

Information and Privacy Commissioner,
Ontario, Canada



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

INTERIM ORDER MO-3166-I

Appeal MA14-99

Municipality of Kincardine

March 4, 2015

Summary: The appellant sought access to a consultant's report prepared for the municipality concerning the possible sale of the municipally-owned telecommunications company. Access was denied under sections 6(1)(b), 7(1), 10(1) and 11. The appellant relied upon the public interest override provision in section 16. In this order, the adjudicator upholds the municipality's decision to apply section 7(1) to the majority of the information in the record. The adjudicator also found a portion of the record to be "a valuation report" within the meaning of the section 7(2)(c) exception to the section 7(1) exemption and was ordered disclosed. The application of sections 6(1)(b), 10(1) and 11 to the valuation portion of the record were not upheld. In addition, section 16 was found to have no application. Finally, in the absence of any representations concerning the municipality's exercise of discretion, it is ordered to do so and provide a new decision letter to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 6(1)(b), 7(1), 7(2)(c), 10(1)(a) and (c), 11(a), (c) and (d) and 16.

OVERVIEW:

[1] The Municipality of Kincardine (the municipality) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a consultant's report regarding the valuation of a local telecommunications company. The municipality located the responsive record and denied access to it, claiming the application of the following exemptions in the *Act*:

- section 6(1)(b) (closed meeting)
- section 7(1) (advice or recommendations)
- sections 10(1)(a) and (c) (third party information)
- sections 11(a), (c) and (d) (valuable government information)

[2] The requester, now the appellant, appealed the municipality's decision to deny access to the record. During the mediation stage of the appeal process, the appellant raised the possible application of the public interest override provision in section 16 of the *Act*. In addition, the mediator asked the municipality if it had considered the possible application of the mandatory exception to the section 7(1) exemption in section 7(2)(c), which addresses "a report by a valuator". Accordingly, these issues were added to the scope of the appeal.

[3] As mediation was not successful in resolving the appeal, the file was moved to the adjudication stage of the process, where an adjudicator conducts an inquiry under the *Act*. I sought and received the representations of the municipality and the two consulting firms that prepared the record (the affected parties), initially. I then provided the appellant with the non-confidential portions of the representations of the municipality and the affected parties and received his representations in response. Finally, I solicited and received additional representations by way of reply from counsel for the municipality and the affected parties.

[4] In this decision, I uphold the municipality's decision to deny access to the record, in part, on the basis that portions of it are subject to exemption under section 7(1) of the *Act*. The remaining portions of the record are not exempt from disclosure as they do not contain "advice or recommendations" within the meaning of section 7(1) or consist of information that falls within the ambit of one of the exceptions to the section 7(1) exemption listed in section 7(2). I further find that sections 6(1)(b), 10(1)(a) and (c) and 11(a), (c) and (d) have no application to the valuation portion of the record at issue, at pages 13 to 16. I also order that the municipality exercise its discretion with respect to the application of section 7(1) to the record.

RECORDS:

[5] The sole record at issue in this appeal is a document entitled "Assessment Report – Bruce Telecom's Positioning, Valuation & Strategic Alternatives".

ISSUES:

- A. Does the discretionary exemption at section 6(1)(b) apply to the record?
- B. Does the discretionary exemption at section 7(1) apply to the record? Do any of the exceptions to the section 7(1) exemption in section 7(2) apply to the record?

- C. Does the mandatory exemption at section 10(1)(a) and/or (c) apply to the record?
- D. Does the discretionary exemption at section 11(a), (c) and (d) apply to the record?
- E. Is there a compelling public interest in the disclosure of the records under section 16 that clearly outweighs the purpose of the section 7(1), 10 and 11 exemptions?
- F. Did the municipality exercise its discretion under sections 6(1)(b), 7(1) and 11? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A. Does the discretionary exemption at section 6(1)(b) apply to the record?

[6] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[7] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting¹

¹ Orders M-64, M-102 and MO-1248.

