



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-1948

Appeal MA-040086-3

Municipal Property Assessment Corporation



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NATURE OF THE APPEAL:

Background

Under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), the Municipal Property Assessment Corporation (MPAC) received a request for information pertaining to an assessment dated June 30, 2003 for realty tax purposes in relation to the requester's residential property. As set out in section 19 of the *Act*, in the normal course, an institution has 30 days to respond to a request for access to a record.

On March 19, 2004 the requester (now the appellant) wrote to this office indicating that MPAC had not replied to his request under the *Act* within the requisite time frame. Under section 22(4) of the *Act*, failing to respond to a request for access to a record within the statutory time frame results in a "deemed refusal" to provide access, which gives rise to a right of appeal. Accordingly, this office opened file MA-040086-1, and sent a Notice of Inquiry to both the appellant and MPAC advising MPAC that if it did not issue a decision by April 7, 2004, this office would be in the position to issue an order requiring it to provide a decision letter to the appellant.

On April 6, 2004, MPAC sent a letter to the appellant advising that, relying on sections 20(1)(a) and (b) (which allow an institution to extend the time limit to respond to a request if certain conditions are met), it was extending the time limit to June 11, 2004 for it to respond to the request. MPAC said the extension was necessary because of the large number of records involved (in excess of 12,000) and that consultations with parties outside of the institution were necessary to comply with the request. MPAC stated these steps could not reasonably be completed within the 30 day time limit in section 19 of the *Act*.

On April 14, 2004, Intake Analyst Lucy Costa issued Order MO-1777, in which she noted:

Barring exceptional circumstances, which are not present here, when assessing the time and resources it will need to properly respond to a request, an institution must decide and provide written notice within the initial 30-day time limit for responding to the request, the length of any time extension it will need pursuant to section 20 of the *Act* (Orders P-234, M-439 and M-581, MO-1748). In this case, notice of the time extension for responding to the request was not issued until more than two months after the request was made, which is clearly not in accordance with the direction provided by these previous orders. To ensure that there are no further delays in processing this request, I am ordering MPAC to issue a decision regarding access.

MPAC was then ordered to issue a decision letter to the appellant regarding access to the records in accordance with the *Act* and without recourse to a time extension, no later than April 20, 2004.

In response, on April 19, 2004, MPAC issued a decision to the appellant indicating the following:

Our records indicate that you made a request for the same information in a letter dated January 21, 2003 and that the Municipal Property Assessment Corporation

responded to that request via its decision letter dated February 26, 2003. That being the case, it is our opinion the current request is a “frivolous” [one] as contemplated by section 4(1)(b) of the *Act* and therefore we will not be proceeding with its processing.

The appellant appealed this decision and file MA-040086-2 was opened to address it. That file was closed when MPAC issued a new decision letter dated July 5, 2004. In its new decision letter, there is no mention of the request being frivolous or vexatious and it provided access to information relating to the items listed as (b), (c), (d), (f) and (g) in the request. Access to information relating to the following parts of the appellant’s request (mostly framed in the form of questions) was denied:

- (a) Please identify the geographical market area which applies to this assessment, supplying me with a map or geographical boundaries;
- ...
- (e) How many sales were used to calculate the relevant equation, and over what period of time were the sales derived?
- ...
- (h) With respect to the sales data used to generate this assessment, kindly provide me with the raw data (each sale including the 265 variables) for the geographical area in question from your Business Development Branch (minus personal information). Kindly provide this data in the form of an EXCEL or SPSS electronic output file so that I can analyse the raw data myself, and
- (i) Kindly tell me the amount of variation explained in your Multiple Regression Equation for our area (structural equation or model) or R^2 , the F value of the entire equation, its statistical significance, and the T values for each independent variable and their statistical significance.

As set out in its decision, MPAC refused to disclose the 2003 Base Year Market Model Report that MPAC says would be responsive to the request in items (a) and (e) on the basis that it is subject to the discretionary exemption in section 15(a) of the *Act* (publicly available information). MPAC’s decision letter also points out that the 2003 Base Year Market Model Report contains a list of variables, coefficients and standard error statistics that are used in the model.

It should be noted at the outset that the section 15(a) exemption may apply even where a fee scale other than the one prescribed by the *Act* would govern. However, as set out in Order MO-1573, discussed in more detail below, this office may find in certain circumstances that a record

is not in fact “publicly available” under section 15(a) due to the magnitude of the amount to be charged for the record.

MPAC also refused to disclose records responsive to item (h) under the mandatory exemptions in sections 10(1)(a), (b) and (c) (third party information), and the discretionary exemptions in sections 11(a), (c) and (d) (economic and other interests) and section 15(a). Disclosure of records responsive to item (i) was also refused under sections 11(a), (c) and (d).

