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

ORDER MO-1564

Appeal MA-010188-1

Municipal Property Assessment Corporation

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BACKGROUND

The Municipal Property Assessment Corporation

This appeal relates to the manner in which property assessments are calculated in connection with municipal property taxation. Assessments are prepared by the Municipal Property Assessment Corporation (MPAC), which was established by the *Municipal Property Assessment Corporation Act, 1997*. MPAC started operating on December 31, 1998, when the government of Ontario transferred responsibility for property assessment to this new organization. Originally named the Ontario Property Assessment Corporation, it became "MPAC" as a result of amendments included in the 2001 Ontario Budget.

MPAC is a non-share capital, not-for-profit corporation. Every municipality in Ontario is a member of MPAC, and the organization is governed by a 15-member Board of Directors appointed by the Minister of Finance. The Board includes municipal representatives, property taxpayers and members representing provincial interests. MPAC is funded by its member municipalities.

Property Valuation Process

MPAC administers a uniform province-wide system, based on current value assessment, and carries out its activities in accordance with the *Assessment Act*, the *Provincial Land Tax Act*, and the regulations under these statutes.

In documentation submitted in this appeal, MPAC outlines the approach it uses in establishing current values for properties, and how it applies this approach to value in mass appraisal. MPAC explains that it uses advanced statistical techniques and a statistical tool known as "Multiple Regression Analysis" (MRA), and that it estimates unknown data (e.g. market value) from known and available data (e.g. sales prices and property characteristics of sold properties). MPAC indicates that MRA is the tool used to implement the sales comparison approach, and is not the valuation methodology itself.

According to MPAC, it uses the sales comparison approach and MRA in a 3-step valuation process:

1. sales investigations and data collection
2. model specification/model calibration
3. model application

Sales investigations and data collection

In step #1, MPAC analyses and stores data concerning properties and sale information. To do so, MPAC establishes market area and neighbourhood boundaries to be used for analysis and comparison purposes. These are areas referred to as "models", and MPAC explains that there are approximately 165 models in Ontario, 11 of which are in the City of Toronto. The models are geographic areas that are considered to be subject to the same economic influences and are usually, but not always, geographically contiguous.

Within these models, locational neighbourhoods are created to capture the influence of location within a given market. MPAC identifies that significant resources are expended by it in defining, identifying, monitoring and reviewing these locational neighbourhoods. Furthermore, their boundaries are not static, and are subject to change based on macro and micro economic fluctuations.

Model specification/model calibration

Model specification is the formal process of developing a model into a formula or equation. This work is done by MPAC staff, who analyse the factors influencing the local real estate market and determine the property characteristics (independent variables) to test in the particular model. MPAC explains that, in order to specify sound valuation models, an analyst must first conduct data analysis based on a study of property sales in the model area, and then exercise professional judgement in establishing the specification for the model. Once the model has been specified, model calibration takes place. Calibration is the process of developing adjustments, known as coefficients, for the particular model, based on market analysis of the property characteristics that are used in the valuation methodology. This process allocates specific values to the various property characteristics on the basis of the sale prices of sold properties.

MPAC stores its sales databases and calibrates its models using the statistical software package SPSS. Once the analysis has been completed and coefficients have been identified, the analyst uses the software to create a syntax file. The syntax file, in turn, creates an output file, which includes the model coefficients and standard statistical information. The syntax file, once created, can be used to re-run the analysis on the current sales database, or to run a new analysis on an adjusted sales database through edits to the syntax file.

Model application

The model application part of the process involves developing values for all properties within a given market area, by programming the model into MPAC's mainframe computer system, OASYS. All variables and data transformations from each model must be entered into OASYS. Each model is assigned a model number, and the model number is used as the basis of valuation for all properties in the model area.

NATURE OF THE APPEAL:

MPAC received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for the following information relating to the property assessment of the requester's home:

> I wish to receive the actual regression equation which is used to calculate residential assessments. Specifically, I would like to see the final equation which was used to determine the assessment on my home….
>
> Specifically I would like the following information:

1. The exact regression equation used to determine the assessed value for my house including its functional form (linear, log-linear, etc). Included in this would be the following:

2. A complete listing of the independent (explanatory) variables used in the property equation. Presumably, these variables are, in part at least, those reported on the property profiles which you use and would include information such as site area, year built, and garage type. Which variables exactly are included, and in what form (continuous variables, dummy variables, etc.)? This request can be addressed by providing me with a copy of the variables codebook.

3. The coefficients attached to each variable in the final equation. These are constant and indicate the impact on the dependent value (assessed value) of a one-unit change in the corresponding independent variable.

The requester also identified that he did not want to receive a "disk that contains huge amounts of information". He stated, "[w]hat I would like is just one equation that was used to generate the final assessment value (along with the corresponding codebook)". He went on to state, "I should also be able to input the corresponding information for a neighbour's house and generate the assessed value for that house – and the difference between the two houses should be readily visible."

MPAC provided the requester with access to certain information relating to variables and specifics for his own property, and denied access to any information pertaining to the models, including coefficients, variables and equations, on the basis of the following exemptions provided in the *Act*:

- 11(a) (valuable government information), and
- 11(c) and (d) (economic and other interests).

MPAC's reasons for applying these exemption claims were:

- the models are both commercial and financial in nature;
- the models have been developed by MPAC at a high cost to MPAC;
- the models are MPAC's intellectual capital and proprietary in nature;
- the release of such information would allow others to compete with MPAC, thereby prejudicing MPAC's competitive position and causing financial injury to MPAC.

MPAC also advised the requester that, pursuant to its *Release of Records* policy, the requester could purchase a package of documents that would provide a generic overview of the sales comparison approach to valuation, as well as the statistical indicators of the values produced within his market area. This would include the *Residential Valuation Overview* and the *Market Model Report* for the appellant's geographic region.

The requester (now the appellant) appealed MPAC's decision. In his appeal letter he raised the following three arguments in favour of the disclosure:

- Individuals should have a right to know how their taxes, including their property taxes, are calculated. This includes an ability to review the calculations and hold MPAC accountable for their processes, given that individuals have no choice but to rely on MPAC's assessment.

- MPAC's relationship with taxpayers, which is not voluntary, should prevail over commercial interests.

- MPAC's concern about competition is no longer an issue in light of Bill 45 [the *Responsible Choices for Growth and Accountability Act, (Budget, 2002)*], which has removed the right of municipalities to opt out of the MPAC process. There can be no competition to MPAC, which retains a legal monopoly on the calculation of residential assessments.

During the mediation stage of the appeal process, the appellant confirmed that he did not want to purchase the package of documents referred to by MPAC. In his view, the documents are general in nature and would not provide him with the specific information necessary to determine how his individual property assessment was calculated.

A new potentially responsive record was also identified during mediation: the "MCE screen". This is a screen printout for an individual property that is sometimes provided to the property owner as part of the pre-hearings process in appeals before the Assessment Review Board. MPAC initially took the position that this record fell outside the scope of the appellant's request, but later changed its position and provided the appellant with a severed copy of the "MCE screen", removing the portions consisting of the variables and coefficients used for the appellant's property on the basis of the same exemptions claimed for the other records.

