TO: Chair and Members
    General Issues Committee

WARD(S) AFFECTED: CITY WIDE

COMMITTEE DATE: August 10, 2011

SUBJECT/REPORT NO:
Signing Authorization - Confidentiality Agreement - 2015 Pan Am Projects
(CM11015) - (City Wide)

SUBMITTED BY:
Chris Murray
City Manager

PREPARED BY:
Lisa Pasternak
Senior Solicitor, Extension 7292

SIGNATURE:

RECOMMENDATION

That the Mayor and City Clerk be authorized and directed to sign a confidentiality agreement, in a form satisfactory to the City Solicitor, with Infrastructure Ontario for the 2015 Pan Am Projects.

EXECUTIVE SUMMARY

Infrastructure Ontario requires that the City enter into a confidentiality agreement before it will disclose certain sensitive and commercially confidential budgetary and other information with respect to the 2015 Pan Am Projects, information required to move forward on these Projects. The recommendation authorizes and directs the Mayor and City Clerk to sign the confidentiality agreement.

FINANCIAL / STAFFING / LEGAL IMPLICATIONS

Financial: Not applicable.

Staffing: Not applicable.

Legal: Not applicable.
HISTORICAL BACKGROUND

On January 31, 2011 Council adopted a number of recommendations with respect to the City’s participation in the 2015 Pan Am Games. One of these recommendations authorized the Mayor and City Clerk to sign all required agreements, however, the wording was limited to the Ivor Wynne Stadium Project and did not extend to other Projects.

POLICY IMPLICATIONS

Not applicable.

RELEVANT CONSULTATION

Legal Services was consulted in the preparation of this report.

ANALYSIS / RATIONALE FOR RECOMMENDATION

For staff to continue the process of implementing recommendations with respect to the City’s participation in the 2015 Pan Am Games, a confidentiality agreement with Infrastructure Ontario must be signed. The confidentiality agreement includes all 2015 Pan Am Projects.

ALTERNATIVES FOR CONSIDERATION

Not applicable.

CORPORATE STRATEGIC PLAN (Linkage to Desired End Results)


Growing Our Economy

• A visitor and convention destination

Healthy Community

• Plan and manage the built environment

APPENDICES / SCHEDULES

None
CONFIDENTIALITY AGREEMENT

THIS AGREEMENT (the "Agreement") is made as of the ___ day of August, 2011

BETWEEN:

CITY OF HAMILTON
("Recipient")

AND

ONTARIO INFRASTRUCTURE AND LANDS CORPORATION
("Infrastructure Ontario")

WHEREAS Infrastructure Ontario and Recipient will be engaged in certain matters from time to time related to various projects in respect of the 2015 Pan Am Project, including but not limited to the Hamilton Soccer Stadium, Velodrome and any other Pan Am Project delivered by Infrastructure Ontario where the Recipient will have an ownership stake (collectively, the "Projects"), which will include the disclosure of certain sensitive and commercially confidential budgetary and other information that if disclosed by the Recipient would damage the economic interests of the Province of Ontario;

AND WHEREAS Infrastructure Ontario would not disclose any such information to Recipient unless Recipient had first executed this Agreement;

NOW THEREFORE in consideration of the mutual covenants and agreements of the parties hereinafter contained, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the parties covenant and agree as follows:

1. **Definition**

   "Confidential Information" means all information in respect of any of the Projects, whether in written, verbal or electronic form, which is furnished to, made available to or comes into the knowledge, possession or control of Recipient or its affiliates, directors, officers, councillors, employees, consultants, advisors or agents (collectively, "Representatives"), by or on behalf or at the request of Infrastructure Ontario, whether before or after the date of this Agreement, provided it has been identified in writing by Infrastructure Ontario as "confidential", "non-public" or "proprietary" and includes, without limitation, all budgetary and financial information to the extent it is confidential, non-public or proprietary information related to the Projects, and provided it has been identified in writing by Infrastructure Ontario as such.

