



**Information and Privacy
Commissioner/Ontario**

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

ORDER MO-2247

Appeal MA-060069-1

Township of Severn



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NATURE OF THE APPEAL:

The Township of Severn (the Township) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for information relating to the requester's application to purchase a portion of an unopened shore road allowance (the land) at a specific address:

...copies of the contents of [the Township's] file relating to [the requester's] request and Council's determination of the matter. Specifically, [the requester requests] a copy of the appraisal which the Town obtained and for which [the requester] provided the associated fees. Also, specifically, [the requester] request[s] a copy of the Corporate Services Committee report/recommendation which was adopted by Council on July 8, 2004. As noted above, [the requester is] also requesting any other documents which may be in your file pertaining to the matter.

The Township issued a decision, granting partial access to the records identified as responsive to the request and applied the exemptions found in sections 11(c) (prejudice to economic interests), 11(d) (injury to financial interests) and 12 (solicitor-client privilege) of the *Act* to deny access to the remaining information. The Township included an Index of Records with its decision letter, describing the records at issue and the exemptions claimed.

The requester (now the appellant) appealed the Township's decision to deny access to some of the information.

During the mediation stage of the appeal process, the appellant narrowed the scope of her appeal to Records 15 and 17, as numbered by the Township in the Index of Records attached to its access decision. As section 12 of the *Act* was not claimed for these records, the application of the solicitor-client exemption is no longer at issue in this appeal.

Mediation was unsuccessful in resolving the appeal and the file was transferred to the adjudication stage for an inquiry.

I commenced my inquiry by first seeking and receiving representations from the Township, which it agreed to share in their entirety with the appellant. I then sought and received representations from the appellant. As the appellant's submissions raised issues in response to the Township's representations, I decided to seek reply representations from the Township. I provided the Township with a complete copy of the appellant's representations. The Township provided reply representations and I then decided to seek sur-reply representations from the appellant. The appellant submitted sur-reply representations in response.

RECORDS:

Portions of the following two records remain at issue: Record 15 (letter of opinion for sale of the land prepared by a named realtor) and Record 17 (follow-up letter of opinion from a named realtor). Access to the information at issue in these records is being denied pursuant to sections 11(c) and (d) of the *Act*.

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

General principles

Sections 11(c) and (d) state:

A head may refuse to disclose a record that contains,

- (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.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if a record was released [Order MO-1474]. For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the records "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The parties' representations

The Township states that in the vicinity of its municipality there are five additional property owners who are adjacent to the unopened shore road allowance. The Township submits that it intends to approach these landowners in the future to determine whether there is an interest in purchasing these parcels of land from the Township.

The Township believes that the unopened shore road allowance has significant potential value to adjacent property owners since gaining access to it provides these property owners with “lakefront advantages”, namely waterfront access. The Township asserts that the “purchase price was determined in the best interest of the municipality with a view to obtaining the true market value as revenue for the municipality.” The Township argues that disclosing the information at issue in this case would “prejudice any future land negotiations with the neighbouring property owners” over additional parcels of the unopened shore road allowance. The Township also suggests that a “reasonable expectation of harm exists for future land deals within the vicinity of the unopened shore road allowance”, in the event that this information is disclosed.

In addition, the Township states that in the past it has tried unsuccessfully to negotiate a purchase price with the appellant for the land. Since a purchase price has not yet been agreed to, disclosing the contents of the appraised value set out in the opinion letters would, in the view of the Township, “jeopardize any future negotiations in the best interests of the municipality.”

The Township makes these arguments in support of its section 11(c) exemption claim. It also relies on this evidence in regard to its reliance on section 11(d), adding that disclosure of the appraised value of the land “could seriously impair the municipality’s ability to obtain a fair market price for the unopened shore road allowance when future negotiations are required.”

In response, the appellant states that access to the information at issue is essential to enabling her to “negotiate with and, if necessary, to pursue [her] legal remedies against [the Township]”. The appellant states that the Township directed the appellant to obtain a “sealed opinion from a realtor of its own choosing”, at the appellant’s expense, regarding the fair market value of the land. The appellant states that she complied with the Township’s request and obtained and paid for the appraisal. In doing so, the appellant submits that the Township created a legitimate expectation that the sale price would approximate the appraised value arrived at by the realtor. Through “informal inquiries”, the appellant states that she believes the appraised value is \$6,000. In negotiations, the appellant states that the Township initially sought \$50,000, which was rejected by the appellant, and then \$25,000, which was also rejected. The appellant believes that the Township has acted in bad faith by refusing to accept the opinion on fair market value and then seeking to withhold the contents of the records to conceal its actions.

