Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3482-I

Appeals MA15-524, MA15-525, MA15-526 and MA15-527

City of Toronto

August 15, 2017

Summary: An individual submitted eight access requests for information relating to the appraisal of identified high density developments in Toronto. This order addresses the four remaining appeals resulting from the city's access decisions denying partial access to the responsive valuation file records under sections 11 (valuable government information) and 12 (solicitor client privilege) of *MFIPPA.* In this interim order, the adjudicator addresses the late raising of exemptions and permits the city to raise section 12, but finds that it does not apply. The adjudicator also finds that section 11 does not apply. The adjudicator remains seized of the appeal to address a notification issue.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 4(2), 11(a), 11(c), 11(d), 12; *Planning Act,* S.O. 1990, c.P.13., sections 42(6), 42(10).

Orders Considered: Orders P-658, MO-3449-I.

Cases Considered: *Confederation Treasury Services Ltd. (Re)* [1997] O.J. No. 3598 (Ont CJ, Gen. Div.).

OVERVIEW:

[1] Under section 42(6) of the *Planning Act*[1] and Chapter 415, Article III of Toronto's

[1] R.S.O. 1990, c.P.13.

Municipal Code, landowners intending to pursue high-density mixed-use or residential developments must pay to the City of Toronto (the city) an amount of money known as cash-in-lieu-of-parkland, the "park levy," in order to obtain a building permit to develop the land. The park levy is calculated based on the city's determination of the market value of the property. In the process of arriving at that market value determination, the city relies on appraisals prepared by in-house, or external, appraisers.[2] A landowner has the option to bring an application to the Ontario Municipal Board (the OMB) under section 42(10) of the *Planning Act* to challenge the city's market value determination for this purpose. As a member of the public, a landowner may also seek access to records prepared by appraisers or related city staff under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*).

[2] This interim order addresses four related appeals and the access decisions issued to a landowner by the city in response to requests submitted under the *Act*. The requester sought access to records relating to a specified property (the subject property) and similar records relating to seven other properties in order to understand the basis upon which the city had calculated the value of the subject property and other similar development sites in the vicinity in order to set the park levy payments required.

[3] The city divided the request into eight separate requests – one for the subject property and seven for the comparator properties, the latter being identified as Properties A to G. The request relating to the subject property had three parts and sought a broader range of records than the ones for Properties A to G and is not outlined fully here. For context, however, the second part of the request sought access to:

> All City policy and guideline documents related to the appraisal or valuation of land for the purposes of determining the amount of cash-in-lieu-of-parkland (parks levy) to be paid to the City for high-density mixed-use and/or residential developments pursuant to section 42 of the *Planning Act* and Chapter 415, Article III of the Municipal Code.

[4] The third part of the original request was the part addressed by the seven separate requests for Properties A to G and sought access to:

> All letters and notices issued by the City between January 2010 and August 2015, which indicate the parks levy payment amounts required to be made to the City in relation to the approved high-density development projects … [at seven identified addresses/locations], together with all appraisal reports, real estate market reviews, valuation analyses and other background documentation relied upon by the City to determine such payment amounts.

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[2] Market value determined, generally, under the Canadian Uniform Standards of Professional Appraisal Practice, Appraisal Institute of Canada.

[5] The city issued decisions granting partial access to the records responsive to the subject property and Properties A, B, F and G. In the city's initial decision about the subject property, information was withheld under sections 12 (solicitor-client privilege) and 14(1) (personal privacy) of the *Act*. For the other properties, the city relied on sections 11(a), (c) and (d) (valuable government information) and, for one of the properties, section 14(1) to deny access.

[6] The access decisions were appealed to this office, which resulted in the opening of five appeals.[3] The city's access decisions in relation to Properties C, D and E are not before me. One mediator was appointed to explore the possibility of resolving all five appeals. During mediation, the appellant advised that he was no longer seeking records related to the second part of the request, which removed any records responsive to that part from the scope of the appeals. The appellant also advised that he was not seeking information relating to individuals, which removed certain information and the personal privacy exemption in section 14(1) from the scope of two of the appeals.[4]

[7] During mediation, the city issued revised decisions in all five appeals, which added claims of section 11 to the withheld records in Appeal MA15-523 and section 12 to the undisclosed records in the other four appeals. The appellant challenged the "late raising" of these discretionary exemptions and this was added as an issue.

[8] As a mediated resolution of the appeals was not possible, they were transferred to the adjudication stage and assigned to me as the adjudicator. At this point, I started my inquiries by issuing a Joint Notice of Inquiry for all five appeals to the city, initially, to invite representations. The city provided representations, which included a request to place all five appeals on hold until related, ongoing OMB proceedings under section 42 of the *Planning Act* had been completed. The city argued that some of the records at issue in those proceedings were the same as those at issue in the five IPC appeals and that allowing parallel proceedings to continue before the IPC and OMB would be inappropriate. The city's alternate position was that the appeals ought to be placed on hold pending the outcome of a production motion brought to the OMB by the appellant and other third parties not involved in the five IPC appeals before me.[5]

[9] Subsequently, I issued a decision refusing the city's hold request. I addressed the city's arguments related to the alleged potential for double recovery in the two venues, possible overlap of records, multiplicity of proceedings, and other matters of jurisdiction. I asked the city to advise me if the appellant had obtained access through the OMB motion to any of the records at issue in the IPC appeals that were before me. When I sent the city's non-confidential representations and a modified Joint Notice of Inquiry summarizing the issues to the appellant, I made the same request for

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[3] Appeal MA15-523 for the subject property, Appeal MA15-524 for Property A, Appeal MA15-525 for Property B, Appeal MA15-526 for Property F and Appeal MA15-527 for Property G.
[4] Appeals MA15-523 and MA15-525.
[5] The motion was, however, related to another IPC appeal with a different adjudicator.

clarification around access to records. I wanted to hear from the appellant on the relevance of the disclosures possible through the OMB process to this inquiry under *MFIPPA*, as well as a general update on the status of matters before the OMB. I received representations from the appellant in which the appellant confirmed that the OMB was not asked by any participating party to those proceedings to order production of any of the records sought in Appeals MA15-524-527.[6] Next, I asked the city to provide reply submissions, which it did.

[10] Several months after receiving the city's reply representations, certain information came to my attention; I communicated that information to the appellant with a copy of the city's reply representations to seek sur-reply on the relevance of the property appraisal disclosures ordered by the OMB. I also invited the appellant's submissions on the OMB decision's relevance to my inquiry under *MFIPPA*. The appellant provided sur-reply representations.

[11] Shortly after I received the appellant's sur-reply representations, I was made aware of the city's revised access decision in another IPC appeal that was assigned to a different adjudicator, but was related to the same OMB production motion. I wrote to the city, conveying my understanding that the responsive records in the related appeal had been disclosed to that requester. As there were nearly identical issues of exemption and disclosure before me, I asked the city if it also intended to disclose additional records in the set of five appeals before me. The city then issued revised decisions in all five appeals, such that all responsive records were disclosed to the appellant in Appeal MA15-523 related to the subject property.[7] This led to the closing of Appeal MA15-523.

