

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-3097

Appeal MA13-493

Town of Bracebridge

September 16, 2014

**Summary:** An appellant sought access to a report prepared by a third party who conducted an organizational review for the town. The third party and the town claim that the report is exempt under sections 10(1)(third party information) and 14(1)(personal privacy) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The town also claims that the report is exempt under section 11(f)(economic and other interests). The appellant raised the possible application of the public interest override in section 16 of the *Act*. Small portions of the report are found exempt under sections 10(1) and 14(1) of the *Act* but the public interest override is found not to apply. The town is ordered to disclose the remaining portions of the withheld report, and the town's decision is upheld in part.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss.2(1) definition of "personal information", 10(1), 11(f), 14(2)(a), (h), (i) and 16.

**Orders and Investigation Reports Considered:** MO-1708 and MO-2983.

### OVERVIEW:

[1] The appellant filed a request under the *Act* to the Town of Bracebridge (the town) for a copy of a report entitled "Corporate Organization and Service Delivery Review Project", dated June 12, 2012. The report was prepared by a municipal management consulting firm (the third party).

[2] The town granted the appellant partial access to the responsive record, claiming the application of a number of exemptions under the *Act*. The appellant appealed the town's decision to this office and a mediator was assigned to explore settlement with the parties.

[3] During mediation, the town raised the possible application of the mandatory personal privacy exemption in section 14(1) of the *Act*. Also during mediation, the town confirms that it continued to rely on the mandatory exemption at section 10(1)(third party information) and the discretionary exemption at 11(f) (economic and other interests) of the *Act*. However, the town withdrew its reliance on section 38(c) of the *Act*. In turn, the appellant raised the possible application of the "public interest override" provision in section 16 to the records.

[4] No further mediation was possible and the appeal was moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. During the inquiry process, the town, third party and appellant provided representations to this office.

[5] The appeal file was subsequently transferred to me to issue a decision. In this order, I uphold the town's decision to withhold information found exempt under sections 10(1) and 14(1) of the *Act*.

## **RECORDS:**

[6] The record remaining at issue consists of the undisclosed portions of a report entitled "Town of Bracebridge Corporate Organization & Service Delivery Review", dated June 12, 2012.

## **ISSUES:**

- A. Does the record contain "personal information" as defined in section 2(1)?
- B. Would disclosure of the portions found to contain "personal information" constitute an unjustified invasion of personal privacy?
- C. Does the mandatory exemption at section 10(1) apply to the record or portions of the record?
- D. Does the discretionary exemption at section 11(f) apply to the record or portions of the record?
- E. Does the public interest override at section 16 apply to the portions of the record found exempt?

## **DISCUSSION:**

### **A. Does the record contain "personal information" as defined in section 2(1)?**

[7] The appellant's redacted copy of the report included a list of the names and job titles of the employees and councillors interviewed by the third party. The information these individuals provided to the third party during the interview process is anonymized in the report and attachments.

[8] In the report, the employee's responses are broken-down into four groups. Their names and job titles are not identified with the responses. The councillors responses are treated similarly in the report. Though the councillors responses are not broken down the same way, their aggregate responses are compared with the employee's aggregate responses without identifying any individuals by name or district.

[9] Despite the fact that the data contained in the report is anonymized, the third party and town argue that release of this information would constitute an unjustified invasion of personal privacy under the *Act*. In order to determine whether the personal privacy provisions in section 14(1) of the *Act* apply to the information at issue, I must first decide whether the record contains "personal information" and, if so, to whom it relates.

#### *Representations of the parties*

[10] The town and third party provided representations indicating that the employees and councillors were assured that the interviews were "confidential one-on-one sessions". The town's representations state:

At the outset of the consultant's work on this project, individual employees (29) and members of Council (9) were advised that their inputs were being recorded on a confidential basis.

Based on their understanding of the format and circumstances under which the inputs were collected, employees and members of Council provided responses that in many cases, in addition to responses in a professional capacity, also contained statements relating to personal views of individuals in the organization, relayed views or opinions about other individuals, or relayed views of opinions about themselves in their work environment.

[11] The third party's representations state:

The employees interviewed were advised that the interviews were confidential and that their responses would not be published in a manner that would permit an employee to be identified. With the response breakdowns, particularly when there is a small number of interviewees in a breakdown, a determined outside party could just do that.