Mediation was not successful in resolving this appeal, so it was transferred to the adjudication stage. I sent a Notice of Inquiry to MPAC initially, and received detailed written representations in response. At this stage, MPAC identified the "syntax file" relating to the appellant's property as another potential new responsive record. MPAC issued a decision letter to the appellant, denying access to the syntax file on the basis of sections 11(a), (c) and (d) of the *Act*. At that stage, the appellant wanted to appeal the denial of access to both the "syntax file" and the severed portion of the "MCE screen" and, with the agreement of the parties, I added these two records to the scope of the appeal.

I then sent a modified Notice of Inquiry to the appellant, along with the non-confidential portions of MPAC's representations. The appellant submitted detailed representations in response, which were then shared with MPAC. MPAC provided additional representations in reply.

RECORDS:

There are 4 records at issue in this appeal, all of which have been denied, in whole or in part, on the basis of the exemptions in section 11(a), (c) and (d) of the *Act*.

Record 1: a five-page computer printout consisting of raw data and tables. The tables are labeled: *Regression, Model Summary, ANOVA, Coefficients, Case Wise Diagnostics* and *Residual Statistics*. The entire record is known as MPAC's SPSS output file for City of Toronto Market Model 8. MPAC identifies that this output file is the "model". MPAC explains that approximately 36,000 properties are valued using Market Model 8.

Record 2: a 15-page computer printout of variables, entitled *File Information*.

Record 3: a "syntax file", which is the computer program used to conduct analyses to create and recreate Market Model 8.

Record 4: the severed portion of the "MCE screen" for the appellant's property, portions of which have been disclosed to the appellant.

DISCUSSION:

THE RECORDS

The stated purpose of the appellant's request is quite straightforward - to understand how his property assessment was calculated, and how it compares to his neighbours' properties. However, in translating his request into responsive records, the issues in the appeal become complex, and the records falling within the scope of the appellant's request are both technical and at times confusing.

As far as the appellant is concerned, he is asking for straightforward information about his property tax assessment. He makes it clear that:

> I am not seeking the formulae which MPAC uses to calculate the coefficients. I am merely requesting the result of their calculations.

In addition, although he specifically asked that the syntax file for Model 8 (Record 3) be included within the scope of his appeal, after considering the arguments put forward by MPAC regarding why disclosure of this record would result in one or more of the section 11 harms, the appellant withdrew this record from the scope of the appeal.

MPAC takes the position that addressing the appellant's request is not as straightforward as he maintains. MPAC submits that it would be necessary to disclose a great deal of information in order to fully address the request, and that disclosure in this context would harm MPAC's economic interests, as provided in section 11. For example, MPAC states in its initial representations:

> The appellant has asked for information so that he can replicate the model used to value his home and, after inputting corresponding information, his neighbour's home. In order to complete this task, and to fully understand the model, the requester must receive the MPAC SPSS output file, MPAC SPSS syntax file and the MPAC variable definitions. The output file contains the calibrated model and associated statistics. The syntax file is the program file created to calibrate the model and allows the analyst to repeat his/her analysis by simply running the program on the existing sales database. The syntax file contains the notes of each modeller and shows the modeller's thought process and the trial and error process. It contains the process by which the model was created.

In responding to MPAC's representations, the appellant attempts to clarify the scope of his request in a way that would minimize the extent of disclosure required by MPAC. He states that he is simply interested in obtaining the following:

1. a list of the variables that were used in calculating the assessments for the houses in his neighbourhood. This would include not only the variables used to calculate his specific assessment, but also variables used for other properties within his neighbourhood but determined by MPAC not to be relevant to his property;

2. the definitions of these variables;

3. the coefficients attached to each of these variables. He clarifies that he is not seeking the formulae which MPAC uses to calculate the coefficients, only the results of the calculations; and

4. the values assigned to each of the variables for his specific property.

MPAC points out in its reply representations that the appellant has been provided with a "VDE screen", which contains the variables considered in the valuation of his property and the values ascribed to each variable. MPAC states that, on one level, this could be interpreted as providing the appellant with all of the information he needs to understand how his assessment was calculated, but in MPAC's view, this would not address all components of the appellant's request. MPAC submits:

> However, the appellant has requested something more. He wants to know all the variables, all the transformations applied to those variables and all of the coefficients for his and the approximately 36,000 other properties in his market area. In layman's terms, the appellant is seeking all value adjustments for all property characteristics. In effect, he has requested the model.
>
> … the appellant is [also] seeking … the quality adjustments for all of the variables used. That information is the "nuts and bolts" of the model. The adjustments are the intellectual property that MPAC is seeking to protect.

> The regression equations and transformations are defined as part of the syntax file and do not exist independently from that file. The syntax file creates the variables and determines the coefficients.

Despite extensive mediation efforts and the exchange of representations during the course of this inquiry, the parties clearly still do not have a meeting of the minds as to what information is required in order to adequately respond to the appellant's request. The appellant maintains that he does not require all the formulae and background information to the data relating to the properties, simply the results; and MPAC maintains that in order to address the scope of the request, MPAC must provide the appellant with more information than he thinks he needs, including information that would compromise its economic interest.

MPAC has provided four records to this office during the course of this appeal, and takes the position that there are no other records responsive to the appellant's request. These four records are: a 15-page list of variables and most of their definitions; a five-page computer printout of an "output file" for the appellant's model area, which includes a list of approximately 26 variables with corresponding coefficients; a "syntax file" for Market Model 8 (which the appellant has removed from the scope of the appeal); and the severed portion of the "MCE screen" for the appellant's property, which contains five variables and their coefficients. Four of the five variables on the appellant's "MCE screen" are contained in the list of coefficients found in the "output file".

Based on the various statements and submissions made by the parties, it seems to me that these four records may not contain all of the information sought by the appellant. However, I have decided in the circumstances to issue this order based on the four records provided by MPAC. In my view, reaching some degree of clarity through this order is preferable to delaying the matter further while the parties continue to try to sort out whether other responsive records exist. I will be ordering the disclosure of certain records in this appeal. If, after reviewing these records and considering the reasoning in this order, the parties are in a position to identify the existence of additional responsive records, the appellant will be entitled to pursue his request further at that time.

That being said, in my view, some things are clear:

- the appellant does not want access to MPAC's OASYS mainframe computer system, or the software associated with that system;
- the appellant does not want access to MPAC's MRA statistical tool or the software associated with it;
- the appellant no longer seeks access to Record 3, the syntax file for his model area;
- the appellant does not want access to the formulae used by MPAC to calculate the various coefficients relevant to the assessment of his property or other properties in his area.

In order to reconcile the positions of the parties in this appeal, I have decided that I must determine:

1. whether disclosing the market model developed by MPAC could reasonably be expected to result in one or more of the harms to MPAC's economic interests defined in section 11(a), (c) or (d) of the *Act*;

2. if so, whether disclosing any of the contents of Records 1, 2, or 4 would reveal the market model and therefore qualify for exemption under sections 11(a), (c) or (d);

3. if so, whether any of the records can be severed in a way that would respond to the appellant's request without resulting in any of the section 11 harms; and

4. if severance is not possible, whether there is nevertheless a compelling public interest in disclosing the records, or any portions of them, sufficient to outweigh the purpose of the various section 11 exemptions.

DOES THE MARKET MODEL DEVELOPED BY MPAC QUALIFY FOR EXEMPTION UNDER SECTIONS 11(a), (c) or (d) OF THE *ACT*?