The appellant appealed MPAC’s decision and this office opened appeal MA-040086-3, the current appeal. In this appeal the appellant also alleges that the manner in which MPAC handled his request amounts to an abuse of process. Mediation was not possible and this matter was moved to the adjudication stage.

A Notice of Inquiry was sent to MPAC, initially, and it filed representations in response. MPAC’s representations included an affidavit sworn by its Freedom of Information and Privacy Coordinator (the affidavit). A Notice of Inquiry, along with MPAC’s representations, was then sent to the appellant. He indicated to this office that he did not wish to file representations in response.

Although the affidavit and MPAC’s representations addressed the issues raised in the Notice of Inquiry, they do not state the amount that would be charged under MPAC’s fee structure for the sales data in paragraph (h) of the request. There was, however, a letter that MPAC had previously filed which indicated that the amount that MPAC would charge under MPAC’s fee structure for obtaining the sales data requested by the appellant is \$5,184,000.00 plus GST (based on the rate of \$432.00 per property x 12,000 properties).

Since it was not clear that this was the amount MPAC was still claiming to access these records, how that amount was arrived at, why there appeared to be a variance between the cost of sales data in this appeal and the appeal under consideration in Order PO-1655, and whether the amount to be charged was so prohibitive as to amount to an effective denial of access, I sent correspondence to MPAC dated February 28, 2005, seeking clarification.

After inquiring whether the sum of \$5,184,000.00 plus GST remained the cost for the sales data, my letter continued as follows:

In addition, we invite you to explain how that cost was arrived at and why there appears to be a variance between the cost of the sales data in the appeal under consideration in Order PO-1655 and the appeal before me. I enclose a copy of Order PO-1655 for your reference.

Finally, you are also invited to provide representations on whether or not this cost for accessing the records outside the *Municipal Freedom of Information and Protection of Privacy Act* is so prohibitive as to amount to an effective denial of

access. This concept is discussed in Order MO-1573, a copy of which is enclosed for your reference.

A copy of the letter was also sent to the appellant.

The appellant responded as follows:

I have your letter of 28 February 2005, and wish to reiterate that the issues you raise are, indeed, part and parcel of the appeal.

Permit me to also re-emphasize my request that you make a finding of fact that MPAC has abused the process under the *Municipal Freedom of Information and Protection of Privacy Act*. This issue goes beyond specific exemptions claimed, and addresses how MPAC handled my initial request filed January 2004, the egregious delays and omissions as well.

MPAC then filed further representations on the issues as set out in my letter. In their representations MPAC confirmed that the cost for access to the sales data requested by the appellant was that as quoted: the sum of \$5,184,000.00 plus GST. MPAC asserted however, that due to the unique circumstances of the request, this did not result in an effective denial of access to the information.

I then provided the appellant with a copy of MPAC's representations, inviting him to provide submissions in response. The appellant indicated that he did not wish to file any representations in response, and pressed this office for a ruling on the issue as to whether MPAC abused the process under the *Act*.

RECORDS

The following records are at issue:

- Record 1** 2003 Base Year Market Model Report
(Responds to items (a) and (e) of the request)
[Exemption claimed - section 15(a)]

- Record 2** Case Summaries
(These records contain the requested sales data and
responds to item (h) of the request)
[Exemptions claimed - sections 10(1) (a), (b) and (c), 11(a),
(c) and (d), 15(a)]

- Record 3** Model Summary
(Responds to item (i) of the request)
[Exemptions claimed - sections 11(a), (c) and (d)]

DISCUSSION

Introduction

In Order MO-1564 former Assistant Commissioner Tom Mitchison undertook an exhaustive and detailed analysis of MPAC and its processes and procedures. To put the request for the records in this appeal in context, it is helpful to reproduce his summary of the sales comparison approach that MPAC uses. He explained:

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.

As explained by MPAC in its representations on the appeal before me, the 2003 Base Year Model Report (Record 1 - pertaining to items (a) and (e) of the request) is the Market Model Report for the relevant area and the Residential Value Overview. This, MPAC says, would respond to the appellant's request regarding the geographical market area that applies to the assessment in question and the number of sales and time period used to calculate the "relevant equation". This is generated by MPAC after it has completed its valuation process and includes a sample regression equation, discussion of ratio studies, market area boundaries, summaries of sales data, and lists of the variables, coefficients, and standard errors used in the model.

The Case Summaries (Record 2 – pertaining to item (h) of the request) constitutes the raw sales data for the geographical area in question, in electronic form. It consists of approximately 12,000 documents totalling approximately 108,000 pages. The information is compiled from various sources including MPAC's data collectors, land registry information, and information under licence from Teranet. To assist in assessing a given property's value, each property in the OASYS database can have as many as 256 data elements assigned to it although not every element is necessarily completed for each property. The elements are extremely detailed and include for example: the types of access to the property, the presence or absence of air conditioning, the floor area for each level, etc. The data is then stored in the Ontario Assessment System (OASYS) and a report is produced.

