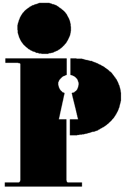

INTERIM ORDER MO-2192-I

Appeal MA-050049-1

City of Ottawa

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NATURE OF THE APPEAL:

The City of Ottawa (the City) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

> "… a list of all properties within [the City] that have a tax capping or clawback applied to them [with] the amount of the clawback [being] indicated for each property.

The City identified records responsive to the request and, relying on sections 11(c) and (d) of the *Act* (economic and other interests), denied access to them in full.

The requester (now the appellant) appealed the decision.

In response to a request for documentation, the City advised this office that it would also be relying on the mandatory exemption in section 9(1) (relations with other governments) and the discretionary exemption in section 11(a) (valuable government information) of the *Act* to deny access to the responsive records. However, the City did not send a revised decision letter to the appellant indicating its reliance on section 11(a) within the 35-day time frame required by section 11.01 of this office's *Code of Procedure* (the *Code*). As a result, the City's ability to claim the application of this discretionary exemption became an issue in the appeal.

Furthermore, at the mediation stage of the appeal process, the appellant advised the mediator that, in addition to the amount of "clawback", he was also seeking access to the total amount of municipal taxes for each property. The City objected to the appellant's attempt to broaden the scope of the request. Accordingly, the scope of the request became an issue in the appeal.

The appeal did not resolve at mediation and it was moved to the adjudication stage of the process.

I sent a Notice of Inquiry setting out the facts and issues in the appeal to the City, initially. The City provided representations in response. I then sent a Notice of Inquiry, along with the complete representations of the City, to the appellant. The appellant decided not to file any representations in response, stating that his position was set out in the original request.

RECORDS

The records at issue consist of two documents that the City produced for the purposes of the appeal:

> A multi-page list of assessment roll numbers under the heading "tax capping", without amounts, and,
>
> A multi-page list of assessment roll numbers with a heading entitled "clawback" with the amount of "clawback" shown for each assessment roll number.

The City states that the information in the records does not include personal information.

ISSUES

This order addresses the following issues in this appeal:

1. The scope of the request.

2. The late raising of the section 11(a) discretionary exemption by the City.

3. Whether the provisions in sections 53(1), (2) and (4) of the *Assessment Act* require the City to refuse to disclose the requested information whether or not an exemption under the *Act* might apply.

4. Whether MPAC should be given an opportunity to make submissions on the application of the mandatory exemption at section 10(1) (third party information) of the *Act*.

5. Subject to my determination on the second issue above, whether any or all of the claimed exemptions are applicable.

BACKGROUND

In order to put the request into context, some discussion of the evolution of the City's property tax practices is required.

As explained by Commissioner Ann Cavoukian in Order M-1089, in 1997, the *Fair Municipal Finance Act (Nos.1 and 2)* changed the way properties in Ontario are taxed. This legislation created the Ontario Fair Assessment System (OFAS), under which all properties were reassessed with a Current Value Assessment (CVA).

In January/February 1998, the Ministry of Finance provided requesting municipalities with information on preliminary draft current value property assessments on a Phase-in/Property Impact File tape (Phase-in Tape). This document could be obtained in various formats, including CD ROM.

On December 31, 1998, the Government of Ontario then transferred responsibility for property assessment to the Ontario Property Assessment Corporation, later continued under the name Municipal Property Assessment Corporation (MPAC).

MPAC is governed by a 15-member board of directors appointed by the Ontario Minister of Finance. One of MPAC's duties is to prepare an assessment roll for each municipality in Ontario, including the City. Section 14(1) of the *Assessment Act* sets out the information that MPAC is required to include on the assessment roll that it provides. This information includes:

- The names and surnames of all persons liable to assessment in the municipality

- A description of the property sufficient to identify it
- The number of acres, or other measures showing the extent of the land
- The current value of the land.

Under sections 39(1) and (2) of the *Assessment Act*, MPAC must deliver the assessment roll to the clerk of the municipality, who then must make it available for inspection by the public during office hours.

Section 340 of the *Municipal Act, 2001*, requires that the Treasurer of a municipality prepare a tax roll for each year, based on the last returned assessment roll for the year. Section 340(2) sets out the information that is to be shown on the tax roll for each separately assessed property in the municipality. This information includes:

- The assessment roll number of the property
- A description of the property sufficient to identify it
- The name of every person against whom land is assessed
- The assessed value of the property
- The total amount of taxes payable

Upon request, section 352(1) of the *Municipal Act, 2001* requires the Treasurer to provide a tax certificate setting out an itemized statement of all amounts owing for taxes in respect of every separately assessed property.