Sections 11(a), (c) and (d) of the *Act* read as follows:

A head may refuse to disclose a record that contains,

(a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

(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;

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the *Act*. Sections 11(c) and (d) both take into consideration the **consequences** that would result to an institution if a record was released (Order MO-1474). This contrasts with section 11(a), which is concerned with the **type** of the record, rather than the consequences of disclosure (see Order MO-1199-F).

Section 11(a)

In order to qualify for exemption under section 11(a), MPAC must establish that the information:

1. is a trade secret, or financial, commercial, scientific or technical information; and

2. belongs to MPAC; and

3. has monetary value or potential monetary value. (Order 87)

Type of information

MPAC submits that the information in Records 1, 2 and 4 consists of scientific and commercial information. It states:

> The information … consists of an advanced statistical application developed by MPAC to create models used for property valuation that requires a unique combination of both a background in statistical theory as well as a thorough understanding of appraisal theory so that the models produced accurately replicate the real estate market and the resultant values are explainable to the public. The information contained in the record relates to the observation and testing of market data to arrive at conclusions of value. Experts in the fields of statistics and appraisal theory created the models.

MPAC also submits that the information contained in its market models is a trade secret. It states:

> The models are the product of advanced statistical techniques, valuation approaches and methodologies researched and developed by MPAC. They are kept confidential by MPAC.
>
> …
>
> Under item 2, "definitions of the variables" the appellant is seeking, *inter alia*, the quality adjustments for all of the variables used. That information is the "nuts and bolts" of the model. The adjustments are the intellectual property that MPAC is seeking to protect.

The term "trade secret" has been defined in previous orders as follows:

> "Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which,
>
> (i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

(Order M-29)

MPAC submits:

> The information [in its market models] is protected by the copyright laws of Canada and MPAC is the owner of the copyright in the information. The information is a "literary work" and it enjoys copyright protection pursuant to section 5 of the *Copyright Act*. All of the information contained in the record is the creation of MPAC.
>
> … The development of MPAC's market models is the direct result of the expenditure of time and money and the application of skill and effort to develop the information. To develop its valuation models, MPAC employs 15 full time modellers directed by a senior manager who is assisted by two MRA managers. In addition to the modellers, staff are employed for data collection, sales investigation and database preparation. The entire process takes many months to complete.

MPAC also identifies the significant costs it incurred to develop its market models, and that the information is consistently treated in a confidential manner. In that regard, MPAC submits:

> There is a quality of confidence about the information in the sense that it is consistently treated in a confidential manner and there is value to the institution in the information not being generally known. MPAC considers the valuation models developed by it to be its intellectual property and has taken the appropriate steps to ensure protection of this property both internally and externally. Access to model information is limited to certain MPAC staff through the MRA Security Plan. The security plan was implemented to protect MPAC's intellectual property and proprietary interests.

MPAC also points out that it has existing customers that purchase information produced by its market models, and submits:

> … [MPAC] is in the final stages of negotiation with other customers and is continually exploring new markets. Those customers and potential customers are not likely to continue to purchase the information from MPAC if that information is made public and is available at little or no cost.

The appellant submits in his appeal letter that the assessment process itself is not confidential, because courses on the process are offered through a professional association, and because the process is used in the property assessment industry.

In responding to this point, MPAC acknowledges that the type of assessment process it employs is used within the property assessment field, and that it is not necessary to have the actual SPSS syntax file, SPSS output file or the variable definitions in order to develop independent statistical models and resulting values. However, MPAC submits that other models are different from MPAC's, and it is these distinctions that give the information in the records its value as a trade secret.

MPAC also confirms that its employees have prepared written course material on the use of advanced statistical techniques and MRA to apply the sales comparison approach to property assessment, but that this material is licensed to a professional association for a fee, for the purpose of a training program. MPAC indicates that it took steps in this context to protect its intellectual property, and that no actual market model or database were used. Instead, MPAC developed a mock model specifically for the course, which altered some of the codes and changed certain variables.

I find that the market models designed by MPAC for the purpose of evaluating property assessments in Ontario, which would include the SPSS output files, SPSS syntax files and processes underlying the implementation of the sales comparison approach for property assessment adopted by MPAC qualify as 'trade secrets" for the purposes of section 11(a) of the *Act*. Specifically, I find that:

- the models consist of a product or process that includes formulae, programmes, methods and techniques that are used in the business of property assessment;

- although other jurisdictions may have developed comparable models based on the sales comparison approach to property assessment, the specific market models designed by MPAC are not generally known in the property assessment industry;

- the models produce information, which MPAC sells to current and potential customers, and there is economic value in this information not being generally known; and

- MPAC has implemented policies that are reasonable under the circumstances to maintain the secrecy of the content of its models, both internally, and externally in making information from its models available to others for the purposes of training programs and under licence.

Technical information has been defined in past orders to mean:

> …information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields would include architecture, engineering or electronics. While, admittedly, it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing. (Order P-454)

I find that the formulae, coefficients and other related information contained in MPAC's market models also fall within the scope of the definition of "technical information". In my view, property assessment is properly characterized as an applied science, and the market models developed by MPAC would constitute a process prepared by professionals in this specific field of expertise.

Previous order have defined "commercial information" as follows:

> … information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises. (Order P-493)

MPAC refers to previous orders of this office that have identified commercial information as information such as "price lists, lists of suppliers or customers, market research surveys and other similar information relating to the commercial operation of a business", and points out that it is in the "business" of producing property values, and that the information in the records is used by MPAC both in its day-to-day operations as well as the development of products that have commercial value and application.

I do not accept MPAC's position. The information contained in the records is the technical information and formulae used to produce assessment information. Unlike the "price lists, lists of suppliers or customers, market research surveys and other similar information relating to the commercial operation of a business" referred to by MPAC, the information in the records is the actual product of the work done by MPAC. It does not contain information relating to the actual commercial operation of MPAC.

Furthermore, the fact that this information can be marketed or sold by MPAC does not make it "commercial information", regardless of what the "business" of MPAC is. In Order P-1114, I specifically rejected the "commercial value" argument in relation to the meaning of "commercial information" under the comparable provincial legislation. I also addressed the issue in Order P-1621-I, where I stated:

> … The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information. These two aspects of the exemption must be considered separately. Unless the records themselves contain commercial information, the fact that the format in

> which the information is stored may give the record monetary or potential monetary value will not, on its own, bring the record within the scope of section 18(1)(a).
>
> If considerations of potential commercial value were in themselves determinative of the character of the information, enormous amounts of government information would qualify as "commercial information" which, in my view, could not have been the legislature's intention, and would be inconsistent with one of the fundamental principles of the *Act*, that exemptions from the right of access should be limited and specific.
>
> Further, in a decision quashing Order P-373, in which I applied this interpretation of "commercial information", the Divisional Court alluded to the commercial value of information to the requester in concluding that I had erred in finding that the information was not "commercial". (The Court said that the information had a "commercial effect" because the requester was "in a commercially related business"). However, the Ontario Court of Appeal recently overturned the Divisional Court's decision and restored my Order P-373. The Court of Appeal found that "the Commissioner adopted a meaning of the terms [including "commercial information"] which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable" (see *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.)).