The Model Summary (Record 3 – pertaining to item (i) of the request) is a list of variables, coefficients and standard error statistics chosen by MPAC for its valuation process, along with other associated statistics. These are used for the Market Model by which MPAC values property in the applicable area.

Information Currently Available to the Public

Section 15(a) – Records 1, 2 and 3

In its decision letter, MPAC advised the appellant that the 2003 Base Year Market Model Report (Record 1) and Case Summaries (Record 2) are available to the public for purchase. In their representations, MPAC also points out that a portion of the Model Summary (Record 3) would be available through the purchase of the 2003 Base Year Market Model Report. As set out in its decision letter and based on my review of the records at issue, this would be a list of variables, coefficients and standard error statistics that are found in both the 2003 Base Year Market Model Report and the Model Summary (Record 3).

If the information is publicly available, it may be exempt under section 15(a), which reads:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public.

For this exemption to apply, MPAC must establish that the record or the information contained in the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre [Orders P-327, P-1387 and MO-1881].

To show that a “regularized system of access” exists, MPAC must demonstrate that

- a system exists
- the record is available to everyone, and
- there is a pricing structure that is applied to all who wish to obtain the information

[Order MO-1881]

Examples of the types of records and circumstances that have been found to qualify as a “regularized system of access” include

- unreported court decisions [Order P-159]
- statutes and regulations [Orders P-170, P-1387]
- property assessment rolls [Order P-1316]
- septic records [Order MO-1411]
- property sale data [Order PO-1655]
- police accident reconstruction records [Order MO-1573]

The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act* [Orders P-159, PO-1655, MO-1411 and MO-1573].

The 2003 Base Year Market Model Report (Record 1) is available for a fixed fee. The amount that MPAC seeks to charge for the Case Summaries (Record 2) is the issue.

The Amount that MPAC Charges for Obtaining Sales Data

Prior to MPAC being created, the Ministry of Finance answered requests for sales data related to property assessments. In Order PO-1655, Adjudicator Cropley considered whether the exemption in section 22(a) of the *Freedom of Information and Protection of Privacy Act* [the equivalent of section 15(a)] was available to the Ministry of Finance in the context of a request for sales data relevant to that requester's property and five comparables.

As set out in Order PO-1655, the Ministry of Finance indicated that there were 2,476 sales used in the analysis in that appeal and Adjudicator Cropley was satisfied with the Ministry of Finance's explanation that there was no way to specifically determine which of the 2,476 properties related specifically to that requester's property and the five comparables. The Ministry of Finance, like MPAC in the appeal before me, submitted that access to this sales data could be denied because it is publicly available. In Order PO-1655, issued February 4, 1999, the cost for access was set out to be \$1.50 per property. In the appeal before me the cost, for what at first glance may be considered the same type of information, is \$432.00 per property.

As ultimately confirmed by MPAC, the amount to be charged under its fee structure for access relating to Case Summaries (Record 2) was the sum of \$5,184,000.00 plus GST.

Are MPAC's Charges under its Fee Structure so Prohibitive as to Amount to a Denial of Access?

In Order MO-1573, former Senior Adjudicator David Goodis, accepted that there may be circumstances where the cost of accessing a record outside the *Act* is so prohibitive that it amounts to an effective denial of access. He explained the basis for this proposition in the following way:

In a recent case in the United States, *Hartford Courant Co. v. Freedom of Information Commission*, (SC 16568) (July 23, 2002) [hereinafter referred to as *Hartford Courant*], the Supreme Court of Connecticut was asked to decide whether a request for criminal history records should be considered as falling under a departmental fee for services statute, or the freedom of information statute. The applicable fee under the departmental statute was over \$20 million, while the fee under the freedom of information statute was far lower. For various reasons that are not applicable here, having to do with the interpretation of the specific legislation, the court decided that the freedom of information statute applied. The court's final point in support of its decision read as follows:

Were we to hold otherwise, the fee for the plaintiff's request would be \$20,375,000, a result that would have the practical effect of denying the plaintiff access to records that, by statute, must be made available to the public. Such a result would be inconsistent both with the act's broad policy favoring the disclosure of information and with the well established canon of statutory construction "that those who promulgate statutes or rules do not intend to promulgate statutes or rules that lead to absurd consequences or bizarre results." *State v. Siano*, 216 Conn. 273, 278, 579 A.2d 79 (1990).

I agree with this view. Applying the "absurd result" principle here, this office may find in certain circumstances that a record is not in fact "publicly available" under section 15(a), due to the magnitude of the fee. However, the "absurd result" principle is not engaged here, particularly where the evidence indicates that the Police have granted access to similar records based on the by-law fee structure.

