Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3362-F

Appeal MA14-319

The Corporation of the City of Cambridge

September 30, 2016

Summary: The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* for records relating to the city's purchase and restoration of a historic building. In Order MO-3273-I, I disallowed the city's mandatory and discretionary exemption claims and ordered the city to disclose the records but for a small portion which I found may contain "personal information". The city was also ordered to conduct further searches for responsive records. This order deals with the city's further search efforts and decision to withhold the appraisal report located in its further search. In this order, I find that the city's further search for responsive records is reasonable. However, I order the city to disclose the appraisal report to the appellant but for a small portion which may contain "personal information" on the basis that the mandatory exemption at section 10(1) and discretionary exemptions at section 7(1) and 11 do not apply.

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

Orders and Investigation Reports Considered: MO-1228, MO-3166-I, MO-3193-F and PO-1887-I.

OVERVIEW:

[1] The appellant submitted a request to the Corporation of the City of Cambridge (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the city's purchase of the Old Post Office building, including records regarding the construction of a restaurant in the new library to be built at the site.

[2] The city conducted a search for responsive records and notified an architectural firm and decided to grant the appellant partial access to the records. The city claimed that the withheld portions of the records qualify for exemption under the third party information exemption under section 10(1). The appellant appealed the city's decision to this office and a mediator was assigned to the file. During mediation, the city issued a second access decision and granted the appellant further access to the records. However, the appellant continued to seek access to the withheld information and raised questions about the reasonableness of the city's search for responsive records.

[3] The file was subsequently transferred to adjudication and I was assigned to conduct an inquiry. In Order MO-3273-I, I ordered the city to conduct further searches for records which respond to the appellant's questions about the proposed restaurant and appraised value of the site. I also found that the third party information exemption at section 10(1) did not apply to the records and ordered the city to disclose the portions of the records which did not appear to contain the "personal information" of identifiable individuals. The city was ordered to disclose the following records to the appellant:

- An executed Standard Form of Contract for Architect Services, dated March 25, 2014;
- Old Post Office Building Library & Restaurant Request for Proposal for Architectural/ Consultant Services, February 2014 but for portions on pages 42 to 48 which may contain "personal information"; and
- Architectural/ Consultant's fee proposal letter to the city, dated March 12, 2014.

[4] In compliance with order provision 2 of Interim Order MO-3273-I, the city conducted a further search for responsive records and located no additional records responding to the appellant's request for records relating to the proposed restaurant. However, the city produced a copy of a 2011 appraisal report prepared by a real estate appraisal company. The city subsequently issued a decision letter to the appellant withholding a copy of the appraisal report claiming that it qualifies for exemption under section 7(1)(advice or recommendations), 10(1) (third party information) and 11 (economic and other interest).

[5] I invited representations from the parties and received representations from the appellant, the city and the real estate appraisal company (the third party). The parties' representations were shared in accordance to this office's confidentiality criteria.

[6] In this final order, I find that the city's further search for records responsive to the appellant's questions about the proposed restaurant and appraised value of the site was reasonable. However, the city is ordered to disclose the portions of the appraisal report which do not contain "personal information", to the appellant on the basis that the mandatory exemption in section 10(1) and discretionary exemptions at sections 7(1), 11(a), (c) and (d) do not apply.

RECORDS:

[7] The sole record at issue is an Appraisal Report prepared by a real estate appraisal company, dated October 20, 2011 (65 pages).

Note: Pages 54 to 56 of the Appraisal Report contain the resumes/ professional profiles of the two individuals who prepared the report. This portion of the report contains information describing their education and work history along with their names. This type of information appears to constitute the "personal information" of identifiable individuals within the meaning of section 2(1) and as a result may qualify under the mandatory personal privacy exemption under section 14(1). I removed education and work history information from the scope of this appeal in Order MO-3273-I as I was satisfied that the appellant's request did not seek access to this information. I have removed pages 54-56 from the scope of this appeal on the same basis.

ISSUES:

A. Was the city's further search for responsive records reasonable?

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 third party information exemption at section 10(1) apply to the record?