For the same reasons, I find that the records at issue in this appeal do not contain "commercial information" for the purposes of section 11(a).

In summary, I find that the first requirement of section 11(a) has been established for the market models developed by MPAC, when considered as a whole.

Belongs to

In Order PO-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], Senior Adjudicator Goodis reviewed the phrase "belongs to" as it appears in section 18(1)(a) of the *Freedom of Information and Protection of Privacy Act*, which is similar to section 11(a) at issue in this appeal. After reviewing a number of previous orders, he summarized the status of the relevant previous orders as follows:

> The Assistant Commissioner [Tom Mitchinson] has thus determined that the term "belongs to" refers to "ownership" by an institution, and that the concept of "ownership of information" requires more than the right to simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial

> design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party. Examples of the latter type of information may include trade secrets, business to business mailing lists (Order P-636), customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, there is a quality of confidence about the information, in the sense that it is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others. (See, for example, *Lac Minerals Ltd. v. International Corona Resources Ltd.* (1989), 61 D.L.R. (4th) 14 (S.C.C.), and the cases discussed therein).

Having found that the market models developed by MPAC constitute a trade secret, and in light of the fact that the models are protected by copyright, I find that they "belong to" MPAC, as the term is used in section 11(a) and interpreted in previous orders.

Monetary Value

In Order M-654, Adjudicator Holly Big Canoe stated:

> The use of the term **"monetary value"** in section 11(a) requires that the information itself have an intrinsic value. The purpose of section 11(a) is to permit an institution to refuse to disclose a record that contains information where circumstances are such that disclosure would deprive the institution of the monetary value of the information...

MPAC states that the information contained in its market models has monetary value, and that MPAC will be deprived of this value of the information if it is made public.

MPAC states:

> … it is implicit that disclosure of trade secrets, technical, commercial, financial or scientific information belonging to an institution and having monetary value will deprive the institution of the institution of the benefit of that information. Valuable, confidential information will lose any monetary or potential monetary value if it is made public at relatively little cost. It is unlikely that anyone will pay for something that is available for free.
>
> … MPAC will be deprived of the monetary value of the information if it is made public. The information contained in the records is used to produce information and to develop products (property appraisals) that have commercial value and application. … MPAC has existing customers that purchase information produced by the model. It is in the final stages of negotiation with other customers and is continually exploring new markets. Those customers and potential customers are

> not likely to continue to purchase the information from MPAC if that information is made public and is available at little or no cost.

MPAC points out that it has been developing and is now producing an automated valuation model that "is the direct result of the advanced statistical techniques and MRA modeling developed and being carried out by [MPAC]". MPAC submits that it has successfully marketed the product to a major client, which is not an Ontario municipality and therefore under no obligation to deal with MPAC, and that MPAC expects to earn significant revenue from this commercial venture. MPAC has negotiated provisions with this client that prohibit it from gaining knowledge of or acquiring or using the intellectual property of MPAC and the MRA-related model information. These controls are targeted at allowing MPAC to retain the value of this model information for purposes of future sales.

MPAC has also provided an affidavit in support of its position, identifying the commercial contracts it has entered into.

Based on MPAC's submissions, I am satisfied that the market models MPAC has developed have monetary and potential monetary value. MPAC has provided evidence of its ability to negotiate the licensing of its product to at least one client, for a significant price, and I accept that there is a potential market for the future sale of information developed by MPAC and forming its market model to other commercial enterprises or public entities performing similar functions.

Therefore, I find that MPAC has established all three parts of the section 11(a) test as it relates to its market models when considered in their entirety. Accordingly, I find that these market models when considered as a whole qualify for exemption under section 11(a) of the *Act*.

Sections 11(1)(c) and (d)

Section 11(1)(c) provides MPAC with a discretionary exemption which can be claimed where disclosure of information could reasonably be expected to prejudice MPAC's economic interests or its position in the competitive marketplace (Order P-441). To establish a valid exemption claim under section 11(d), MPAC must demonstrate a reasonable expectation of injury to its financial interests.

In Order PO-1747, Senior Adjudicator Goodis stated:

> The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *Ontario (Workers' Compensation Board)* v. *Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 at 476 (C.A.), reversing (1995), 23 O.R. (3d) 31 at 40 (Div. Ct.), and *Ontario (Minister of*

> *Labour)* v. *Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Accordingly, in order to establish the requirements of the section 11(1)(c) or (d) exemption claims, MPAC must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probability of one or more of the harms described in either of these sections if the records are disclosed to the appellant.

MPAC identifies that it is permitted by its enabling legislation to earn surplus income, and that any such income must be applied to reduce the charges it levies to its municipal members.

MPAC submits:

> In an effort to reduce its operating costs, borne by MPAC's municipal stakeholders (and therefore the public), the corporation is actively seeking revenue-generating opportunities. Having already established itself as an industry leader in this field, MPAC has been attempting to market this expertise and the products of this expertise to other assessment jurisdictions throughout North America and the rest of the world. It is also looking to market this expertise and the products of this expertise to the private sector. Many private and public sector concerns have expressed an interest in the work that has been done by MPAC, specifically the effective use of advanced statistical techniques and MRA to value real estate.
>
> MPAC has developed and in 2001 began producing what is known as the MPAC automated valuation model (AVM) product. This product that includes a "real time" opinion of value for over 3 million residential properties monthly, is the direct result of the advanced statistical techniques and MRA modeling developed and being carried out by [MPAC]. …

As outlined earlier in my discussion of section 11(a), MPAC has successfully licensed its product to a major corporation, and is currently in discussions with other potential clients in both the private sector and with its counterparts in other public sector organizations throughout the world.

MPAC submits that, if its trade secrets are disclosed, its current and potential clients may decide to purchase or develop their own databases and use MPAC's market model or a variation of the model to generate values *en masse*. In MPAC's view:

> … [i]f the model is available for the minor cost of [a request under the *Act*], then its value to MPAC in the marketplace will be diminished. The diminished capacity to sell the products generated by the information contained in the record will prejudice the economic interests of MPAC.

As far as its competitive position is concerned, MPAC makes two points. First, it acknowledges, as argued by the appellant, that it is currently in a legal monopoly position as the only entity

entitled by legislation to provide property assessment services to Ontario municipalities. However, MPAC points out that:

> … the provincial government report that led to the change in legislation [creating the monopoly] also recommended that opting out be revisited in three years. It is possible that pressure from municipalities may engender a further change in the legislation requiring MPAC to compete for municipal business.

The second point, which MPAC states is more important than the first, is its effectiveness in competing with other entities providing appraisal and assessment expertise. In that regard, MPAC names three specific competitors, and then submits:

> The release of the market model information, and thus the knowledge of the advanced statistical techniques employed by MPAC, would put MPAC at a competitive disadvantage by allowing others to replicate the efforts of MPAC and produce highly sophisticated and accurate valuation models at a greatly reduced cost. Values based on up-to-date market conditions would be marketed either individually or *en masse* to the real estate industry, the financial services sector, and appraisal industry and others interested in this type of information.