[12] Additional disclosures were also made in the other four appeals, but since many records remain partly or fully withheld, the appellant chose to continue to pursue access to the remaining valuation file records. Following these supplemental decisions, section 12 was removed from the scope of Appeals MA15-525 to MA15-527. Additionally, in the November 2016 supplemental access decision in Appeal MA15-524, the city added an exemption claim under section 8(1)(i) (security of a system or procedure) for several withheld portions of two pages. As the appellant challenged the new claim of section 8 because it was claimed more than a year after the initial access decision, this was added to the existing issue of the late raising of section 12 in Appeal MA15-524. I sought the city's supplementary submissions on this extra issue in that appeal and received them.

[13] To contextualize their positions in this appeal, the parties gave considerable attention to details and descriptions of the OMB proceedings relating to whether the city calculated the appellant's land value in accordance with the *Planning Act.* I have only

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[6] The appellant also observed that the owners of the other properties to which those records relate were not involved in the OMB production motion.

[7] With the exception of a severance on page 1 under section 14(1), which the appellant did not pursue. The appellant also did not pursue access to the section 14(1) severances in Appeal MA15-525.

provided this context where I felt it necessary to explain my reasons for decision under *MFIPPA.*

[14] In this order, I conclude that it is not necessary to address the late raising or application of section 8(1)(i). I permit the city to "late raise" section 12 in Appeal MA15-524, but I find that it does not apply. I also find that sections 11(a), (c) and (d) do not apply to the records in Appeals MA15-524 to MA15-527. As it is possible that disclosure of these records may affect the interests of the owners of Properties A, B, F and G, I remain seized of the appeals to address the issue of notification.

RECORDS:

[15] Following the city's November 2016 supplemental access decisions, the records remaining at issue in the four appeals consist of:

> In Appeal MA15-524 (Property A), the city continues to withhold 16 pages, in full, and 19 pages, in part, under sections 12 and 11. Two pages are removed from the scope of the appeal and will not be addressed beyond the discussion in Issue A, below.
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> In Appeal MA15-525 (Property B), the city continues to deny access to 45 pages, in full, and 10 pages, in part, under section 11.
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> In Appeal MA15-526 (Property F), the city maintains its denial of access to 74 pages, in full, and four pages, in part, under section 11.
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> In Appeal MA15-527 (Property G), the city continues to withhold 72 pages in full, and four in part, under section 11.

ISSUES:

A. Should the city be permitted to "late raise" the discretionary exemptions in sections 12 and 8(1)(i) in Appeal MA15-524?

B. Are the records protected by the discretionary solicitor-client privilege exemption in section 12?

C. Does the discretionary exemption for valuable government information at section 11 apply to the records?

DISCUSSION:

A. Should the city be permitted to "late raise" the discretionary exemptions in sections 12 and 8(1)(i)?

The first late-raised exemption – section 12

[16] The appellant took issue with the city adding section 12 to its exemption claims in these appeals after the initial period for doing so had passed. Consequently, I sought submissions from the parties on the issue of whether the city should be permitted to rely on this discretionary exemption in the context of the IPC's *Code of Procedure* (the *Code*).

[17] The *Code* provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. In particular, section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[18] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[8]

[19] In Order P-658, former Adjudicator Anita Fineberg explained why the prompt identification of discretionary exemptions is necessary in order to maintain the integrity of the appeals process. She indicated that, unless the scope of the exemptions being claimed is known at an early stage in the proceedings, it will not be possible to effectively seek a mediated settlement of the appeal under section 51 of the *Act*, which is the equivalent of section 40 of *MFIPPA*. She also pointed out that, where a new discretionary exemption is raised after the Notice of Inquiry is issued, this could require a re-notification of the parties in order to provide them with an opportunity to submit representations on the applicability of the newly claimed exemption, thereby delaying

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[8] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.); see also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

the appeal. Finally, she pointed out that in many cases the value of information sought diminishes with time and, in these situations, appellants are particularly prejudiced by delays arising from the late raising of new exemptions.

[20] The 35-day policy is not inflexible. The specific circumstances of each appeal must be considered in determining whether discretionary exemptions can be raised after the 35-day period. In making this determination, the adjudicator must also balance the relative prejudice to the institution and to the appellant. In this appeal, the Notice of Mediation is dated November 17, 2015 and set December 22, 2015 as the deadline for claiming additional discretionary exemptions. The city's revised decision letter adding section 12 is dated January 14, 2016.

[21] The following questions were posed to the parties: whether the appellant had been prejudiced in any way by the late raising of a discretionary exemption; whether the city would be prejudiced in any way by not allowing it to apply an additional discretionary exemption in the circumstances of this appeal; and whether the integrity of the appeals process would be compromised in any way by allowing the city to claim an additional discretionary exemption.

Representations

[22] The city argues that I ought to exercise my discretion under section 11.01 of the IPC *Code of Procedure* to permit this appeal to proceed with a determination of the application of all of the exemptions claimed in relation to these records. The city maintains that the integrity of the appeals process would not be harmed by allowing the late raising of section 12 in Appeal MA15-524 because the appellant was directly notified of the additional claim to section 12 during the mediation stage. While late, the city maintains that the appellant was in fact notified promptly of the additional exemption when it identified that similar documents in the main appeal (MA15-523) were subject to a solicitor-client privilege exemption claim.

[23] The city submits that the appellant has "suffered no meaningful prejudice from the city's accidental non-inclusion of relevant exemptions in the initial decision letters," particularly since this oversight was remedied very soon after its discovery. The city maintains that the appellant would already have been aware of the interests at stake due to its participation in the concurrent OMB proceedings related to the same subject matter of the park levy. Therefore, the city's opinion is that the "cross-claiming" of the exemptions between the appeals did not prejudice the appellant because he had pre-existing knowledge of the value of, and relevant exemptions applicable to, the requested documents. The city submits that it would suffer significant prejudice by not being allowed to rely on section 12 to protect its important interests in "the current litigation proceeding before the OMB." According to the city, the result of preventing it from claiming section 12 would be to "deny the city's ability to utilize solicitor-client and litigation privilege to protect the … documents from being utilized contrary to the city's (and thereby the public's) interest" in the related OMB proceeding.

[24] The appellant acknowledges the purpose of the access requests, but points out the well-established principle that a requester's motivation or purpose in submitting a request is irrelevant to the determination of the exemption claims.[9] In general, the appellant submits that the city's revised decision adding section 12 is an "obvious after-the-fact attempt to rectify the flaws in its initial … decision." According to the appellant, the city's failure to raise this additional exemption within the appropriate timeframe "demonstrates the superficiality" of its arguments. Further, there was nothing accidental about it since it was always clear that the legal department had advised the access department[10] prior to the decisions being issued. In the context of section 12 having already been claimed in relation to the appraisal records at issue in the now-closed appeal about the subject property, the appellant suggests that the late-raised claim to section 12 in Appeal MA15-524 has the air of being fabricated to avoid disclosure.

