



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1690

Appeal MA-020310-1

Municipal Property Assessment Corporation



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NATURE OF THE APPEAL:

The Municipal Property Assessment Corporation (MPAC) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from a labour union for “information regarding a survey conducted at the behest of MPAC”. The requester identified that the request was for the full text of the survey, a full description of the methodology used to conduct the survey, the results of the survey, and other information relating to the survey.

MPAC located six responsive records and denied access to all of them, citing the discretionary exemption in section 6(1)(b) of the *Act* (closed meeting), the mandatory exemption under section 9(1)(b) (relations with other governments), and the mandatory exemption under section 10(1)(b) (third party information). MPAC also stated that no records exist in response to a particular portion of the request.

The requester (now the appellant) appealed the decision of MPAC. One of the issues raised in the letter of appeal was the application of section 16 of the *Act* (public interest override).

Mediation did not resolve this appeal, and a Notice of Inquiry summarizing the facts and issues was sent to MPAC. MPAC provided representations and the Notice of Inquiry, along with the non-confidential portions of MPAC’s representations, was sent to the appellant. The appellant also provided representations which were, in turn, shared with MPAC, who provided reply representations.

In the course of exchanging representations during the inquiry process, the following issues were resolved:

- MPAC identified that it was prepared to disclose portions of Records 1 through 4, and Record 5 in its entirety, and that the severed portions of Records 1 through 4 were not responsive to the appellant’s request. MPAC provided those records to the appellant, and the appellant identified that he was not appealing the issue of whether or not the severed portions were responsive. Records 1 through 5 are therefore no longer at issue in this appeal.
- MPAC provided representations on the application of the exemptions in sections 9 and 10 of the *Act* to Record 6, but did not provide representations on the possible application of section 6 to that record. Accordingly, section 6 is no longer at issue in this appeal.

As a result of the matters that were resolved through the exchange of representations, the sole record remaining at issue in this appeal is Record 6. This record is described by MPAC as the results of the Municipal Customer Satisfaction Survey, prepared by a consultant. It is 66 pages in length, and MPAC has claimed that the record is exempt from disclosure under sections 9(1)(b) and 10(1)(b) of the *Act*.

DISCUSSION:

SECTION 10 - THIRD PARTY INFORMATION

Introduction

MPAC claims that section 10(1)(b) of the *Act* applies to the record at issue. That section reads:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the “informational assets” of businesses or other organizations that provide information to institutions [See Orders PO-1805, PO-2172].

Although one of the central purposes of the *Act* is to shed light on the operations of government institutions, section 10(1) serves to limit disclosure of information which, while held by government institutions, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace [Order PO-2172].

For a record to qualify for exemption under section 10(1)(b), the party resisting disclosure (in this case MPAC) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that the harms specified in paragraph (b) of section 10(1) will occur [Orders 36, P-373, M-29 and M-37].

In the circumstances of this appeal, I have decided to review the second part of the three-part test under section 10, initially.

Supplied in Confidence

To meet the “supplied” aspect of part 2 of the test, it must first be established that the information was actually supplied to MPAC, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to MPAC [Orders P-203, P-388 and P-393].

The requirement that the information be “supplied” reflects the purpose of the section 10(1) exemption claim - protecting the informational assets of third parties (Order PO-2172).

MPAC's representations

MPAC identifies in its representations that it is a non-share-capital, not-for-profit corporation whose main responsibility is to provide its customers (property owners, tenants, municipalities, and government and business stakeholders) with property assessments. It also identifies that every municipality in Ontario is a member of MPAC.

MPAC has provided extensive representations in support of its position that Record 6 qualifies for exemption. In its affidavit evidence supporting its position, MPAC identifies how Record 6 was created. Briefly, MPAC contacted an independent marketing research and strategic planning company (the research company) to conduct a Municipal Customer Satisfaction Survey (the survey) of the 448 municipalities who use MPAC's services and products regularly. These municipalities represent a major sector of MPAC's customer base.

The research company mailed copies of the survey to each municipal office, and the survey was then distributed locally to certain employees in their respective municipal offices. The research company used an interactive automated telephone interviewing system to receive and record the survey responses from the responding municipal employees. Record 6 (the record remaining at issue) consists of the results of this Municipal Customer Satisfaction Survey, as prepared by the research company.

Neither MPAC nor the research company that provided supporting affidavit evidence in this appeal take the position that Record 6 contains the research company's information.

MPAC takes the position that the information in the record was supplied in confidence to MPAC by the respondents to the survey (whom it considers the affected parties). It states:

As set out in the affidavits ..., MPAC and [the research company] explicitly advised potential respondents to the Survey that information they supplied in response to the Survey would be kept confidential. The assurances were made to the respondents explicitly, in writing, both at the beginning and the end of the Survey... . The Survey stated “*Your responses to this survey are completely confidential and will not be used to identify you or any other customer who participates*” (emphasis added by MPAC in its representations). At the end of

the Survey, the written assurance of confidentiality is repeated: “We would like to remind you that *this survey is confidential* and will not be used to identify you or any other participant” (emphasis added by MPAC in its representations).