[8] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;² and
- “substance” generally means more than just the subject of the meeting.³

[9] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.⁴

[10] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.⁵ In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?⁶

[11] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution’s *in camera* meeting, not merely the subject of the deliberations.⁷

[12] I will review each part of this three-part test to determine whether the records qualify for exemption under this section.

Part 1 - a council, board, commission or other body, or a committee of one of them, held a meeting

[13] The municipality indicates that council held a closed special meeting on July 29, 2013 to discuss the contents of the record at issue in this appeal. Based upon my review of the record and all of the circumstances, I am satisfied that the meeting took place, and that Part 1 of the three-part test under section 6(1)(b) has been met.

² Order M-184.

³ Orders M-703 and MO-1344.

⁴ Order MO-1344.

⁵ Order M-102.

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁷ Orders MO-1344, MO-2389 and MO-2499-I.

Part 2 - a statute authorizes the holding of the meeting in the absence of the public

[14] The municipality submits that the July 29, 2013 meeting at which Council discussed the record at issue was closed to the public in accordance with the provisions of section 239(2)(c) of the *Municipal Act, 2001*, which reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

a proposed or pending acquisition or disposition of land by the municipality or local board;

[15] With its representations, the municipality provided me with excerpts from its "Formation By-law" No. 2006-266 which established Bruce Telecom as a Municipal Service Board to operate the municipality's telecommunications services, as well as a later By-law No. 2014-010 which enabled the municipality to enter into an Asset Purchase Agreement for the sale of Bruce Telecom. It also provided me with copies of a resolution of the Council dated January 22, 2014 in which it approved the sale of Bruce Telecom.

[16] Following the conclusion of my inquiry, the appellant provided me with a copy of a Closed Meeting Investigator's Report which was submitted to the municipality on July 22, 2014. The Investigator's Report was prepared by an outside consulting firm and was begun pursuant to a complaint made to the municipality under section 239.2 of the *Municipal Act*. The complaint alleged that certain closed meetings held between February 6, 2013 and January 20, 2014 were "in contravention of the open meetings provision of the *Municipal Act, 2001*, as amended by Bill 130."

[17] Section 239 of the *Municipal Act* mandates that all meetings of councils or local boards be open to the public unless they satisfy certain exceptions set out in section 239(2). As indicated above, the municipality relies upon section 239(2)(c) which enables a council or local board to go *in camera* if the subject matter being considered is "a proposed or pending acquisition or disposition of land by the municipality or local board. The Investigation Report carefully reviews the events surrounding the closed July 29, 2013 Council meeting and evaluates the municipality's claim that the subject matter of the meetings was "the security of the property of the municipality", as described in section 239(a), as well as section 239(c), as was argued in this appeal.

[18] The authors of the Investigation Report dismissed the municipality's arguments based on its interpretation of the term "security of the property", adopting a "plain meaning" definition and interpretation set out by this office in Order MO-2468 instead. As a result, the authors of the Investigation Report found that the municipality was

unable to rely on the exception in section 239(a) as the discussions did not relate to the physical protection of a municipal asset from loss or damage.

[19] The Investigation Report's drafters go on to address the possible application of section 239(c), though the municipality did not originally rely upon it. The report concludes with a consideration of the possible application of that exception:

The Municipality was not selling only the land owned by the Municipality as the sole shareholder of Bruce Telecom. It was selling the entire ongoing operation of a municipal asset.

We do not believe that the *Municipal Act* exemption dealing with the acquisition or disposition of land should be used so broadly as to encompass closed session discussions of an entire municipal operation, merely because that operation is situated on lands. If that were the case, a municipality or local board could discuss, behind closed doors, the sale of an entire municipal service (for example, all community centres) without the benefit of public disclosure or discussion, merely because the service operates on lands owned by the municipality or local board.

This is clearly not the intent of the *Municipal Act*. Had the Legislature intended to shield the sale of a municipal operation from public discussion or disclosure, it would have provided for that explicitly in the legislation.