[25] The appellant alleges that the late raising compromised the integrity of the appeal process here because they have had to respond to additional issues and make further submissions, with the added delay and expense this entails. The appellant maintains that the city would not be prejudiced by not allowing the section 12 claim, particularly since the arguments "have no merit."

[26] In the city's view on reply, the appellant's acknowledgement that concern about the "late raising" was expressed in its appeal letter and during the mediation stage makes it clear that section 12 was raised early enough that the related considerations were known to the appellant. The city submits that this situation and past IPC orders, such as Order MO-2209, bely the suggestion of prejudice to the appellant. Regarding the appellant's assertion that the delay in claiming the additional discretionary exemptions suggests fabrication to avoid disclosure under the *Act*, the city states that it does not deny errors were made in the initial access decisions and points out that these "good faith errors" were corrected: in other words, the fact of error in the initial decisions does not equal wrong-doing as the appellant alleges, but does reflect the limited involvement and awareness of CIMS staff with the purpose and use of the responsive records. Further, the city submits that not permitting its claim to section 12 would prevent me from considering its application to direct correspondence between city planning staff and the Director for the Planning and Administrative Tribunal Law Practice Group of Legal Services. This, the city maintains, would lead to greater damage to the integrity of the IPC's appeal process than barring the late section 12 claim.

Analysis and findings

[27] Based on the circumstances of the city's late-raising of section 12 to the records

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[9] The appellant refers to sections 1 and 4 of the *Act.*

[10] This term is used for convenience since it is called the "Corporate Information Management Services (CIMS) Department.".

in Appeal MA15-524,[11] I am prepared to accept the city's position on this exemption claim. In particular, I accept that the omission of section 12 from the exemptions claimed in the initial access decisions were unfortunate, but inadvertent. No additional or supplementary processes, including re-notification, were required by it. It may be, as the appellant asserts, that the city ought to be imputed with sufficient knowledge of the interests at stake to have made a more timely claim to section 12. However, the appellant could also be said to have been aware of the active interests. There appears to have been communication between the parties on the issues and controversies arising between them in the context of the *MFIPPA* requests.

[28] Overall, I am satisfied that no appreciable or significant delay resulted from the additional claim to section 12. Indeed, any delay there may have been was relatively brief because the particular revised decisions adding it were issued during mediation. The inquiries proceeded apace, with the appellant having an opportunity to address section 12 in relation to all of the records – not only in the now-closed appeal (MA15-523) for which it was initially claimed, but in all of them. Moreover, I accept that not allowing the city to claim section 12 would be more prejudicial to it based on the important legal interests that are sought to be protected by the solicitor-client privilege exemption. My view is that the appellant was not prejudiced by the late raising of the section 12 exemption, and I have decided to permit the city to claim it in relation to the records for which it is at issue in Appeal MA15-524.

The second late-raised exemption - section 8(1)(i)

[29] After the city raised section 8(1)(i) in its November 28, 2016 supplemental access decision in Appeal MA15-524, I sent a supplementary Notice of Inquiry to the city seeking its submissions on the issues raised by that action. I asked the city to provide its justification for the claim of section 8(1)(i) well beyond the 35-day period that I discussed, above. I referred to the 2015 dates for the Notice of Mediation and the deadline for claiming additional discretionary exemptions, and I noted that:

> The city's revised decision letter adding section 8(1)(i) is dated November 28, 2016. Accordingly, I am asking the city to provide the justification for adding section 8 at the point in the inquiry for Appeal MA15-524 when submissions had already concluded to the point of sur-reply.

[30] I also asked the city to specifically identify, and offer representations on, the information on pages 91 and 100 for which it was claiming section 8(1)(i). I surmised that the explanation could result in removal of this information (and exemption) from the scope of the appeal at the next stage. I received the city's representations and learned that the city had directly contacted the appellant to discuss the matter. In a

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[11] As stated above, although section 12 was also "late raised" in Appeals MA15-525, MA15-526 and MA15-527, the exemption claim was withdrawn by the city in the November 2016 supplemental access decisions.

January 31, 2017 email to the city, which was provided to me as an appendix to the city's supplementary representations, the appellant confirmed that he did not take issue with the city's application of section 8(1)(i) to the bank account information severed from the cheques which comprise records at pages 91 and 100.

[31] In this context, it is not necessary for me to address either the late raising of the discretionary exemption in section 8(1)(i) or whether the city has actually established the exemption's application to the cheque information severed from pages 91 and 100 in Appeal MA15-524. These records are removed from the scope of Appeal MA15-524 by the appellant's agreement and will not be addressed further in this order.

B. Are the records protected by the discretionary solicitor-client privilege exemption in section 12?

[32] In Appeal MA15-524, the only appeal where section 12 remains at issue, the city claims that section 12 applies to exempt pages 80, 82, 93 in part, and 67-70, 77-79, 84, 86, 102-103 in full.

[33] Section 12 states as follows:

> A head may refuse to disclose a record that is subject to solicitor-client privilege or that was prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation.

[34] Section 12 contains two branches. Branch 1 ("subject to solicitor-client privilege") is based on the common law. Branch 2 ("prepared by or for counsel employed or retained by an institution…") is a statutory privilege. The institution must establish that one or the other (or both) branches apply. In the city's representations, it claims that both branches apply.

[35] Under Branch 1, the common law, solicitor-client privilege encompasses two types of privilege: (i) solicitor-client communication privilege; and (ii) litigation privilege.

[36] Solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. It applies to communications within the "framework" of the solicitor-client relationship.[12]

[37] The rationale for this privilege is to ensure that a client may freely confide in his or her lawyer on a legal matter.[13] The privilege covers not only the document containing the legal advice, or the request for advice, but information passed between

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[12] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[13] Orders PO-2441, MO-2166 and MO-1925.

the solicitor and client aimed at keeping both informed so that advice can be sought and given.[14]

[38] The privilege may also apply to the legal advisor's working papers directly related to seeking, formulating or giving legal advice.[15]

[39] Confidentiality is an essential component of the privilege. Therefore, the institution must demonstrate that the communication was made in confidence, either expressly or by implication.[16] The privilege does not cover communications between a solicitor and a party on the other side of a transaction.[17]

[40] Litigation privilege protects records created for the dominant purpose of litigation. It is based on the need to protect the adversarial process by ensuring that counsel for a party has a "zone of privacy" in which to investigate and prepare a case for trial.[18] Litigation privilege protects a lawyer's work product and covers material going beyond solicitor-client communications.[19] It does not apply to records created outside of the "zone of privacy" intended to be protected by the litigation privilege, such as communications between opposing counsel.[20] The litigation must be ongoing or reasonably contemplated.[21]

[41] Branch 2 is a statutory privilege that applies where the records were "prepared by or for counsel employed or retained by an institution for use in giving legal advice or in contemplation of or for use in litigation." The statutory and common law privileges, although not identical, exist for similar reasons.

[42] Although only litigation privilege was claimed in the city's decision letters, the city also argued in its representations that the records are subject to solicitor-client communication privilege.