In support of its position on section 11(d), MPAC relies on the representations relating to harms to its economic interests and competitive position under section 11(c). MPAC also points out that it has an obligation to its municipal customers to control its operating costs, and that it chooses to do so, at least in part, by generating revenue through the marketing of its property assessment models. MPAC points to the millions of dollars it has spent developing and marketing its models, and submits:

> … It is reasonable to expect that if disclosure of the information contained in the record severely diminishes its marketability then MPAC will not be able to generate revenue or recoup any of the costs that it has spent in developing that information or in marketing that information and the products derived from that information. The inability of MPAC to generate revenue or to recoup these costs will be injurious to its financial interests.

The appellant points out that he is only seeking access to "context-specific" and "time-specific" information, not the entire market model, and takes issue with the extent to which MPAC is a significant player in the global market for property assessment methodologies.

The appellant also questions the suitability of actual or potential business loss as a test of financial loss for what he describes as a "protected monopoly". He submits:

> … there is nothing to stop MPAC from cross-subsidizing its commercial marketplace activities with the proceeds of its protected monopoly position, or from selling its services, or models at levels well below production or replacement cost. MPAC would incur in effect a loss on each commercial transaction, but the losses would be buried in the monopoly structures. MPAC would then be able to argue that it has numerous customers who might be lost to it

> and claim a section 11 exemption. In fact, however, under this scenario the public interest would be best served by MPAC making no commercial transactions, as the marginal cost of each was greater than the marginal revenue. In other words, the fact of actual or potential consumers does not necessarily lead to cost reduction for a protected monopoly, but may potentially represents a waste of public funds to subsidize private entrepreneurial activities.

In response, MPAC points out that:

> …The scenarios described by the appellant are purely speculative and have no basis in fact. MPAC developed its models in order to assist in fulfilling its statutory obligation to return current value assessments as the provincial assessing authority. It is seeking to exploit the intellectual property developed in fulfilling its primary function by selling products created by its expertise to commercial enterprises in order to generate revenue to reduce the costs to member municipalities.

The report entitled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy/1980*, vols. 2 and 3 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) discussed the policy rationale for including sections 11(c) and (d) among the discretionary exemption claims available to institutions under the *Act*. The Williams Commission Report described how the purpose of the valuable government information exemption is to protect the informational assets of government institutions to the same extent that similar information of non-governmental interests would be protected by the third party exemption for trade secrets and other commercial information:

> 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. The activities of the Ontario Research Foundation, for example, are a primary illustration of this phenomenon. We are not opposed in principle to the sale of such expertise or the fruits of research in an attempt to recover the value of the public investments which created it. Moreover, there are situations in which government agencies compete with the private sector in providing services to other governmental institutions . . . on a charge back basis. . . . In our view, the effectiveness of this kind of experimentation with service delivery should not be impaired by requiring such governmental organizations to disclose their trade secrets developed in the course of their work to their competitors under the proposed freedom of information law. (See also PO-1805)

In my view, the activities undertaken by MPAC within the scope of its mandate are the type of activities described by the Williams Commission. MPAC has been given the statutory authority to earn surplus income for the purpose of reducing the charges levied to municipalities for assessment services. To do so, in my view, it is reasonable to expect that MPAC would try its best to become a dynamic and entrepreneurial organization, applying its expertise in ways that

would enhance its reputation and, in turn, increase its revenue through the sale of its products. I find that MPAC has provided the necessary detailed and convincing evidence to establish a reasonable likelihood of prejudice to its economic interests and competitive position (section 11(c) and its financial interests (section 11(d)), should the trade secrets it has developed for its marketing models be disclosed and available to others who might choose to exploit this information to gain a financial benefit or competitive edge.

Accordingly, I find that MPAC has established the requirements of sections 11(c) and (d) as they relate to the market models when considered as a whole.

WOULD DISCLOSURE OF THE CONTENTS OF ANY OF THE RECORDS REVEAL THE MARKET MODEL AND THERFORE QUALIFY FOR EXEMPTION UNDER SECTIONS 11(a), (c) OR (d) OF THE ACT?

Having found that the market model considered as a whole qualifies for exemption under sections 11(a), (c) and (d), it does not necessarily follow that all records or portions of records created by MPAC in the context of completing assessments or valuations necessarily qualify for exemption on this basis; only those records or portions of records that contain or would reveal the actual trade secrets.

I will deal with each of the four records at issue in this appeal in turn.

Record 3

Although the appellant has removed Record 3 from the scope of the appeal, I think it would be useful for me to make a finding regarding its accessibility, in order to assist in understanding my findings regarding the other three remaining records.

The syntax file consists of a combination of computer codes, programming instructions, and narrative comments made by MPAC analysts in developing the model for Market Model 8. In my view, the syntax file for this, and presumably all market models, contains the key components of MPAC's trade secret. It consists of a computer-based data analysis of the various property sales information for the model area, together with the subjective assessment of an expert analyst, which are combined to produce the model specification that is then calibrated, as described in the Background section of this order.

I find that disclosure of syntax file would reveal the MPAC's trade secrets, specifically the process for developing its model specification for Market Model 8. Therefore, I find that Record 3, had it not been removed from the scope of this appeal by the appellant, would have qualified for exemption under sections 11(a), (c) and (d) of the *Act*, for the same reasons as the models when considered as a whole.

Record 2

Record 2 is a 15-page listing of all variables used by MPAC to assess property values. Each variable has been assigned a "name", which is either an alphabetical short-form or an alphanumeric abbreviation of the variable being described. In some instances, the variable itself

if identifiable from the assigned name, and in other cases it is not. Each variable also has an assigned "position", which is a 2 or 3-digit number. The third and final column on Record 2 is a "label" assigned to each variable, which translates the "name" and "position" into laymen's language.

I find that this entire record can be disclosed without resulting in any of the section 11 harms that would apply to disclosure of MPAC's market model as a whole. In my view, this record is best described as a "dictionary" of the various factors that are of potential relevance in the context of the property assessment industry. None of the information described in the "label" heading is sensitive or confidential, and the other two columns on the list, although part of a computer program, do not reflect any of the methodologies, formulae or other components of MPAC's trade secret. In addition, I find that I have not been provided with sufficient evidence to convince me that it would be possible to take the information contained in Record 2 and reverse-engineer it to reveal information that would constitute a trade secret.

Therefore, Record 2 does not quality for exemption under sections 11(a), (c) or (d) of the *Act*, and should be disclosed to the appellant.

Record 1

Record 1 is a 5-page printout comprising the SPSS output file for Market Model 8.

Pages 1, 2, 4, 5 and the bottom portion of page 3 of this record consist of a series of computer programming codes, entry codes and calculations and statistical information derived from data entered into MPAC's property assessment computer systems. The information on these pages is highly technical and, in my view, is properly characterized as part of the market model that I have determined qualifies for exemption under section 11 as a trade secret.

The top portion of page 3 of Record 1 is a chart headed "Coefficients". It has a number of columns, listing the variables chosen by MPAC as relevant for various properties in Market Model 8; unstandardized and standardized coefficients identified for each variable; and other associated statistics. All of the statistical information on this chart would appear to be derived from the model for Market Model 8. Although the information on the chart, in and of itself, does not appear to disclose enough of the model to compromise MPAC's trade secrets, I accept that an expert in the field of statistical analysis might be able to take this information and reverse-engineer it in a way that could reveal the actual trade secrets contained in the model. Accordingly, I find that disclosure of Record 1, including the chart headed "Coefficients" on page 3, when considered as a whole, would reveal MPAC's market model for Market Model 8, and therefore this record qualifies for exemption under sections 11(a), (c) and (d) for the same reasons as the model.