We have reviewed the record of all of the closed sessions of Council throughout the period February 6, 2013 to January 20, 2014. We conclude that none of the discussions would permit the meeting(s) to have been closed as an exemption to the open meetings provisions of the Municipal Act under section 239(2)(c) dealing with the acquisition or disposition of land by a municipality or local board. [emphasis in original]

[20] I adopt the rationale of the authors of the Investigation Report with respect to the application of the exception in section 239(2)(c). I find that section 239(2)(c) of the *Municipal Act* cannot be relied upon to operate as an exception to the general provision requiring that all meetings of a municipal council be held in public. I agree with the investigator's findings that the subject matter of the discussions of the closed meeting of council did not relate to "a proposed or pending acquisition or disposition of land by the municipality" within the meaning of section 239(2)(c). Because I have determined that section 239(2)(c) of the *Municipal Act* does not authorize the holding of the meeting in the absence of the public, the second part of the test under section 6(1)(b) has not been satisfied. Since all three parts of the test must be met in order for the exemption to apply, I find that section 6(1)(b) has no application to the records at issue.

Issue B. Does the discretionary exemption at section 7(1) apply to the record? Do any of the exceptions to the section 7(1) exemption in section 7(2) apply to the record?

General principles

[21] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[22] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternative courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made. "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁸ "Advice" involves an evaluative analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[23] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁹

[24] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁰

⁸ See above at paras. 26 and 47.

⁹ Order P-1054.

¹⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

[25] Section 7(1) covers earlier drafts of material containing advice or recommendations. This is so even if the content of a draft is not included in the final version. The advice or recommendations contained in draft policy papers form a part of the deliberative process leading to a final decision and are protected by s. 7(1).¹¹

[26] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information¹²
- a supervisor's direction to staff on how to conduct an investigation¹³
- information prepared for public dissemination¹⁴

Analysis and Findings

Section 7(1)

[27] The municipality submits that the record is exempt, in its entirety, because it contains the consultant's advice and recommendations to the municipality. It submits that this advice and recommendations were:

. . . informed by their respective expertise and professional assessment of the material risks associated with Bruce Telecom's financial outlook and operating issues that would affect the municipality, and most importantly, contains the consultants' recommendations on the preferred course of action, alternatives and strategies available to the Board of Directors of Bruce Telecom and (and to the municipality).

[28] It goes on to add that:

. . . the advice and recommendations . . . is not 'objective information' since the Record is based upon the consultants' specific and detailed analysis of Bruce Telecom's unique situation using tailored benchmarks, assessment procedures and valuation techniques, all of which were applied in light of certain assumptions made by the consultants, instead of being mere observations gathered by them.

¹¹ *John Doe v. Ontario (Finance)*, cited above, at paras. 50-51.

¹² Order PO-3315.

¹³ Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹⁴ Order PO-2677.

[29] The appellant appears to take issue with the tendering process which resulted in the retaining of the consultants' services and alleges that they are in a conflict of interest situation as they were also retained by the municipality to find it a buyer for Bruce Telecom.

[30] The record is a complex document which provides detailed financial information about Bruce Telecom and its competitors and describes future trends and anticipated technological events which could impact the financial viability of the company. The record provides a possible blueprint for continuing the operation of Bruce Telecom and provides a very specific analysis of the pros and cons for each of the many options it examines. In my view, taken as a whole, the record represents a detailed assessment of the viability of Bruce Telecom into the future, taking into account a number of variables and the strengths and weaknesses of its competitors.

[31] The record also contains several very specific recommendations for the municipality to consider in determining the future of its involvement in Bruce Telecom. In my view, the record in its entirety represents a set of guiding principles and detailed analysis of the continued operation of Bruce Telecom from a number of perspectives. It describes in great detail the options available to the municipality and provides advice and recommendations on several suggested courses of action for it to take.