Representations

[43] The city's initial and reply representations and the appellant's first representations were submitted to this office prior to the issuing of the revised decision letters in the five related appeals in November 2016, which themselves were issued

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[14] *Balabel v. Air India*, [1988] 2 W.L.R. 1036 at 1046 (Eng. C.A.).
[15] *Susan Hosiery Ltd. v. Minister of National Revenue*, [1969] 2 Ex. C.R. 27.
[16] *General Accident Assurance Co. v. Chrusz* (1999), 45 O.R. (3d) 321 (C.A.); Order MO-2936.
[17] *Kitchener (City) v. Ontario (Information and Privacy Commissioner)*, 2012 ONSC 3496 (Div. Ct.).
[18] *Blank v. Canada (Minister of Justice)* (2006), 270 D.L.R. (4th) 257 (S.C.C.) (also reported at [2006] S.C.J. No. 39).
[19] *Ontario (Attorney General) v. Ontario (Information and Privacy Commission, Inquiry Officer)* (2002), 62 O.R. (3d) 167 (C.A.).
[20] *Ontario (Ministry of Correctional Service) v. Goodis*, 2008 CanLII 2603 (ON SCDC).
[21] Order MO-1337-I and *General Accident Assurance Co. v. Chrusz,* cited above; see also *Blank v. Canada (Minister of Justice)*, cited above.

following an August 2016 OMB decision on a motion for production. The ruling on the OMB motion ultimately led to nearly complete disclosure in, and the closing of, Appeal MA15-523. The representations therefore address the city's earlier, broader privilege claim in relation to all five appeals. In my analysis below, I apply these representations to the records remaining at issue for which section 12 is claimed.

[44] The city's position is that the records withheld under section 12 were created with "real litigation in mind" and that disclosure of them would reveal materials which are to be used in preparing for, or engaging in the actual litigation concerning Property A. The city claims that it denied access to the records because disclosure could reveal to "an assiduous [inquirer]" the nature of direct communications between solicitor and client for the purpose of providing legal advice and would also reveal the documents utilized in litigation.

[45] According to the city, the records relate to matters in which the assigned city solicitor was acting to provide legal advice concerning the city's park levy By-law. The city submits that section 12 applies not only to records that contain legal advice but also, as stated in *Balabel v. Air India*, *supra*, to other communications where the client may require advice on "matters great or small at various stages." According to the city, some of the records at issue refer to applications that were commenced to dispute the park levy and/or communications concerning the possible settlement of the matter. For all of these records, the city submits that there is no suggestion or basis to establish waiver of the privilege.

[46] The city's main argument, however, is that the records are litigation privileged because they were used to prepare for litigation concerning the park levy and, possibly, to settle the potential claims for Property A. In other words, the city argues that the records were prepared for the dominant purpose of utilization by the assigned city solicitor in contemplation of the OMB litigation. The city acknowledges that the preliminary valuations and "preparation for litigation" relating to park levies are undertaken by the city's dedicated staff in the Policy and Appraisal Section of the Office of the Chief Corporate Officer, but argues that the dominant purpose of their creation is for use before the OMB. Noting that IPC decisions, such as Order PO-2037, have held that litigation privilege protects documents which were produced or brought into existence with the dominant purpose of conducting, or aiding in the conduct of, reasonably expected litigation, the city submits that:

> The records predominately [sic] consist of documents which were used to form or implement legal advice with respect to an issue where litigation was reasonably contemplated at the time the documents were created; or were otherwise utilized by the assigned solicitor in the contemplated litigation before the OMB concerning the appropriate amount of the park levy owing by the property owner.

> The city applied s. 12 to the collections of documents used to prepare for a potential litigation matter. … The reasonableness of the anticipation of the litigation in considering and calculating the park levy owing … is born out by the fact that litigation concerning this issue has been commenced.

[47] Since litigation before the OMB remains outstanding, the argument goes, the privilege continues because the records include documents utilized for the purpose of determining an appropriate resolution or settlement. Moreover, the city submits that at some point in the OMB litigation, there will be a mutual exchange of the final expert report (valuation); however, at this point, the responsive records are exempt under section 12 because they contain the preliminary, confidential draft materials for that expert report. The city submits that disclosure of the calculations, worksheets and handwritten notes regarding the preliminary valuation would give the appellant a "significant strategic advantage" in the litigation.

[48] In response, the appellant submits that the city's assertion of privilege is entirely inconsistent with the rationale behind both the solicitor-client and litigation privileges and, further, that the circumstances here support a finding that privilege, if any exists, has been waived. To begin, the appellant strongly disputes the city's claim that the records are solicitor-client privileged, arguing that the city has failed to establish that any of the responsive records constitute confidential information provided with a view to obtaining legal advice. The appellant points to the city's acknowledgement that the records were not prepared by, or for, the city's legal department, but rather "staff in the Policy and Appraisal Section of the Office of the Chief Corporate Officer," and emphasizes the importance of this fact. Specifically, the appellant argues that such records are created as a matter of course in consultation with the city's Parks, Forestry and Recreation department to determine the applicable percentage of cash-in-lieu of parkland and at the request of the city's Building department. The appellant submits that the city has also admitted that no city lawyer, including the solicitor assigned to the cash-in-lieu applications, was involved with the preparation of the appraisal records. For this, and other points made by the appellant in arguing that section 12 does not apply to these records, the appellant relies on the city's response to its OMB motion for production and the transcript of evidence given by the city's Manager of Policy & Appraisal Services on cross examination prior to the motion.[22] The appellant states that the city's legal department was not provided with copies of these appraisal records, nor were they involved at all until the appellant applied to have the OMB determine the value of its property.[23] The appellant adds that the city did not argue that any of the records were protected by solicitor-client privilege at the time it resisted production of the appraisal documentation relating to the subject property in the motion, which is

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[22] These matters are the subject of considerable attention in the parties' representations. The appellant provided excerpts from the transcript of the cross examination with its representations, as well as a complete copy of the city's response to the motion.

[23] This is a reference to the subject property from Appeal MA15-523, now closed.

inconsistent with the claim in this appeal under the *Act.*

[49] The appellant also vigorously disputes the city's claim that the records are subject to litigation privilege. Referring to *Blank, supra,* the appellant states that the purpose of litigation privilege is to protect the adversarial process by creating a "zone of privacy" around materials created to prepare a case for trial. Noting that the precondition for finding that records are protected by litigation privilege is that they were created for the dominant purpose of ongoing or reasonably contemplated litigation,[24] the appellant submits that the records were "clearly not prepared by or under the direction of City Legal in contemplation of or for use in litigation," as section 12 requires. Rather, the records were prepared by the city's Real Estate Services section to fulfill its statutory obligation under section 42(6.4) of the *Planning Act* to determine the land's value for the purpose of collecting the cash-in-lieu-of-parkland payment.

[50] As for the city's argument that the appellant's subsequent OMB land value determination application supports the assertion that litigation was reasonably anticipated, the appellant points to the city's own evidence in the OMB motion. The appellant notes that the challenge to a valuation permitted by section 42(10) of the *Planning Act* is optional and is "certainly not a remedy routinely exercised by landowners in every case, or even in the majority of cases." The appellant also states that the suggestion that litigation was reasonably contemplated, because litigation in fact arose, is circular. The mere fact that a land owner may apply to the OMB to have the land value determined does not result in every single document created to comply with the city's statutory obligations being considered to have been prepared in contemplation of litigation.