D. Does the discretionary exemption at section 11 apply to the record?

DISCUSSION:

A. Was the city's further search for responsive records reasonable?

[8] As noted above in Interim Order MO-3273-I, I ordered the city to conduct further searches for records relating to the proposed restaurant in the library and the appraisal report. Accordingly, my review of the city's search is limited to these two category of records.

[9] The city submits that it conducted further searches of its databases and contacted its Manager of Building Construction, City Manager and Chief Financial Officer but was unable to locate any additional records relating to the proposed restaurant to be built in the Old Post Office Building. In support of its position, the city states:

> The Library Board is a separate entity with its own governing body, separate from the City of Cambridge. Decision[s] made by the Library Board are final and not required to be approved by City Council; therefore they have their own approving/governing their own documents, which is separate from the City.

[10] The appellant submits that additional records the city "may have used to guide [its] decision to make the purchase in 2012" should exist. In support of her position, she provided a copy of an email from a city councillor. The email recounts the councillor's recollection of events leading up to the city's purchase of the subject property. The appellant provided a copy of the email with her representations. It states:

> Council demanded a business plan before we could put in an offer. We offered [a specified amount] and it was turned down. We then negotiated the library and business plan. We bought the post office for [a higher specified amount] with a condition that the owners would have a right to run a restaurant as part of the library.

[11] The appellant submits that the councillor's email suggests that two business plans should exist. One prepared before the city's initial offer was made and another after the library and business plan was negotiated. The appellant also submits that a retired councillor "confirmed verbally" to her that these types of documents should exist. Finally, the appellant submitted a copy of a news article which reports that the city's Chief Administrative Officer (CAO) stated that the restaurant renovation project was a "public private partnership" involving the city and the former owners of the post office building.

[12] In support of her position that she has a reasonable belief to conclude that additional records should exist, the appellant states:

> I can't name all of these documents but having their existence confirmed by two City Councillors and a newspaper report attributing confirming comments from the City's CAO certainly suggest that some documentation must exist and be within the City's control. In the alternative, am I to assume that the City committed to such a major project and spent millions of taxpayer dollars with no documented basis to support it?

[13] The city was also ordered to conduct a further search for an appraisal report which it located. The city's and appellant's submissions as to whether this report qualifies for exemption under the *Act* will be addressed later in this order.

Decision and analysis

[14] Where a requester claims that additional records exist beyond those identified by the institution, the issue to be decided is whether the institution has conducted a reasonable search for records as required by section 17.[1] If I am satisfied that the search carried out was reasonable in the circumstances, I will uphold the institution's decision. If I am not satisfied, I may order further searches.

[15] The *Act* does not require the institution to prove with absolute certainty that further records do not exist. However, the institution must provide sufficient evidence to

[1] Orders P-85, P-221 and PO-1954-I.

show that it has made a reasonable effort to identify and locate responsive records.[2] To be responsive, a record must be "reasonably related" to the request.[3]

[16] A reasonable search is one in which an experienced employee knowledgeable in the subject matter of the request expends a reasonable effort to locate records which are reasonably related to the request.[4]

[17] A further search will be ordered if the institution does not provide sufficient evidence to demonstrate that it has made a reasonable effort to identify and locate all of the responsive records within its custody or control.[5]

[18] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.[6]

[19] In Interim Order MO-3273-I, I ordered the city to conduct further searches to locate records responsive to the appellant's request for records relating to the proposed restaurant in the library and the appraised value of the site. The basis for my decision to order further searches was my determination that the city had provided insufficient evidence to demonstrate that it made a reasonable effort to identify and locate responsive records. For example, the city did not provide details of the searches such as who conducted the search, what places were searched and what program areas were contacted.

[20] In my view, the city's further search remedied these deficiencies. Based on the city's evidence, I am satisfied that its further search was conducted by an experienced employee knowledgeable about the subject-matter of the request and that a reasonable effort to locate records was expended. In particular, the city's Manager of Information Management/ Freedom of Information Co-ordinator conducted a search of the city's record holdings and contacted the city's Manager of Building Construction, City Manager and Chief Financial Officer in an effort to locate additional responsive records.