The Representations of MPAC

With respect to the calculation of the \$5,184,000.00 plus GST cost for the Case Summaries (Record 2), MPAC states in its representations that it established a pricing schedule that is used for and applied to all requests for property information. It indicates that the pricing is based on the volume and type of information requested. The pricing system has been developed based on market research conducted by its Business Development Group, and includes standard rates for computing time and other resources, as well as administration, marketing, and delivery charges. MPAC says each data element has a set cost, but it has grouped some of the elements into bundles, so that certain types of reports that are comprised of numerous data elements may have a lower unit price than purchasing individual data elements. Individual data elements are generally priced at \$2.00 per unit.

With respect to the appellant's request in this appeal, MPAC states:

The request in issue involves the following costs *per property*: a Primary Structures report that includes 22 data elements, with a unit price of \$9.00; a Residential Report involving 13 data elements, with a unit price of \$11.00; a Secondary Structures Report involving 16 data elements, with a total price of \$2.00; 205 additional data elements at \$2.00 each, for a total of \$410.00. This generates a subtotal of \$432.00 plus \$30.24 GST, for a total of \$462.24 per property. Since the request covers 12,000 properties, the total cost of the request based on the established fee structure is \$5,184,000.00 plus GST. The appellant has requested 3,072,000 data elements. If the request can be limited, either by the number of data elements requested or by the number of properties involved, the cost will be incrementally lower.

In its representations filed in response to my letter dated February 28, 2005, MPAC also addresses the differences in amounts charged for sales data between Orders PO-1655 and MO-1573.

With respect to Order PO-1655, MPAC states:

Order PO-1655 was issued in February 1999. At the time of the request that was the subject of that Order, MPAC had not yet been established, and the Ministry of Finance was responsible for assessment duties in the Province. ... MPAC's predecessor, the Ontario Property Assessment Corporation, was established by the *Municipal Property Assessment Corporation Act, 1997* (the "MPAC Act") and started operating on December 31, 1998. It assumed the assessment responsibilities for the Province and was given legislative authority to engage in revenue generating activities (as described in MPAC's Original Representations and the affidavit submitted with them in this matter). The Corporation was renamed MPAC in 2001. In keeping with its legislative authority and attendant responsibility to generate fees to offset the costs of its services, MPAC's Business Development Group developed value-added electronic products that could be provided as a convenience to customers at an established fee. In essence, Order PO-1655 must be distinguished because MPAC has statutory authority to generate revenue, which the Ministry of Finance did not have.

MPAC does not have access to the Ministry of Finance records relating to the request in that case, and therefore cannot know the basis for the fee or precisely what data was requested or provided. Individuals at MPAC recall that the Ministry's fees, as reflected in Order PO-1655, were calculated based on a cost-recovery mechanism and applied to a request that appears to be of vastly different scope. Nor can MPAC determine from a review of the Order exactly what "sales data" cost \$1.50 per property, but it would not have been the same sales data or the same number of elements requested here. MPAC's review of the case suggests, based on experience, that the data requested was likely minimal, including a roll number, an address, and the date and amount of sale. Some structural information may have been included. However, the MPAC database now houses considerably more detail and hundreds of data elements, including information MPAC obtains from third parties, for which MPAC pays license fees.

What can be stated with certainty is that the scope and magnitude of the request in Order PO-1655 were not nearly as broad or comprehensive as the request in the current appeal. In Order PO-1655, the Ministry indicated that 2,476 sales were used to assess the requester's property, and it appears that the requester limited his request to sales data for five properties comparable to his own. In the case at hand, [the appellant] is requesting the sales data "for the geographical area in question." That area is defined by MPAC in its 2003 Base Year Market Model

Report as the "Ottawa Urban" Market Area. In 2003, there were nearly 12,000 property sales across the 52 Locational Neighbourhoods that make up the Market Area. This request for access to all 265 variables for all 12,000 properties in the geographical area is clearly a much broader request than that in Order PO-1655. If [the appellant] chose to limit the scope of his request to five comparable properties, as in PO-1655, the data would in fact be available to *him free of charge* through the AboutMyProperty™ service MPAC provides to property owners.

MPAC asserts that in Order MO-1573 Senior Adjudicator Goodis only briefly considered the issue and posits that the *Hartford Courant* case was decided under an entirely different statutory regime, and was based on statutory construction, particularly the choice between more than one potentially applicable law, rather than on the premise that the fee structure amounted to an effective denial of access. The freedom of information statute was applied in that case, MPAC says, as opposed to another act regulating the agency in question, because the plaintiff's request was for a "digital copy" of the department's criminal conviction database. If the request had been classified as a "search" for specific criminal convictions, MPAC says the agency's statute would have governed. The fact that it was a "digital copy" fell within the wording of the freedom of information statute (whereas "search" would have fallen under the agency's statute) and, therefore, MPAC says, the issue was one of statutory construction as to which statute should prevail over the other. In addition, MPAC says, another statute mandated that conviction information "shall" be available to the public.