2. **Exception**

   "Confidential Information" does not include any information which (i) is, or becomes, generally available to the public other than as a result of a disclosure resulting from a breach of this Agreement; (ii) becomes available to Recipient on a non-confidential basis from a source other than Infrastructure Ontario, so long as that source is not bound by a confidentiality agreement with respect to the information or otherwise prohibited from transmitting the information to Recipient by a contractual, legal or fiduciary obligation; or (iii) Recipient is able to demonstrate was known to it on a non-confidential basis before it was disclosed to Recipient by Infrastructure Ontario.
3. **Recipient’s Obligations**

Recipient acknowledges that the Confidential Information is the confidential and, if applicable, proprietary and privileged information of Infrastructure Ontario. Recipient and Infrastructure Ontario agree that:

(i) the Recipient shall keep the Confidential Information confidential and secure and, without limiting the foregoing, agrees to hold the same in confidence using the same means it uses to protect its own confidential information;

(ii) the Recipient shall, subject to subsections 3(vi) and (vii), not disclose, transfer or provide access to any of the Confidential Information to any other party whatsoever without the prior written authorization of Infrastructure Ontario or unless as required by applicable law, judicial process or governmental authority, provided that Recipient provides Infrastructure Ontario with reasonable notification and an opportunity to contest such requirement to disclose prior to the disclosure of the Confidential Information;

(iii) the Recipient shall not use the Confidential Information in any way detrimental to the commercial or legal interests of Infrastructure Ontario, the Province of Ontario or any of their respective related entities as related to the conducting of a competitive procurement by Infrastructure Ontario in respect of the Projects;

(iv) the Recipient shall not duplicate any Confidential Information submitted in any form by Infrastructure Ontario, except for the purposes of the Projects, as permitted by this Agreement;

(v) the Recipient shall not use the Confidential Information, directly or indirectly, for any purpose other than the sole purpose set out in the recital above;

(vi) notwithstanding the foregoing provisions of this Section 3, Infrastructure Ontario acknowledges and agrees that the Recipient may at any time after the day that is seven (7) days after commercial and financial close have been achieved under the relevant project agreement to be entered into between Infrastructure Ontario and various private-sector consortia selected by Infrastructure Ontario to undertake the various Projects (each a “Project Co”), disclose for legitimate municipal purposes certain Confidential Information related to the applicable Project Co’s proposal related to the applicable Project, including for certainty, information related to the cost of Project Co’s proposal, and including construction, payment, scheduling or other aspects of Project Co’s proposal that would otherwise constitute Confidential Information under this Agreement. For greater certainty, this Section 3(vi) applies to: (a) the aggregate cost figure for the Project, (b) the aggregate hard costs figure for the Project; and (c) the aggregate soft costs figure for the Project, but does not apply to any other Confidential Information related to proprietary analysis, calculations, estimates, and costing break-downs of budgetary figures done by Infrastructure Ontario, and the actual budgetary figures arising out of such analysis, calculations, estimates and costing break-downs;

(vii) Infrastructure Ontario further acknowledges that the Recipient may wish to disclose for legitimate municipal purposes (including disclosure to the Mayor and the Councillors of the City of Hamilton) or otherwise make available at publicly
attended municipal Council meetings certain Confidential Information related to budgetary figures, analysis, calculations, estimates, costing break-downs and/or other budgetary information related to the implementation of one or more of the Projects. The Recipient and Infrastructure Ontario acknowledge and agree that the Recipient may, subject to the other provisions of this Agreement, only disclose such Confidential Information if: (i) the Recipient has first provided Infrastructure Ontario with a complete description of the Confidential Information it wishes to disclose; and (ii) Infrastructure Ontario has provided its written consent to the Recipient prior to the disclosure of such Confidential Information. Infrastructure Ontario shall, provided that the disclosure of such Confidential Information would not reasonably be seen to have an adverse impact on the economic interests of the Province or Infrastructure Ontario, provide such consent to the Recipient for the purpose of providing Confidential Information to the Recipient's Council in order to make decisions relating to the Projects. Infrastructure Ontario acknowledges that the Recipient's Council meetings shall be open to the public, as required under the Municipal Act (Ontario).