The City explains in its representations that municipal property tax is currently calculated by multiplying the assessed value of the property in question by the yearly tax rate determined by the municipality in accordance with the procedures in the *Municipal Act, 2001*.

The City indicates that in order to address concerns raised by property owners whose taxes increased as a result of CVA, the Government of Ontario introduced a tax capping arrangement. This involved limiting or "capping" an annual increase to a fixed percentage amount. To offset any reduction of a municipality's tax revenues due to "capping", municipalities were permitted to limit the percentage decrease in tax caused by a reduction in the value of a property under CVA. This recovery is known as "clawback". For properties in the Commercial, Industrial and Multi-Residential tax classes, a further calculation of the "capping" or "clawback" amount is done by the City in accordance with regulations to the *Municipal Act, 2001*, in order to establish final tax liability. The City states that "significant staff time" is expended in producing the calculations and at times it utilizes a specialized outside service to perform the calculations.

The City submits that the "capping" and "clawback" amounts are "partially derived" from information in the Phase–in Tapes that the Ministry of Finance provided to the City during the 1998 CVA phase-in process. The City states that while property owners are likely aware of whether their own properties are subject to the application of a "capping" or a "clawback", these amounts are not publicly available for properties across the City as a whole.

The appellant's original request was for information relating to tax "capping" and "clawback" amounts.

SCOPE OF THE REQUEST

As discussed above, at mediation the appellant advised the mediator that in addition to the amount of the "clawback", he was also seeking access to the total amount of municipal taxes for each property. The City's position is that access to the total amount of municipal taxes for each property is not included in the scope of the original request. The City objects to any expansion of the scope of the original request.

Analysis and Findings

Section 17 of the *Act* imposes certain obligations on requesters and institutions when submitting and responding to requests for access to records. This section states, in part:

> (1) A person seeking access to a record shall,
>
> > (a) make a request in writing to the institution that the person believes has custody or control of the record;
> >
> > (b) provide sufficient detail to enable an experienced employee of the institution, upon a reasonable effort, to identify the record; and
>
> . . . . .
>
> (2) If the request does not sufficiently describe the record sought, the institution shall inform the applicant of the defect and shall offer assistance in reformulating the request so as to comply with subsection (1).

Institutions should adopt a liberal interpretation of a request, in order to best serve the purpose and spirit of the *Act*. Generally, ambiguity in the request should be resolved in the requester's favour [Orders P-134, P-880].

I find that the scope of the original request is specific and unambiguous and cannot be construed to include a request for access to the total amount of municipal taxes for each property. In my view, therefore, a request for access to the total amount of municipal taxes for each property is outside the scope of the original request and this appeal. If the appellant wishes to obtain access to this other information, he should submit a new request for it to the City.

LATE RAISING OF DISCRETIONARY EXEMPTIONS

Section 11.01 of this office's *Code of Procedure* provides:

> In an appeal from an access decision, excluding an appeal arising from a deemed refusal, an institution may make a new discretionary exemption claim only within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

In its initial decision letter, the City only claimed the application of the discretionary exemptions found at sections 11(c) and (d) of the *Act*. In a letter sent to this office within the 35-day period in section 11.01, the City indicated that it would also be relying on the discretionary exemption at 11(a) and the mandatory exemption at 9(1) of the *Act* to deny access to the records. The City explains in its representations that it was through oversight that no new decision letter was sent to the appellant. During mediation, the City advised the mediator that it would be sending a revised decision letter to the appellant. In that new decision letter, the City informed the appellant that in addition to the exemptions claimed in its original decision letter, it would also be relying on the exemptions found at sections 9(1)(b) and (d) and 11(a) of the *Act* to deny access to the responsive records.

Analysis and Findings

The purpose of this office's 35-day policy is to provide institutions with a window of opportunity to raise new discretionary exemptions, but only at a stage in the appeal where the integrity of the process would not be compromised and the interests of the requester would not be prejudiced. The 35-day policy is not inflexible, and the specific circumstances of each appeal must be considered in deciding whether to allow discretionary exemption claims made after the 35-day period (Orders P-658, PO-2113). The 35-day policy was upheld by the Divisional Court in *Ontario (Ministry of Consumer and Commercial Relations) v. Fineberg* (21 December 1995), Toronto Doc. 110/95, leave to appeal refused [1996] O.J. No. 1838 (C.A.).