[21] The appellant takes the position that given the amount of tax-payer dollars involved in renovating the subject property, records documenting the city's decision to go ahead with the proposed restaurant should exist. In support of her position, the appellant provided a copy of an email from a city councillor as proof that council required a business plan before approving the negotiation of a purchase price. The appellant also provided a copy of a newspaper article in which the city's CAO states that the project was a "public private partnership involving the City of Cambridge contributing $6 million, the library board contributing $6 million and former owners [named company] contributing $500,000 for restaurant a renovation as part of the

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[2] Orders P-624 and PO-2559.
[3] Orders P-624 and PO-2559.
[4] Orders M-909, PO-2469 and PO-2592.
[5] Order MO-2185.
[6] Although a requester will rarely be in a position to indicate precisely which records the institution has not identified, the requester still must provide a reasonable basis for concluding that such records exist.

purchasing agreement".

[22] In my view, the appellant's evidence suggests that before the city made its decision to proceed with its purchase and restoration of the old post office building, it reviewed records or business plans regarding the advisability of the proposed project. However, there is insufficient evidence to suggest that the same type of documentation regarding the proposed restaurant should also exist. A copy of the purchase agreement is not one of the records at issue in this appeal and thus I was not provided a copy. However, based on the submissions of both parties there appears no dispute that the agreement contains a term which gives the former owner a right to operate a restaurant in the renovated library. In my view, the existence of this term on its own does not provide sufficient evidence that the city reviewed background documents regarding the advisability of adding this term to the purchase agreement.

[23] For the reasons stated above, I find that the city's search for further records responsive remedied the deficiencies outlined in Interim Order MO-3273I.

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?

[24] 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.

[25] The purpose of section 7 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.[7]

[26] "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.

[27] "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]

[28] "Advice" involves an evaluative analysis of information. Neither of the terms

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[7] *John Doe v. Ontario (Finance)*, 2014 SCC 36, at para. 43.
[8] See above at paras. 26 and 47

"advice" or "recommendations" extends to "objective information" or factual material.

[29] 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]

[30] 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]

[31] Sections 7(2) and (3) create a list of mandatory exceptions to the section 7(1) exemption. If the information falls into one of these categories, it cannot be withheld under section 7. Section 7(2)(c) states:

> Despite subsection (1), a head shall not refuse under subsection (1) to disclose a record that contains
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> (c) a report by a valuator;

[32] The valuation report exception in paragraph (c) is an example of objective information. It does not contain a public servant's opinion pertaining to a decision that is to be made but rather provides information on matters that are largely factual in nature.

[33] The word "report" appears in several parts of section 7(2). This office has defined "report" as a formal statement or account of the results of the collation and consideration of information. Generally speaking, this would not include mere observations or recordings of fact.[11]

Decision and Analysis

[34] The city provided brief submissions on the application of section 7(1) to the appraisal report. The city states:

> Information from appraisals that have been reviewed and rejected is not released routinely to the public. The information has been given to city

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[9] Order P-1054.
[10] *John Doe v. Ontario (Finance),* cited above, at para. 51.
[11] Order PO-2681; Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.).

> staff on an advisory basis from a consultant/appraiser. Information provided as advice is never released under section 7(1) of the *Act*.

[35] In my view, the appraisal report falls within the exception at section 7(2)(c). The report was prepared by a real estate appraisal and evaluation company. The scope of the report was limited to identify the current market value for the subject-property for potential sale negotiations. The appraiser gathered information from numerous sources, including assessment reports, sales data of comparable properties, Zoning Classifications and Official Plan Designations. The report also identifies the appraiser's methodology and provides their opinion of the current fair market value of the property.

[36] In Interim Order MO-3166-I, Adjudicator Donald Hale found that the record in that appeal went "far beyond a simple valuation" as it also evaluated the current and future earnings potential of the business being valuated. It also made detailed and thorough suggestions as to its value as an ongoing entity and made comparisons with other entities in the marketplace. However, Adjudicator Hale found that the portion of the report which described the parameters set out the writers' valuation work and explored different valuation methodologies fell within the mandatory exception in section 7(2)(c) and stated:

> I conclude 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).