[12] In numerous press releases, the town advised that 38 interviews were conducted by the third party which ranged in length from 45 minutes to 2 hours. The town advises that the interviews were structured by a questionnaire. The town states “[t]he completed questionnaire was tested for clarity and effectiveness and then administered to interviewees in confidential one-to-one sessions by the consultants.”<sup>1</sup> The town went on to advise in its press release, that the results of the interviews are presented in graphs which are attached as exhibits to the report.

[13] In its representations, the third party highlights two graphs found at exhibits 1.19 and 1.25 of the report. The third party submits that these two graphs represent “two of the more sensitive questions” asked during the interview process. Namely, information about the employee’s relationship with his or her immediate supervisor (Exhibit 1.19) and working relationships with other departments (Exhibit 1.25).

[14] The third party argues that the release of the aggregate responses reported in the graph related to employees’ satisfaction rates with their supervisor (Exhibit 1.19) would result in individual supervisors being identified. In support of this position, the third party provided confidential representations concerning one particular group of employees and argued that the release of the aggregate responses in that category, along with the other information found in Exhibit 1.19 would result in the identification of one or two supervisors being associated with having lower satisfaction rates.

[15] The third party also provided confidential representations concerning the possible identification of individuals if the aggregate responses reported in the graph presenting employee satisfaction rates with their working relationship with other departments (Exhibit 1.25) was to be disclosed.

[16] The appellant argues that the personal privacy provisions of the *Act* do not apply in the circumstances of this appeal. The appellant concedes that “...municipal employees have, generally speaking, an absolute right to privacy in their private lives”. Accordingly, he is confident that they were not asked to disclose personal information during the interview process.

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<sup>1</sup> The Corporation of the Town of Bracebridge, *Corporate Organizations and Service Delivery Review Project*, Employee Up-date, February 20, 2013

*Decision and analysis*

[17] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.<sup>2</sup>

[18] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.<sup>3</sup>

[19] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.<sup>4</sup>

[20] The issue is not, as described by the appellant, whether details of the personal lives of municipal employees or councillors are contained in the records. Rather, the issue is whether disclosure of the information at issue could reasonably result in the identification of the views or opinions of employees and councillors in response to the questions asked by the third party.

[21] The town and third party claim that the withheld information contains personal information, which if disclosed, could reasonably be expected to identify individuals or councillors.

[22] However after a careful review of the record, I am of the view that it appears that the only portions of the report which could possibly contain "personal information" are the portions that relate to the employee's and councillor's anonymized responses.

[23] I find it helpful to group the anonymized responses as follows:

- Employee's anonymized responses to the third party's questions about their satisfaction level with their direct supervisors (Exhibits 1.19 and 1.21);
- Employee's anonymized responses to the third party's questions about their working relationship with other departments (Exhibits 1.25-1.32); and

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<sup>2</sup> Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

<sup>3</sup> Orders P-1409, R-980015, PO-2225 and MO-2344.

<sup>4</sup> Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

- Employee's and councilor's anonymized responses to the third party's questions about general work conditions, organizational and service delivery issues (Exhibits 1.1-1.18, 1.20, 1.22-1.38, 2.1-2.16)

[24] The remaining information at issue in the report comprises of the third party's summation, analysis and recommendations to the town. In my view, these portions of the report cannot be said to be about an individual. Accordingly, I find that the following portions of the report do not constitute "personal information" for the purposes of section 2(1) of the *Act*:

- The consultant's summation of the information gathered, including all the summaries located on the left-side of the graphs presenting the interview results;
- their analysis of the information gathered during its interviews, explanation of its methodology and copies of the questionnaires;
- their comparative analysis of the town's corporate organization and service delivery with other municipalities; and
- their recommendations to the town.

[25] The town and third party claim that these portions of the report either qualify for exemption under section 10(1) and/or 11(f) (third party information and economic and other interest) of the *Act*. I will determine if these portions of the report qualify for exemption under section 10(1) and/or 11(f) below.

*i) Employee's responses to the third party's questions about their satisfaction level with their direct supervisors (Exhibits 1.19 and 1.21)*

[26] The vast majority of questions asked by the third party do not solicit employee's or councillor's views or opinions about other individuals. There are only two questions where employee's satisfaction levels relating to their supervisors are solicited. The aggregate responses are captured in Exhibit 1.19 and 1.21. However, only Exhibit 1.19 contains actual breakdowns, as no breakdown was provided in Exhibit 1.21 due to high satisfaction rates being reported across departments. Accordingly, I find that disclosure of Exhibit 1.21 could not result in the identification of individual employees and thus does not contain "personal information".