[32] As a result, I find that the record at issue qualifies for exemption under the discretionary exemption in section 7(1) as it represents advice or recommendations within the meaning of the section. Because of the manner in which the information is presented in the report, I find that the disclosure of any part of it would reveal the advice or recommendations being put forward in the document. Various options and courses of action are evaluated throughout the report and their disclosure could reasonably be expected to reveal the actual advice which is given in the report. For this reason, I find that it is not practicable to attempt to sever the exempt information from any non-exempt information which it may contain.

Section 7(2)(c)

[33] The appellant relies upon the mandatory exception to the section 7(1) exemption found in section 7(2)(c), which reads:

Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains,

a report by a valuator;

[34] The appellant points out that the report at issue in this appeal is entitled "Assessment Report-Bruce Telecom's Positioning, **Valuation**, and Strategic Alternatives." [appellant's emphasis] He submits that because the report contains "a

range of values”, the record qualifies as a “valuation report” for the purposes of section 7(2)(c).

[35] The municipality submits that section 7(2)(c) has no application because the report which is the subject of the appeal is not a “report by a valuator” for the purposes of the *Act*. It points out that the authors of the report are not “valuators”, instead the municipality submits that each of these individuals are “a professional advisor equipped with specialized knowledge and expertise which [they use] to facilitate detailed and tailored advice and recommendations, including the Information in the Record.” The municipality also refers to the professional qualifications of the drafters of the record to demonstrate that they are not simply valuers, but bring additional skills to the task.

[36] In its reply representations, the municipality explains that the “consultants’ mandate was to assess the material risks associated with Bruce Telecom’s financial outlook and operating issues that would affect the municipality” and to “make recommendations on the preferred courses of action.” The municipality also disputes the appellant’s allegation that the consultants were retained to assist in locating a buyer for Bruce Telecom.

[37] Examining the record itself, it is clearly a document which goes far beyond a simple valuation of Bruce Telecom. Instead, the record delves deeply into the current and future earnings potential of Bruce Telecom and makes detailed and thorough suggestions as to its value as an ongoing entity, as well as its place in comparison with other players in its market. I find that the information contained in the record is sufficiently detailed and wide-ranging to remove it from what would be considered to be a “report of a valuator” within the meaning of section 7(2)(c). As a result, I conclude that the mandatory exception in section 7(2)(c) has no application to the majority of the information contained in the record.

[38] However, at pages 13 to 16, the authors of the report set out what they describe as their “Valuation Framework” which describes the parameters set around their valuation work. In addition, several valuations based on different valuation methodologies are put forward in the report. These valuations are based on “comparable publicly traded companies in Canada and the United States” and a “discounted cash flow” method of valuation. The report’s authors then give their opinion as to the actual valuation of Bruce Telecom on pages 15 and 16.

[39] I find that the information in pages 13 to 16 relating exclusively to the valuation of Bruce Telecom falls within the ambit of the mandatory exception in section 7(2)(c). This portion of the report is clearly a “report of a valuator”, regardless of the fact that other portions of the report examine the financial situation of Bruce Telecom in greater detail and in a very different manner. I conclude that while the majority of the record is exempt under section 7(1), the valuation portion set out in pages 13 to 16 is not exempt because it falls within the exception in section 7(2)(c).

[40] I will now go on to determine whether the valuation information at pages 13 to 16 qualifies for exemption under sections 10 and 11.

Issue C. Does the mandatory exemption at section 10(1)(a) and/or (c) apply to the valuation information at pages 13 to 16 of the record?

[41] The municipality and the consultants submit that all of the report at issue in this appeal, including the valuation information at pages 13 to 16, qualifies under the mandatory exemption in section 10(1)(a) and (c). They argue that the information satisfies the definition of "trade secret", as it relates to the affected party consultants and constitutes the "commercial" or "financial" information of Bruce Telecom. These parties claim that the disclosure of the report will give rise to the types of harm contemplated by section 10(1)(a) and (c), which 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

[42] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹⁵ 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.¹⁶

[43] For section 10(1) to apply, the municipality and/or the consultants who are resisting disclosure must satisfy each part of the following three-part test:

¹⁵ *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.*).