These assurances of confidentiality were made by both [the research company] and by MPAC directly to the respondents, in the context of the request to complete the survey. No time limits were placed on the confidentiality, since MPAC intended to keep the results of the Survey confidential and for internal use only. MPAC submits that it is entirely reasonable that respondents would have an expectation of confidentiality in view of these explicit assurances and that a reasonable expectation of confidentiality is readily apparent on an objective basis. MPAC submits, furthermore, that it is reasonable to assume in the circumstances that respondents supplied information in response to the survey on the condition of confidentiality (as is common with surveys of any nature which expose the views of respondents).

MPAC then refers to the test set out in Order P-561, which establishes certain criteria to assist in deciding whether information was provided in confidence. MPAC posits that “all criteria are met in these circumstances”, and states:

- the information was communicated to MPAC on the basis that it was confidential and that it was to be kept confidential;
- the information was treated consistently in a manner that indicates a concern for its protection from disclosure, in this case, both by the respondents and by MPAC;
- as MPAC has not released the results of the survey in any form, the information is not otherwise available from sources to which the public has access; and
- the information was prepared for a purpose which would not entail disclosure – namely, in response to the confidential survey.

MPAC then states:

[The research company] has compiled the results of the Survey on the basis of the information originally provided by the affected parties, and inferences (correct or incorrect) could be drawn with respect to the information supplied to the institution and the exact source of the information.

As explained in [the affidavit], respondents to the Survey are individual employees from the municipal offices that comprise a substantial portion of MPAC’s customer base. All of the information in issue was supplied by municipal employees in response to the Survey The methodology employed to complete the Survey allows respondents to enter their answers to Survey questions by touch-tone telephone. [This] technology also offers respondents an audio component to record oral comments. With this portion of the Survey in

particular, respondents can openly identify themselves (in view of the assurance of confidentiality) or, in some cases, the substance of their comments may directly or indirectly allow them to be identified.

Moreover, because of the very nature of surveys, it is reasonable to expect that the information is supplied implicitly in confidence. Both the organization that collected the data and the institution using the data have treated the information confidentially in accordance with the written guarantee of confidentiality in the Survey. In the case of the [research company] ... [it] complies with industry codes of conduct and policies on confidentiality. The only individuals with knowledge of the information are the respondents, the individuals at [the research company] who compiled the results, and the individuals at MPAC who reviewed the results of the Survey prepared by [the research company]... .

The appellant's representations

The appellant was provided with a copy of MPAC's representations, and provided representations in response.

The first matter the appellant takes issue with is MPAC's position that MPAC itself is in receipt of the confidential submissions from the municipalities. The appellant takes the position that the research company alone would have received the confidential survey responses, and that MPAC itself was never in receipt of the responses. The appellant states:

The survey was conducted by an independent third party marketing research firm (the research company). It is submitted that the very reason for retaining such an organization to conduct a survey on your behalf is to ensure that the identities of respondents are concealed from you. It is only by this means that you will be certain to receive unbiased and unqualified answers to the inquiry you are undertaking. The independent market research company can assure respondents that their answers to survey questions and, indeed, even their participation in the survey, will not be revealed to the party engaging its services.

In fact, the confidentiality of respondents' information is guaranteed by the processes involved in market research. In virtually all instances, once the answers provided by survey respondents are tabulated, coded, and analyzed, the respondents' identities will be rendered indiscernible. Apart from ensuring that respondents haven't replied more than once to the survey, the identities of individual respondents will be of no value to the process. Identities of respondents will not figure in the analysis of survey responses.

Closely connected to this argument is the appellant's further position that the information contained in the Record – the actual “survey results” – is not the information “supplied” to MPAC. The appellant's representations state:

[The appellant] disagrees that the disclosure of [the record] could reasonably be expected to reveal information MPAC received in confidence from the municipalities who responded to the survey.

[The appellant] submits that disclosure of the results of the [survey] would not reveal confidential information about the respondent municipalities because the information they provided is not, in fact, revealed in that document. The record therefore does not disclose... the identities of individual respondents or their information.

....

[The research company] produced a report of the survey results (Record 6). It is submitted that this report does not contain information the same as that originally provided by the individual respondents. The report contains analyzed data extracted from the entirety of survey responses. Data and analysis contained in the report would not permit the drawing of accurate inferences with respect to the information actually supplied to [the research company] by individual respondents.

Survey respondents had a reasonable expectation of confidentiality... Respondents' information was, in fact, kept confidential. The report of the survey results does not contain information in the form in which it was originally provided by the respondents. [No one] would thus be able to identify individual survey respondents or their answers in the survey results report.