Because sections 9(1)(b) and (d) are mandatory exemptions, the 35-day time limit does not apply. Accordingly, I will be considering the application of sections 9(1)(b) and (d) in this appeal.

In Order PO-2113, dealing with the provincial equivalent of the *Act*, Adjudicator Donald Hale set out the following principles that have been established in previous orders with respect to the appropriateness of an institution claiming additional discretionary exemptions after the expiration of the time period prescribed in the Confirmation of Appeal:

> In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the Act. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying the appeal. Finally, she pointed out that in many cases the value of information sought by appellants diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.
>
> The objective of the 35-day policy established by this Office is to provide government organizations with a window of opportunity to raise new discretionary exemptions, but to restrict this opportunity to a stage in the appeal where the integrity of the process would not be compromised or the interests of the appellant prejudiced. The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.

In the circumstances of this appeal, I am prepared to consider the application of section 11(a) to the responsive records. In my view, the delay in forwarding a new written decision and/or the City's timing in claiming section 11(a) has not resulted in any significant prejudice to the appellant nor has it compromised the integrity of the process. I note that the appellant has had an opportunity to make representations on the application of the new discretionary exemption (and for that matter, the mandatory exemptions at sections 9(1)(b) and (d)) and chose not to do so. In the circumstances, I find that the prejudice to the City in disallowing its section 11(a) claim would outweigh any prejudice to the appellant in allowing it. As a result, I will consider the application of section 11(a) in this appeal.

There is another related issue. In its representations, the City also asserted that if the section 9(1)(b) and (d) mandatory exemptions were found not to apply, MPAC's interests might be affected by disclosure, thereby raising the possible application of the mandatory exemption in section 10(1) of the *Act*. This was more than 35 days after the issuance of the Confirmation of Appeal. However, because section 10(1) is a mandatory exemption, the 35-day time limit does not apply. That said, in the course of adjudicating this appeal, MPAC was not given an opportunity to make submissions on the application of the section 10(1) mandatory exemption. For this reason, I will address the other exemptions claimed by the City in this interim order, leaving the issue of the application of the section 10(1) exemption to a final order, after MPAC has been given an opportunity to provide representations on the application of that section.

SECTIONS 53(1), (2) and (4) OF THE *ASSESSMENT ACT*

The City relies on sections 53(2) and (4) of the *Assessment Act*, along with its licensing agreements with MPAC, to support its position that it is "precluded" from disclosing the assessment roll numbers in the records at issue. The City submits that the only authority it has to disclose assessment roll numbers is through providing access to a paper copy of the assessment roll under section 39(2) of the *Assessment Act* or providing tax certificates under the provisions of the *Municipal Act, 2001*, and not through an access to information request. In response to inquiries from this office during the adjudication of this appeal, the City advised that while assessment roll numbers appear on the assessment roll that is available for public inspection, whether a property is subject to tax-capping and the amount of any tax "clawback" does not.

Section 53(1) of the *Act* specifies that the *Act* prevails over a confidentiality provision in any other provincial legislation unless section 53(2) of the *Act* or the other legislation provides otherwise. Section 53(2) of the *Act* stipulates that section 53(1) of the *Assessment Act* is such a confidentiality provision which prevails over the *Act*.

Section 53(1) of the *Assessment Act* provides that:

> Every person employed by [MPAC], a municipality or a school board who in the course of the person's duties acquires or has access to actual income and expense information on individual properties, and who wilfully discloses or permits to be disclosed any such information to any other person not likewise entitled in the course of the person's duties to acquire or have access to the information, is guilty of an offence and on conviction is liable to a fine of not more than $2,000, or to imprisonment for a term of not more than six months, or to both.

Section 53(3) of the *Assessment Act* provides that, subject to section 53(1), MPAC shall make available to all municipalities and school boards information sufficient to meet their planning requirements. Section 53(4) states that the information provided under section 53(3) shall not be used by the municipalities or school boards for any other purpose. As set out in its representations, the City's position is that these provisions:

> … make it clear that the legislature intended to limit the use of assessment information such as the assessment roll number and other information linked to that number to municipal planning purposes only. The City submits that disclosure of the information through [the process of the *Act*] would circumvent this legislative intention to limit the use of assessment information.