With regard to the Township’s fears that disclosing the information at issue would prejudice its position in future negotiations regarding the sale of parcels of the unopened shore road allowance, the appellant asserts that if the Township truly intends on selling these properties at fair market value then it should disclose the opinions.

In reply, the Township states that in accordance with its Municipal Property Sale By-law No. 2004-166 (the Township Property Sale By-law), it requested an appraisal of the land prior to Township Council determining the actual purchase price. The Township states that all applicants who wish to purchase Township land are required to submit a deposit in accordance with Section 7 of the By-law, which states:

Unless otherwise directed by Resolution of Council, the proposed purchaser shall be responsible for all costs incurred by the Township. Prior to the formal acceptance of any offer to purchase land, the proposed purchaser shall be required to submit a cheque payable to the Township in the minimum amount of \$1,500.00 as a deposit to be applied to the expenses of the sale that may be incurred by the Township including, but not limited to, appraisal costs, advertising, easements to be retained by the Township or to be granted to a public authority, legal fees and disbursements, survey costs, administrative fees and all applicable federal and provincial taxes.

The Township adds that an appraisal for any given parcel of land is viewed as a “guideline” for Council “to ensure that the true value is obtained when disposing of public lands.” The Township states that it is at Council’s “sole discretion to determine the actual purchase price while having due consideration for all the information provided”. With reference to section 268 of the *Municipal Act*, the Township states that it has the right to sell at a lower or higher price than any valuation obtained. With regard to its discretion to determine the selling price, the Township cites Ian Rogers, in his book titled, *The Law of Canadian Municipal Corporations*, in which he states the following at page 1096.3:

In deciding the amount at which municipally-owned land is to be sold, councils in Ontario have complete discretion.

The Township submits that it has met its obligations under the *Municipal Act* and has acted in good faith with regard to this matter. The Township also states that the \$6,000.00 appraisal referred to by the appellant is incorrect.

The Township submits that Council is “entitled to seek the best price possible when negotiating for land sales.” It adds that the appellant has “failed to negotiate or offer an alternative purchase price for further consideration to-date.” The Township indicates that all prospective purchasers are “given an opportunity to negotiate the final purchase price” with it.

The Township reiterates that disclosure of the appraisal opinion could seriously impair its ability to obtain “a fair market value price for adjacent unopened shore road allowance when future negotiations are required.”

In sur-reply, the appellant makes reference to section 268(3) of the *Municipal Act*, which provides as follows:

Before selling any land, every municipality and local board shall,

- (a) by by-law or resolution declare the land to be surplus;
- (b) obtain at least one appraisal of the fair market value of the land; and

(c) give notice to the public of the proposed sale.

The appellant suggests that because the Township is required under the *Municipal Act* to obtain at least one appraisal of the fair market value of the land, by implication, the legislation would also require the Township to sell the land “at or around fair market value.” The appellant states that it is not appropriate for the Township to “seize upon an arbitrary figure and then seek to obtain a grossly inflated price from the [appellant].”

The appellant then makes reference to section 268(4) of the *Municipal Act*. Section 268(4) addresses the powers of the court to review a sale by a municipality in circumstances where the municipality has not acted in good faith. Section 268(4) states:

The manner in which the municipality or local board carries out the sale of its land, if consistent with this section and with the by-law under subsection (1), is not open to review by any court if the municipality or local board may lawfully sell the property, the purchaser may lawfully buy it and the municipality or local board acted in good faith.

The appellant takes the position that section 268(4) does not apply in this case because the Township has not conducted itself in its negotiations with the appellant in good faith. The appellant concludes that this office should not allow the Township’s claim for an exemption under sections 11(c) and (d) when to do so would “cloak the bad faith actions of the municipality behind the [Act].

Analysis and findings

Section 11(c): prejudice to economic interests

The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position [PO-2014-I].

Section 268 of the *Municipal Act* sets out the procedures that a municipality must follow in order to sell a parcel of land. In this regard, section 268(1) provides as follows:

Every municipality and local board with authority to sell land shall pass a by-law establishing procedures, including the giving of notice to the public, governing the sale of land.

Section 268(3), reproduced above, provides that before selling land the municipality must obtain at least one appraisal of the market value of the land.

The Township has made reference in its representations to section 7 of the Township Property Sale By-law, citing in particular its ability to collect a deposit from a prospective purchaser to cover the expenses of the sale of property that may be incurred by the Township, including the cost of obtaining an appraisal.