Record 4

As far as the MCE screen relating to the appellant's property is concerned, MPAC states:

> The severed portions of the MCE Screen contain information contained in the record. Accordingly, MPAC's representations with respect to the main appeal apply to the MCE Screen.

MPAC has disclosed the majority of information contained in Record 4, including the "MRA derived value" of the appellant's property, the 5 variables chosen from among the potential variables for Market Model 8 that have been selected by MPAC as relevant to the assessment of the appellant's property, and certain figures derived from the model, including the "value" of each of the 5 variables. What has not been disclosed is the descriptions of the 5 variables (ie. the "label" information for these variables contained in Record 2) and the coefficient for each variable.

I am not persuaded that providing the appellant with the remaining information in Record 4 would disclose MPAC's trade secrets, or could reasonably be expected to result in any of the harms associated with disclosure of the market model as a whole. As outlined in my discussion of Record 2, the descriptions of the variables in the model is simply a translation of the variable code into laymen's language. In my view, these descriptions are less closely associated with MPAC's trade secret than the variable codes themselves, which have already been disclosed. As far as the coefficients are concerned, they are a mathematical calculation of the two figures contained on the portions of Record 4 already disclosed, as well as the appellant's "VDE screen" provided to him by MPAC in response to his request. In essence, Record 4 is a report produced from MPAC's model, not the model itself, and the contents of the report do not provide sufficient information to reveal the "nuts and bolts" of the model, as suggested by MPAC.

I find that disclosing the remaining portions of the "MCE screen" for the appellant's property would not disclose any of the methodologies, formulae or other requirements of MPAC's trade secret, nor am I persuaded, based on MPAC's representations, that it would be possible to take the information contained in the severed portions of Record 4 and reverse-engineer it to reveal information that would constitute a trade secret. Therefore, the undisclosed portions of Record 4 do not qualify for exemption under section 11(a), (c) or (d) of the *Act*, and should be disclosed to the appellant.

In summary, I find that disclosing Record 3 (the syntax file) and Record 1 when considered as a whole (Market Model 8), would reveal the market model itself, and therefore, subject to my discussion of severance below, these two records qualify for exemption under sections 11(a), (c) and (d) of the *Act*. On the other hand, disclosing Record 2 and the withheld portions of Record 4 would not reveal the market model itself, or any other information that is exempt under sections 11(a), (c) or (d), nor do I accept that their disclosure would permit one to ascertain components of the model or other exempt information through reverse-engineering.

SEVERANCE

Section 4(2) of the *Act* requires MPAC to "disclose as much of the [exempt] record as can reasonably be severed without disclosing the information that falls under one of the exemptions."

Accordingly, although I have found that information which comprises the market models developed by MPAC for property assessment and valuation purposes constitute trade secrets and qualify for exemption under sections 11(a), (c) and (d) of the *Act*, if records that contain this exempt information can reasonably be severed in a way that would permit disclosure of information that does not qualify for exemption, then MPAC has an obligation to do so.

MPAC takes the position that none of the records at issue in this appeal can be severed without disclosing information that qualifies for exemption. It states that the records must be considered as a whole, and submits:

> In order to fully understand the model, the requester must receive the MPAC SPSS output file, MPAC SPSS syntax file and the MPAC variable definitions in the file. …
>
> The appellant has asked for an equation and for corresponding data to interpret that equation in order to produce a result. As stated above, the entire record is required to produce the desired result. Each component of the record is fundamental to the process and cannot be reasonably severed without disclosing material that is exempt.
>
> Even if it could be argued that a severed part of the record would not in itself be exempt pursuant to section 11, the operation of the Act makes severance unreasonable. A person seeking information under the Act does not have to disclose the purpose for seeking access. Once information is disclosed, it becomes public so that access to one is access to all. A single person or group of persons may initiate multiple requests for individual portions of the record. It would defeat the purpose of the exemptions in section 11 if a person or a group of persons were able to obtain information in a piecemeal fashion with the end result being that the entirety of the record is ultimately disclosed.

In response to MPAC's representations, the appellant states:

> As I read over the MPAC brief, I think there is either a misunderstanding of what I am actually seeking, or an attempt to create a straw man to divert attention. Much of what they raise in their brief simply has no relevance to my request.

He then goes on to summarize the type of information he is interested in receiving, which, in his view, would not necessarily involve disclosure of the model itself and result in the harms suggested by MPAC. He states:

> When these [previously described] data are taken together, the following type of calculation should emerge: "Frontage in feet" is identified as a variable; the

> coefficient attached to this variable might be 200 (which means that each foot of frontage adds $200 to my assessment); my property might have 100 feet of frontage, so the variable "frontage in feet" would increase the assessment by $200 times 100 feet, or by $20,000. … and so on for each variable. The sum of all these calculations, added to the value of the coefficient, would yield the final assessed value.
>
> This is the grand total of what I am seeking. It is … difficult for me to understand how [other governments] could care about these variables and coefficients, and how MPAC's commercial interests could possibly be adversely affected by the release of this information. To repeat, I am not seeking access to MPAC's syntax files…. Nothing I am requesting, in my view, could possibly be construed as having commercial value – it is simply the minimum tools I need to see and understand how my property assessment was calculated.

Although Record 3 has been removed from the scope of this appeal, had it not, I would have found that the severance provisions of section 4(2) are not applicable to this record. The technical and narrative portions of the syntax file together comprise the model specification for Market Model 8, and there is no information contained in Record 3 that is not directly related to MPAC's trade secret.

Similarly, I find that pages 1, 2, 4, 5 and the bottom portion of page 3 of Record 1, which consist of a series of computer programming codes, entry codes and calculations and statistical information derived from data entered into MPAC's property assessment computer systems, cannot be severed under section 4(2) for the same reasons.

That leaves only the chart headed "Coefficients" on page 3 of Record 1.

It is clear to me that the appellant wants access to the variables and the coefficients for his market area as a whole, and I find that portions of the chart on page 3 that list the variables and coefficients fall within the scope of his request. The variables included on this chart are chosen from among the listed variables in Record 2. By disclosing the portion of the chart that lists the variables, the appellant would be able to use the "label" portion of Record 2 to define each variable, and to then determine which variables were chosen by MPAC to be relevant to the 36,000 properties included in Market Model 8. Without additional information, the appellant would not know how or why these particular variables were selected for Market Model 8, nor would he know the relative weight attached to each variable for the purpose of establishing property assessment value. Therefore, in my view, the list of variables selected for Market Model 8, although part of MPAC's computer program, does not reflect any of the methodologies, formulae or other requirements of a trade secret, nor, based on MPAC's representations, am I persuaded that one could take the information in this list and reverse-engineer it to reveal information that would constitute a trade secret.