The City also submits that it pays a substantial cost for assessment information from MPAC and that the products it obtains from MPAC are governed by separate licensing agreements. The City provided copies of the licensing agreements with its representations. The City refers in particular to the provisions of the licensing agreements that state:

1. the information is being supplied under the *Assessment Act* for the purposes of the City's planning purposes only;

2. the City may not provide the information to anyone (including unauthorized City staff) at any charge, even free of charge, and,

3. the information is being provided to the City with a non-transferable right, and that MPAC reserves for itself all intellectual property rights, title and interest in the information.

I note that both licensing agreements refer to the confidentiality provisions contained in the *Assessment Act*. However, one of the agreements mentions that, in addition to the above-noted confidentiality provisions, the information is subject to the provisions of the *Act*. This merely states the obvious, that unless the *Act* is excluded by operation of statute, the *Act* governs access to information from the City, even if there may be a contractual provision to the contrary.

Findings and Analysis

Sections 10 and 11 of the *Assessment Act* require property owners and other assessed persons to provide information to MPAC for the purpose of its valuation exercise. Those sections read:

> 10(1) A person authorized by the assessment corporation [formerly an assessor, and any assistant of and designated by an assessor], upon producing proper identification, shall at all reasonable times and upon reasonable request be given free access to all land and to all parts of every building, structure, machinery and fixture erected or placed upon, in, over, under or affixed to the land, for the purpose of making a proper assessment thereof.
>
> (2) Every adult person present on land when any person referred to in subsection (1) visits the land in the performance of his or her duties shall upon request give to the person all the information in his or her knowledge that will assist the person to make a proper assessment of the land and every building, structure, machinery and fixture erected or placed upon, in, over, under or affixed to the land and to obtain the information he or she requires with respect to any person whose name he or she is required to enter on the assessment roll or concerning whom he or she is required to obtain any information for the purpose of the enumeration required by section 15.
>
> 11(1) For any purpose relating to the assessment of land, the assessment corporation [formerly an assessor] may, by letter sent by mail, served personally or delivered by courier, require a person who is

> or may be assessed in respect of the land to provide any information or produce any document relating to the assessment of land within such reasonable time as is set out in the letter.
>
> (2) A person who receives a letter under subsection (1) shall, within the time set out in the letter, provide to the assessment corporation [formerly the assessor] all the information required that is within the person's knowledge and produce all the documents required that are within the person's possession or control.

In Order 23, Commissioner Linden considered the interaction of the predecessors to sections 10, 11 and 53(1) of the *Assessment Act*, along with the categories of information to which these provisions apply. He approached this subject in the following manner:

> The language of subsection 57(1) [now 53(1)] of the *Assessment Act* is clear; it stipulates what sort of information is to be protected from disclosure; identifies the class of persons who provide the information and those who receive it and are entrusted to preserve confidentiality; provides for the conditions of lawful disclosure to third parties; and outlines the penalties for unauthorized disclosure.

In order to qualify under section 53(1) of the *Assessment Act*, the information must therefore be actual income and expense information on individual properties. In my view, this would not include the actual assessment roll number for a given property under consideration in this appeal, which, the City explains, appears on the assessment roll available for public inspection under section 39(2) of the *Assessment Act*.

Furthermore, while this provision would cover actual specific commercial income and expense information on individual properties, in my view, it also does not cover information about whether a given property is subject to tax "capping" or any "clawback" amounts. This is because, in my view, the section relates to the misuse of information supplied in the course of establishing an assessed value for an individual property and not information which is simply a component of the City's taxation scheme.

With respect to the City's other arguments, I will simply repeat that unless the *Act* is excluded by operation of statute, the *Act* governs access to information from the City, even if there may be a contractual provision to the contrary.

As a result, I conclude that the City cannot rely on the provisions of sections 53(1), (2), or (4) of the *Assessment Act*, or the terms of its licensing agreements with MPAC, to resist disclosure of the requested information.

I now turn to the other arguments made by the City.

RELATIONS WITH OTHER GOVERNMENTS

Sections 9(1)(b) and (d) of the *Act* state as follows:

> 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,
>
> (b) the Government of Ontario or the government of a province or territory in Canada; or
>
> (d) an agency of a government referred to in clause (a),(b) or (c).