4. Disclosure to Representatives
Notwithstanding anything else herein, Recipient is entitled to disclose the Confidential Information to its Representatives to facilitate the execution, delivery and completion of the various Projects, provided that (i) the Recipient shall limit on a 'need to know basis' the disclosure to those Representatives who reasonably require access to the Confidential Information for proper performance of their employment or other official obligations; (ii) Recipient shall inform each such Representative of the confidential and proprietary nature of the Confidential Information; and (iii) Recipient shall remain jointly and severally liable to Infrastructure Ontario in respect of any breaches of such obligations by its Representatives to the same extent as if such breach was made by Recipient.

5. Responsibility
Recipient agrees to fully indemnify Infrastructure Ontario, the Province of Ontario, their respective related entities and each of their respective directors, officers, consultants, employees, agents and representatives from and against any loss, cost, damage, expense and liability suffered or incurred by any of them in connection with any such unauthorized disclosure or use of the Confidential Information or breach of this Agreement.

6. No Representation or Warranty regarding Confidential Information
Recipient acknowledges and agrees that (i) neither Infrastructure Ontario nor any related entities makes any representation or warranty as to the accuracy or completeness of the Confidential Information, and (ii) neither Infrastructure Ontario, nor any of its related entities, shall have any obligation or liability to Recipient as a result of the use of the Confidential Information by Recipient.

7. Business Relationship
This Agreement does not create an agency, partnership, joint venture, or other joint relations between Recipient and Infrastructure Ontario.

8. Breach
Any breach known to Recipient of the obligations in this Agreement shall be reported forthwith to Infrastructure Ontario by Recipient.
9. **FIPPA**
   No information, records or documents containing personal information shall be provided to Recipient pursuant to this Agreement. Recipient acknowledges that Infrastructure Ontario is bound by the *Freedom of Information and Protection of Privacy Act* (Ontario) ("FIPPA"). If a request is made under FIPPA for access to information or records provided by Infrastructure Ontario to Recipient, Recipient will use its commercially reasonable efforts to cooperate with Infrastructure Ontario in identifying records responsive to the request and responding to it in a timely manner, where those records are in the custody of or within the control of the Recipient.

10. **MIPPA**
    Notice is hereby given, and Infrastructure Ontario acknowledges that the Recipient is subject to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56. Information submitted to and in the possession of the Recipient that is governed by that Act may be required to be disclosed in accordance with the requirements of that Act, and Infrastructure Ontario acknowledges and agrees that such disclosure shall not constitute an unauthorized disclosure of Confidential Information or a breach of this Agreement.

11. **Entire Agreement**
    This Agreement sets out the entire agreement between the parties pertaining to the subject matter hereof and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written regarding confidentiality obligations with respect to any of the Projects. This Agreement replaces and supersedes any other confidentiality and non-disclosure agreements executed by the Recipient and its Representatives in connection with the Projects or any aspects thereof. For certainty, this Agreement does not affect or otherwise diminish any additional confidentiality obligations arising between Infrastructure Ontario and the Recipient in relation to a memorandum of understanding currently under negotiation between the parties.

12. **Amendment**
    This Agreement may only be amended, modified or supplemented by a written agreement signed by both parties.

13. **No Waiver**
    No waiver of or consent to depart from the requirements of any provision of this Agreement shall be binding against either party unless it is in writing and is signed by the party giving it. No failure on the part of either party to exercise, and no delay in exercising, any right under this Agreement shall operate as a waiver of such right.

14. **Independent Legal Advice**
    Recipient acknowledges that it has been advised to obtain independent legal advice as to its rights and obligations under this Agreement. Further, Recipient acknowledges that it has obtained such independent legal advice or waives its right to do so, and acknowledges that it understands all the rights and obligations under this Agreement.