[27] Previous orders from this office have accepted the position that anonymized information relating to a group of five or fewer individuals could reasonably result in the identification of one of the individuals.<sup>5</sup> This office has also found that disclosure of anonymized information relating to more than five individuals could reasonably be expected to result in identifying individuals having regard to other factors. In Order MO-1708, Adjudicator Sherry Liang found that disclosure of failing grades, even where the grade information related to more than five students, could reasonably be expected to result in identifying the students who received a failing grade taking into consideration the small class size and other student's ability to ascertain the performance of their classmates as a result of knowing their own class standing and participating in the classroom together.

[28] I adopt the reasoning in Order MO-1708 and find that disclosure of response breakdowns in Exhibit 1.19 where five or fewer responses are reported could reasonably be expected to result in employees identifying one another or the supervisor in question. I find that disclosure of the remaining response breakdowns in Exhibit 1.19 containing more than five individuals could also be reasonably be expected to result in the identification of employees and/or supervisors. In making my decision, I note that the remaining response breakdowns capture groups of 6, 7 and 8 employees. In my view, these groupings, though over five, are still small enough to enable other employees to ascertain their colleagues' responses, taking into consideration their own responses and working relationships with their colleagues. Accordingly, I find that the response breakdowns in Exhibit 1.19 relating to employees views and opinions about their supervisor constitutes "personal information" as defined in paragraphs (e) and (g) of the definition of that term found at section 2(1) of the *Act*. I will go on to determine whether disclosure of this information would constitute an unjustified invasion of privacy under section 14(1) of the *Act* below.

*ii) Employee's anonymized responses to the third party's questions about employee's working relationship with other departments (Exhibits 1.25-1.32)*

[29] As mentioned above, the third party provided confidential representations concerning the possible identification of individuals if the aggregate responses reported in the graph related to satisfaction rates regarding working relationships with other departments (Exhibit 1.25). However, I note that in the example provided by the third party, an entire department is identified as having good or poor working relationships with another department as opposed to an individual.

[30] Accordingly, I find that Exhibit 1.25 and the other graphs (Exhibits 1.26-1.32) which contain aggregate responses relating to departmental as opposed to personal working relationships do not contain "personal information" for the purposes of section 2(1) as this information does not relate to "an identifiable individual".

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<sup>5</sup> Orders P-644 and MO-1415

*iii) Employee's and councilor's anonymized responses to the third party's questions about general work conditions, organizational and service delivery issues (Exhibits 1.1-1.18, 1.20, 1.22-1.38, 2.1-2.16)*

[31] Exhibits 1.1, 1.2, 1.22, 1.23 and 1.38 do not contain employee response breakdowns as the third party determined that the responses reported high satisfaction rates across the board. Accordingly, I find that Exhibits 1.1, 1.2, 1.22, 1.23 and 1.28 do not constitute "personal information" for the purposes of the definition of that term in section 2(1) of the *Act*.

[32] I have carefully reviewed the remaining exhibits in this category and find that the information contained in the graphs which report low, median or high satisfaction rates relating to work conditions, organizational and service delivery issues do not reveal something of a personal nature about the groups of individuals interviewed by the third party. Accordingly, I find that this information also does not constitute "personal information" for the purposes of section 2(1) of the *Act*.

#### *Summary*

[33] The only portions of the report found to contain "personal information" as defined in section 2(1) of the *Act* is the graph in Exhibit 1.19, which relates to employees satisfaction rates with their supervisor. Accordingly, I will go on to determine whether disclosure of this information would constitute an unjustified invasion of personal privacy under section 14(1).

[34] Later in this order, I will determine whether the remaining information qualifies for exemption under sections 10(1) or 11(f) of the *Act*.

#### **B. Would disclosure of the portions found to contain "personal information" constitute an unjustified invasion of personal privacy?**

[35] Under section 14(1)(f), if disclosure would not result in an unjustified invasion of personal privacy, it is not exempt from disclosure under section 14(1). Sections 14(2) and (3) help in determining whether disclosure would or would not be an unjustified invasion of privacy. Also, section 14(4) lists situations where disclosure would not lead to an unjustified invasion of personal privacy.