MPAC's reply representations

The appellant's representations were in turn shared with MPAC. MPAC does not agree with the appellant's position that MPAC never received the survey results, and takes the position that the research company was acting as MPAC's agent for the purpose of preparing the survey.

With respect to the appellant's position that the results in the record in any event do not disclose the information provided by the affected parties, MPAC states:

...the results of the survey were supplied in confidence to MPAC through [the research company]. As set out in order M-574, the test for determining whether the information was supplied to an institution is that the information contained in the record must be substantially the same as that originally provided by the affected party. The test will also be met if disclosure of the information would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

The information found in the survey is the information that the municipalities originally provided. Contrary to the appellant's assertion, [the research company] did not analyse, evaluate or manipulate the information provided by the respondents to the survey. [The research company] did not alter or shroud the original responses by providing MPAC with professional recommendations or suggestions of its own. Instead, [the research company] collected and compiled the information received directly from the municipalities and provided MPAC with the results they received.

Findings

Supplied

I do not accept MPAC's position that the information contained in the record was "supplied" by the municipalities for the purpose of section 10 of the *Act*.

As set out above, in order to satisfy this part of the three-part test under section 10, the information in the record for which the exemption has been claimed (Record 6) must have been supplied to MPAC in confidence, either implicitly or explicitly, or its disclosure must permit the drawing of accurate inferences with respect to the information actually supplied to MPAC.

Whether or not the research company acted as agent for MPAC is immaterial for the purpose of this appeal. In fact the information requested is the survey results, not the specific information provided piece by piece from the municipalities who chose to participate in and provide responses to the survey questions.

Based on the representations of the parties, it appears that the original, individual responses from the respondents to the survey were likely supplied by the respondents to either MPAC or the research company conducting the survey on MPAC's behalf. However, those individual responses are not the record at issue in this appeal, nor have they been provided to me in the course of this appeal. What is at issue is Record 6, the results of the Municipal Customer Satisfaction Survey, which was clearly prepared by the research company conducting the survey.

What I must decide in this appeal is whether the disclosure of Record 6 would reveal information that was supplied to MPAC (or its agent) by the respondents to the survey, or whether its disclosure would permit the drawing of accurate inferences with respect to any information so supplied.

Previous orders have found a distinction between information contained in a responsive record, and information "supplied" to an institution. In Order P-373, which was upheld by the Ontario Court of Appeal, Assistant Commissioner Mitchinson had to decide whether a number of computer-generated lists of information were "supplied" to the Workers' Compensation Board for the purpose of the provincial equivalent to section 10(1) of the *Act*. He stated:

Records 1, 2, and 3 list the names and addresses of the employers with the fifty highest surcharges in 1991, together with the amount of surcharge for each employer. Records 4 and 5 list only the names and addresses of the employers with the highest penalties in 1990 under the relevant program.

In my view, the surcharge amounts were not “supplied” to the Board by the affected persons; rather, they were calculated by the Board. **While it is true that information supplied by the affected parties on the various forms was used in the calculation of the surcharges, it is not possible to ascertain the actual information provided by the affected persons from the surcharge amounts themselves.** (emphasis added)

The Ontario Court of Appeal reviewed the Assistant Commissioner’s approach in *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, and stated:

With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records would not reveal information supplied in confidence to the WCB by the employers.

In Order MO-1237, Senior Adjudicator Goodis relied on the approach taken by Assistant Commissioner Mitchinson in deciding whether certain scores calculated by an architect for a school board revealed the information actually supplied by the third parties. He stated:

In my view, the reasoning in Order P-373 applies to the scores assigned to the contractors with respect to each of the criteria. In each case, disclosure of these scores would not reveal the specific information actually supplied to the architect (as agent for the Board). Rather, the architect calculated or derived the scores based on the information that was actually supplied, or in some cases the architect arrived at the scores based on a subjective evaluation of the information actually supplied....

To conclude, none of the information at issue qualifies as having been “supplied” to the Board, or to the architect as agent for the Board. As a result, I find that part two of the test has not been met with respect to the information at issue.

I adopt the approach taken in both of the orders referred to above, and I apply it to the information in the record at issue in this appeal. In my view, the survey results set out in Record 6 do not reveal the specific information **actually supplied** to MPAC or to the research company on MPAC’s behalf. Rather, the research company took the information supplied by the respondents and then prepared the survey results (Record 6) based on the information that was

actually supplied. While it is true that information supplied by the survey respondents was used in the preparation of Record 6, I am not persuaded on the material before me that it is reasonable to expect that a person could ascertain the actual information provided by the individual respondents, from the summarized survey results contained in the record.