[51] The appellant also takes issue with the wording chosen by the city in its representations to describe the records, pointing specifically to references to the park levy calculation and land valuation process as "settlement," "negotiation," "advisory documents" or "draft outline of information." The appellant notes that while litigation privilege would extend to records prepared for use in the mediation or settlement of litigation, under *Magnotta, supra,* the city's attempt to characterize its appraisal process as a negotiation or litigation is inaccurate.

> The valuation of a property reflects the city's statutory obligation to determine a property's fair market value based on minimum statutory and regulatory standards … and is not analogous to negotiations between private parties.

[52] The appellant also points out that the city claimed simultaneously that the appraisal records would not be relied upon if the matter proceeded to a hearing before

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[24] The appellant relies on *Chrusz, supra*; *Blank, supra*; and *Nova Chemicals (Canada) Ltd. v. Ceda-Reactor Ltd.,* [2014] O.J. No. 3284 (Ont. S.C.J.), paras. 34-37.

the OMB (motion evidence) and also that the initial appraisals were prepared for the dominant purpose of use by the city solicitor in the litigation before the OMB (IPC representations). According to the appellant, "the city cannot have it both ways. If the appraisal records were prepared with no intention of being used at a hearing, then they were not prepared for the purpose of litigation."

[53] The appellant also explains why, in its view, the city has waived any privilege that may have existed. Briefly, the appellant submits that the city explicitly waived solicitor-client privilege because, according to its evidence on the motion, the information on which the appraisal reports were based was communicated to a representative of the subject property[25] and is also available for viewing by landowners on request. This, the appellant submits, evinces the city's voluntary intention to waive privilege and lack of intention to keep the records confidential. The appellant's alternate view is that the same evidence also demonstrates an implied waiver of privilege.

[54] In reply, the city refutes the appellant's claim that the records are not litigation privileged, asserting that it contemplates litigation in "each one of these matters." Indeed, the city's reply reiterates its position that the dominant purpose of the records' creation was, in fact, for use in preparation and contemplation of litigation before the OMB, including in relation to "potential resolution of such potential litigation through settlement."[26] The city states that the overwhelming majority of these valuation disputes are settled prior to the holding of a full hearing before the OMB and submits that litigation privilege does not only apply to documents that would be submitted as evidence in a hearing, but also to all records utilized in the context of such matters.

[55] Regarding waiver, the city submits that sharing information for the purpose of settlement discussions does not, without more, establish waiver of privilege over the records available for viewing, nor does the city's willingness to engage in discussion.

[56] The appellant's sur-reply focuses on disputing the city's position on litigation privilege. Specifically, the appellant argues that its subsequent application to the OMB "does not change the incontrovertible fact that the dominant purpose (in fact the only purpose) for which the city completed its 'initial valuation' work was to enable it to extract a substantial park levy payment … before [we] could proceed with … development. The evidence led by the city during the OMB motion clearly indicated that its Legal Department had no involvement whatsoever in the preparation" of the valuation. Regarding the OMB decision on the motion for production, the appellant states that the city's litigation privilege argument was rejected because the OMB concluded that the dominant purpose of the preparation of the reports was to establish

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[25] Again, this refers to the property in Appeal MA15-523, now closed, and alludes to evidence that the appraiser hired by that developer was given information that the city's lawyer would not give to legal counsel for the same party.

[26] The city also provided excerpts from the OMB Transcript of Proceedings.

the market value of the lands to facilitate the collection of a park levy payment.[27] The appellant addresses the terms of the OMB's production order relating to the records requested in Appeal MA15-523 and emphasizes that the OMB was not asked to order production of any of the records relating to Appeals MA15-524 to MA15-527.[28] The appellant submits that in this context, it remains important that the IPC render a decision on the validity of the city's exemption claims in this appeal and the related ones; in the appellant's view, access under *MFIPPA* must be determined since the city's position that a landowner must "pursue a costly and time-consuming OMB appeal in order to understand the basis … [of the] park levy payment" is untenable.

Analysis and findings

[57] In Appeal MA15-524, the city claims that pages 80, 82 and 93 are exempt, in part, and that pages 67-70, 77-79, 84, 86 and 102-103 are exempt, in their entirety, under section 12. For the reasons that follow, I find that neither branch 1 nor branch 2 of the exemption in section 12 applies to the records remaining at issue in this appeal.

[58] As stated previously, solicitor-client communication privilege protects direct communications of a confidential nature between a solicitor and client, or their agents or employees, made for the purpose of obtaining or giving professional legal advice. It applies to communications within the "framework" of the solicitor-client relationship.[29] Therefore, for the communication privilege to apply, the communication must be a direct communication between solicitor and client.

[59] With one exception discussed below, the records at issue in this appeal do not consist of communications between a city lawyer and an internal client. The records consist either of draft valuation documents, including calculations and handwritten notes, respecting the park levy for Property A or communications with principals of, or representatives for, Property A. There is no solicitor-client relationship between these parties. Further, while the city submits that section 12 may apply even to records containing no legal advice, such as the draft appraisals, there is no evidence that these records were ever provided to the assigned city solicitor for the purpose of obtaining legal advice or that they were somehow otherwise part of a confidential "continuum of communications" between solicitor and client; nor am I satisfied that they formed part of a lawyer's working papers. I conclude that none of these records are subject to solicitor-client communication privilege.[30]

[60] The exception, page 93, does consist of a communication between a city lawyer,

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[27] At paragraphs 16 and 17 of the OMB decision, now reported at 2016 CanLII 56915 (ON OMB).
[28] The records disclosed in relation to subject property by order of the OMB were: "appraisal reports, market reviews and any valuation analysis referenced by the city official setting forth the park levies required on the basis of which park levies have been exacted and paid.".
[29] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[30] Order MO-1258.

the director of the Planning and Administrative Tribunal Law section, and a client, the Manager of Policy & Appraisal Services (copied to other city staff). The email deals with assigning a specific city solicitor to assist with the matter of the "under protest" payment of the park levy by Property A's developer. This much is evident and can be stated here because page 93 was disclosed to the appellant nearly in its entirety: the only severance was the approximate amount of that park levy payment. In the circumstances, I do not accept that privilege attaches to this particular communication. Notably, it is missing the required element of having been sent for the purpose of obtaining or giving professional legal advice.[31] The adjudicator in Order MO-3449-I set out the following part of Justice Farley's reasons in *Confederation Treasury Services Ltd. (Re)*[32] that I find relevant in this appeal:

> … I would also note that [solicitor client] privilege does not automatically come into play merely because a lawyer is engaged by a client. The privilege attaches to the request for and obtaining of legal advice. It does not attach to communications between a client and his retained counsel when that counsel is either not acting as a lawyer or where it is not legal advice but rather some other form of advice or other assistance being offered.

[61] As stated, this record merely deals with the administrative matter of what city solicitor was assigned to provide assistance to the city's appraisal staff, and I find that it is not exempt by reason of solicitor-client communication privilege.

