

Information and Privacy Commissioner,  
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,  
Ontario, Canada

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## **ORDER MO-3182**

Appeal MA-060129-1

Toronto Hydro Corporation

April 10, 2015

**Summary:** The appellant sought access to records relating to the sale of the City of Toronto's street and expressway lighting systems in 2005 from Toronto Hydro. A number of appeals were filed arising out of decisions made by the city and Toronto Hydro involving a large number of records. Following the conclusion of those other appeals, the sole remaining appeal involved a request for records relating to the transaction that were held by Toronto Hydro. Some disclosure of information took place and access to other records was denied on the basis that the information was exempt under sections 10(1) and 11(a), (c), (d) and (e). In this decision, because several records were ordered disclosed in the earlier appeals, they were found not to be exempt under the exemptions claimed for them in this appeal. The decision to deny access to record 20 was upheld under section 11(a) while the application of various section 11 exemptions to the remaining records was not upheld. As a result, they were ordered disclosed.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1), 11(a), (c), (d) and (e).

**Orders and Investigation Reports Considered:** Orders MO-2997 and MO-2468-F.

### **OVERVIEW:**

[1] This order represents the conclusion of a lengthy series of appeals and orders arising from a request made to both the City of Toronto (the city) and Toronto Hydro Corporation (Toronto Hydro) for access to records relating to the sale of the city's street

lighting assets in 2005. On January 31, 2014, I issued Order MO-2997 in which I upheld the city's decision to withhold a number of responsive records which it maintained that documented its side of the transaction. I also ordered it to disclose other records to the appellant in that appeal, who is the same individual who made the request which gave rise to this and a number of related appeals.

[2] The original request was made to Toronto Hydro on January 3, 2006 and sought access to the following:

The agreement(s) of sale related to the sale of Toronto's street lights and expressway lights to Toronto Street Lighting Inc.

The agreement(s) for Toronto Street Lighting Inc. to provide street lighting and expressway lighting services to the City.

All e-mails, handwritten notes, voice mail messages, memoranda and other documents, whether electronic or written, related to either of the above transactions

[3] In a final decision dated May 16, 2006, Toronto Hydro granted complete access to a number of responsive records, designated as records 1-13, partial access to records identified as records 14, 15 and 16 and access to records 17-22 was denied in their entirety. In its decision, Toronto Hydro relied upon the mandatory third party information exemption in section 10(1)(a) and (c), and the discretionary exemptions in sections 11(c), (d) and (e) of the *Act* (economic and other interests). The appellant appealed that decision to this office. During the mediation of the appeal, the appellant indicated that he was no longer seeking access to records 17, 19 or 22, as well as the undisclosed portions of records 15 and 16.

[4] Representations were sought and obtained from Toronto Hydro, the city and a consulting firm who prepared certain records relating to the transaction. The appellant was also provided with a Notice of Inquiry and the non-confidential portions of the representations submitted by the other parties to the appeal. In response, on January 11, 2007 the appellant asked that this appeal be placed "on hold" pending the outcome of his other appeals involving the same transaction in which the city was the institution.

[5] The last of these appeals was finally resolved when I issued Order MO-2997 on January 31, 2014. I again sought representations from the appellant on the remaining issues in this appeal in March 2014. The appellant declined this additional opportunity to make representations and, at his request, the appeal now is proceeding in the absence of any submissions from him.

[6] In this decision, I uphold Toronto Hydro's decision, in part, and order it to disclose some records to the appellant.

## **RECORDS:**

[7] The records at issue in this appeal were identified as follows:

- The withheld portions of record 14, the service agreement between the city and Toronto Hydro Street Lighting Inc.;
- A report dated October 31, 2005, along with related correspondence and documentation, identified as record 18;
- A financial model dated December 16, 2005 with related correspondence and documentation, designated as record 20; and
- Record 21, internal issues lists composed of a deliverables list, asset sales issues list and briefing notes.

[8] In Order MO-2997, I addressed the application of the same exemptions claimed to apply to portions of the records identified as records 14, 18, 20 and 21 (in whole or in part) in this appeal, which were listed as records 92, 39, 104 and 59, respectively. After having received and considered representations from all of the parties to this appeal, I considered and rejected the application of the section 10(1) and 11(c), (d) and (e) exemptions to certain portions of equivalent documents to records 18 and 20 in Order MO-2997. I will not revisit my findings with respect to them. As a result, I do not uphold Toronto Hydro's decision respecting the denial of access to those portions of records 18 (document 18-1) and 20 (document 20-22) that were addressed as records 39 and 104, respectively, in Order MO-2997.