[37] I adopt and apply the reasoning in Order MO-3166-I for the purposes of this appeal. I have reviewed the report and am satisfied that it falls within the "report of valuator" exception in section 7(2)(c). The work completed by the appraiser gave the city a "snapshot" valuation of the subject property taking into account a number of sources of information which included publicly available information.

[38] As the exception in section 7(2)(c) applies, the city can not refuse to provide the appellant access to the appraisal report under section 7(1).

C. Does the mandatory third party information exemption at section 10(1) apply to the record?

[39] The city and the third party take the position that the record qualifies for exmeption under section 10(1). This section states:

> 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,
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> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[40] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[12] 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.[13]

[41] 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

[42] The city states that the appraisal report at issue "…contains specific information relating to existing property values, and outlines rational for the conclusion outlined by the appraiser's method of operation". The third party submits that though the report may include public information such as assessment details, zoning classifications and Official Plan designations, its analysis methodology and conclusions are "confidential and proprietary" to it and the city.

[43] Though the representations of the parties resisting disclosure did not specifically identify the type of information at issue it appears that they take the position that the appraisal report contains "financial information", which has been discussed in prior orders, as follows:

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[12] *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.*).

[13] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

> *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.[14]

[44] I have reviewed the appraisal report and am satisfied that it contains "financial information". The report contains various sources of information, such as property and assessment information of comparable properties and the subject property along with the appraiser's final valuation.

[45] Having regard to the above, I find that the first part of the three-part test has been met.

Part 2: supplied in confidence

[46] 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.[15]

[47] 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.[16] There is no dispute between the parties that the third party prepared the report and submitted it to the city. Having regard to the representations of the parties and the record itself, I am satisfied that the third party supplied the appraisal report to the city.

[48] 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.[17]

[49] The city and the third party submit that the appraisal report was supplied to the city in confidence. In support of this position, the third party's representations refer to its October 20, 2011 letter attached to the report which states:

> The client acknowledges that the attached report is confidential and agrees not to disclose the information contained herein to a third party without the expressed authority of the author of the report…

[50] I have reviewed the representations of the parties and am satisfied that the third party adduced sufficient evidence to demonstrate that when it provided the city with a copy of the appraisal report it had a reasonable expectation of confidentiality. In making my decision, I took into consideration the confidentiality provision set out in the third party's letter to the city accompanying the report. Furthermore, the third party's

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[15] Order MO-1706.
[16] Orders PO-2020 and PO-2043.
[17] Order PO-2020.

evidence suggests that the report has been consistently treated in a manner that indicates its continued concern for confidentiality. Finally, despite the report being prepared five years ago, there is no evidence before me suggesting that the report was otherwise disclosed or is publicly available.

[51] Accordingly, I find that the second part of the three-part test in section 10(1) has been met.

Part 3: Harms

[52] 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.[18]

[53] 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*.[19]

[54] The city and the third party claim that disclosure of the record would give rise to the harms contemplated in sections 10(1)(a) and (c).

Sections 10(1)(a) and (c): Prejudice to Competitive Position and Undue Loss or Gain.

[55] The city submits that disclosure of the report "…could have an impact on the appraiser's competitiveness in the market and [their] earning capabilities".

[56] The third party's representations concede that some of the information in the appraisal report includes public information, such as assessment details, Zoning Classifications and Official Plan Designations. However, the third party takes the position that their "analysis methodology" and conclusions contained in the report are their proprietary information. The third party also submits that some of the data contained in the report "may not be generally accessible to the general public" and was provided to them on a confidential basis by real property professionals such as other appraisers or realtors.

[57] In support of their argument that disclosure of the report could reasonably be expected to prejudice their competitive position or cause an undue loss of profits, the third party also made the following arguments:

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

[19] Order PO-2435.

- A layperson's interpretation of the report could be "misconstrued" resulting in harm to the appraiser's business interests; and
- Disclosure could hamper the ongoing exchange of information between the appraiser and their data sources which may result in negative impact in completing existing assignments and competing for new assignments which would affect their competitiveness and earning capabilities.