As discussed in the background section above, the City submits that the "capping" and "clawback" amounts are "partially derived" from information in Phase–in Tapes that the Ministry of Finance provided the City during the 1998 CVA phase-in process.

The City submits that in Order MO-1089 Commissioner Ann Cavoukian found the information in those Phase-in Tapes to be exempt from disclosure under section 9(1)(b), because they were received in confidence directly from the Ministry of Finance at the outset of the process. The City submits that since the starting point for the calculation of property taxes is the amount of taxes billed for the previous year, which is based on information originally provided in the Phase-in Tapes, the information in the later assessment rolls remains exempt under section 9(1)(b).

The City further submits that the information MPAC provides is similar to the information that Commissioner Cavoukian found in Order MO-1089 to have been "received in confidence". The City submits that when MPAC provides the information, it is performing a role that is analogous to that of an agency of the Ministry of Finance. Hence, the City submits, this information is also exempt from disclosure under section 9(1)(d).

Finally, the City submits that if it was to disclose the information in violation of its licensing agreements with MPAC, the City's relationship with MPAC would be prejudiced and the City might face legal action as a result. Since this is an argument that is more appropriately addressed in the section 11 analysis, I will consider it in my discussion of those exemptions.

Analysis and Findings

Sections 9(1)(b) and (d) of the *Act* apply to information received in confidence from the Government of Ontario or an agency of the Government of Ontario. In my view, while the base information contained in the Phase-in Tapes that were supplied by the Ministry of Finance in 1998 would fall into that category (because it was provided in confidence by a ministry of the Government of Ontario), the assessment information the City now receives from MPAC, would

not. The information at issue is not supplied by an Ontario ministry, rather, the City states it is supplied by MPAC, which, according to section 2(3) of the *Municipal Property Assessment Corporation Act, 1997*, "is not a Crown Agent". As a result, I find that when the City receives assessment information from MPAC, it is not receiving the information from the Government of Ontario or an agency of the Government of Ontario, as sections 9(1)(b) and (d) require.

I now turn to the City's argument that since the starting point for the calculation of property taxes is the amount of taxes billed for the previous year, which is based on information originally provided in the Phase-in Tapes, the information in the later assessment rolls remains exempt under section 9(1)(b).

As noted by the Commissioner in Order MO-1089, the information on the Phase-in Tapes was simply "preliminary draft current value assessments". The City has failed to provide me with sufficient evidence or explanation how, in light of the intervening time period, the manner in which property values are assessed by MPAC and the operation of the property assessment provisions of the *Assessment Act*, disclosing the information that MPAC has provided since 1998 would reveal the information provided in the Phase-in Tapes or permit an accurate inference to be drawn about what was originally supplied.

Accordingly, I find that the exemptions in sections 9(1)(b) and (d) of the *Act* do not apply.

VALUABLE GOVERNMENT INFORMATION

The City claims that the exemptions in sections 11(a), (c) and (d) of the *Act* apply in the circumstances of this appeal.

Sections 11(1)(a), (c) and (d) read:

> 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.

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *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) explains the rationale for including a "valuable government information" exemption in the *Act*:

> 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.

For sections 11(c) or (d) to apply, the City must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the City must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [See *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, (C.A.)]. This contrasts with section 11(a), which is concerned with the **type** of information, rather than the consequences of disclosure (see Orders MO-1199-F, MO-1564).

Section 11(a)

In order for a record to qualify for exemption under section 11(a) of the *Act*, it must be established that the information contained in the record:

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

2. belongs to an institution; **and**

3. has monetary value or potential monetary value [Orders 87, P-581].

The City submits that the "capping" and "clawback" amount for a property is financial information that belongs to it and that this information has "significant" monetary value. The City states that "significant staff time" is expended in producing the calculations and at times it utilizes an outside specialized service to perform the calculations. The City states that while property owners are likely aware of whether their own properties are subject to the application of a "capping" or a "clawback", these amounts are not publicly available for properties across the City as a whole.

The City submits that the information in the records would be valuable in the hands of those wishing to challenge their property assessments, as it would allow one to circumvent the standard information gathering process. Furthermore, it submits that private tax agencies could use the information "to expand their customer base and increase business profits".