[9] Consistent with my decision in Order MO-2997, however, I uphold Toronto Hydro's decision to deny access to that portion of record 21 described in this appeal as document 21-3, which was addressed as record 59 in Order MO-2997. The application of sections 10(1) and 11(c), (d) and (e) to the other portions of records 18, 20 and 21 will be considered below.

[10] Based on my review of the other related files arising out of these requests, the application of sections 10(1) and 11(c) and (d) to record 14 was completely addressed in Order MO-2468-F which was issued on October 27, 2009, where it was described as record 2. In this 97-page decision, Adjudicator Laurel Cropley reviewed in great detail and dismissed the arguments put forward by both the city and Toronto Hydro respecting the application of the section 10(1) and 11(c), (d) and (e) exemptions to this record. Because of the thorough and comprehensive manner in which record 14 was addressed in Order MO-2468-F, it is not necessary for me to re-visit the application of the exemptions claimed for this record again. In addition, assuming that the order was complied with by the city, this record has already been disclosed to the appellant following the issuance of the order in October 2009.

[11] I will now proceed to address the application of the sections 10(1)(a) and (c), and sections 11(c), (d) and (e) exemptions claimed for the remaining portions of record 18, 20 and 21 which have not been identified as a responsive record in any of the previous appeals involving this transaction. It would appear that these records originated in the record-holdings of Toronto Hydro, as opposed to the city, which was the case in the other appeals.

## **ISSUES:**

- A. Are the remaining portions of record 18 exempt from disclosure under the mandatory third party information exemption in section 10(1)(a) and (c)?
- B. Are the remaining portions of records 18, 20 and 21 exempt from disclosure under the discretionary exemptions in sections 11(a), (c), (d) or (e)?
- C. Did Toronto Hydro exercise its discretion under section 11? If so, should this office uphold the exercise of discretion?

## **DISCUSSION:**

**Issue A: Are the remaining portions of record 18 exempt from disclosure under the mandatory third party information exemption in section 10(1)(a) and (c)?**

[12] Section 10(1)(a) and (c) state:

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

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[13] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>1</sup>

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<sup>1</sup> *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.<sup>2</sup>

[14] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

[15] One of the affected parties, a consulting firm who provided Toronto Hydro with a report dated October 31, 2005 claims the application of section 10(1) to that record, arguing that its commercial interests will be harmed by the disclosure of the document. As noted above, identical arguments were made and rejected in Order MO-2997 for the same record, which was described as record 39 in that decision. As I have already adjudicated upon the application of section 10(1) to this record and considered the arguments of this affected party, I will not address it again. As a result, the October 31, 2005 report which comprises part of record 18 is not exempt under section 10(1).

[16] I have not been provided with any representations respecting the application of section 10(1) to the remaining portions of record 18. Based on my review of these documents, I am satisfied that they do not qualify for exemption under that section.

**Issue B: Are the remaining portions of records 18, 20 and 21 exempt from disclosure under the discretionary exemptions in sections 11(a), (c), (d) or (e)?**

[17] Toronto Hydro takes the position that the remaining portions of records 18, 20 and 21 are exempt from disclosure under the discretionary exemptions in sections 11(a), (c), (d) or (e) of the *Act*, which state:

A head may refuse to disclose a record that contains,

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<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

- (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;
- (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;

[18] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.<sup>3</sup>

[19] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.<sup>4</sup>

[20] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>5</sup>

### **Section 11(a): information that belongs to government**

[21] For section 11(a) to apply, the institution must show that the information:

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

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<sup>3</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

<sup>4</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>5</sup> Order MO-2363.

2. belongs to an institution; and
3. has monetary value or potential monetary value.

***Part 1: type of information***

[22] Toronto Hydro argues that the documents that comprise record 20 satisfy the definition of “commercial, financial, technical and trade secret information that appear in section 11(a). However, I find that only two of these terms, commercial and financial information, are relevant to the types of information present in the records at issue. These types of information have been discussed in prior orders:

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>6</sup>

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.<sup>7</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>8</sup>

***Part 2: belongs to***

[23] 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.

[24] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,<sup>9</sup> 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, the information is consistently treated in a confidential manner, and it derives its value

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<sup>6</sup> Order PO-2010.

<sup>7</sup> Order PO-2010.

<sup>8</sup> Order P-1621.

