



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-209**

## **Appeal M-9300303**

### **Corporation of the Town of Dunnville**



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# ORDER

On September 20, 1993, the undersigned was appointed Inquiry Officer and received a delegation of the power and duty to conduct inquiries and make orders under the provincial Freedom of Information and Protection of Privacy Act and the Municipal Freedom of Information and Protection of Privacy Act.

## **BACKGROUND:**

The Corporation of the Town of Dunnville (the Town) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to "an environmental audit done on CN-owned land the town is proposing to purchase." The Town denied access to the record on the basis that "the Town is legally bound by a signed agreement with CN that states this audit remain confidential." The record at issue is a report compiled by an outside consultant retained by the Town which contains information about the subject land arrived at by the consultant through its research. The requester appealed the decision of the Town.

During mediation, the Commissioner's office informed the Town that it would have to issue a more detailed decision letter to meet the requirements of section 22 of the Act. The Town then sent the appellant a new decision letter denying access to the records on the basis of section 10(1)(a) of the Act. In the course of further mediation, the Town indicated that it had misquoted the exemption, and it was, in fact, claiming that section 11(c) of the Act applied to exempt the record from disclosure. The appellant indicated his intention to claim that section 16 of the Act applied to the record.

Mediation was not successful and notice that an inquiry was being conducted to review the Town's decision was sent to the Town and the appellant. Representations were received from both parties. In its representations, the Town stated that section 11(g) of the Act also applied to exempt the record.

## **ISSUES:**

The issues arising in this appeal are as follows:

- A. Whether the discretionary exemption provided by section 11(c) of the Act applies to the record.
- B. Whether the discretionary exemption provided by section 11(g) of the Act applies to the record.

## **SUBMISSIONS/CONCLUSIONS:**

**ISSUE A: Whether the discretionary exemption provided by section 11(c) of the Act applies to the record.**

Section 11(c) states:

A head may refuse to disclose a record that contains,

information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

In order to qualify for exemption under section 11(c) of the Act, the Town must successfully demonstrate that there exists a reasonable expectation of probable harm to its economic interests or competitive position should the information contained in the record at issue be disclosed. The mere possibility of harm is not sufficient. At a minimum, the institution must establish a clear and direct linkage between the disclosure of the information and the harm which is alleged (Order M-202).

Furthermore, the evidence to support such an expectation must be "detailed and convincing." An institution relying on the exemption bears the onus of providing sufficient evidence to substantiate the reasonableness of the expected harm(s) by virtue of section 42 of the Act (Orders M-27, M-37, M-117 and P-229).

The Town's sole representation is as follows:

... the release of this information may prejudice the economic interest or competitive position of the Town, as the Town has made a conditional offer on the lands to which the record pertains, and the lands may be the subject of future negotiations.

In my view, the Town has not provided evidence sufficiently detailed and convincing to demonstrate a reasonable expectation of harm. The Town has failed to make the necessary connection between the disclosure of the information contained in the records themselves and any specific prejudice which could reasonably be expected to result to its economic interests or competitive position should the information be disclosed. Accordingly, I find that the record does not qualify for exemption under section 11(c) of the Act.

**ISSUE B: Whether the discretionary exemption provided by section 11(g) of the Act applies to the record.**

Section 11(g) of the Act states:

A head may refuse to disclose a record that contains,

information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in

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premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

In order to qualify for exemption under section 11(g) of the Act, the Town must establish that the record:

1. contains information including proposed plans, policies or projects; **and**
2. that disclosure of the information could reasonably be expected to result in:
  - (i) premature disclosure of a pending policy decision, **or**
  - (ii) undue financial benefit or loss to a person.

[Orders P-229 and P-426]

Each element of this two-part test must be satisfied.

The Town has not, however, made any representations concerning the application of section 11(g) of the Act to the record in this appeal. I have examined the record and, in my view, it is clear on its face that neither element of the two part test have been met. Accordingly, I find that the exemption set forth in section 11(g) has no application to this appeal.

As I have found that the record does not qualify for exemption under sections 11(c) or (g) of the Act, I need not consider the application of section 16 of the Act.

**ORDER:**

1. I order the Town to disclose the record to the appellant within fifteen (15) days of the date of this order.
2. In order to verify compliance with the order, I order the Town to provide me with a copy of the record which was disclosed to the appellant pursuant to Provision 1, **only upon request**.

Original signed by: \_\_\_\_\_  
Donald Hale  
Inquiry Officer

\_\_\_\_\_ October 29, 1993