Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3527-F

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

City of Toronto

November 23, 2017

Summary: This order concludes four appeals of access decisions issued by the City of Toronto in response to requests under *MFIPPA* for valuation records related to setting the "park levy" for certain high-density developments. In Interim Order MO-3482-I, the adjudicator did not uphold the city's claims of sections 11 (valuable government information) and 12 (solicitor client privilege) of *MFIPPA* to deny access, in part. The adjudicator remained seized of the appeals to address the issue of notifying the property owners to seek their views on disclosure. The property owners did not respond to notification. The adjudicator finds that the remaining responsive portions of the valuation records are not exempt under the mandatory section 10(1) exemption and orders them disclosed to the appellant.

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

Orders Considered: Interim Order MO-3482-I.

OVERVIEW:

[1] This final order follows Interim Order MO-3482-I and concludes four related appeals of access decisions issued by the City of Toronto (the city) regarding requests submitted under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for records related to the calculation of the city's "park levy" for

eight identified high-density property developments.[1] Specifically, the request sought:

> 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.

[2] In Interim Order MO-3482-I, I provided the following additional explanation of the context in which the request was submitted:

> Under section 42(6) of the *Planning Act*[2] and Chapter 415, Article III of Toronto's 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.[3] 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*).

[3] The stated intention behind the request in these appeals was to understand the basis upon which the city had calculated the value of the requester's property, and other similar development sites in the vicinity, in order to set the required park levy payments.

[4] The city granted partial access to the valuation records relating to each of the properties, withholding portions of them under sections 11(a), (c) and (d) (valuable

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[1] The city assigned a letter for each of the seven properties identified in the access request. The request also sought essentially the same information for the requester's own development project. This appeal of the city's decision in respect of the requester's "subject property" and its park levy resulted in the opening of Appeal MA15-523, which resolved when the city granted full disclosure to the records remaining at issue during the inquiry stage (section 14(1) severances aside). The four remaining appeals are Appeal MA15-524 (Property A), Appeal MA15-525 (Property B), Appeal MA15-526 (Property F) and Appeal MA15-527 (Property G).

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

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

government information) and 12 (solicitor-client privilege). The requester's appeals to this office, their progress through IPC appeal processes and the related Ontario Municipal Board matters are more fully described in Interim Order MO-3482-I, and I will not repeat the entire history in this final order.

[5] In Interim Order MO-3482-I, I determined the issues of whether the city should be permitted to "late raise" discretionary exemptions, whether the discretionary solicitor-client privilege exemption in section 12 applied to certain records, and whether the discretionary exemption for valuable government information at section 11 applied to the records. In the interim order, I permitted the city to "late raise" the solicitor-client privilege exemption in section 12 in Appeal MA15-524.[4] Based on the evidence provided and the content of the records, I concluded that sections 11(a), (c) and (d) and 12 did not apply to the valuation records for the four properties. However, I observed that the owners of the properties to which the valuation records related had not been notified of the requests or the resulting appeals to this office. Since it was possible that disclosure of the records relating to Properties A, B, F and G may affect the interests of their owners, I remained seized of the appeals to address the issue.

[6] On September 29, 2017, I sent a Supplementary Notice of Inquiry to the four identified property owners in Appeals MA15-524 to MA15-527 that described the background, context and issues. For reference, the Supplementary Notice of Inquiry contained an outline of the mandatory third party information exemption in section 10(1) of *MFIPPA,* a copy of Interim Order MO-3482-I, and a consent form. In this way, I invited the property owners to submit their views on the disclosure of the records. None of the owners responded to the Supplementary Notice of Inquiry.

[7] In this final order, I find that section 10(1) does not apply, and I order the city to disclose the remaining responsive records in Appeals MA15-524, MA15-525, MA15-526 and MA15-527 to the appellant, subject to the severance of personal information in Appeal MA15-525.

RECORDS:

[8] The records at issue in Appeals MA15-524 to MA15-527 consist of calculations/worksheets, tables, reports, memos and correspondence.

[9] In Appeal MA15-524 (Property A), the city withheld 16 pages, in full, and 17 pages, in part. In Appeal MA15-525 (Property B), the city withheld 45 pages, in full, and

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[4] However, I concluded that it was unnecessary for me to consider the other late-raised discretionary exemption in section 8(1)(i) in Appeal MA15-524 because the appellant withdrew the appeal respecting the information withheld on that basis. Additionally, the appellant had indicated earlier on in the appeal process that he did not seek information relating to individuals, which removed the mandatory personal privacy exemption in section 14(1) from the scope of Appeals MA15-523 and MA15-525.

10 pages, in part. In Appeal MA15-526 (Property F), the city withheld 74 pages, in full, and four pages, in part. In Appeal MA15-527 (Property G), the city withheld 72 pages in full, and four in part.

DISCUSSION:

Does the mandatory exemption for confidential third party information in section 10(1) of *MFIPPA* apply to the valuation records remaining at issue?

[10] Section 10(1) is a mandatory exemption from disclosure and it provides that:

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

[11] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[12] Under section 42 of the *Act*, the burden of proof that a record, or a part of it, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Where a third party relies on section 10(1), it shares the onus of proving

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[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

that the exemption applies with the institution.[7] In this appeal, the city did not rely on section 10(1) to deny access to the valuation records.[8] Further, as I noted above, none of the property owners responded to the Supplementary Notice of Inquiry. However, since the section 10(1) exemption is a mandatory one, I must still consider whether the records themselves provide sufficiently compelling evidence to persuade me that the exemption might apply.

[13] For section 10(1) to apply, therefore, the records must demonstrate that each part of the following three-part test is met:

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.