The City also argues that disclosure of the information would harm it by allowing property owners to subvert the complaint mechanism of the Assessment Review Board. This is explained

in more detail below, but in a nutshell, the City asserts that this is because an applicant could use comparables based on whether a property is subject to "capping" or "clawback", rather "than the objective and measurable standards as set by MPAC (through [section] 331 of the *Municipal Act, 2001*)", thereby reducing City tax revenues. The City also submits that if it was to disclose the information in violation of its licensing agreement with MPAC, its relationship with MPAC would be prejudiced and it might face legal action as a result. While these submissions were raised by the City in the context of the section 9(1) exemption, this type of argument is more appropriate to a discussion of section 11 harms, and I will consider it here.

Part 1: type of information

In my view, given the nature of the information requested, it is clear that the records at issue contain "financial" information under section 11.

Part 2: belongs to the City

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 the provincial equivalent to section 11(a) of the *Act*. After reviewing a number of previous orders, he summarized the reasoning in 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 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).

Analysis

The City has established that it conducts an additional calculation to determine the tax "capping" or "clawback" amounts applicable to eligible properties in the City. In my view, however, this does not result in the City having some proprietary interest in these amounts 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. For example, there is no evidence before me that an owner is prohibited in some way from disclosing the property's tax status in the context of a sale. Simply put, this type of information lacks the quality of confidence necessary to qualify for exemption under section 11(a).

Based upon my review of the records and the City's representations, I have therefore concluded that the withheld information does not "belong to" the City.

Therefore, I find that the information sought to be withheld does not "belong to" the City within the meaning of section 11(a) of the *Act*. Part 2 of the test under that section has not, therefore, been met.

As all three parts of the test must be met, this is sufficient for me to find that section 11(a) does not apply.

Sections 11(c) and (d)

As discussed earlier, in support of its sections 11(c) and (d) exemption claim, the City argues that releasing the records would allow owners (or private taxation agents on behalf of owners) to argue before the Assessment Review Board (ARB) for a lower taxation level to be applied to their properties. This, the City says, would cause the type of harms addressed in sections 11(c) and (d) of the *Act*.

The City explains earlier on in its representations:

> Capping and clawback limitations for prescribed properties are administered by the City in accordance with the procedures found in Part IX of the *Municipal Act, 2001*, and the regulations passed under that Part. A municipality must ensure that eligible properties (e.g. newly-constructed properties) are taxed at the same level as comparable properties (s.331). MPAC identifies 6 comparable properties and provides this list to both the municipality and the owner of the eligible property, pursuant to s. 331(6) to (10). MPAC determines eligible properties on the basis of <u>objective and measurable standards</u> such as similar characters, purposes and uses with the eligible property in question, *not* on the basis of taxation levels. The rationale for selection of comparable properties is crucial to ensure that properties are being compared on equitable bases, and is further explained on page 4 and 5 of [a report attached to the City's representations]. As explained in [the report],

> MPAC's rationale for selection of comparables has been reviewed and upheld by the Assessment Review Board.
>
> …
>
> The City argues that the disclosure of capping and clawback information through requests [under the *Act*] such as this one would allow property owners and taxation agents to pick comparables based on taxation levels, rather than the objective and measurable standards as set by MPAC (through s. 331 of the *Municipal Act),* so as to pick the properties having the least amount of taxes due to capping. This would allow property owners and their agents to go on a "fishing expedition" for comparables based on criteria that were not contemplated in the *Municipal Act, 2001,* as further explained in [the report attached to the City's representations at pages 4 and 5]. One of the likely consequences of this unintended selection process would be that owners and tax agents would then be in a position to argue that properties having the least amount of taxes due to capping would be the appropriate comparables for the property being complained about.
>
> This ability to pick comparables is neither contemplated nor authorized in applicable legislation, and would subvert the complaint processes that are prescribed and determined by legislation, as described above. The Legislature deemed it appropriate to give MPAC the responsibility of choosing comparables given MPAC's expertise in assessment. It should be noted that MPAC is a neutral party in the taxation process, as its role is limited to assessment of properties. MPAC is not aware of the tax calculations that may be applied to a particular property, and thus taxation levels are not considered when comparables are chosen by MPAC. The City submits the *Assessment Act* and the *Municipal Act, 2001* provide the complete procedure with respect to disclosure of comparables, and that only the disclosure processes found in that legislation and through the ARB should apply to disclosure of assessment information of this type.
>
> [emphases in original]

The City further relies on the decision of the Ontario Divisional Court in *Alcorn v. Bayham (Municipality),* (2002) 33 M.P.L.R. (3d) 132 and refers to a statement on page 136 that:

> ...it must also be said that the *Assessment Act is* a self-contained code for assessment issues and if an aggrieved landowner is unhappy with his or her assessment and consequential taxes, the landowner must seek a remedy under the Act and not elsewhere.

