reasonable alternative, and there is no evidence to suggest that the confidential information is inextricable from other relevant information. The City's bald submission that confidentiality can only be preserved by fully withholding the Procurement Documents runs counter to a public inquiry's open and public nature.

On the third step, the Commission must consider whether the benefits of the order outweigh its negative effects. In this case, the negative effects of withholding the Procurement Documents would outweigh the benefits for two reasons. First, contrary to the City's submission, the Procurement Documents are directly probative of issues within the Commission's mandate. Consequently, the suppression of the Procurement Documents will impair the Commission's ability to fulfill its mandate. Second, the City has not identified any specific harm that could arise from disclosing the information.

For these reasons, the City's application for a confidentiality order concerning the Procurement Documents is dismissed.

### *b) RAID Documents*

The City seeks to suppress the production of the RAID Documents principally on the basis that disclosure would allow RTG to commence additional new claims against the City or give RTG an advantage in existing disputes. It adds that the RAID Documents are not critical to the Commission's overall mandate because they are not directly relevant to the

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“commercial and technical circumstances that led to the OLRT1 breakdowns and derailments.” The City does not claim litigation privilege over these documents.

The City’s relevance argument is meritless. Among other provisions, paragraph 3(e) of the OIC authorizes and directs the Commission to inquire into “Whether the City’s oversight of the Concession Agreement and the OLRT1 Project, including its audit, evaluation, inspection, and monitoring of the OLRT1 Project, was adequate to ensure compliance with the Concession Agreement and any applicable laws and industry standards.” The adequacy of the City’s processes for identifying and mitigating various risks associated with the OLRT1 Project is clearly relevant to the Commission’s mandate.

Applying the *Sherman/Sierra Club* test, the City has not specifically identified the public interest at stake in the confidentiality of the RAID Documents. The Commission understands the City to mean that disclosure would infringe the City’s fair trial and discovery rights in its litigation with RTG. While the case law recognizes fair trial rights as an important public interest,<sup>3</sup> the Commission notes that if the RAID Documents are sufficiently relevant that they could prejudice the City in its disputes with RTG, and the documents are not otherwise privileged, then it is unlikely that disclosure within this Inquiry will prejudice the City’s fair trial rights in any way.

The City argues that the RAID Documents could be used to commence new claims against the City, but it is unclear how this could be done, nor whether this engages a “public interest” beyond the isolated disputes between the parties. In any event, for the purposes of the *Sherman/Sierra Club* test, even if I assume that the first step is met, the City’s application ultimately fails on the second and third steps.

In the second step, the City has not explained why reasonable alternative measures could not preserve the confidentiality of the RAID Documents. It must be remembered that the burden is on the City to show that the order sought is “necessary”, in the sense that it is the least restrictive measure available.<sup>4</sup>

In the third step, the City has failed to meet its burden to show that the harms of disclosure outweigh the benefits. As the Supreme Court emphasized in *Sherman*, at para. 35, an applicant seeking a confidentiality order “cannot content [itself] with an unsubstantiated claim.” Here, the City does not specify how RTG could use the RAID Documents to commence additional claims against the City, nor how disclosure could give RTG an advantage in existing disputes. Without a clear idea of the potential harms, the heightened public interest in open Commission hearings outweighs the harms the City would allegedly suffer if RTG used the RAID Documents in different litigation.

Based on the foregoing, the City’s application for a confidentiality order regarding the RAID Documents is dismissed.

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<sup>3</sup> *Sierra Club*, at para. 50-55.

<sup>4</sup> *Sherman*, at para. 105

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c) *TRA Documents*

The City seeks to withhold the TRA documents on the following basis:

The City submits that the information in the TRA Documents is commercially sensitive and contains confidential information regarding the City's assessment in relation to the derailments and RTG's return to service. As such, these documents should not be disclosed to the public. In particular, given the City's current dispute with RTG over the derailments, the City submits that disclosure of TRA's assessment of the derailments and RTG's return to service risks would prejudice the City's position in its ongoing litigation against RTG. It bears noting that TRA has attended various Transit Commission meetings and answered questions by Commissioners, but its final findings in its reports have not been made public on the basis of the concerns outlined above.