<sup>9</sup> Order P-636.

to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.<sup>10</sup>

### ***Part 3: monetary value***

[25] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.<sup>11</sup>

[26] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section,<sup>12</sup> nor does the fact, on its own, that the information has been kept confidential.<sup>13</sup>

### **Section 11(c) and (d): prejudice to economic interests/injury to financial interests**

[27] The purpose of section 11(c) and (d) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic and financial 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 or financial interests or the institution’s competitive positions.<sup>14</sup>

[28] 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.<sup>15</sup>

### **Section 11(e): positions, plans, procedures, criteria or instructions**

[29] In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,

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<sup>10</sup> Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

<sup>11</sup> Orders M-654 and PO-2226.

<sup>12</sup> Orders P-1281 and PO-2166.

<sup>13</sup> Order PO-2724.

<sup>14</sup> Orders P-1190 and MO-2233.

<sup>15</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.



2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.<sup>16</sup>

[30] Section 11(e) applies to financial, commercial, labour, international or similar negotiations, and not to the development of policy with a view to introducing new legislation.<sup>17</sup> The terms “positions, plans, procedures, criteria or instructions” suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.<sup>18</sup>

[31] This office has adopted the dictionary definition of “plan” as a “formulated and especially detailed method by which a thing is to be done; a design or scheme”.<sup>19</sup>

### **Analysis and findings**

[32] It must be noted that the records before me are now approaching a decade old. Their relevance and their timeliness have clearly diminished a great deal over that time. This is an important consideration when evaluating the harms component of section 11 to the records before me.

#### *Record 18*

[33] Toronto Hydro has not made submissions respecting the application of the section 11 exemptions claimed for the remaining portions of record 18. In the absence of any such submissions, and based on my review of these records, I find that section 11(c), (d) and (e) have no application to this information. As no other exemptions have been claimed for them and no mandatory exemptions apply, I will order that they be disclosed to the appellant.

#### *Record 20*

[34] Again, I note that document 20-22 of record 20 is identical to the document identified as record 104 in Order MO-2997 which I ordered disclosed. I will not, accordingly, revisit the application of section 11 to that portion of record 20.

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<sup>16</sup> Order PO-2064.

<sup>17</sup> Orders PO-2064 and PO-2536.

<sup>18</sup> Orders PO-2034 and PO-2598

<sup>19</sup> Orders P-348 and PO-2536.

[35] Toronto Hydro has provided very detailed and carefully-reasoned representations in support of its argument that the other documents which comprise record 20 are exempt under sections 11(a) and (c). Accompanying those representations are two affidavits sworn by the Director of the Street Lighting Division of Toronto Hydro Energy Services Inc. (THESI), the successor to Toronto Hydro Street Lighting Inc., and the Chief Financial Officer of Toronto Hydro. THESI is wholly owned by Toronto Hydro, which is in turn wholly owned by the City of Toronto.

[36] Record 20 consists of a series of financial models and the supporting data relied upon by Toronto Hydro as part of its obligations under the terms of the Asset Purchase Agreement between it and the city dated December 15, 2005. The information is extremely detailed and consists mainly of computer printouts demonstrating various current data and projections surrounding the Street Lighting Division's revenue and growth potential, looking many years into the future. Clearly, this information satisfies the definition of commercial and financial information under section 11(a), as those terms have been defined in previous orders. As a result, I find that the first part of the test under section 11(a) is satisfied.

[37] Insofar as the second part of the test under section 11(a) is concerned, I am satisfied that the information contained in the various documents that comprise record 20 belong to Toronto Hydro as it is the owner of THESI's Street Lighting Division. As a result, I conclude that the second part of the test under section 11(a) has been met.

[38] The third part of the test under section 11(a) requires that the information "has monetary value or potential monetary value". In support of this contention, Toronto Hydro argues the:

. . . financial and commercial information that belongs to [it] has monetary value or potential monetary value. The financial model is proprietary to [it]; it was developed internally as a result of the application of financial professionals to develop a unique methodology for analysis of financial performance, projections, discounted present value and other financial value calculations. . .

[39] As noted above, the appellant did not provide me with representations; nor has he referred to the possible similarities between the information in record 20 and that which was ordered disclosed in Order MO-2468-F or MO-2997, with the exception of document 20-22 which is described above.

[40] The information contained in record 20 is now approaching ten years old. In most cases, it would be difficult for an institution to make the argument that information in a record continues to have monetary or potential monetary value after the passage of such a lengthy period of time. The information at issue in record 20 is

different, however. Rather than representing information with a "shelf life", the financial and commercial information found in the tables and spreadsheets that comprise the majority of record 20 consists of projections of income and revenue, expenses and costs stretching many years into the future, beyond 2015. For this reason, I am of the view that the information continues to have some monetary or potential monetary value to this day. Because of this fact, I conclude that section 11(a) applies to the information in record 20, with the exception of document 20-22, and that it is exempt from disclosure on that basis.