The City submits that this decision affirms the principle that all assessment matters, including those relating to the selection of comparables, or the disclosure of "capping" and "clawback" information, should be dealt with under the prescribed code found in the *Assessment Act* and the *Municipal Act, 2001,* and not through an access to information request under the *Act*. I must note

that, as acknowledged by the City in its representations, the issue before the Court in *Alcorn* was one of determining remedies available to a property owner, and not access to information.

The City also submits that disclosing the information would also allow property owners to secure a lower tax rate by using properties with a "capping" limit as a comparable before the ARB. The City states that this would result in a reduced tax base and increase the number of refunds to owners. The City submits that the refund amounts would have to come from the City's general revenues, which would cause "significant unforeseen financial pressures on the City and its taxpayers", place a burden on residential property owners, result in taxpayer complaints and impact City budget planning.

Finally, the City submits that disclosure of the information would also lead to the reduced correction of erroneous assessments. The City explains:

> Property owners having knowledge of which properties are subject to a clawback would not likely take the necessary steps to correct an incorrect CVA assessment for their own property if they determined that a competing property was in a clawback position. The incorrect assessment would stand and thereby increase the costs of funding the capping program, as described in the [report attached to the representations at page 8], along with other consequences. The result of erroneous CVA assessments would have the effect of adversely influencing clawback and capping rates which would create more financial liability for the City.

Analysis

I have considered the City's submissions and the content of the attached report. I find that the City has failed to provide me with sufficiently detailed evidence to establish that disclosure could reasonably be expected to result in the harm contemplated by the sections 11(c) and (d) exemptions. In my view, the evidence tendered by the City in support of its harms argument is highly speculative and does not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario* (*Workers' Compensation Board*), cited above.

Basically, the City's primary argument is that taxpayers should not get information that they may be able to use to their advantage in a tax assessment hearing. I cannot accept that this is the type of harms that sections 11(c) or (d) were intended to address.

Furthermore, the hearing process at the ARB is governed by its own rules and procedures. Like in all similar administrative proceedings, the decision about the relevancy and admissibility of evidence, including what is a comparable property, would be up to the trier of fact to decide. Therefore, for the City's hypothesis to ring true it would have to establish that it would make a difference to an applicant appearing before the ARB, if the six comparable properties it chooses under section 331(11) had the same tax status, rather than other shared factors. If there is a difference, then the City would have to establish that the ARB would alter its processes (which the City acknowledges are governed by statutory provisions) to allow the six comparable

properties to be compared on the sole basis of their tax status, rather than the other shared factors that it considers now when adjudicating an appeal. In my opinion, the City has not led sufficiently "detailed and convincing" evidence to establish that any of this could reasonably occur.

Nor, in my view, has the City led sufficient evidence to substantiate its other assertions of prejudice, not the least of which is that permitting disclosure under the *Act* would somehow lead to fewer owners challenging their tax assessments and to MPAC possibly embarking on legal action against the City. The number of owners challenging tax assessments depends on a wide variety of factors, and I am not satisfied that the City led sufficient detailed and convincing evidence to establish that the release of the information would reduce that number. Finally, the contracts that MPAC entered into with the City are governed by the *Act*, and if disclosure is ordered it is done under the auspices of the *Act*, not through a party to the agreement breaching its terms.

In all the circumstances, I find that the City is speculating as to the impact that disclosure of the information will have.

In my view, the harms set out in sections 11(c) and (d) are simply not established by the assertions made by the City, that are speculative at best. Again, the generalized statements made by the City in support of its position do not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*, cited above. Accordingly, I find that the records do not qualify for exemption under sections 11(c) and/or (d).

ORDER:

1. I do not uphold the City's application of the exemptions claimed.

2. I will make a final order in this appeal once MPAC has been provided with an opportunity to make submissions on the application of section 10(1) of the *Act*.

Original signed by: May 9, 2007
Steven Faughnan
Adjudicator