[36] If any of paragraphs (a) to (h) of section 14(3) apply, disclosure of the information is presumed to be an unjustified invasion of personal privacy under section 14(1). Once established, a presumed unjustified invasion of personal privacy under



section 14(3) can only be overcome if section 14(4) or the "public interest override" at section 16 applies.<sup>6</sup>

[37] The town submits that disclosure of the information found to contain "personal information" would constitute an unjustified invasion of personal privacy taking into consideration the presumption at section 14(3)(g) of the *Act*. Section 14(3)(g) states:

A disclosure of personal information is presumed to constitute an unjustified invasion of personal privacy if the personal information consists of personal recommendations or evaluations, character references or personnel evaluations

[38] This office has determined that the terms "personal evaluations" or "personnel evaluations" refer to assessments made according to measurable standards.<sup>7</sup>

[39] The thrust of section 14(3)(g) is to raise a presumption concerning recommendations, evaluations or references about the identified individual in question rather than evaluations, etc., by that individual.<sup>8</sup>

[40] Other than to raise the possible application of the presumption at section 14(3)(g), the town did not make specific representations in support of its position that the presumption applies.

[41] Having regard to the nature of the information at issue, I find that the presumption at section 14(3)(g) does not apply. As noted above, the terms "personal evaluations" or "personnel evaluations" are normally applied to assessments made in according to "measurable standards", such as evaluations and scores of job interviews. The personal information at issue in this appeal is quite different. The third party was not retained to assess and evaluate the town's supervisors, but rather to conduct a systemic review of the town's services and organizational structure. In my view, the employees' views about their supervisors do not constitute a personal or personnel evaluation for the purpose of section 14(3)(g). Accordingly, I find that the presumption at section 14(3)(g) does not apply; nor do any of the other presumptions apply to the personal information at issue in this appeal.

[42] If no section 14(3) presumption applies and the exception in section 14(4) does not apply, section 14(2) lists various factors that may be relevant in determining whether disclosure of personal information would constitute an unjustified invasion of personal privacy.<sup>9</sup> In order to find that disclosure does not constitute an unjustified invasion of personal privacy, one or more factors and/or circumstances favouring

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<sup>6</sup> *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767 (Div.Ct.).

<sup>7</sup> Orders PO-1756 and PO-2176.

<sup>8</sup> Order P-171.

<sup>9</sup> Order P-239.

*disclosure* in section 14(2) must be present. In the absence of such a finding, the exception in section 14(1)(f) is not established and the mandatory section 14(1) exemption applies.<sup>10</sup>

[43] The list of factors under section 14(2) is not exhaustive. The institution must also consider any circumstances that are relevant, even if they are not listed under section 14(2).<sup>11</sup> In its representations, the town argues that the factors favouring non-disclosure at section 14(2)(h) and (i) apply in the circumstances of this appeal. Though the appellant did not specifically refer to the application of any factors listed in section 14(2), his submissions about the importance of open government appear to raise the possible application of the factor favouring disclosure at section 14(2)(a), which reads:

A head, in determining whether a disclosure of personal information constitutes an unjustified invasion of personal privacy, shall consider all the relevant circumstances, including whether the disclosure is desirable for the purpose of subjecting the activities of the institution to public scrutiny;

***14(2)(a): public scrutiny***

[44] The appellant submits that the report is an examination of how the town operates and that its taxpayers have a right to know how the town is managed.

[45] Section 14(2)(a) contemplates disclosure in order to subject the activities of the government (as opposed to the views or actions of private individuals) to public scrutiny.<sup>12</sup> Simple adherence to established internal procedures will often be inadequate, and institutions should consider the broader interests of public accountability in considering whether disclosure is desirable for the purpose outlined in section 14(2)(a).<sup>13</sup>

[46] In order for this section to apply, it is not appropriate to require that the issues addressed in the records have been the subject of public debate; rather, this is a circumstance which, if present, would favour its application.<sup>14</sup>

[47] The purpose of the report was to gather information to review the town's organizational structure and/or service delivery model to help promote increased efficiency and effectiveness in the delivery of municipal services. In my view, disclosure of the personal information at issue would not reveal information regarding the efficient and effectiveness of the town's delivery of municipal services. I do not agree that

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<sup>10</sup> Orders PO-2267 and PO-2733.

<sup>11</sup> Order P-99.

<sup>12</sup> Order P-1134.

<sup>13</sup> Order P-256.

<sup>14</sup> Order PO-2905.

disclosure of individual employee's views or opinions about their supervisor would inform taxpayers about the efficiency and effectiveness of the town's delivery of municipal services. Accordingly, I find that this factor does not apply to the information I found contains the "personal information" of employees and their supervisors.