15. **Governing Law**
    This Agreement will be governed by and construed and enforced in accordance with the laws in force in Ontario (excluding any conflict of laws rule or principle which might refer such construction to the laws of another jurisdiction) and will be treated in all respects as
an Ontario contract. The parties irrevocably submit to the exclusive jurisdiction of the Ontario courts with respect to any matter arising hereunder or related thereto.

16. Severability
If any provision of this Agreement is determined to be invalid, illegal or unenforceable in any respect by a court of competent jurisdiction, the validity, legality or enforceability of the remaining provisions of this Agreement shall not in any way be affected or impaired thereby.

17. Notices

17.1 All notices, requests, demands, instructions, certificates, authorizations, consents, agreements and copies thereof and other communications (each being a "Notice") required or permitted under this Agreement shall be served by sending the same by facsimile or by hand, as follows:

If to Infrastructure Ontario:
777 Bay Street, 6th Floor
Toronto, Ontario M5G 2C8
Fax: 416.326.9291

Attn.: Tariq Taherbhai, Vice President, Project Legal

If to Recipient:
City of Hamilton
71 Main Street West
Hamilton, Ontario
L8P 4Y5
Fax: 905.546.2095

Attention: R. Caterini, City Clerk

17.2 Where any Notice is provided or submitted to a party via facsimile, an original of the Notice sent via facsimile shall promptly be sent by regular mail. For greater certainty, a Notice given via facsimile shall not be invalid by reason only of a party's failure to comply with this section 17.2.

17.3 Any party to this Agreement may, from time to time, change any of its contact information set forth in section 17.1 by prior Notice to the other party, and such change shall be effective on the business day that next follows the recipient party's receipt of such Notice unless a later effective date is given in such Notice.

17.4 Subject to subsection 17.4(i), a Notice given by hand delivery shall be deemed to have been received on the day it is delivered. Subject to subsections 17.7(i) and 17.4(ii), a Notice given by facsimile shall be deemed to have been received on the day it is transmitted by facsimile.

(i) If any Notice delivered by hand or transmitted by facsimile is so delivered or transmitted, as the case may be, either on a day that is not a business day or on a business day after 4:00 p.m. (Recipient's local time), then
such Notice shall be deemed to have been received by such recipient on
the next business day.

(ii) A Notice given by facsimile shall be deemed to have been received by the
recipient on the day it is transmitted only if a facsimile transmission report
(maintained by the sender) indicates that the transmission of such Notice
was successful.

For the purposes of this section 17.4 "business day" means any day other than a
Saturday, Sunday or statutory or civic holiday observed in Toronto, Ontario.

18. **Headings**
The division of this Agreement into paragraphs and the insertion of headings are for
convenience of reference only and shall not affect the construction or interpretation of
this Agreement.

19. **Non-Assignment**
Recipient shall not assign this Agreement or any interest herein without Infrastructure
Ontario’s prior written consent.

20. **Survival**
The obligations of Recipient under this Agreement shall survive the return to
Infrastructure Ontario of the Confidential Information.

21. **Counterparts**
This Agreement may be signed in one or more counterparts, each of which so signed
shall be deemed to be an original, and such counterparts together shall constitute one
and the same instrument. Notwithstanding the date of execution or transmission of any
counterpart, each counterpart shall be deemed to have the effective date first written
above.

21. **Term**
This Agreement will terminate on the seventh anniversary of the date first above written.

22. **English Language**
The parties hereto have required that this Agreement and all deeds, documents or
notices relating thereto be drafted in the English language. Les parties aux présentes
ont exigé que la présente convention, tout avis et tout document se rapportant à ladite
convention soient rédigés en langue anglaise.

[Signature page follows]
IN WITNESS WHEREOF the parties have executed this Agreement as of the date first above written.

Ontario Infrastructure and Lands Corporation

Per: ____________________________
Name: __________________________
Title: __________________________

I have the authority to bind the corporation.

City of Hamilton

Per: ____________________________
Name: R. Bratina
Title: Mayor

Per: ____________________________
Name: R. Caterini
Title: City Clerk

We have authority to bind the City of Hamilton.