In this case, the appellant approached the Township about purchasing the land. In accordance with section 268(3) of the *Municipal Act* and section 7 of the Township Property By-law, the Township required the appellant to pay for an appraisal by a realtor to determine the fair market value of the land. In addition, it appears that the Township asked that the opinion remain confidential and that the appellant agreed to comply with this condition. Accordingly, the appellant has not been provided with a copy of this appraisal. However, the appellant perceives that the Township has not bargained in good faith, suggesting that the Township has sought an inflated price for the land that is far in excess of what she perceives the appraised fair market value to be.

While I understand the appellant's desire to negotiate a price that is in line with the fair market value of the land, there is no evidence before me that the Township, in conducting these negotiations, is required to agree to a price at or near the appraised value. It would seem to me that the appraisal is used to establish a benchmark for the value of the land. I concur with the Township that it is entitled to seek the best price possible for the benefit of the municipality when negotiating land deals. In addition, the fact that the appellant was required to pay for the appraisal does not, in my view, provide her with any special rights. I suspect that Section 7 of the Township Property By-law requires a prospective purchaser, such as the appellant, to pay for an appraisal and any other expenses associated with a sale since, in cases like this one, it is the prospective purchaser who expresses the interest in acquiring a piece of property and then presents an offer to purchase.

In my view, how the Township chooses to use the appraisal is a question of negotiation strategy. It is not a matter for me to consider in this inquiry. If the appellant was concerned about the confidentiality condition, then she should not have agreed to it. If the appellant is concerned with how the Township is using the appraisal to negotiate a sale price of the land then perhaps she should consider obtaining her own independent appraisal and using it to direct her negotiation strategy.

I will now turn to my analysis of the information at issue in Records 15 and 17. Records 15 and 17 both include the same 2004 appraisal value of the land (the 2004 appraisal). In addition, Record 15 contains additional information about the land, including the municipal address, the

name of the owner, the legal description, the zoning designation, a 2003 property assessment, and the appraiser's basis for arriving at the 2004 appraisal. Record 17 also contains information about the land, including a detailed breakdown of how the 2004 appraisal was determined.

I am satisfied that disclosure of the 2004 appraisal and the basis for determining that value, set out in Records 15 and 17, could reasonably be expected to harm the economic interests or competitive position of the Township. I am also satisfied that revealing the 2003 assessment, provided in Record 15, could reasonably be expected to harm the Township's economic interests or competitive position.

These findings are consistent with previous orders of this office [see, for example, Orders MO-1228, MO-1258, MO-1392]. In these cases, there was evidence of harm with respect to future negotiations. Accordingly, in this case, I am satisfied that disclosure of this information at this stage in the process could weaken the Township's bargaining position in any future discussions with the appellant regarding the sale of the land as well as in any prospective negotiations with neighbouring property owners regarding the remaining portions of the unopened shore road allowance.

However, I am not persuaded that the remaining information severed from Records 15, including the municipal address, the name of the owner, the legal description and the zoning designation, could reasonably be expected to cause harm to the Township, as described in section 11(c) of the *Act*, as this information is publicly available and therefore known to the appellant.

Section 11(d): injury to financial interests

As alluded to above, the parties intended their representations, as set out above under section 11(c), to also apply to section 11(d). For similar reasons, I find that disclosure of the legal description of the land in Record 15 could not reasonably be expected to be injurious to the financial interests of the Township.

EXERCISE OF DISCRETION

Where appropriate, institutions have the discretion under the *Act* to disclose information even if it qualifies for exemption under the *Act*. Because section 11(c) is a discretionary exemption, I must, therefore, review the Township's exercise of discretion in deciding to deny access to the withheld information to determine whether it properly exercised its discretion.

I may find that the Township erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

Having reviewed the parties representations on this issue, I am satisfied that, in the circumstances of this case, with the exception of the municipal address, the name of the owner, the legal description and the zoning designation provided in Record 15, which I have ordered disclosed, the Township has properly exercised its discretion in deciding not to disclose the information remaining at issue in the two records. In deciding to withhold this information, I am satisfied that it took only relevant considerations into account and did not consider irrelevant factors.

ORDER:

1. I order the Township to disclose Record 15 in part, in accordance with the highlighted version of this record included with the Township's copy of this order, by **January 3, 2008**. To be clear, the Township must not disclose the highlighted portions of this record.
2. In order to verify compliance, I order the Township to provide me with a copy of Record 15 as ordered disclosed in provision 1 of this order.

Original Signed By: _____

Bernard Morrow
Adjudicator

November 28, 2007