MPAC continues its representations by pointing out that Senior Adjudicator Goodis concluded in Order MO-1573 that "this office may find in certain circumstances that a record is not in fact 'publicly available' under section 15(a), due to the magnitude of the fee" but held that this was not the case in the situation before him, particularly because the police had granted access to similar records in the past based on their established fee structure. MPAC says that requests for information to verify property assessments are regularly made and filled through its regularized system of access including application of fees based on its established price structure. MPAC regularly provides data of the nature requested by the appellant, but the requests are on a much smaller scale. The regularized system of access has enormous flexibility. It allows individuals to purchase all of the sales data maintained by MPAC or any combination of individual elements. By reducing the number of individual elements, the person asking for information can significantly reduce the fees.

MPAC states that while the cost of access in this specific instance is admittedly high, the request in issue is very unusual and its magnitude is unprecedented.

MPAC says, however, that it does not follow from the amount charged for what MPAC claims is an "unreasonably" large request, that the entire scheme of regularized access established by MPAC is suspect or that the alternative access mechanisms amount to an effective denial of access. MPAC submits that I must make a determination as to the reasonableness of MPAC's *fee structure in its entirety*, and not a determination of the reasonableness of the cost of a unique

request before it. Therefore, it is MPAC's position that while the cost is high in this case, it is the *nature of the request*, and not the nature of the fee structure, that is to blame for the price tag. MPAC argues that its pricing structure for access to its property information in electronic form works well and achieves a variety of goals, including providing a flexible and convenient service to the public, at a low cost for the average user, which generates revenue to offset the cost of MPAC's services. On a daily basis, members of the public access property information for free and/or pay the prescribed fees for additional information they may be seeking.

MPAC recognizes that property owners understandably want assurances that the assessment of their respective properties is in line with comparable properties, and MPAC considers this to be a legitimate purpose for requesting information. To this end, MPAC states, property owners can view assessment details for their property and assessment roll values for up to 12 comparable properties using AboutMyProperty, a free online service on MPAC's website. Once registered for the service, property owners have access, free of charge, to a Property Profile Report for their own property and assessment information for twelve properties of their choice consisting of six Assessment Roll Look Ups and six Detailed Property Reports. Additional reports and Assessment Roll Look Ups are available at a nominal cost within the AboutMyProperty site. MPAC says that users are prepared to and regularly do pay the reasonable fees for additional properties for the convenience of having access to data in electronic form.

MPAC questions why the appellant needs the voluminous amount of data he has requested or how he could possibly make use of it. It states that the only reason it can discern for requesting all of the data elements for all of the properties in the area is to attempt to re-create the model that MPAC uses to determine assessed values. MPAC submits that not only is this purpose inconsistent with the *Act*, but the appellant cannot re-create the model even with all the data. MPAC says he does not have the necessary elements, including MPAC's algorithm and formulae, to make any practical use of the voluminous data he has requested. MPAC states that past decisions of this office confirm that it is under no obligation to give the appellant the tools needed to manipulate the sales data.

In particular MPAC states:

Section 53(5) of the *Assessment Act* provides that MPAC may "disclose any information acquired by it and may do so on terms as it determines" [emphasis added]. Clearly, the word "any" is all encompassing and applies to the information at hand. Section 12(5) of the *MPAC Act* expressly allows MPAC to "levy a charge to be paid by other persons for whom it performs duties under this or any other Act." The Divisional Court in *MPAC v. Ontario* ((2004), 240 D.L.R. (4th) 759 (S.C.J., Div. Ct.), para. 8 (hereafter "MPAC v. IPC")) held that section 53(5) of the *Assessment Act* and section 12(5) of the *MPAC Act* in combination permit MPAC to sell information to members of the public for a fee set by MPAC and upon terms set by MPAC.

The fees charged by MPAC do not avoid or restrict the rights of the public pursuant to [the *Act*].... The fact that MPAC received only 16 freedom of information requests in 2004 is evidence that most requests for information are handled satisfactorily through MPAC's regularized system of access. As described further below, this regularized system includes *free* access to property information sufficient to compare an individual property assessment to those of comparable properties, as well as quick and convenient access to electronic data about additional properties at a fee.

MPAC further states that, relying on Orders P-159, PO-1655, MO-1411 and MO-1573, it is permitted to use a fee system that is different from the fee structure in the *Act*, arguing that:

In addition, the Commission does not have a mandate to question whether the institution has confined its fees to mere administrative costs or has included additional costs. Institutions are under no obligation to limit their fees to cover only their costs of production and sale. As stated in Order MO-1573, at page 12 of the decision:

....once it is established that the records are 'publicly available', the exemption applies, and this office is not in a position to inquire into whether (as the BC Commissioner put it) the alternative fee structure 'includes a profit element or only covers the seller's costs of production and sale.'

