



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

ORDER MO-2532

Appeal MA09-167

Town of South Bruce Peninsula



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OVERVIEW:

This order addresses the issues raised by a request under the *Municipal Freedom of Information and Protection of Privacy Act* (MFIPPA or the *Act*) to the Town of South Bruce Peninsula (the town) for a copy of a real estate appraisal report it obtained respecting property owned by the appellant. The town denied access to the seven-page report in its entirety, initially claiming that it was privileged and could not be released prior to the conclusion of negotiations between the town and the requester for the purchase of the requester's land.

Upon appeal of the town's decision to this office, the town issued a revised decision in which the town relied on sections 10(1) (third party information) and 11 (economic and other interests) to deny access. Section 10(1) was removed from the scope of the appeal when the third party who had prepared the appraisal report consented to its disclosure. The appeal was then transferred to the adjudication stage of the process where an adjudicator conducts an inquiry under the *Act*. During the inquiry into the appeal, the former adjudicator sought and received representations from the town and from the appellant on the possible application of sections 11(a), (c), (e) and (g) of the *Act*. Subsequently, the appeal was reassigned to me for the purpose of preparing the order.

In the discussion below, I have found that portions of the appraisal report are exempt under section 11(c).

DISCUSSION:

ECONOMIC AND OTHER INTERESTS

The town denied access to the sole record at issue, a real estate appraisal report dated July 12, 2007, on the grounds that it is exempt under sections 11(a), (c), (e) and/or (g) of the *Act*, which 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;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;
- (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably

be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

The purpose of the discretionary exemption in section 11 of the *Act* is to protect certain economic interests of institutions. The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 11 (Orders MO-1947 and MO-2363).

Sections 11(a) and (e) are concerned with the type of information at issue and its inherent value, whereas the application of sections 11(c) and (g) is based on the provision of “detailed and convincing” evidence to substantiate that disclosure of the record “could reasonably be expected to” lead to the specified harm. Evidence amounting to speculation of possible harm is not sufficient¹ nor should parties assume that harms under section 11 are self-evident or can be substantiated by submissions that merely repeat the words of the *Act* (Order MO-2363).

Representations

The representations submitted by the appellant do not directly address the town’s exemption claim or the tests established by this office to determine their application. More generally, the appellant expresses the view that “as a tax payer and property owner I should be able to obtain a copy of the appraisal of our land.”

The town takes the position that the appellant should obtain their own independent property appraisal and that “it is not up to the potential purchaser to strengthen the bargaining position of the potential seller.” According to the town, disclosure of the record while the negotiations are ongoing would undermine the ability of the parties to bargain and would thereby prejudice the town’s bargaining position. The town argues that it is not reasonable “to provide asset value information obtained by a potential purchaser to a potential seller, in advance of a fair bargaining process.” As part of its representations respecting section 11(e), the town explains that “premature release of this information would result in an undue financial benefit to the land owner as he would possess information critical to the bargaining process in advance of any agreement being reached.” However, the town appears to acknowledge that it “may be possible to sever the financial information from the remainder of the document.”

As this appeal moved to the orders stage some time ago, I asked a staff member from this office to contact the town to determine the current status of the negotiations between the parties. The town advised that negotiations have not been completed, which leaves the town’s property purchase still outstanding.

Analysis and findings

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

¹ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

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).²

Past orders of this office have addressed the exemption of real estate appraisal information under section 11 of the *Act*. In Order MO-1392, former Senior Adjudicator David Goodis found that section 11(c) applied to an appraisal regarding a property purchased by the Toronto and Region Conservation Authority (TRCA). He stated:

I am satisfied that if the appraisal figures in Records 1 and 2 were disclosed at any time prior to the closing of the transaction, disclosure could reasonably be expected to harm the economic interests or competitive position of the TRCA. This finding would be consistent with previous orders of this office [see, for example, Orders MO-1228, MO-1258]. In these cases, there was evidence of harm with respect to future negotiations.