### *Record 21*

[41] Record 21 consists of the following documents:

- A list of key issues and expected deliverables for the period April and May, 2005;
- Issue sheets dating from April, May and June of 2005; and
- A fact sheet dated February 2005, along with briefing slides for a meeting with then-Mayor David Miller on February 22, 2005.

[42] Toronto Hydro argues that the "internal issues lists (record 21) were prepared for the purpose of [its] acquisition of the City of Toronto Street and Expressway Lighting System. Record 21 was created for strategic purposes for [its] negotiation with the City." It goes on to submit that "[I]f competitors were privy to [its] strategy in their negotiations with the City, they could adjust their pricing and other financial elements for future competitive bids for street lighting services with the City."

[43] It then suggests that it would be put to a disadvantage in any competitive bid processes in the future as it would "have to constantly change their strategy when bidding for projects" and that "these changes would require large monetary and staff expenses." According to Toronto Hydro, the increased competition in the street lighting industry that would result from the disclosure of record 21 would negatively affect its economic interests and would give rise to injury to its financial interests.

[44] Toronto Hydro has put forward the scenarios described above, but it has not provided the kind of sufficiently detailed and convincing evidence which would demonstrate how the disclosure of the contents of record 21, which are issue sheets from many years ago relating to a transaction that closed nearly 10 years ago, could reasonably be expected to give rise to the harms contemplated by sections 11(a) and (c). I find that the harms described by Toronto Hydro are not reasonably likely to flow from the disclosure of the contents of record 21.

[45] Toronto Hydro also raised the possible application of section 11(e) to record 21. Clearly, section 11(e) has no application to record 21 as the negotiations which are reflected in the content of this record were concluded many years ago.

[46] To summarize, I find that records 18 and 21 are not exempt under section 11 while record 20 is exempt, in its entirety, under the discretionary exemption in section 11(a).

**Issue C: Did Toronto Hydro exercise its discretion under section 11? If so, should this office uphold the exercise of discretion?**

### **General principles**

[47] I have found above that the majority of the documents that comprise record 20, with the exception of document 20-22, qualify under the discretionary exemption in section 11(a), which is discretionary. Section 11(a) permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[48] In addition, the Commissioner may find that the institution 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.

[49] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.<sup>20</sup> This office may not, however, substitute its own discretion for that of the institution.<sup>21</sup>

### **Relevant considerations**

[50] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:<sup>22</sup>

- the purposes of the *Act*, including the principles that
  - information should be available to the public

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<sup>20</sup> Order MO-1573.

<sup>21</sup> Section 43(2).

<sup>22</sup> Orders P-344 and MO-1573.

- individuals should have a right of access to their own personal information
- exemptions from the right of access should be limited and specific
- the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

### **Exercise of discretion**

[51] Toronto Hydro has provided detailed representations describing the considerations it relied upon in exercising its discretion not to disclose record 20. It indicates that in response to this request and during the subsequent processing and mediation of the appeal, a number of records containing a variety of information about the transaction were disclosed to the appellant.

[52] It then goes on to state that it did not claim the section 11 exemption in bad faith, or take into account irrelevant considerations when it decided to claim it for record 20. It goes on to state that:

. . . it has taken into account all relevant considerations and subsequently considered the proportionality of the release. [It] determined that the adverse effects of the release of the information were much greater than

the benefits it would provide. The release of any information in the records sought would significantly compromise [its] financial and economic interests. Moreover, the release of the information would force [it] to surrender an asset of monetary value and compromise [its] competitive position.

[53] The appellant did not provide representations on this issue.

[54] Based upon the considerations set forth by Toronto Hydro in its representations and, in the absence of submissions to the contrary by the appellant, I find that Toronto Hydro has exercised its discretion not to disclose record 20 appropriately, taking into account all of the circumstances surrounding this request and appeal. Despite the passage of time, I find that Toronto Hydro's concerns about the confidentiality of the information in record 20 remain valid. As a result, I uphold its exercise of discretion and dismiss this aspect of the appeal.

**ORDER:**

1. I order Toronto Hydro to disclose records 14, 18, document 20-22 from record 20 and 21 to the appellant by providing him with copies by no later than **May 15, 2015** but not before **May 11, 2015**.
2. I uphold Toronto Hydro's decision to deny access to record 20.
3. In order to verify compliance with order provision 1, I reserve the right to require Toronto Hydro to provide me with copies of the records which are disclosed to the appellant.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_ April 10, 2015