[62] With respect to the city's main position that litigation privilege applies to all of the records withheld under section 12, in part or in full, I find the appellant's submissions to be persuasive. I conclude that these records were not, in fact, prepared for the dominant purpose of ongoing or reasonably contemplated litigation as is required for a finding of litigation privilege under either branch.[33]

[63] The appellant submits – and the city appears to acknowledge – that the records were not prepared by or for the city's Legal department, but rather the Real Estate Services department. This is consistent with information provided by the city during the inquiry indicating that the Real Estate Services Division was asked to conduct the search because only that area "would have any responsive records." I also agree with the appellant that on the facts, the "dominant purpose" part of the litigation privilege test is not met. The evidence simply does not establish the foundation of ongoing or reasonably contemplated litigation. Park levy valuations are prepared and completed within the city's Real Estate Services Division "in every case where it is required." This requirement flows from the city's statutory obligation under the *Planning Act* and Chapter 415 of Toronto's *Municipal Code* to determine a land value to enable the

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[31] *Descôteaux v. Mierzwinski* (1982), 141 D.L.R. (3d) 590 (S.C.C.).
[32] [1997] O.J. No. 3598 (Ont CJ, Gen. Div.).
[33] See *Chrusz, supra,* and *Blank, supra*.

Building Department to collect the cash-in-lieu-of-parkland payment. In other words, such land valuations happen as a matter of course under this scheme. In this context, it is clear that the records were "not prepared by or under the direction of City Legal in contemplation of or for use in litigation." In my view, to find that the fact that a landowner may challenge the valuation (and, by extension, the park levy) by application to the OMB means that all records created under this valuation scheme for every single property are "prepared in contemplation of litigation" would be absurd.

[64] Even if I were to accept the city's position that challenges to land valuation at the OMB are becoming more frequent, it does not follow that increasing recourse to this type of application somehow renders the contemplation of litigation in this particular situation reasonable, particularly from a retroactive standpoint. In sum, I find that neither the common law nor the statutory litigation privilege apply. The common law privilege requires that the communication be for the dominant purpose of reasonably contemplated or ongoing litigation, while the statutory privilege requires that the communication be "in contemplation of or for use in litigation."[34] Both privileges require that the litigation be reasonably contemplated or ongoing *at the time of the communication* and this qualification is not satisfied here.

[65] I also find support for my conclusion in the OMB's ruling on the production motion. In considering the question of whether appraisal reports relied upon by the city in arriving at the park levy ought to be ordered disclosed to the parties whose properties those reports had been prepared for, the Associate Chair noted that "the relevance of disclosure is beyond dispute insofar as these documents are the basis for the demand of payment." The Associate Chair also outlined the importance of the disclosure to exploring resolution of park levy disputes. In response to the question "does litigation privilege apply to the appraisal report, market review analysis and valuation analysis?" the Associate Chair said no. On his assessment of the matter before him, the Associate Chair concluded that the dominant purpose of the preparation of the documents is "to establish the market value of the lands so that park levies can be calculated, exacted, imposed and collected as early as possible." He concluded there was no reasonable basis to extend the litigation privilege to these records. I agree.

[66] In summary, based on my conclusion that the records are not subject either to solicitor-client communication privilege or litigation privilege, I find that they do not qualify for exemption under section 12 of the *Act*.

[67] All of the records from Appeal MA15-524, as well as the remaining records in Appeals MA15-525, MA15-526 and MA15-527, are also subject to the city's section 11 exemption claim, except page 93. I note, however, that the company named in the records related to Property A (MA15-524) was, like the other owners, not notified of the request or the appeal. It may be the case that Property A's owner has an interest in the

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[34] Order MO-3449-I.

disclosure of page 93 and other records. I will address this consideration in relation to all four appeals, below, at the conclusion of my analysis of the discretionary exemption in section 11.

C. Does the discretionary exemption for valuable government information at section 11 apply to the records?

[68] The records at issue in Appeals MA15-524 to MA15-527 consist of calculations/worksheets, tables, reports, memos and correspondence. Based on the copies of the records provided to this office following the city's supplementary decisions, they were withheld pursuant to sections 11(a), (c) and (d), either together or under combinations of the three. The relevant parts of section 11 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;

[69] 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*.[35]

[70] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[36]

[71] 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

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[35] *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.
[36] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

harms in the *Act*.[37]

Representations

[72] According to the city, it is relying on section 11 to prevent harm to the city's competitive position and financial interests in any negotiations concerning the park levy amount. In this context, therefore, the denial of access under section 11 is intended to prevent both the deprivation of its interest in the valuation documents and the corresponding enrichment of the appellant by their disclosure.

[73] The city explains that it claimed section 11(a) to the "initial phase valuation" for the properties and other related documents that would disclose the content of the valuations. The city submits that all three requirements for section 11(a) are met for the following reasons:

- The records contain information qualifying as "commercial information" because it consists of a review of the market value of the land at a specific time and the basis upon which the appraisers applied professional skill to analyze it.

- Due to the city's purchase of the valuation, it retains an ownership interest in the content; the information was developed "through the city's expenditure of money to retain individuals to apply skill and effort" to prepare it. Further, the city treats the information in a confidential manner and its value to the city arises from it not being generally known.

- Disclosure of the initial phase valuations would deprive the city of the monetary value of this intrinsically valuable information. In the city's view, the cost to the city to create the record and the confidence in which it has been maintained are evidence of the monetary value of the records. The city refers to their intended use in "anticipated litigation in relation to the city's entitlements under the city's Park Levy By-law" and submits that providing the appellant with these records would be "a misappropriation of a valuable informational assert of the city."

[74] Regarding sections 11(c) and 11(d), the city contends that a reasonable expectation of prejudice or injury to its economic interests is established because there is a direct link between those harms and disclosure of the initial appraisal records. According to the city, "any calculation of the proper Park Levy amount must take into account this market value; therefore, any negotiations by the city with respect to these amounts would be prejudiced by the other party having knowledge of the city's appraisal information and worksheet/calculations." The records include information on each property, but also comparator properties and other details that identify the basis of the comparison figures used. In the city's view, prejudice to its ability to negotiate a resolution would result from disclosure of the information detailing "how the city

[37] Order MO-2363.

undertook its analysis, revealing the various considerations and the identified factors relevant to determining the very amount currently being negotiated." The city claims that a reasonable expectation of harm in similar circumstances "has been routinely found to be present by the IPC," although no orders are cited in support of this assertion.

[75] The city submits that "premature disclosure" prior to resolution could reasonably be expected to harm the city's economic interests or competitive position because there is a "direct link" between disclosure and those harms. The city points to the appellant's stated intention to use the records in the context of an "[adversarial] litigation matter," and related negotiations where the city's and appellant's positions are "in direct opposition."