Decision and Analysis

[58] There is no dispute between the parties that the third party was retained by the city to establish a market value for the Old Post Office Building at the time the report was prepared. The report was prepared before the city purchased the site and started its renovation project.

[59] In my view, the submissions of the parties resisting disclosure fail to demonstrate that disclosure could reasonably be expected to cause the harms contemplated in sections 10(1)(a) and (c).

[60] Though I accept that the appraisal business is a competitive one I am not satisfied that disclosure of the appraisal report would prejudice the third party's competitive position. I have reviewed the report and it appears that the appraiser inspected the property site and reviewed a number of public sources of information such property, tax and assessment information. A large portion of the report contains information regarding the definition of standard terms and conditions as defined by the Appraisal Institute of Canada. In my view, most of the record contains standard language, terms and conditions which adhere to the Appraisal Institute of Canada rules for designated appraisers or contains property-related information from public sources.

[61] The appraisal report also identifies a number of other properties for comparison purposes. In most cases, this information merely refers to publicly available property related information such as the names of the vendor and purchaser, purchase price, site area/ square footage and identifies selling features such as location and parking. However, I note that two of the comparable properties appear to contain small amounts of information the appraiser may have obtained verbally from other sources. The third party submits that this type of information was provided to it on a confidential basis and that its release would negatively affect existing relationships with other real property professionals, which in turn, could reasonably be expected to cause an undue loss of profits. In my view, the third party's argument is speculative and fails to establish a connection between the actual information at issue and the perceived harm.

[62] Furthermore, I find that disclosure of the remaining information such as the appraised value of the subject property, description and inspection of the subject-property along with the third party's discussion of its selected evaluation approaches would not result in the harms contemplated in sections 10(1)(a) and (c). In making my decision, I took into account that the information contained in the report was gathered five years ago. In addition, I find that the third party's discussion of its selected

evaluation approach does not reveal an unique methodology or data analysis. Accordingly, I find that disclosure of the remaining information at issue would not result in the harms contemplated in sections 10(1)(a) and (c).

[63] Having regard to the above, I find that I have not been provided with sufficient evidence to support a finding that disclosure of the appraisal report would result in prejudice in the third party's competitive position or result in an undue loss or gain under sections 10(1)(a) and (c).

[64] As I have found that the third part of the test under section 10(1) has not been met, I find that the record does not qualify for exemption under section 10(1). I will go on to review the city's claim that the record qualifies for exemption under section 11.

ECONOMIC AND OTHER INTERESTS

[65] The city takes the position that the appraisal report qualifies for exemption under sections 11(a), (c) and (d). These sections state:

> A head may refuse to disclose a record that contains,
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> (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; and
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> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

[66] 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.[20]

[67] For sections 11(c) or (d) to apply to the appraisal report, the city 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

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[20] *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.

consequences.[21]

[68] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.[22]

Decision and analysis

Section 11(a): information that belongs to government

[69] 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;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

[70] The city submits that the appraisal report contains "commercial valuable information" and that "[g]overnment sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited".

Part 1

[71] Earlier in this order I found that the report contains "financial information" within the meaning of that term defined by this office. Accordingly, I am satisfied that the first part of the three-part test in section 11(a) has been met.

Parts 2 and 3:

[72] Parts 2 and 3 require the information at issue to "belong to" the city and to have a monetary value.

[73] 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.

[74] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the

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

[22] Order MO-2363.

information.[23]

[75] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.[24] Nor does the fact, on its own, that the information has been kept confidential.[25]

[76] The city's representations did not specifically address the test in section 11(a). However, it appears to take the position that the report contains information which could be used to develop its "expertise or scientific innovations".

[77] In my view, the city has failed to adduce sufficient evidence to establish that the information in the record "belongs to" it for the purposes of part 2 of the test under section 11(a). Though there is no dispute that the city retained the appraiser to prepare the report, the city's representations fall short of demonstrating that its interest in the five-year report is one the law would recognize as a substantial interest or a traditional intellectual property interest.