The same sentiment is expressed by former Commissioner Wright in Order P-1387:

Since I have found that section 22(a) has been properly applied to exempt the information at issue, the fee structure of the Act, including the provisions for fee waiver, are no longer operative and I am unable to consider the issue of cost.

As noted in MPAC's Original Representations, the report *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the "Williams Commission Report") stated that "government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited." As discussed earlier, the MPAC *Act* provides legislative endorsement and authorization for MPAC to generate revenue. Its ability to generate revenue from its expertise and from its innovative and specialized services ensures that MPAC can continue to provide its reliable statutory services to the public at the lowest possible cost to the taxpayer. In Order MO-1564, Assistant Commissioner Mitchinson recognized that:

....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.

The pricing structure in the case at hand is not merely based on administrative charges such as photocopies or the cost of employee time spent on responding to requests. The database constitutes the intellectual property of MPAC, housing detailed and voluminous information obtained through research or from third party providers under licence agreement. MPAC made a considerable investment of time and expertise to develop the databases and, on a regular basis, to input, confirm and update the information. MPAC is entitled to generate revenue from its entrepreneurial activities through the sale of products developed using its unique expertise. The price list for eProducts is published on MPAC's web site and the pricing structure applies equally to every requester.

If the Commission orders MPAC to provide the data to [the appellant] at the rates set out in the Regulations, it will gut MPAC's statutory authority to generate revenue and undermine a regularized system of access that has been implemented with great success for both the institution and individual users. A disclosure order based on the unusual facts of this [appeal] would effectively require MPAC to grant all future requests for data (no matter how routine or how outrageous in scope) for free, at substantial detriment to MPAC's bottom line and ultimately to taxpayers. Moreover, since there is no limit to the amount of data individuals will be able to demand for free from MPAC, a disclosure order would result in enormous prejudice to the institution. This result would not accord with the spirit and intent of [the *Act*] or the legislative scheme that governs the activities of MPAC.

In summary, MPAC says its fee structure is based on the knowledge that property owners can effectively evaluate their property assessment with a specific, manageable amount of property information and that vast quantities of detailed property data cannot be of any use to property owners. MPAC says its Business Development Group has experience and expertise in this area, and has handled a variety of requests over time. A request such as this, it says, is entirely outside the norm and does not lead to an inevitable conclusion that MPAC's system of access does not constitute a regularized system of access or that it constitutes an effective denial of access. In fact, it says, since virtually all requests are readily and seamlessly accommodated by MPAC's

current system, the more reasonable conclusion is that the request itself is “at issue”, not the system of access.

Analysis and Findings

2003 Base Year Market Model Report (Record 1) and Case Summaries (Record 2)

There appears to be no dispute that the 2003 Base Year Market Model Report (Record 1) is available to the public for purchase for a fixed fee.

The amount that MPAC charges under its fee structure for access to the Case Summaries (Record 2) in the sum of \$5,184,000.00 plus GST is a source of dispute.

As regards MPAC’s submission on *Hartford Courant*, I note that in Order MO-1573 reproduced above, Senior Adjudicator Goodis referred to the court’s final point in support of its decision, which focused on the magnitude of the fee having the practical effect of denying access, not the choice of legislative scheme. In fact, Senior Adjudicator Goodis expressly stated, before reproducing the section of the case that he found germane, that “(f)or various reasons that are not applicable here, having to do with the interpretation of the specific legislation, the court decided that the freedom of information statute applied”. Hence, the allocation of the burden of proof or the exercise in statutory interpretation that was engaged in by the court in *Hartford Courant* was not of importance, but the final principle was.

That principle, with which I agree, stands alone. This office may find in certain circumstances that a record is not in fact “publicly available” under section 15(a), due to the magnitude of the fee.

However, I find that this is not one of those circumstances. I have reviewed the representations of MPAC and the affidavit filed in support. In my opinion, one of the material differences between this appeal and Order PO-1655 is the vast scope of the appellant’s request, which covers some 12,000 properties. It is therefore the scope of the request and not the method of calculating the fee that results in the amount to be charged for access. Based upon the representations of MPAC and the affidavit filed in support, I find that MPAC has satisfied the requirements of section 15(a) of the *Act* with respect to Records 1 and 2.

Furthermore, particularly in the absence of any specific representations from the appellant or other evidence weighing in favour of the position taken by the appellant on this issue, based upon the representations of MPAC and the affidavit filed in support, I am also satisfied that MPAC appropriately exercised its discretion under section 15(a). Even though this request presented particular challenges to address, MPAC disclosed a great deal of information, took relevant considerations into account and did not act in bad faith. As a result, I uphold the decision of MPAC not to disclose Records 1 and 2 on the basis of the exemption set out in section 15(a). It is therefore not necessary to consider the application of the other claimed exemptions with respect to Records 1 and 2.