As suggested in the passage above, the former Senior Adjudicator distinguished between disclosure of appraisal information prior to the conclusion of negotiations and its disclosure upon completion, concluding that once the purchase price was known, the value of the information for future similar negotiations was greatly diminished or even eliminated. This approach was adopted by Adjudicator Bernard Morrow in Order MO-2247, where he upheld the decision of the Township of Severn to deny access to appraisal information regarding shore land owned by the Township. In my view, the following comments of Adjudicator Morrow are applicable in the present appeal and I adopt them here:

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.

I also agree with the conclusion in these orders that the appraisal information – and how it is used by the institution that has obtained it – is an aspect of the institution's negotiation strategy that qualifies for exemption under section 11(c) of the *Act*.

Based on the town's representations and the circumstances of this appeal, I find that the town has provided me with sufficiently detailed evidence to establish a link between disclosure of the appraisal figures contained in the record and prejudice to the town's bargaining position regarding the future purchase of the appellant's property. However, I note that the record contains not only an appraisal figure for the appellant's property, but also information about three sales of similar or comparable properties. This section of the record includes certain other details that identify the basis of the comparison figures used by the individual who prepared the

² Upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.).

record. In view of its connection to the appraisal figure for the subject property, I am satisfied that the information contained in the section titled “Comparables [sic] Sales” also qualifies for exemption under section 11(c) of the *Act*.

On the other hand, the town has not persuaded me that the remaining information in the record could reasonably be expected to result in the harm contemplated by section 11(c) of the *Act*. Accordingly, my finding with respect to the application of section 11(c) is, as suggested from the phrasing used directly above, limited to the appraisal figures of the subject property and the sale values and associated details of the comparable properties included in the record.

Moreover, in my view, section 11(c) is the only exemption that could apply to this particular information or the record as a whole. Briefly stated, I find that sections 11(a), (e) or (g) do not apply to the record for the following reasons. To begin, I find that the appraisal does not either “belong to” the town nor does it have inherent monetary value as contemplated by section 11(a) (see Order M-862). Next, the first part of the section 11(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use (Order M-862). On review of this record, I find that it does not contain positions, plans, procedures, criteria or instructions and so fails to qualify for exemption under section 11(e). Finally, although the town suggests that disclosure of the information would result in undue financial benefit to the property owner in future negotiations, this concern is more aptly addressed by section 11(c) which exists to protect an institution’s competitive position, and I find that section 11(g) does not, therefore, apply.

Further, as the town appears to acknowledge in its representations, this information can be severed. In fact, section 4(2) of the *Act* obliges the town to disclose as much of a responsive record as can reasonably be severed without disclosing material which is exempt. The key question raised by section 4(2) is one of reasonableness. This provision of the *Act* does not require the head to sever the record and disclose portions where to do so would reveal only “disconnected snippets,” or “worthless,” “meaningless” or “misleading” information. Severance will not be considered reasonable where an individual could ascertain the content of the withheld information from the information disclosed.³ However, in the present case, I find that it is possible to sever the appraisal figures and associated details specified above and disclose the remainder of the report without rendering the content meaningless. Accordingly, I will order the town to sever the record and disclose the non-exempt portions to the appellant.

Because section 11(c) is a discretionary exemption, I must review the town’s exercise of discretion in choosing to deny access to the withheld information to determine whether it properly exercised its discretion. My review applies only to the portions of the record for which I have upheld the claim for exemption under section 11(c). I may find that the town 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; or it fails to take into account relevant considerations. In the circumstances of this appeal, I am satisfied that the town considered relevant factors and has properly exercised its discretion in deciding not to disclose the appraisal

³ Order PO-1663, *Ontario (Minister of Finance) v. Ontario (Information and Privacy Commissioner)* (1997), 102 O.A.C. 71 (Div. Ct.).

information. Accordingly, I will not interfere with the town's exercise of discretion in denying access to the appraisal figures on appeal.

ORDER:

1. I order the town to disclose the record in part, in accordance with the highlighted version of the record included with the town's copy of this order, by July 23, 2010. The town must not disclose the highlighted portions of this record.
2. I uphold the town's decision to deny access to the highlighted (exempt) portions of the record.
3. In order to verify compliance with this order, I reserve the right to require to the town to provide me with a copy of the record as ordered disclosed in provision 1.

Original signed by: _____
Daphne Loukidelis
Adjudicator

_____ June 23, 2010