The coefficients on the page 3 chart are a series of numbers, which are apparently derived from the model for Market Model 8. Two columns of figures are listed against each variable to reflect "unstandardized coefficients", and one column of figures for "standardized coefficients". The remaining columns on the chart contain other statistical information also apparently derived from

the model. Erring on the side of caution, I am prepared to accept that disclosing all of the chart could reveal or enable one to re-create enough of Market Model 8 to constitute MPAC's trade secret and result in the section 11(a), (c) and (d) harms. However, if the chart is severed to disclose only the variables and corresponding coefficients, in my view, this would not disclose any of the actual model, and without the additional statistical information contained in the chart, and based on MPAC's representations, I am not convinced that it would be possible to reverse-engineer the information in a way that would reveal the model. As MPAC points out a number of times in its representations, all of the various components of the model are required in order to understand how the property assessment has been determined for each model area. In my view, it would appear to follow that disclosing only certain components, such as the variables and coefficients associated with the model area, would not be sufficient to reveal the trade secret itself, and this supports my finding that severance can be made in this case without compromising MPAC's legitimate interest in the confidentiality of its intellectual property.

I find that the portions of the chart on page 3 headed "Coefficients" that contain the variables and coefficients for Market Model 8 can reasonably be severed from the chart and disclosed to the appellant without revealing information that qualifies for exemption under sections 11(a), (c) and (d). Therefore, these portions of Record 1 should be disclosed to the appellant.

PUBLIC INTEREST IN DISCLOSURE

The appellant argues that there is a compelling public interest in knowing how assessments are determined, and that disclosing the records at issue in this appeal should outweigh the purpose of the section 11 exemption claims, if they apply.

Section 16 of the *Act* states:

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

In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure; and second, this interest must clearly outweigh the purpose of the exemption (see Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused (January 20, 2000), Doc. 27191 (S.C.C.)). In Order P-1398, former Adjudicator John Higgins made the following statements regarding the application of the equivalent provision to section 16 (section 23) contained in the provincial *Freedom of Information and Protection of Privacy Act*:

> An analysis of section 23 reveals two requirements which must be satisfied in order for it to apply: (1) there must be a **compelling** public interest in disclosure, and (2) this compelling public interest must **clearly** outweigh the **purpose** of the exemption.
>
> If a compelling public interest is established, it must then be balanced against the purpose of any exemptions that have been found to apply. Section 23 recognizes

> that each of the exemptions listed, while serving to protect valid interests, must yield on occasion to the public interest in access to information that has been requested. An important consideration in this balance is the extent to which denying access to the information is consistent with the purpose of the exemption.

In Order P-241, former Commissioner Wright commented on the burden of establishing the application of the public interest override. He stated as follows:

> The *Act* is silent as to who bears the burden of proof in respect of section 23. However, Commissioner Linden has stated in a number of Orders that it is a general principle that a party asserting a right or duty has the onus of proving its case. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 23 applies. To find otherwise would be to impose an onus which could seldom if ever be met by the appellant. Accordingly, I have reviewed those records which I have found to be subject to exemption, with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.

Is there a public interest in disclosure, and if so, is it "compelling"?

The Divisional Court has provided guidance in determining whether a "compelling public interest" exists in a given case. In *Ontario Hydro v. Mitchinson,* [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), the Court noted that, in assessing the issue of "compelling public interest", it is necessary to "… take into account the public interest in protecting the confidentiality …" of the information. In this part of my analysis, I must therefore consider both the existence of any compelling public interest in the records' disclosure and the public interest in keeping them confidential.

The appellant's representations on this issue state:

> Concerning the "compelling public interest" requirement, I can only repeat the words of adjudicator Holly Big Canoe (Order P-984) that the information,
>
> > 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.
>
> Taxation clearly lies at the base of all government activities; there can be nothing more central to understanding government, to expressing public opinion, or to making political choices, than to understand how taxes (including property assessments) are determined. It is my own personal view … that the principles and philosophy of taxation represent the single most important consideration in assessing governmental activities in a free society. To paraphrase the words of the Boston Tea Party of US history, "taxation without *information* is tyranny".

> … I suggest that a compelling public interest in information about how assessment are determined cannot be proven empirically …; rather the case must stand on its own. The converse position – that the public does *not* have a right to learn how taxes are calculated – strikes me as utterly untenable. [appellant's emphasis]

MPAC argues that there is no public interest in the specific records at issue in this appeal. MPAC states that its valuation model does not determine how a person is taxed, rather it is the resulting property values that determine, indirectly, how much property tax one pays. The valuation model is the tool used to derive the property values. MPAC then states that there are other methods to test the accuracy of the valuations derived from the model that do not involve revealing the contents of the model itself.

MPAC submits that there is no strong public interest in the subject matter of the records, nor is there a compelling public interest in the "nuts and bolts" of the model. In support of its position, MPAC identifies that a person may review his or her assessment through a "reconsideration" process, which can in turn be appealed. MPAC refers to statistics identifying the low number of requests for reconsideration that it has received in recent years. It also identifies that these requesters receive comparable sales data if they ask for a reconsideration.

MPAC also points out that the Assessment Review Board has jurisdiction under the *Assessment Act* to consider appeals from assessment decisions on individual properties. In that context, MPAC submits:

> In defending its values before [the Assessment Review Board], MPAC does not rely on the model. Rather, it seeks to demonstrate the correctness of the assessment by reference to sales of similar properties in the vicinity. Complainants are provided, free of charge, with information on six comparable properties. The [Assessment Review Board] has the power to order disclosure of the information, including sales information, that complainants may wish to rely upon.

MPAC also submits:

> … The appellant has raised a private interest with respect to the calculation of the value of the assessment of his property. The appellant's private interest is moot as the assessment appeals relating to his property have been determined by [the Assessment Review Board].

MPAC also refers to a 1998 order (Order M-1089), where Commissioner Ann Cavoukian briefly addressed the possible public interest in records provided by the Ministry of Finance to municipalities in the context of moving to the new current value assessment system of property valuation. In MPAC's view, this order supports its position that any interest in the records is a private one that would not outweigh the purpose of the section 11 exemption claims.

In responding to the appellant's representations, MPAC again identifies that there are other methods available to protect the identified public interest in property taxation and assessment,

and refers to property owners' right to request a reconsideration, which can in turn be appealed. MPAC also submits that, in order to determine whether they have been assessed correctly, property owners can refer to sales of other similar properties and can compare their assessments to those of similar properties in the vicinity. In this regard, MPAC states: "[T]he issue on an assessment appeal is not whether the method of valuation is correct rather it is on whether the value is correct."

If I were satisfied that the appellant's request was directed at information that could only be used on an assessment appeal of his particular property, and had nothing to do with the process of valuation and how it works generally, I would find that the interest in disclosure was of a private, rather than public nature. A request of this nature would be similar to one dealt with by Adjudicator Donald Hale in Order M-536, where he concluded that a requester's interest in an agreement of purchase and sale relating to an individual's purchase of public land was of a private character where it was to be used in a law suit and in litigation before the Ontario Municipal Board.

However, in my view, the interest in this case is different. Although the appellant has requested access to records specific to his own property, he has raised issues that have general application to property owners throughout the province. His stated purpose in making his request is to understand how his property was valued, in order to satisfy himself that the assessment for his property was calculated on the basis of variables he can both understand and accept. In this sense, the appellant has raised concerns that are shared by other property owners, and as the appellant points out, they are connected to one of the main points of intersection between the government and members of the public, namely taxation. MPAC performs an important public function, and does so from a monopoly position established by statute. The fact that 1/3 of MPAC's board is comprised of individual property taxpayers is evidence of a public interest in its operation. In my view, there is an inherent public interest in some level of transparency provided by MPAC through the disclosure of information sufficient to satisfy property owners throughout the province that their assessments have been made on the basis of sound and defensible criteria. The question is whether the amount of disclosure provided by MPAC under its current policies is adequate to address this public interest.