***14(2)(h): supplied in confidence***

[48] This factor applies if both the individual supplying the information and the recipient had an expectation that the information would be treated confidentially, and that expectation is reasonable in the circumstances. Thus, section 14(2)(h) requires an objective assessment of the reasonableness of any confidentiality expectation.<sup>15</sup>

[49] Both the town and the third party maintain that the employees and councilors interviewed by the third party were assured that their interviews would be treated as "confidential one-on-one sessions". I have carefully reviewed the blank questionnaires attached to the report and note that they are marked "Private and Confidential". I also note that it does not appear that the consultant provided the town with copies of the completed questionnaires. Instead, the information gathered in the interviews is presented to the town in the form of graphs and summations contained in the exhibits attached to the report.

[50] Having regard to the representations of the parties and the consultant's treatment of the information it gathered on the town's behalf, I am satisfied that the employees invited to discuss their views and opinions of their supervisors were given assurances of confidentiality by the consultants. I am also satisfied that those participating in the interviews had a reasonable expectation that their responses would be kept confidential. Accordingly, I find that the factor at section 14(2)(h) applies to the information I found contains "personal information".

***14(2)(i): unfair damage to reputation***

[51] The applicability of this section is not dependent on whether the damage or harm envisioned by the clauses is present or foreseeable, but whether this damage or harm would be "unfair" to the individual involved.<sup>16</sup>

[52] The town did not provide representations specifically addressing this issue. However, given the nature of the information at issue, I am satisfied that disclosure of information which could lead to the identification of supervisors who received lower than average satisfaction rates. In addition, I am satisfied that this disclosure would result in unfair damage to the supervisors reputation. In my view, the damage would be unfair as there is a possibility that the wrong individual is identified as a result of

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<sup>15</sup> Order PO-1670.

<sup>16</sup> Order P-256.

individuals not being named in the portions of the report which discusses the responses to the interviews.<sup>17</sup> In addition, the information at issue was gathered as part of a systemic review of the town's organizational structure and delivery of services as opposed to an examination of a particular supervisor's conduct. As such, the views and opinions of the employees were not investigated and remain unverified.<sup>18</sup>

[53] Having regard to the above, I find that this factor also applies to the information I found contains "personal information".

### *Summary*

[54] As I have found that only the factors favouring non-disclosure apply, I find that disclosure of the graph information contained in Exhibit 1.19 relating to employees satisfaction rates with their supervisor would constitute an unjustified invasion of personal privacy under section 14(1).

[55] Accordingly, I will uphold the town's decision to deny the appellant access to this information.

### **C. Does the mandatory exemption at section 10(1) apply to the record or portions of the record?**

[56] Based on the representations of the town and the third party, it appears they rely on sections 10(1)(a) and (c) in support of their position that the withheld information contained in the report constitutes the third party's proprietary asset.

[57] Sections 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;

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<sup>17</sup> Order 151

<sup>18</sup> Order MO-1343

[58] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>19</sup> 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>20</sup>

[59] 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.

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

[60] The third party submits that the report contains its proprietary information. Most of the third party’s submissions focus on the blank questionnaires attached to the report. The third party argues that over the years it has “developed a proprietary interview diagnostic questionnaire for use in corporate or department organization reviews”. It argues that the wording and sequence of the questions and the response breakdowns contained in the exhibits are unique to its industry. The third party maintains that its proprietary information is not only contained in the questionnaire, but also in the titles of each graph.

[61] The town’s representations state:

The record was developed based on a scientific approach developed by the [c]onsultant and contains labour relations information for which all of its components have not been implemented.

[62] The town did not provide further representations on this issue.

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<sup>19</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.*).

<sup>20</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[63] Scientific and labour relations information have been discussed in prior orders, as follows:

*Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.<sup>21</sup>

*Labour relations* means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships. Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute<sup>22</sup>
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,<sup>23</sup>

[64] Though the town asserts that the report contains labour relations information I find that there is insufficient evidence before me to suggest that the information at issue relates to management and labour. In fact, in one of its press releases, the town advises that the majority of individuals interviewed by the third party were management employees.<sup>24</sup> Given that the report presents the interview findings of management employees and council, I find that this information does not qualify as "labour relations information" within the meaning of that term defined by this office.

[65] Previous decisions from this office have found that while the creation of survey questions or questionnaires, when done by an expert in the field of social science, the survey or questionnaire itself may qualify as scientific information.<sup>25</sup> These decisions accept that the creation of the survey or questionnaire would have involved the observation and testing of specific hypotheses or conclusions. In Order MO-2983, Adjudicator Catherine Corban also accepted that "the survey questionnaire itself might reveal a unique method, formula, pattern or compilation of information embodied in a product used by the affected party's business". However, she did not accept that the "aggregate survey results" obtained by applying the survey or questionnaire would reveal information that would qualify as a "trade secret".