¹⁶ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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

[44] The types of information referred to by the municipality and the consultants that are listed in section 10(1) have been discussed in prior orders:

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.¹⁷ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁸

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.¹⁹

Trade secret means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

- (i) is, or may be used in a trade or business,
 - (ii) is not generally known in that trade or business,
 - (iii) has economic value from not being generally known,
- and

¹⁷ Order PO-2010.

¹⁸ Order P-1621.

¹⁹ Order PO-2010.

- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.²⁰

[45] Clearly, the valuation information contained in pages 13 to 16 of the report qualify as “financial” and “commercial” information relating to Bruce Telecom, as contemplated by section 10(1). The information speaks directly to the value of the business and its profitability. As a result, I have no difficulty in determining that it qualifies as Bruce Telecom’s financial and commercial information, thereby satisfying the first part of the test under section 10(1).

[46] The affected party consultants argue that the report also contains information that satisfies the definition of “trade secret” under section 10(1). They submit that the information:

. . . represents methods, techniques, processes or information embodied in [the affected parties’] consulting reports/tools which are used in [its] consulting business. [The affected parties] services a niche sector of the telecommunications industry and has a competitive advantage over small consulting firms which do not have the same level of specialized knowledge as [they do]. As well, the perspective and approach utilized by [the affected parties] is not generally known to the larger, generalist consulting firms which are not able to provide the same tailored advice that [they] provide, on an affordable and cost-effective basis. As well, many of [their] competitors do not fully understand which metrics and tools are the most effective to assess telecommunications companies like BT. The Information has economic value for the above reasons and [the affected party consultants] reasonably seek to maintain confidentiality and secrecy of the Information by providing the Information in a confidential report addressed to the Municipality and presenting its recommendations and advice in a closed meeting.

[47] The affected party consultants also suggest that the information in the records qualifies as their “commercial information” as it relates to their “business of selling [their] consulting services and its trade”. However, I note that the only information remaining at issue is the valuation of Bruce Telecom contained at pages 13 to 16. I cannot agree that this represents “commercial information” about the affected parties as it relates solely to Bruce Telecom’s business and the value placed upon it.

[48] I also find that the valuation information in pages 13 to 16 of the report cannot properly be characterized as a “trade secret” belonging to the affected party consultants. While the format of the discussion and the framework employed in

²⁰ Order PO-2010.

performing the valuation belong to the affected parties, the information being discussed remains that of Bruce Telecom. Further, I find that the information at pages 13 to 16 of the report cannot be described as a “formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism”. On its face, this portion of the report simply does not include information of this sort which relates to the processes or techniques employed by the affected party consultants in carrying out their work on behalf of the municipality. I conclude that the information remaining at issue relating solely to the valuation of Bruce Telecom cannot be described as a “trade secret” belonging to the affected party consultants.

Part 2: supplied in confidence

Supplied

[49] 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.²¹ 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.²²

[50] Clearly, the information in pages 13 to 16 of the report that relates solely to the valuation of Bruce Telecom was supplied by the affected party consultants to the municipality as part of its mandate to provide their services in assisting the municipality to determine the future of its involvement in Bruce Telecom.

In confidence

[51] 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.²³

[52] 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

²¹ Order MO-1706.

²² Orders PO-2020 and PO-2043.

²³ Order PO-2020.

- 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 disclosure²⁴

[53] The municipality and affected parties submitted extensive representations on the circumstances surrounding the provision of the report and their expectations with respect to its confidentiality. The document was marked as “Strictly Confidential” and it was intended to be discussed only at an *in camera* meeting of Council. I am satisfied that the record, including the valuation information that remains at issue, was provided to the municipality by the affected parties with a reasonably held expectation that it would be treated in a confidential fashion. As a result, I find that the second part of the test under section 10(1) has been satisfied.