Model Summary (Record 3)

The Model Summary (Record 3) is a list of variables, coefficients and standard error statistics chosen by MPAC for its valuation process along with other associated statistics. Based on my review of the records at issue, a list of variables, coefficients and standard error statistics are found in both the 2003 Base Year Market Model Report and the Model Summary (Record 3). In response to inquiries from this office MPAC specifically identified that information in three of six columns that appear on the Model Summary is also found throughout the 2003 Base Year Market Model Report (Record 1). My review of the two Records confirms that this is the case.

I therefore find that the first three of the six columns in the Model Summary (Record 3) are also publicly available and also exempt under section 15(a) of the *Act*.

However, as other information in the Model Summary (Record 3) does not appear in the 2003 Base Year Market Model Report (Record), I will consider the exemptions in section 11(a), (c) and (d) of the *Act* that MPAC claimed are applicable to the remainder of the record.

PREJUDICE TO THE ECONOMIC INTERESTS OF AN INSTITUTION

MPAC claimed that the exemptions in sections 11(a), (c) and (d) of the *Act* apply to the Model Summary (Record 3). Those sections state:

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 Orders MO-1199-F, MO-1564).

Section 11(a)

I will first address the possible application of section 11(a) to the Model Summary (Record 3).

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.

Part 1- Type of information

The terms “trade secret” and “technical information” have been defined in prior 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 PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While 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 PO-2010].

MPAC submits that the Model Summary in Record 3 is “technical information” and constitutes a “trade secret”. It submits that the information in Record 3 is prepared by professionals in the fields of statistics and valuation and describes the proprietary equations used by MPAC to calculate assessment values. In support of its position MPAC refers to Order MO-1564, which held that the formulae, coefficients and other related information contained in the Market Model

at issue in that appeal fell within the scope of the definition of “technical information” in section 11(a).

MPAC further submits that the Model Summary also falls within the scope of the definition of a “trade secret” as set out in Orders M-29 and PO-2010. MPAC states this is because the information in Record 3 is part of the related Market Model (Record 1) and consists of formulae and information that are used in MPAC’s business of property assessment. MPAC says that its techniques of assessment are not generally known in the assessment industry and that is how it maintains the economic value of its processes. MPAC submits it can and does sell information produced by its Market Models to customers and would no longer be able to do so should its models and its various components become generally known. MPAC says it has made efforts to keep the elements of its Market Models secret by maintaining a copyright interest in the Market Models and only revealing its results under license agreements with purchasers.

As former Assistant Commissioner Tom Mitchison did in Order MO-1564, I am prepared to find that, based upon the representations of MPAC and the affidavit filed in support, the information contained in Record 3 meets the definition of “technical information”. As I have made this determination it is not necessary to determine whether the information in Record 3 is also a “trade secret”.

Part 2: Belongs to MPAC

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 David 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).

MPAC submits that the Market Models it developed and uses “belong to” MPAC. MPAC submits that the Market Models were created and designed by it for its assessment business and is used exclusively by MPAC. It submits that all of the regression equations and coefficients used in the models are the result of MPAC’s processes of model specification and application. It says that the models are protected by copyright and are treated with the utmost confidence. The Market Model coefficients in the Model Summary (Record 3), it submits, are the result of time, money, skill and effort on the part of MPAC.

Based on the representations of MPAC, and in keeping with the findings of Former Assistant Commissioner Tom Mitchinson in MO-1564, I find that the information in the Model Summary belongs to MPAC.

Part 3: 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 relies on the quote above and submits that although the monetary value of the Market Models and its various components are difficult to quantify, the models essentially constitute MPAC’s entire operation. MPAC states that it treats its model as confidential and valuable information that would lose its monetary value if disclosed to the public. MPAC further submits that the products have commercial value that would be lost if MPAC were required to reveal its processes to the public. It says that a decision by this office that grants free public access to the components of MPAC’s Market Models would allow a skilled user to recreate MPAC’s processes and produce information that is currently only available through purchases and licence agreements from MPAC.

Again, based on the representations of MPAC and the affidavit filed in support, and in keeping with the findings of Former Assistant Commissioner Tom Mitchinson in Order MO-1564, I find that the information in the Model Summary has monetary value. As a result MPAC has satisfied the requirements of the exemption and I find that the information in the Model Summary (except

for the information in the first three columns which is also found 2003 Base Year Market Model Report and is exempt under section 15(a)) is exempt under section 11(a) of the *Act*.

Finally, in the absence of any representations from the appellant or other evidence weighing in favour of the appellant on this issue, based upon the representations of MPAC and the affidavit filed in support, I am satisfied that MPAC appropriately exercised its discretion under section 11(a).