> The requester believes that the records with respect to Properties A, B, F & G would assist in determining the potential vulnerabilities in the city's Park Levy calculations for the Subject Property. In the current circumstances, the negotiations are a "zero sum" game where gains to the requester's position would come at a direct cost to the city. Additionally, disclosure to one member of the public under MFIPPA is "disclosure to the world" as all of the [properties] related to matters where the Park Levy amount is a potential matter of negotiations with respect to the property owners, similar harms may be expected through the disclosure of this information in relation to these other negotiations. … Disclosure of these documents would prejudice the city in its negotiations with the various appellants. Disclosure would lay bare the city's entire information basis and prejudice the city's ability to negotiate the Park Levies. The potential difference in the city's ability to negotiate resolutions due to the disclosure of the valuation and calculations would be a loss of millions of dollars in value to the public.

[76] In response, the appellant disputes the city's position that the purpose of preparing the appraisal documents is to use them strategically to gain an advantage in negotiations and thereby maximize the park levy it can collect. Rather, the appellant submits that the requirement to pay a park levy under section 42(6) of the *Planning Act* is a precondition to development imposed by legislation, not a private negotiation between contracting parties, each of whom is seeking to secure the best deal possible. Further, the appellant points out that to meet the onus of establishing that section 11 applies, the city was required – but failed – to demonstrate a risk of harm that is more than merely possible or speculative.[38]

[77] Regarding section 11(a) and the city's argument that it holds an ownership

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[38] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra.*

interest in the valuation records because it paid to purchase them, the appellant notes that the land owner, not the city, had to pay for the valuations by submitting an "$8,000 appraisal service fee" and from this perspective, it would be more accurate to say that the records have monetary value to the landowners. The appellant submits that the mere fact that costs were incurred in preparing the records does not endow the records with monetary value as that term is understood in section 11(a). Further, the appellant adds that it is nonsensical to say that the city derives monetary value from the information not being generally known when the city's Manager of Policy & Appraisal Services admitted under oath (in the OMB proceeding) that the information is routinely disclosed to the owner and/or made available for inspection on request. Further, much of the data is publicly available and it does not constitute sensitive business or commercial information; therefore, such information cannot be misappropriated. The appellant submits that "the legitimacy of the city's extraction of cash-in-lieu payments depends on the validity and transparency of its market value determinations," which are not the type of information intended to be protected by section 11(a).

[78] The appellant prefaces the rebuttal to the city's representations on sections 11(c) and (d) by noting again that the appraisal documents are available for review upon request. The appellant disputes the city's characterization of the setting of the park levy payment calculation as a "negotiation," claiming that it is more properly described as an attempt to arrive at the appropriate land value to ensure the city has complied with its statutory obligations under subsection 42(6.4) of the *Planning Act.* In this context, therefore, disclosing the appraisal amounts prior to the resolution of any dispute over the park levy could not reasonably be expected to harm the city's economic interests or competitive position since a landowner's use of them is still subject to determination of the land value by the OMB. The appellant submits that the valuation of the land under section 42 of the *Planning Act* for the purpose of calculating the park levy ought to be an objective exercise based on an analysis of comparable land sales nearby and, accordingly, appraisals are not intended to produce a competitive advantage or disadvantage for the city or anyone else privy to the analysis. In the appellant's view, the city's insistence on characterizing the valuation exercise as a "zero sum game" reveals the fallibility of its position on economic prejudice.

[79] In reply, the city suggests that the appellant's representations offer no basis to question the application of sections 11(a), (c) and (d) to the records. If anything, the city says that the appellant's submissions confirm that the records at issue contain information that has financial value to the appellant in negotiating a settlement of the OMB dispute, "which the requester does not want to pay to obtain." The city contends that the appellant recognizes that obtaining the records may assist in determining the strength and weaknesses in the city's valuation and will be of benefit in either preparing its own expert reports for use before the OMB or in negotiations to resolve the current dispute. The city also states that the fact that the city may partially recover the costs incurred in obtaining or developing the appraisal (by charging the $8,000 fee) does not transfer ownership of the city's property to a third party.

[80] The appellant's sur-reply representations, which were provided following the release of the OMB decision in the production motion, do not add much to the section 11 submissions provided previously. Rather, the appellant emphasizes the limitation of the OMB's decision to the records at issue for the subject property and the importance of the determination in Appeals MA15-524 to 527 of the public's right of access to this particular information in the city's possession.

Analysis and findings

[81] For section 11(a) to apply, the city was required to satisfy a three-part test establishing that the information: is a trade secret, or financial, commercial, scientific or technical information; belongs to the city; *and* has monetary value or potential monetary value.

[82] The types of information listed in section 11(a) have been discussed in prior orders. In this appeal, I accept the city's position that the appraisal records contain commercial information, described in past orders as follows:

> *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.[39] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[40]

[83] The records therefore meet part 1 of the test under section 11(a) on this basis.

[84] Turning to part 2 of the test under 11(a), which requires that the information "belong to" the city, I note that even though the city may have spent money to have employees and external consultants develop and prepare the initial appraisal records, it does not necessarily follow that the information "belongs to" the city within the meaning of that term in section 11(a) of the *Act*.[41] Rather, 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.

[85] 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

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[39] Order PO-2010.
[40] Order P-1621.
[41] Orders P-1281 and PO-2166.

another party.[42] At dispute here are records related to the park levy payments for four properties. The starting point of the park levy calculation is the appraisal of market value, which is a value determined according to well-established methods that do not "belong to" to the city, such as those adopted under the Canadian Uniform Standards of Professional Appraisal Practice.[43] Certainly, I have no evidence before me that any specific valuation model for determining these amounts was developed by the city itself.[44]

[86] Not only must the information have monetary value, it must be found to have been consistently treated in a confidential manner and to derive its value from not being generally known. Both conditions are not satisfied on the facts of this appeal. Rather, the evidence suggests that at least some of this data is in the public domain generally and, further, that the appraisal records, market analysis and other similar information is made available for inspection, if not copying, upon request by a landowner. In the context of that inspection scheme, I find that the city's confidentiality concerns are substantially diminished. This, in turn, makes it difficult to accept the city's contention that it must protect the records from "misappropriation." Additionally, the city's concerns about the intended use of these records in "anticipated litigation" over the city's park levy entitlements are better addressed under sections 11(c) or 11(d).

[87] In conclusion, the evidence does not persuade me that the initial appraisal records "belong to" the city in the sense contemplated by section 11(a). I find that the discretionary exemption in section 11(a) does not apply.

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

[88] Although the wording of sections 11(c) and (d) differ, namely "prejudice the economic interests" (or its competitive position) and "be injurious to the financial interests," the context of an institution's claim to both of them has often resulted in their possible application being considered together in orders of this office.[45] The circumstances of these appeals are such that I am satisfied that it is appropriate to address the possible application of sections 11(c) and (d) together in this order.

[89] Both exemptions consider the consequences of the disclosure of information, unlike section 11(a), under which the form of the record matters most. 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

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[42] See Orders P-1763 [upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)* (April 25, 2001), Toronto Doc. 207/2000 (Ont. Div. Ct.)], PO-2632 and PO-2990.
[43] Appraisal Institute of Canada.
[44] For example, as was accepted to be the case with the formulae or "syntax files" developed by the Municipal Property Assessment Corporation in Order MO-2412.
[45] Order PO-2598 and PO-2987.