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<sup>21</sup> Order PO-2010.

<sup>22</sup> Order P-1540.

<sup>23</sup> Order P-653.

<sup>24</sup> Supra note 15.

<sup>25</sup> Orders MO-1379 and MO-2983.

[66] I agree and adopt Adjudicator Corban's reasoning in this appeal. Accordingly, I accept that disclosure of the blank questionnaires may reveal the third party's method of gathering information to conduct its organizational reviews. Accordingly, I find that the questionnaires contain scientific information and thus met the first part of the three-part test.

[67] The third party submits that the remaining information contains scientific information. In support of its position, the third party argues that disclosure of the report and attached exhibits which contain the graphs would enable competitors to reconstruct the questionnaires. In particular, the third party submits that the titles contained on each graph reflect the actual question asked. I have carefully reviewed the questionnaires, along with the graphs, and am satisfied that the titles assigned to each graph does not, in most cases, mirror the exact questions contained in the questionnaire. In fact, I note that many of the questions in the questionnaires are complex and contain several parts which are summarized as a general topic in the graph's title.

[68] Having regard to the above, I find that only the actual questionnaires attached to the report contains "scientific information" within the meaning of that term as defined by this office.

[69] In my view, the remaining withheld information in the report does not contain any of the types of information identified in section 10(1), specifically, trade secret, scientific, technical, commercial or labour relations information. Given my finding, it is not necessary that I go on to consider whether the other parts of the three-part test have been met with respect to this information. However, I will go on to determine whether this information qualifies for exemption under section 11(f).

[70] I will now go on to determine whether the blank questionnaires attached to the report were "supplied in confidence".

## **Part 2: supplied in confidence**

### ***Supplied***

[71] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>26</sup>

[72] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.<sup>27</sup>

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<sup>26</sup> Order MO-1706.

<sup>27</sup> Orders PO-2020 and PO-2043.

[73] The third party prepared and provided the report to the town. Accordingly, I am satisfied that the record at issue was directly supplied to the town by the third party.

***In confidence***

[74] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>28</sup>

[75] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure<sup>29</sup>

[76] The town submits that the report was “provided in confidence and ultimately considered by Council in a closed meeting”. I have carefully reviewed the information before me and am satisfied that the third party has consistently treated the questionnaires in a manner that indicates its concern for confidentiality. In particular, I note that the blank questionnaires attached to the report are marked “Private and Confidential” and “Copyright” by the third party. Having regard to the representations of the parties and the record itself, I am satisfied that the third party supplied the blank questionnaires to the town with a reasonable and explicit expectation of confidentiality.

[77] As a result of my finding, the second part of the three-part test has been met.

**Part 3: harms**

[78] To meet part three of the test under section 10(1), the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must

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<sup>28</sup> Order PO-2020.

<sup>29</sup> Orders PO-2043, PO-2371 and PO-2497.



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>30</sup>

[79] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>31</sup>

[80] The town's representations state:

It is our understanding that the disclosure of this record would impact the Consultant's delivery of this product as their unique product as developed and copyrighted by them. Representations in this regard can be made by the Consultant directly as the [town] may not fully understand the financial or contractual impacts to this individual business now and in the future.

[81] In support of its position that disclosure of the report would significantly prejudice its competitive position or result in an undue loss, the third party argues that:

- the questionnaire constitutes a "proprietary interview diagnostic" tool used in organizational reviews, which if disclosed would allow competitors to use the questionnaire to conduct their own organizational reviews;
- the actual wording and sequence of the questions contained in the questionnaire would reveal the third party's methodology and proprietary information;
- disclosure of the graphs which present the interview findings along with the titles of the graphs would enable a competitor to reconstruct the questionnaires, even if actual copies of the questionnaires are not disclosed; and
- one of its competitive advantages in the marketplace is its ability to pinpoint dissatisfaction rates by breaking down the responses in a manner that is unique to its industry.

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<sup>30</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>31</sup> Order PO-2435.

***Sections 10(1)(a) and (c): prejudice to competitive position or undue loss/gain***

[82] The third party's main concern is that disclosure of the blank questionnaires attached to the report would significantly prejudice its competitive position or result in an undue loss. The third party is in the business of conducting organizational reviews for municipalities. To this end, it has developed a tool to extract and manage the information it gathers by conducting one-on-one interviews. In my view, disclosure of the blank questionnaires could reasonably result in the harm contemplated in sections 10(1)(a) and (c) as disclosure would enable a competitor to revise or revamp its own diagnostic tools. Accordingly, I uphold the town's decision to withhold the blank questionnaires.