In deciding whether this public interest is compelling, the following comments of former Adjudicator John Higgins in Order P-1398 are an appropriate starting point:

> Order P-984 relies on the Oxford dictionary's definition of "compelling" to mean "rousing strong interest or attention". I agree that this is an appropriate definition for this word in the context of section 23 [the equivalent provision to section 16 in the provincial *Act*].

In upholding former Adjudicator Higgins' decision in Order P-1398, the Court of Appeal in *Ontario (Ministry of Finance*), *supra*, stated:

> ... in our view the reasons of the inquiry officer make clear that in adopting a dictionary definition for the term "compelling" in the phrase "compelling public interest", the [adjudicator] was not seeking to minimise the seriousness or strength of that standard in the context of the section [at p. 1].

I support the appellant's position that there is a compelling public interest in obtaining basic information about the way in which a property is assessed and therefore the way in which the taxation is calculated. This public interest is both inherent to the whole concept of property taxation, and also evident from the number of requesters, including the appellant in this case, who have sought access to information about their properties from MPAC under the *Act*. However, I also accept MPAC's position that disclosure of its entire market model, which I have found to qualify as a trade secret, is not required in order to satisfy this public interest in transparency and accountability. In other words, I find that there is a "rousing strong interest" in providing property owners with sufficient information to adequately understand how their properties are valued for assessment purposes, but no "rousing strong interest" in providing the public with access to information relating to the manner in which the model was developed and the trade secrets acquired by MPAC in this regard.

That being said, in my view, basic information such as the variables identified by MPAC as the basis for evaluation in a particular model, how these variables are weighted, as well as what variables from among this list were or were not used in the assessment of an individual's home, should be answered by a public body established by statute to administer a uniform, province-wide current-value assessment process.

Applying my reasoning to the records at issue in this appeal, I find that there is no compelling public interest in disclosing the portions of Record 1 that would reveal the actual trade secrets associated with Market Model 8; but that, in the circumstances of this appeal and based on the appellant's representations, there is a compelling public interest in disclosing Record 2, the remaining portions of Record 4, and the portions of Record 1 that I have found do not qualify for exemption. In other words, if I am incorrect in my finding that Records 2, 4 and portions of Record 1 do not qualify for exemption under sections 11(a), (c) and (d), I nevertheless find that there is a compelling public interest in disclosing them, for the purposes of section 16 of the *Act*.

It is not necessary for me to make a finding here with respect to Record 3, and I decline to do so.

I have also reviewed Order M-1089 referred to by MPAC. In that order, which was issued at a time when current value assessment was being implemented, Commissioner Cavoukian was dealing with a request from an appellant who was seeking access to preliminary draft current value assessments for properties in the Town of Oakville, before that information had been made public. He was not seeking access to information concerning his own property or assessment but, rather, bulk access to assessment-related information for potential commercial purposes. Commissioner Cavoukian determined that the records at issue in that appeal qualified for exemption under a different exemption claim - section 9 (relations with other governments) – and then went on to consider whether there was a compelling public interest in disclosing the information in the records sufficient to outweigh the purpose of that exemption. In concluding that section 16 did not apply, Commissioner Cavoukian found that, "[b]ecause of the nature of the activities of the organization he represents" the appellant's interest in the records in that appeal were best characterized as a private interest.

In my view, Order M-1089 does not assist MPAC in the context of this appeal. Although both cases dealt with the province's current value property assessment system, the records, exemption

claims and contexts of the two appeals are significantly different. Unlike the requester in Order M-1089, the appellant in this case is seeking access to information concerning his own property for the purpose of assessing whether the valuation system had produced an equitable result, and the records all relate to MPAC's market models. That being said, it is interesting to note that Commissioner Cavoukian, as well as the institution and affected party in Order M-1089 (the Town of Oakville and the Ministry of Finance), all refer to a public interest in providing individuals with access to assessment information relating to their own properties. In this respect, Order M-1089 supports the proposition that there is a public interest in records relating to a property owner's own assessment information, as I have identified above.

Does this compelling public interest clearly outweigh the purpose of the section 11(a), (c) and (d) exemptions?

The purpose of section 11(a) is to permit an institution to refuse to disclose a record in circumstances that would deprive the institution of the monetary value of the information (See Orders P-163 and M-654). The purpose of section 11(c) is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests or 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. (See Orders M-862, P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.) and P-1210). The purpose of section 11(d) is similar, providing an institution with discretion to refuse access to records containing information that could reasonably be expected to be injurious to its financial interest.

MPAC submits:

> Even if a compelling public interest exists, the appellant has provided no evidence or argument that it clearly outweighs the purpose of the exemption. He merely asserts that his right to know should override MPAC's commercial interests. MPAC does not agree and asserts that disclosure of the information contained in the record will prejudice its economic and financial interests and will severely diminish or eliminate MPAC's ability to compete and generate revenue by exploiting its intellectual capital contained in its market models. The public interest in the reduction of MPAC's operating costs, which are funded by taxpayers, outweighs the appellant's "right to know". This is especially true where there are, as in this case, many other mechanisms that would serve to protect the public interest identified by the appellant.

While MPAC's position is persuasive as it relates to the impact of disclosure of its entire market models, in my view, it does not take into account the degree to which records directly relating to these models has been protected from disclosure through my findings in this appeal. In my view, the important purposes reflected in the various section 11 exemptions at issue in this case are not impacted by disclosure of information not directly related to MPAC's actual market model. I have determined that disclosing Record 2, the portions of the chart on page 3 of Record 1, and the undisclosed portions of Record 4 would not reveal MPAC's trade secret. However, even if

this information technically falls within the scope of the definition of "trade secret", in my view, the compelling public interest in providing the appellant with sufficient information regarding his property assessment, as reflected in these records, is sufficient to outweigh the purpose of the section 11(a), (c) and (d) exemption claims in the circumstances of this appeal. Similar considerations would apply to other property taxpayers seeking access to similar types of information.

In the circumstances of this case, the public interest in protecting the business or economic interests of MPAC is clearly outweighed by the compelling public interest in individuals being provided with basic information about how their taxes are calculated including what factors (variables) were considered (and which ones were not) and the weight given to those variables (the coefficients). With respect to that information, I therefore find that section 16 would apply to override the application of sections 11(a), (c) and/or (d) of the *Act*.

ORDER:

1. I order MPAC to disclose to the appellant Record 2, the undisclosed portions of Record 4, and the portions of the chart on page 3 of Record 1 headed "Coefficients" that list the variables and coefficients. I have attached a highlighted version of page 3 of Record 1 with the copy of this Order provided to MPAC's Freedom of Information Coordinator that identifies the portions that should be disclosed. Disclosure is to be made by MPAC to the appellant by **September 9, 2002**.

2. I uphold MPAC's decision to deny access to the portions of Record 1 not covered by Provision 1.

3. In order to verify compliance with this order, I reserve the right to require the MPAC to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1 upon receipt.

Original signed by: August 16, 2002
Tom Mitchinson
Assistant Commissioner