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.[46] Section 11(d) requires an institution to establish that disclosure of the information in the record reasonably be expected to be injurious to its financial interests. Importantly, to establish section 11(c) or 11(d), the city was required to provide detailed and convincing evidence about the potential for harm. A risk of harm well beyond the merely possible or speculative must be demonstrated, although the city was not required to 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.[47]

[90] The valuation records at issue deal with the determination of the park levy under the *Planning Act* and Chapter 415 of the *Municipal Code* and are subject to the OMB's final word on land value if disputed by the landowner. The city argues that providing the appellant, and by extension the public, with access to the undisclosed portions of the valuation files in Appeals MA15-524 to 527 – which contain the method of determining, and documentary support for, the park levy in each specific case – could reasonably be expected to lead to the harms in sections 11(c) and (d). After careful consideration of the city's position and the evidence provided, I conclude that their disclosure could not reasonably be expected to jeopardize the city's ability to earn money in the market place.

[91] The city's representations include a claim that disclosure of the valuation records would prejudice the city's ability to negotiate the park levy with developers resulting, potentially, in the "loss of millions of dollars in value to the public." This submission fails to surpass the required threshold of "merely possible or speculative" evidence, at least partly, because it does not properly account for the statutory context within which the park levy is determined and paid into city coffers. Developers must pay the park levy under section 42(6) of the *Planning Act* as a precondition to development. The figures and calculations of this factual determination are based on the market value of a particular property at a specific time, determined with consideration of the value of comparator properties and generally accepted appraisal methods. As I noted above under section 11(a), at least some of this information is publicly available.[48]

[92] The city expressed concern about the appellant's use of the records in the "adversarial litigation matter" between them or in related negotiations where the city's and appellant's positions are "in direct opposition." I agree with the appellant that calculating the park levy is more aptly considered an objective exercise under which

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[46] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[47] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, *supra*.

[48] Components of the appraisal reports are available online, including through the land registry system, but also through other publicly available databases, some of which require a paid subscription.

appraisals do not create a competitive advantage or disadvantage for the city. As noted above, a landowner who protests the city's assessed park levy calculated on the basis of such an appraisal has recourse to the OMB under section 42(10) of the *Planning Act* for determination of the market value. The landowner's and OMB's use of the appraisal records at such a hearing may result in lowering the valuation, but it could also result in the city's valuation being affirmed. As the appellant points out, this use of the undisclosed records would "by definition … produce the correct statutory result." Certainly, in the production motion that led to the OMB ordering disclosure of records to the appellant (and the closure of Appeal MA15-523), the OMB recognized the "relevance of disclosure [as] beyond dispute insofar as these documents are the basis for the demand for payment."[49]

[93] In any event, I am certainly not persuaded by the city's position that the interests of the city and landowners obliged to pay the park levy are "directly opposite." Even if that were the case, this is not sufficient on its own to establish the application of section 11(c) or (d).[50] It would not be incorrect to refer to the discussions city appraisal staff may have with developers (prior to any section 42(10) application to the OMB) as "negotiations." However, this does not create a "competitive position" as the term is used in section 11(c), which contemplates a situation in which two entities in the same or similar businesses compete for customers.[51] Further, although "economic interests" has a broader meaning than "competitive position", its interpretation must be consistent with the purpose of the exemption and with the overall intent of the provision. The "economic interests" the city seeks to protect by withholding these records must relate to earning money in the marketplace. In this context, I do not accept that the use of the valuation records at issue could reasonably be expected to harm the city's economic interests or competitive position, even in relation to a matter not yet resolved. As has been emphasized, any landowner's use of the records is still subject to determination of the land value by the OMB, the body entrusted by the Legislature with that authority under section 42(10) of the *Planning Act*.[52]

[94] The city has significant power here as well, in the form of legislative authority pursuant to Chapter 415, Article III of the Municipal Code, to collect the park levy from developers prior to issuing a building permit. The records contain calculations, comparison figures, the method of analysis, any considerations and relevant factors that might be implicit in the analysis in the appraisal reports, as well as a host of other information that appears to exist in the public domain. The evidence presented by the city under section 11(c) and (d) does not establish a reasonable expectation of harm to its negotiating position or financial interests and is simply not sufficient to withhold records that essentially reveal how the city is carrying out an administrative function

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[49] 2016 CanLII 56915 (ON OMB), para. 13.
[50] Order P-229.
[51] Order MO-2208.
[52] The records in this appeal indicate that there is no outstanding dispute as to the market value of Property A and the park levy payable.

connected to its statutory obligations.

[95] It may also be recognized that any possible risk of harm to the city has been lessened through the passage of time and the passing of other milestones in the process, as well as the prior disclosure of information to the appellant in Appeal MA15-523. In principle, I agree with the appellant that transparency and accountability may assist in measuring the fairness and integrity of the park levy scheme. In any event, as past orders have held, the likelihood of greater public scrutiny occurring with disclosure does not, without more to connect them, establish the harms under section 11(c) or 11(d).[53] Having said that, institutions may exercise their discretion to disclose records to which an exemption applies. This is the essence of a discretionary exemption.

[96] In addition, I note that the records disclosed by the city in its final set of supplemental access decisions in November 2016 featured inconsistent severances under this discretionary exemption. Components of the park levy formula withheld from the calculations/worksheets in Appeals MA15-524 and MA15-527 were not severed from the same records in Appeal MA15-525. The gross floor area (or GFA) redacted from memos in Appeal MA15-524 was not withheld from the same type of record in Appeal MA15-525. The zoning by-law appendix of the narrative appraisal reports in Appeals MA15-526 and MA15-527 also received different treatment in the decisions: it was fully disclosed in one, but withheld in its entirety in the other. Section 4(2) requires the head to disclose as much of a responsive record as can reasonably be severed without disclosing information that falls under one of the exemptions. A valid section 4(2) severance must provide the requester with information which is responsive to the request, while at the same time protecting the portions of the record covered by an exemption. Past orders have held that it would not be reasonable to require a head to sever information from a record if the end result is simply a series of disconnected words or phrases with no coherent meaning or value.[54] In my view, where virtually the entire appraisal report was withheld, these variations in severance would have become material considerations under section 4(2) if I had partly upheld section 11.

[97] In conclusion and for all the reasons articulated above, I find that sections 11(a), (c) and (d) do not apply to the appraisal records in Appeals MA15-524 to MA15-527.

[98] Since I have not upheld the city's decision to withhold the records under sections 11 or 12, it is not necessary for me to review the city's exercise of discretion. However, before making a final determination concerning the disclosure of the withheld records, I must first address the issue of the notification of the owners of Properties A, B, F and G.

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[53] See, for example, Order PO-3707.
[54] Orders 24, P-1107, PO-2366-I and PO-3340.

ORDER:

1. I find that sections 11 and 12 of the *Act* do not apply to the withheld records, or portions of records, in Appeals MA15-524, MA15-525, MA15-526 and MA15-527.

2. I remain seized of these appeals to address the notification issue.

Original Signed by: August 15, 2017

Daphne Loukidelis
Adjudicator