Part 3: harms

[54] The party resisting disclosure 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.²⁵

[55] 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*.²⁶

Section 10(1)(a): prejudice to competitive position

[56] I note that by Resolution #01/22/14-05, the municipality’s Council voted to sell the assets of Bruce Telecom to a purchaser for an agreed-upon, publicly-available price. I understand that the sale proceeded and that the municipality no longer owns any portion of Bruce Telecom. It has provided me, however, with arguments to the effect that harm may accrue to the purchaser of Bruce Telecom and to the consultants if the information in the report was to be disclosed.

²⁴ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

²⁵ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²⁶ Order PO-2435.

[57] In light of the fact that the municipality no longer has any interest in Bruce Telecom, I conclude that there can be no prejudice to the competitive position of that company should the record be disclosed. Bruce Telecom now belongs to another entity and any information about its possible valuation is no longer current. For this reason, I find that section 10(1)(a) has no application to the remaining information at issue.

[58] I have also found that the second part of the test under section 10(1) has not been established with respect to any information about the affected party consultants which may appear in the valuation portion of the records on pages 13 to 16. As all three parts of the test under section 10(1) must be satisfied, I need not consider whether the harm alleged to the competitive position of the affected party consultants could reasonably be expected to result from disclosure of this limited information.

Section 10(1)(c): undue loss or gain

[59] Again, the municipality argues that the affected party consultants will be harmed as a result of the disclosure of the information in the report as their competitors will gain an advantage which will be used to their detriment. For the reasons described above, I do not accept these arguments, particularly in light of the fact that the information remaining at issue consists solely of the valuation information at pages 13 to 16.

[60] Similarly, the interests of Bruce Telecom and its purchaser cannot reasonably be adversely affected by the disclosure of the valuation information because the purchase is completed. I find that any information as to the value of the company is now moot because the sale price agreed upon has been made public and its value is now known to the marketplace.

[61] For these reasons, I find that the third part of the test under section 10(1) does not apply to the valuation information in pages 13 to 16. As all three parts of the test under section 10(1) must be met, I find that the exemption does not apply to this information.

Issue D: Does the discretionary exemption at section 11(a), (c) and (d) apply to the record?

[62] The municipality claims that the record at issue is exempt under the discretionary exemptions in sections 11(a), (c) and (d), 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;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[63] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report)²⁷ explains the rationale for including a “valuable government information” exemption in the *Act*:

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[64] For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient.²⁸

[65] 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 11.²⁹ Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.³⁰

Section 11(a): information that belongs to government

[66] 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;

²⁷ Toronto: Queen’s Printer, 1980.

²⁸ *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

²⁹ Orders MO-1947 and MO-2363.

³⁰ Order MO-2363.

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

Part 1: type of information

[67] I have found above in my discussion of section 10(1) that the valuation information at issue on pages 13 to 16 qualifies both “financial” and “commercial” information. I adopt those findings for the purposes of my analysis under section 11.

Part 2: belongs to

[68] The term “belongs to” refers to “ownership” by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[69] Examples of the latter type of information may include trade secrets, business-to-business mailing lists,³¹ 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 to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others.³²

[70] The municipality’s representations in this regard focus on its interest in maintaining the confidentiality of the information in the report until such time as the sale of Bruce Telecom has been completed. It argues that the information “belongs to” it, it is obliged to protect its disclosure “from misappropriation from another party”.

[71] I find that since the sale of Bruce Telecom has been completed, concerns about confidentiality of information pertaining to it on the part of the municipality are substantially diminished. As it no longer owns Bruce Telecom, I must conclude that its interest in protecting any commercial and financial information pertaining to it has lost its urgency. For this reason, I find that the discretionary exemption in section 11(a)

³¹ Order P-636.

³² 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.

does not apply to the remaining information, consisting solely of the valuation information at pages 13 to 16 of the report.

Section 11(c) and (d): prejudice to economic interests/injurious to financial interests

[72] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.³³

[73] These exemptions are arguably broader than section 11(a) in that they do 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 exemptions require only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position or be injurious to its financial interests.³⁴

[74] Again, the municipality raises concerns about how the disclosure of the information in the report could reasonably be expected to "affect the proceeds to be obtained by the Municipality on a sale of BT's assets." I note that the sale of Bruce Telecom has now been completed and, as a result, those concerns are no longer valid.