The City also submits that the TRA Documents are not critical to the overall mandate of the Commission because they deal with the return to service post-derailment rather than the "commercial and technical circumstances that led to the OLRT1 breakdowns and derailment."

The City's argument that the TRA Documents are not relevant is unpersuasive. Based on the Commission's review, five of the six TRA Documents identified by the City do not contain commercially or financially sensitive information. The remaining TRA Document (DocID #COW104836) is a TRA Technical Briefing presentation containing a root cause analysis of the derailments and recommendations for corrective actions. The TRA Documents, and the Technical Briefing, in particular, are directly relevant to the Commission's mandate. Indeed, it appears that TRA's mandate overlapped with the Commission's mandate.

The City does not explain how the disclosure of the TRA Documents would "prejudice the City's position in its ongoing litigation against RTG." For these reasons, the City has not met its burden to establish that the harms of disclosure outweigh the benefits.

d) *IC Documents*

The City seeks to withhold the IC Documents because they contain commercially sensitive information relating to the various disputes between the City and RTG and that public disclosure would "prejudice the parties in the next steps relating to these claims." Moreover, the City claims that the IC Documents are not critical to the Commission's overall mandate. The only remedy the City submits is to withhold the IC Documents entirely. Notably, the City does not assert mediation, arbitration, or settlement privilege in connection with the IC Documents.

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On the question of relevance, there can be no doubt that the IC Documents are relevant and probative of issues within the Commission's investigative mandate. The IC is charged with dispute resolution under Schedules 6 and 27 of the Project Agreement. The City and RTG have submitted various disputes to the IC arising from cost overruns and delays. The information submitted to the IC, and the IC's determinations, are pertinent to the Commission's mandate.

Beyond its bald assertion that disclosure would "prejudice the parties in the next steps relating to these claims," the City does not specify the harm that would be suffered if the IC Documents were disclosed publicly. It is unclear how disclosing these documents would prejudice the "next steps" in the litigation between the parties when the parties have already exchanged their submissions before the IC or in other related litigation. The City has failed to discharge its burden to demonstrate that any harm would result from disclosure.

*e) Stage 2 Budget Documents*

The City proposes to redact certain commercially sensitive information contained in the Stage 2 Budget Documents. Based on the Commission's review, these documents include some information related exclusively to Stage 2 that is not relevant for the Commission's purposes and may be safely redacted. However, the Stage 2 Budget Documents also include relevant information related to Stage 1, which should not be redacted.

I order that the City provide, within ten days of the date of this order, proposed redactions of the commercially sensitive information, subject to further review by the Commission.

*f) Term Sheets*

In supplemental submissions dated May 9, 2022, the City asserts confidentiality over all "Term Sheets" containing commercially sensitive information. The City identifies DocID# COW0157107 as an example but has yet to identify any other Term Sheets in its document population. The City submits that these documents "contain commercially confidential information as between the signatories, the public disclosure of which will disclose commercial negotiations, and which can give the City's other contracting parties a competitive advantage in any future negotiations." The City does not specify whether it seeks to withhold the Term Sheets or redact portions.

Given the lack of information provided by the City regarding this claim, I am dismissing it without prejudice to the right of the City to file further written submissions, which identify the relevant documents and proposed redactions of the commercially sensitive information. Those submissions are due within ten days of the date of this order.

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## **Disposition**

The City's application for a confidentiality order over the first four categories of documents is dismissed. However, appropriately limited redactions may be applied to Stage 2 Budget Documents, and the City retains the right to deliver further submissions with respect to the Term Sheets (including proposed redactions) for further review and consideration by the Commission. Written submissions regarding these proposed redactions must be filed with the Commission within ten days of the date of this order.

C. William Hourigan, Commissioner