[83] As I found that the remaining withheld information contained in the report did not meet the first part of the section 10(1) test, it is not necessary that I determine whether other parts of the section 10(1) have also been met. However, for the sake of completeness I will determine whether disclosure of the remaining withheld information contained in the report would lead to the harms contemplated in sections 10(1)(a) and/or (c).

[84] The third party argues that disclosure of the information contained in the graphs or titles of the graphs would enable a competitor to reconstruct the actual questionnaires. Though disclosure of the information contained in the graphs would reveal information about the types of questions asked during the interviews, I do not agree that disclosure of this information would reveal third party's methodology which guides the manner the third party extracts and manages the flow of information collected during the interviews.

[85] Earlier in this order, I found that, in most cases, information contained in the graphs did not mirror the exact questions contained in the questionnaires. I also found that in many instances, the questions contained in the questionnaire contained several parts which were presented under a single topic in the exhibits. Having regard to the above, I find that the third party has failed to provide sufficiently detailed and convincing evidence to demonstrate that disclosure of the remaining information at issue would lead to the harms contemplated in sections 10(a) and/or (c). However, I will now determine whether this information qualifies for exemption under section 11(f).

**ECONOMIC AND OTHER INTERESTS**

**D. Does the discretionary exemption at section 11(f) apply to the record or portions of the record?**

[86] Section 11(f) states:

A head may refuse to disclose a record that contains plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public

[87] 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>32</sup>

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

1. the record contains a plan or plans, and
2. the plan or plans relate to:
  - (i) the management of personnel, or
  - (ii) the administration of an institution, and
3. the plan or plans have not yet been put into operation or made public<sup>33</sup>

[89] 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>34</sup>

[90] The town argues that the report contains plans relating to its management of personnel and administration that have not yet been put into operation or made public. In support of its argument, the town states:

Although some of the facets of this plan have been implemented, others are still pending. As recently as February 2014, Council again revisited the next steps, some of which are subject to budgetary approval and consultations with bargaining unit/non-bargaining unit representatives/individuals.

Continued positive labour relations are imperative in the phased roll-out of the components of the record. Premature release may compromise these efforts.

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<sup>32</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>33</sup> Orders PO-2071 and PO-2536.

<sup>34</sup> Orders P-348 and PO-2536.

[91] The appellant argues that the report "is not a plan as noted in section 11(f) but rather a series of suggestions and recommendations". In support of his position, the appellant refers to the town's media release, dated December 21, 2011<sup>35</sup> which he argues states that the third party was retained to "assess and review". In support of his position, the appellant states:

Following the consultant's report the Town's CAO was to list town services and outline a process and a plan. The consultant reviews and the Town's CAO takes responsibility for "the plan".

[92] The relevant portions of the town's December 21, 2011 media release state:

Council has recognized that the Town is faced with increasing challenges to maintain existing service levels; meet new or increased service demands in the face of competing priorities and limited resources; reduce costs; and improve revenues; and, as a result, has authorized the Review in accordance with the provisions of section 224 of the *Municipal Act, 2001* to be undertaken in two phases.

In the first phase, the Town's Chief v Administrative Officer & Associates will be retaining the services of [the third party] to prepare for consideration by General Committee, recommendations regarding potential changes in the Corporation's organization structure and/or service delivery model to help promote increased efficiency and effectiveness in the delivery of municipal services.

The consultant's report will:

- Assess the current organizational structure and service delivery model in light of both the municipality's goals and service delivery requirements as well as sound organizational principles;
- Review and identify recommendations for change that would improve the organization structure and service delivery model, as required; and
- Review and identify whether employee numbers are appropriate in each department considering the size (population, geographic boundaries, etc.) of this municipality compared to other similar jurisdictions.

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<sup>35</sup> "Council Approves Organizational and Service ", Media Release, December 21, 2011.

Through the second phase, the Chief Administrative Officer will prepare a report for consideration by the General Committee that:

- Provides a detailed listing of the Town's services, including the classification of those services as either Mandated (Legislated) or Discretionary and the identification of Key Performance Indicators for each of the services identified;
- Outlines a clear process (such as the use of a Balanced Scorecard) to promote continuous organizational improvement in the future; and
- Outlines a plan for the Town to carry out productive reviews, over time, of all of its services to ensure all opportunities for efficiency, effectiveness, and cost savings are explored.