In my view, Record 6 does not contain the information supplied to MPAC (or to the research company on MPAC's behalf) by the responding municipalities. Rather, it contains an anonymized compilation of the information provided by the respondents. Furthermore, although one of MPAC's main concerns appears to be that certain portions of Record 6, if disclosed, would reveal information that could identify the individual responses received from identifiable parties, MPAC has not referred me to any such specific information. I have carefully reviewed the record, and have not found any such references.

MPAC argues that the record contains the information that the municipalities originally provided, and that the research company did not "analyse, evaluate or manipulate the information" or "alter or shroud" the original responses by providing professional recommendations or suggestions of its own. MPAC states that the research company "collected and compiled the information received directly from the municipalities and provided MPAC with the results they received". However, in the circumstances of this appeal, it is not necessary for me to determine the exact amount of evaluation or interpretation of the data that was done by the research company. The research company clearly prepared the record, and MPAC confirms that the research company, in doing so, did in fact collect and compile the information. The fact that no information contained in the record is referable to any individual respondent is sufficient to support my finding that the record does not contain or reveal any information actually supplied by the respondents.

Accordingly, I find that Record 6 does not contain or reveal information which was supplied to MPAC for the purpose of part two of the section 10(1) test, nor would its disclosure permit the drawing of accurate inferences with respect to the information actually supplied to MPAC.

In Confidence

Even if the information contained in Record 6 could be considered to have been "supplied" by the respondents to MPAC (which I have found is not the case), in my view the information in the record would not have been supplied "in confidence", either explicitly or implicitly.

The representations of both MPAC and the research company specifically set out the written assurances of confidentiality that were given to the customers who responded to the survey. The first of the two assurances reads: "Your responses to this survey are completely confidential and will not be used to identify you or any other customer who participates." The second reads: "We would like to remind you that this survey is confidential and will not be used to identify you or any other participant". In my view, both of these statements clearly indicate that the confidentiality assurances relate to the **identity** of the respondents who choose to respond to the survey.

Based on the representations received, I accept that the respondents to the survey would have had an expectation that their identity as respondents, and the specific information which comprised their individual responses, would remain confidential, and that this expectation was reasonable and had an objective basis (Order M-169). However, I do not accept that this expectation of confidentiality could reasonably be expected to extend to the generic results of the survey as found in Record 6, which neither identify whether or not a particular municipality responded to the survey, nor what their particular responses were.

Because I have found that Record 6 does not meet part 2 of the test, and as all parts of the three-part test must be satisfied in order for section 10(1)(b) to apply, it is unnecessary for me to consider Parts 1 and 3 of the test.

Accordingly, I find that the record at issue does not qualify for exemption under section 10(1)(b) of the *Act*.

SECTION 9 – RELATIONS WITH OTHER GOVERNMENTS

General Principles

Section 9(1)(b) of the *Act* reads:

A head shall refuse to disclose a record if the disclosure could reasonably be expected to reveal information the institution has received in confidence from,

the Government of Ontario or the government of a province or territory in Canada

In order to deny access to Record 6 under section 9(1)(b), MPAC must demonstrate that the disclosure of the record could reasonably be expected to reveal information which MPAC received from one of the governments listed in the section, and that this information was received by MPAC in confidence ([Order M-128](#)).

Under my analysis of the application of section 10(1)(b) above, I found that the information contained in the record at issue in this appeal was not “supplied” to MPAC by the respondents to the survey (the municipalities) for the purpose of section 10 of the *Act*. Applying the same analysis, I find that the disclosure of the record could not reasonably be expected to reveal information MPAC received in confidence from the respondents to the survey under section 9(1)(b). Disclosure of the record would not reveal information “received from” the individual respondents to the survey, nor would it reveal information received by MPAC “in confidence” from the responding municipalities.

Accordingly, I find that the record at issue does not qualify for exemption under section 9(1)(b) of the *Act*.

Although MPAC provided detailed representations in support of its view that a municipality would qualify as one of the governments listed in section 9(1)(b), I have serious reservations about the application of that section to a municipality. It seems clear to me that the list of bodies set out in section 9(1)(b) does not include municipalities. However, it is not necessary for me to make a finding on that point. Having found that the disclosure of the information in the record could not reasonably be expected to reveal information MPAC received in confidence, it is not necessary to examine whether a municipality would in any event qualify as one of the governments listed in section 9(1)(b).

As I have found that Record 6 does not qualify for exemption under section 9(1)(b) or 10(1)(b) of the *Act*, it is not necessary for me to determine whether the “public interest override” found in section 16 applies.

ORDER:

1. I order MPAC to disclose Record 6 to the appellant by **October 16, 2003**.
2. In order to verify compliance with this order, I reserve the right to require MPAC to provide me with a copy of the record which is disclosed to the appellant, upon request.

Original signed by: _____
Frank DeVries
Adjudicator

September 24, 2003 _____