[78] With respect to part 3 of the test, I have reviewed the report along with the city's submissions and am not satisfied that disclosure of the report would deprive the city of the monetary value of the appraiser's valuation. As discussed above, the fact that an institution incurred a cost to have the record created does not mean that the record has a monetary value for the purposes of this section. The circumstances in this appeal are that the city paid the appraiser to prepared a report five years ago. In addition to market changes in the real estate market occurring over the past five years, the city has undertaken a multi-million-dollar project to restore and renovate the subject-property.

[79] Having regard to the above, I find that the exemption at section 11(a) does not apply to the appraisal report.

Sections 11(c) and (d): prejudice to economic interests and injury to financial interests

[80] In support of its position that the report qualifies for exemption under sections 11(c) and/or (d), the city made the following arguments:

- Disclosure would prejudice the city's economic interests under section 11(c) as it contains information regarding the "valuation of property and method of obtaining that valuation by the appraiser and pricing status in the marketplace"; and

- Disclosure of the fair market value of the property identified in the report would be injurious to the city's financial interests under section 11(d) as it would "weaken the city's negotiating position and interfere with its ability to obtain a fair return on its property in the future".

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[23] Orders M-654 and PO-2226.
[24] Orders P-1281 and PO-2166.
[25] Order PO-2724.

[81] The city submits that Orders PO-1877-I and MO-1228 further support its position and states:

> [T]he City finds that the disclosure of the appraisal information could reasonably be expected to result in prejudice to the municipality's economic interests and [be] injurious to its financial interests, as contemplated by sections 11(c) and (d), respectively. In the future if a prospective purchaser were to have access to the appraisal information, the municipality's ability to obtain the maximum return on the sale would be lessened and its financial and economic interests would be adversely affected.

[82] The appellant's representations state:

> The appraisal report is from 2011. Any underlying market or economic conditions for this property or comparable properties from 2011 will have significantly changed; the subject property has undergone extensive renovations and it is simply not realistic to think that its release could be injurious to [the] financial interests of the City. Rather its release would serve to inform and enlighten the taxpayer about the activities of their municipal government in multi-million dollar controversial deals.

[83] I note that the orders referred to by the city were considered by Adjudicator Hale in Order MO-3193-F. In that order, Adjudicator Hale found that disclosure of valuation information regarding a municipality's property before it was sold could reasonably be expected to result in prejudice to its economic interests and injurious to its financial interests, as contemplated in sections 11(c) and (d). In arriving at that decision, Adjudicator Hale considered Orders PO-1877-I and MO-1228 and found that they support the proposition that disclosure of appraisal reports, in circumstances where the sale of the subject property has not yet closed, could prejudice the institution's financial interests.

[84] There is no dispute that the appraisal report was prepared in 2011 and the city subsequently purchased the property. The city claims that disclosure of the report would prejudice its negotiating position and hamper its ability to obtain a fair return in the future. However, the city's evidence did not provide details of any ongoing negotiations. In fact, the city has undertaken a multi-million-dollar project to restore and renovate the Old Post Office building. The city's website indicates that construction of the project started in late 2015. In my opinion, disclosure of the appraised value of the property in 2011 would not prejudice the city's ability to negotiate a fair price in the future for a restored and renovated property.

[85] Accordingly, I find that disclosure of the appraisal report could not reasonably be expected to give rise to the harms in sections 11(c) and (d) in the circumstances of this appeal.

[86] As I have found that the discretionary exemptions in sections 7(1), 11(a), (c) and

(d) along with the mandatory exemption at section 10(1) do not apply to the appraisal report, I will order the city to disclose this record to the appellant but for the portions of the report which may contain the personal information of the appraiser. This information is found on pages 54 to 56 under the heading "Resume of Qualifications".

ORDER:

1. I find that the city's further search for responsive records was reasonable.

2. I order the city to provide a copy of the appraisal report to the appellant by **November 7, 2016** but not before **October 28, 2016**. For the sake of clarity, in the copy of the appraisal report enclosed with the city's order, I have highlighted that portions of the report (pages 54-56) which may contain "personal information" and **should not** be disclosed to the appellant.

3. In order to verify compliance with order provision 2, I reserve the right to require a copy of the report disclosed by the city to be provided to me.

Original Signed By: September 30, 2016

Jennifer James
Adjudicator