[93] At the end of the media release referred to above, the mayor made the following comment:

In addition to the valuable information to be gained through the Phase 1 Review, the primary goal of the Phase 2 work is to focus on the continued development of internal processes and procedures to help build greater accountability in the organization and to develop information that will help Council make even better decisions regarding how the Town's financial resources are expended,...

[94] The town takes the position that the third party's recommendations contained in the report, along with the remaining withheld information qualifies for exemption under section 11(f).

[95] I disagree and find that the remaining information at issue does not constitute a "plan" for the purposes of section 11(f). Previous decisions from this office have found that reports which contain recommendations or other information which form the basis of the development of a plan, is not itself a "plan" for the purposes of section 11(f).<sup>36</sup> In making my decision, I carefully reviewed the report including the portions that contain the third party's recommendations. I am not satisfied that these portions of the report contain a "formulated and especially detailed method by which a thing is to be done; a design or scheme". In fact, most of the report does not contain recommendations but rather contains information regarding the third party's summation and analysis of the information it gathered. The report also contains language which mirrors the town's

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<sup>36</sup> Orders P-348, P-603, P-989, PO-2780

media release which, in my view, demonstrates that the third party was not retained to formulate a "plan" which the town was to automatically implement. Instead, there appears to be a mutual understanding between the parties that the third party was retained to make recommendations and that the town's CAO is to prepare a report detailing the town's plan to improve the delivery of its services and organizational structure. In other words, the report contains recommendations which, if adopted and implemented by the town, may involve the formulation of a detailed plan.<sup>37</sup> However, the report by itself is not a plan or proposed plan for the purposes of section 11(f).

[96] For the reasons stated above, I find that the withheld portions of the report do not constitute a "plan" under section 11(f). As the first part of the section 11(f) has not been met, I will order the town to disclose the portions of the report not found exempt under the mandatory exemptions in sections 10(1) and 14(1) of the *Act*.

## **PUBLIC INTEREST OVERRIDE**

### **E. Does the public interest override at section 16 apply to the portions of the record found exempt?**

[97] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[98] For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[99] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>38</sup>

[100] In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.<sup>39</sup> Previous orders

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<sup>37</sup> Order P-348.

<sup>38</sup> Order P-244.

<sup>39</sup> Orders P-984 and PO-2607.

have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.<sup>40</sup>

[101] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.<sup>41</sup>

[102] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

[103] The appellant argues that the report should be disclosed in its entirety as there is a compelling public interest in its disclosure. The town does not dispute that the report generated public interest. In fact, the town submits that it posted an employee update on its website and issued numerous media releases in an effort to inform its taxpayers about the organization review and its results. The third party’s representations did not specifically address this issue.

[104] In this order, I found that the mandatory exemptions in sections 10(1) and 14(1) apply to some of the information contained in the report. I found that disclosure of the information contained in one of the graphs relating to employees’ satisfaction rates with their supervisors would constitute an unjustified invasion of personal privacy under section 14(1) of the *Act*. I also found that the blank questionnaires attached to the report qualified for exemption under section 10(1). In my view, the information I found exempt under the *Act* does not respond to the public interest raised by the appellant.<sup>42</sup>

[105] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.<sup>43</sup>

[106] Even if I was persuaded that there was a compelling public interest in the circumstance of this appeal, I would not be satisfied that this interest clearly outweighs the purpose of the personal privacy or third party information exemptions in the *Act*. In my view, the interest raised by the appellant does not clearly outweigh the proprietary interests raised by the third party or the personal privacy interests of the affected individuals.

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<sup>40</sup> Orders P-984 and PO-2556.

<sup>41</sup> Order P-984.

<sup>42</sup> Orders MO-1994 and PO-2607.

<sup>43</sup> Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

[107] Having regard to the above, I find that the public interest override at section 16 does not apply to the information I found exempt under sections 10(1) and 14(1) of the *Act*.

**ORDER:**

1. I uphold the town's decision to withhold the information I found exempt under sections 10(1) and 14(1) of the *Act* (graph in Exhibit 1.19 and questionnaires at Appendix B and C). For the sake of clarity, in the copy of Exhibit 1.19 enclosed with the town's order, I have highlighted the portions of the exhibit which **should not** be disclosed to the appellant.
2. I order the town to disclose the balance of the record to the appellant by **October 22, 2014** but not before **October 17, 2014**.
3. In order to verify compliance with order provision 1, I reserve the right to require a copy of the record disclosed by the town to be provided to me.

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Jennifer James  
Adjudicator

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September 16, 2014