[75] In its discussion of section 11(d) in its representations, the municipality also argues that consultants may be less likely to "engage themselves" with the municipality as a result of the disclosure of the information in the report. I find that this harm is speculative and that the municipality did not provide sufficiently detailed and convincing evidence to establish this harm. As a result, I find that section 11(d) has no application to the valuation information contained in the record at issue in this appeal.

[76] To summarize, I find that sections 11(a), (c) and (d) have no application to the valuation information contained in pages 13 to 16 of the record.

Issue E: Is there a compelling public interest in the disclosure of the records under section 16 that clearly outweighs the purpose of the section 7(1) exemption?

[77] I have found above that the discretionary exemption in section 7(1) applies to the majority of the report at issue in this appeal, with the exception of the valuation information contained in pages 13 to 16. The appellant argues that there exists a

³³ Orders P-1190 and MO-2233.

³⁴ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

compelling public interest in the disclosure of the information which I have found to be exempt under section 7(1) within the meaning of section 16 of the *Act*, which reads:

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. [my emphasis]

[78] 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.

[79] 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.³⁵

Compelling public interest

[80] 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.³⁶ Previous orders 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.³⁷

[81] A public interest does not exist where the interests being advanced are essentially private in nature.³⁸ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³⁹ The word "compelling" has been defined in previous orders as "rousing strong interest or attention".⁴⁰

³⁵ Order P-244.

³⁶ Orders P-984 and PO-2607.

³⁷ Orders P-984 and PO-2556.

³⁸ Orders P-12, P-347 and P-1439.

³⁹ Order MO-1564.

⁴⁰ Order P-984.

[82] Any public interest in *non*-disclosure that may exist also must be considered.⁴¹ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".⁴²

[83] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation⁴³
- the integrity of the criminal justice system has been called into question⁴⁴
- public safety issues relating to the operation of nuclear facilities have been raised⁴⁵
- disclosure would shed light on the safe operation of petrochemical facilities⁴⁶ or the province's ability to prepare for a nuclear emergency⁴⁷
- the records contain information about contributions to municipal election campaigns⁴⁸

[84] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations⁴⁹
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁵⁰
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁵¹

⁴¹ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

⁴² Orders PO-2072-F, PO-2098-R and PO-3197.

⁴³ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

⁴⁴ Order PO-1779.

⁴⁵ Order P-1190, 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.), Order PO-1805.

⁴⁶ Order P-1175.

⁴⁷ Order P-901.

⁴⁸ *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

⁴⁹ Orders P-123/124, P-391 and M-539.

⁵⁰ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁵¹ Orders M-249 and M-317.

- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁵²
- the records do not respond to the applicable public interest raised by appellant⁵³

[85] The appellant raises a number of serious concerns with the sale of Bruce Telecom by the municipality, including the lack of transparency around the decision and what he views to be an inordinately low price obtained by the municipality. He has also provided me with an article published in a local newspaper raising questions about the propriety of the sale at the time of its announcement.

[86] The municipality argues that there is a compelling public interest in the non-disclosure of the information in the records. It argues that disclosure would be detrimental to Bruce Telecom:

. . . as it would create employee and customer uncertainty that could be capitalized by competitors, potential acquirers and others. This would be particularly concerning whether or not the sale process is completed, since competitors, and other future purchasers could take advantage of having been exposed to confidential strategic advice provided by the Consultants and other confidential business information about BT.

[87] I find that there is a compelling public interest in the disclosure of the information contained in those portions of the records which are exempt under section 7(1). The report explains in a very detailed fashion the pros and cons behind the decision to sell Bruce Telecom. The appellant has tendered evidence to demonstrate that there has been local interest in this process and the resulting sale. In my view, there exists a sufficiently compelling public interest in the subject matter of the records and that the first part of the test under section 16 has been satisfied.