It is therefore not necessary for me to address the application of the exemptions in section 11(c) or (d) of the *Act* to this record, or to consider any other exemptions claimed by MPAC with respect to the information contained in the Model Summary.

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.” MPAC submits that should this office order the disclosure of any portions of records which are not found to be exempt that they have the right to make representations on the disclosure as well as the application of the fee structures and licence agreement which MPAC would want to apply before the information is disseminated.

In Order MO-1564, which was upheld on reconsideration in Order MO-1600-R, former Assistant Commissioner Mitchison held that disclosing a column of standardized coefficients would not have the unintended result of disclosing the market model under consideration in that appeal.

Those Orders were made in 2002 and were dealing with the records and representations made at that time. I am not satisfied that the records have remained the same over the last few years. No representations were made by the appellant in this appeal. As a result, I am not satisfied that Record 3 should be provided in a severed form.

FINAL MATTER – ABUSE OF PROCESS

In his letter of appeal, the appellant alleges that MPAC abused the access to information process set out in the *Act*. Although representations were requested from the appellant on this issue, including the remedy sought, none were provided, other than the general statements set out in the appellant’s appeal letter and the correspondence he sent to this office which is set out earlier in this decision.

In its representations MPAC stated:

[The appellant] has made two previous requests for information similar to the request at issue in this case. The first was on December 4, 2002. In that instance, MPAC gave [the appellant] an estimate as to how much it would cost him to receive the sales data for the approximately 12,000 properties that he requested. [The

appellant] did not follow up in this matter. He then made a similar request for information on January 21, 2003, to which MPAC responded in a decision letter dated February 26, 2003. [The appellant] again requested the same information on January 23, 2004 [This request led to the current appeal as described above]. He did not receive a timely response from MPAC as the request was addressed to the MPAC call centre rather than to the Freedom of Information Office. [The appellant] then wrote a letter to the Commission indicating that he had not received a decision from MPAC. The Commission advised MPAC that it was in a deemed refusal situation and set an April 20, 2004 deadline for MPAC to provide a decision letter to [the appellant]. MPAC rendered a decision and denied [the appellant's] request on April 19, 2004. [The appellant] appealed the decision, but that file was closed when MPAC issued a further decision on July 5, 2004. In response to [the appellant's] request, MPAC provided access to five items while refusing to disclose four others based on the exemptions indicated. [The appellant] appealed MPAC's decision.

...

The Affidavit of [Freedom of Information and Privacy Coordinator] sets out the procedural history relevant to this issue. Although MPAC did not respond to the request within the initial 30-day time period, it has since met all deadlines set by the Commission. MPAC issued a decision on April 19, 2004, as ordered by the Commission, and a further decision dated July 5, 2004. MPAC indeed disclosed numerous records to the appellant, including a copy of the MCE Screen, a copy of the VDE Screen, the MRA printout for [the appellant's] property, sales data, and the Property Profile Report for his property. These records responded to items (b), (c), (d), (f), and (g) of the appellant's request. By disclosing these records, MPAC provided access to a considerable amount of the requested information. It refused to disclose other items based on mandatory and discretionary grounds set out in the governing legislation.

The appellant's allegation that the manner in which MPAC handled his request amounts to an abuse of process is not supported by evidence. MPAC's refusal to disclose certain items in response to the appellant's request, pursuant to enumerated statutory exemptions, is not an abuse of process. A refusal of access to a record is precisely the sort of response that the access to information process contemplates. MPAC is expected to consider all access requests and either grant or refuse them in accordance with the mandatory and discretionary exemptions set out in [the *Act*]. It did so in the appellant's case and provided its decision to this effect. The appellant was free to continue to make use of the process and appeal the decision, which he has done. MPAC continues to participate in the process by submitting its representations in response to the Notice of Inquiry. MPAC's actions, namely, providing a decision that allowed some of the appellant's requests while refusing others based on statutory exemptions, cannot be said to constitute an abuse of process. In other words, an exercise of discretion, even if it were

incorrect, cannot be said to constitute an abuse of process, *per se*. Finally, as [Former Commissioner Wright] noted in Order M-618, "instances of abuse of process may arise in the future. However, from my experience in administering the Acts, I believe such instances would be extremely rare."

Analysis and Findings

It should be noted that there are remedies under the *Act* for an institution's delay in responding to a request. The appellant availed himself of them, and an order was made resolving those issues.

In light of the representations and affidavit filed by MPAC, and the appellant failing to provide any specific representations or other evidence weighing in favour of his argument, I find no support for the allegations set out in the appellant's letter of appeal and the correspondence he sent to this office. I therefore find that the appellant has failed to establish an abuse of process, either due to delay, the amount to be charged for access to the information or any other act and/or omission of MPAC.

ORDER:

I uphold MPAC's decision to deny access to the records and dismiss the appeal.

Original signed by: _____
Steven Faughnan
Adjudicator

July 27, 2005