[14] In the circumstances of these appeals, I conclude that paragraphs (b) and (d) could not apply, and I will proceed with a review of the possible application of sections 10(1)(a) and 10(1)(c) only.

Part 1: type of information

[15] The types of information listed in section 10(1) have been discussed in prior orders and the following ones are relevant in the circumstances:

> *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.[9] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[10]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[7] Order P-203.
[8] The city neither claimed the exemption nor notified the property owners under section 21(1)(a) of the *Act*. Section 21(1)(a) provides third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 10(1).
[9] Order PO-2010.
[10] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[11]

[16] Based on the content of the records, I am satisfied that they contain commercial and financial information. The withheld information relates to the buying or selling of land or services. It also relates to money matters in the form of the park levy calculations arrived at through the application of formulae to appraised land values.

[17] Since the records contain commercial and financial information, I find that the requirements of part one of the section 10(1) test are met.

Part 2: supplied in confidence

[18] The second part of the test for the application of section 10(1) of the *Act* provides a focal point for the analysis of the exemption's application in these appeals.

Supplied

[19] 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.[12]

[20] 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.[13]

[21] In these appeals, the vast majority of the records remaining at issue are records created or commissioned by the city, not supplied by any of the four property owners. As the city acknowledged in Interim Order MO-3482-I, the preliminary valuations relating to calculating its park levies are "undertaken by the city's dedicated staff in the Policy and Appraisal Section of the Office of the Chief Corporate Officer." However, some of these city-created records contain snippets of information actually supplied by a third party. In Appeal MA15-524, in particular, pages 67, 77-78, 89 and 98-99 contain, or consist of, correspondence sent to the city by the relevant property owner. I am prepared to accept that those pages and several other pages contain information "supplied" by a third party for the purpose of part two of the test under section 10(1).

In confidence

[22] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure – or the evidence – must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the

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[11] Order PO-2010.
[12] Order MO-1706.
[13] Orders PO-2020 and PO-2043.

time the information was provided. This expectation must have an objective basis.[14]

[23] Based on my review of the information that I concluded was "supplied," I find that only the records in Appeal MA15-524 that I identified above were supplied with a reasonable expectation of confidentiality. The communications in question have the appearance of confidentiality and would not otherwise be disclosed or available from sources to which the public has access. I also accept that these particular communications were prepared for a purpose that would not entail disclosure.[15] Respecting the other brief portions of records in these appeals, there is simply not sufficient evidence before me to establish an objective basis for concluding that the information was supplied "in confidence," and I find that it was not.

Part 3: harms

[24] To satisfy part three of the test in section 10(1), the evidence must show a risk of harm that is well beyond the merely possible or speculative, although it need not be proven 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.[16]

[25] Before me, I have no evidence from any party resisting disclosure and so I must determine the reasonable expectation of harm with disclosure on the basis of the information in the records themselves. Based on my consideration, I am not persuaded that disclosure of pages 67, 77-78, 89 and 98-99 from the records in Appeal MA15-524, or any of the remaining records, had they met part two of the test, would result in any of the harms contemplated in sections 10(1)(a) or (c).

[26] As noted, section 10(1) is intended to protect the "informational assets" of private businesses and other organizations from which the government receives information in the course of carrying out its public responsibilities.[17] Past orders have noted that determining disclosure under the tests developed by this office must be accompanied by an appreciation of the commercial realties of the specific context and the nature of the industry in which it occurs.[18] In these appeals, the competitive nature of the development industry is a factor I considered; however, it does not diminish the importance of applying the exemptions in a limited and specific manner to serve *MFIPPA*'s accountability and transparency purposes. Only information that properly fits within section 10(1) of the *Act* must be withheld.

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[14] Order PO-2020.
[15] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.
[16] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-54.
[17] *Boeing, supra.*
[18] See Orders MO-1888, MO-2496-I, PO-2987 and PO-3479.

[27] On my review of the records, I am not satisfied that the withheld information could reasonably be expected to be used to undermine the property owner's position with respect to future development initiatives. Specific as these records are to each particular development, I am also not persuaded that disclosure of the withheld information could reasonably be expected to result in undue loss to the property owners, including by somehow interfering with appraisals or the valuation process.[19] Respecting Appeal MA15-524 and pages 67, 77-78, 89, 98-99, in particular, I do not accept that disclosure of the information about the park levy payable in that instance could reasonably be expected to result in harm to the third party's competitive position or undue loss to it. As I observed above, this information is specific to the facts and context of each particular valuation scenario. Generally, I conclude that the appraisal records have little or no value to each property owner in respect of any future negotiations on similar properties.

[28] In sum, there being no evidence provided by the third parties or by the city, the best evidence is the content of the records themselves, and I find that the records do not establish a reasonable expectation of the harms contemplated by section 10(1)(a) or 10(1)(c) with disclosure. Since all parts of the three-part test under section 10(1) must be met for the third party information exemption to apply, I find that the valuation records remaining at issue in Appeals MA15-524 to MA15-527 do not qualify for exemption under section 10(1). Consequently, I will order the records disclosed to the appellant.

ORDER:

1. I order the city to disclose the remaining withheld responsive records to the appellant by **January 2, 2018**, but not before **December 27, 2017**.
2. Prior to disclosing the records in Appeal MA15-525, the city must sever personal information from them.

Original Signed by: November 23, 2017

Daphne Loukidelis
Adjudicator

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[19] The appraisals are undertaken by the city to fulfil 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. Accordingly, the harm in this context more properly falls under section 11, which I concluded in Interim Order MO-3482-I did not apply.