Purpose of the exemption

[88] 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. 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.⁵⁴

⁵² Order P-613.

⁵³ Orders MO-1994 and PO-2607.

⁵⁴ 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.).

[89] The purpose behind the section 7(1) exemption is to preserve an effective and neutral public service by ensuring that people employed or retained by institutions are able to freely and frankly advise and make recommendations within the deliberative process of government decision-making and policy-making.⁵⁵ In the present case, the consultants retained by the municipality completed a very thorough and complex analysis of all of the factors that were relevant in deciding upon the financial consequences of a sale of Bruce Telecom by the municipality. The consultants conducted a very detailed examination of the profitability of Bruce Telecom and its competitors and arrived at certain recommendations for council to make regarding the disposition. In my view, the report was written with a view to provide council with a full and frank examination of the pros and cons of selling off Bruce Telecom. The information provided to council by the consultants that is contained in the report was clearly very persuasive and very helpful in assisting council to make the decision to sell.

[90] The appellant has not made any submissions with respect to this aspect of the analysis under section 16.

[91] In my view, the municipality has established that the public interest that exists in the disclosure of the majority of the record at issue does not outweigh the purpose of the section 7(1) exemption. I make this finding bearing in mind that the appellant will obtain access to the valuation information contained in pages 13 to 16 of the report which will satisfy to a great extent the public interest that exists in the disclosure of the details behind the decision to sell Bruce Telecom. As a result, I find that the public interest override provision in section 16 has no application to those portions of the record which I have found to be exempt under section 7(1).

Issue F: Did the municipality exercise its discretion under section 7(1)? If so, should this office uphold the exercise of discretion?

[92] The section 7(1) exemption is discretionary, and 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.

[93] 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.

⁵⁵ *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.

[94] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁵⁶ This office may not, however, substitute its own discretion for that of the institution.⁵⁷

Relevant considerations

[95] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁵⁸

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

⁵⁶ Order MO-1573.

⁵⁷ Section 43(2).

⁵⁸ Orders P-344 and MO-1573.

- the historic practice of the institution with respect to similar information.

[96] In the present appeal, the municipality has not provided me with any representations regarding the manner in which it exercised its discretion to deny access to the record at issue in this appeal. As I have not been provided with any basis upon which to uphold its decision to deny access to the record, I will require that the municipality exercise its discretion and provide me with representations as to the reasons for that decision. I will remain seized of this matter to complete my inquiry upon receipt of those representations. The sale of Bruce Telecom has now been completed and the valuation information in the record is ordered disclosed as a result of this order. For this reason, the municipality may wish to reconsider its decision not to disclose the record, in its entirety, as it is solely competent to do.

INTERIM ORDER:

1. I uphold the municipality's decision to deny access to the record with the exception of the valuation information at pages 13 to 16 of the report.
2. I order the municipality to disclose pages 13 to 16 of the report to the appellant by providing him with a copy by no later than **April 13, 2015** but not before **April 8, 2015**.
3. I order the municipality to exercise its discretion to apply section 7(1) of the *Act* to withhold the remaining portions of the record in accordance with the discussion of that issue above and to provide representations to me detailing the result of its exercise of discretion, in writing, by **April 8, 2015**. If the municipality continues to withhold all or part of the information that remains at issue, I order it to provide in its representations an explanation of the basis for exercising its discretion to do so.
4. If the municipality decides, after exercising its discretion, to disclose additional information to the appellant, it must issue a new access decision in accordance with sections 19, 20, 21, and 22 of the *Act*, treating the date of its decision to disclose the information as the date of the request.
5. I may share the municipality's representations on its exercise of discretion with the appellant unless they meet the confidentiality criteria identified in *Practice Direction Number 7*. If the municipality believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.

6. I remain seized of this appeal pending the final determination of the municipality's exercise of discretion or any related issues that may arise.

Original Signed by: _____
Donald Hale
Adjudicator

_____ March 4, 2015