

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4031-I

Appeal MA18-323

Corporation of the County of Grey

March 24, 2021

Summary: The Corporation of the County of Grey (the county) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an appraisal report related to a long-term care home owned by the county. The county issued a decision granting partial access to the report, with severances under the mandatory third party information exemption at section 10(1) the *Act*. The requester, now the appellant, appealed the county's decision. At the adjudication stage, the county claimed the application of the discretionary section 11 (economic and other interests) exemption to the withheld information. Accordingly, the late raising of a discretionary exemption and the application of section 11 were added as issues in this appeal. In this order, the adjudicator finds that sections 10(1) and 11 do not apply to the withheld information. She orders the county to disclose the non-exempt information to the appellant except for the portions she finds may contain personal information as that term is defined under the *Act*. If the appellant wishes to pursue access to the identified portions of the record, she must advise the IPC within 30 days of receiving the disclosed record, and the adjudicator will continue the inquiry into that issue.

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

Orders Considered: Order MO-3545.

OVERVIEW:

[1] This order addresses the issue of access under the *Municipal Freedom of*

Information and Protection of Privacy Act (the Act) to an appraisal report of land and a long-term care home owned by the Corporation of the County of Grey (the county). The county received a request under the *Act* for access to a copy of the final signed appraisal report about a long-term care home prepared by a named company.

[2] The county identified a responsive record relating to the request and notified the third party consultant, who prepared the record for the county, under section 21(1) of the *Act*, to obtain its views regarding disclosure. The county subsequently issued a decision denying access to portions of the report under sections 10(1)(a) and 10(1)(c) (third party information) of the *Act*.

[3] The requester, now the appellant, appealed the county's decision to the Information and Privacy Commissioner (the IPC).

[4] During mediation, the IPC contacted the third party consultant, now the affected party, seeking its consent to disclose the record in full to the appellant. The affected party did not consent to disclosure. The appellant claimed that there is a compelling public interest in disclosure of the record. As such, the application of the section 16 public interest override was added as an issue in this appeal.

[5] As no further mediation was possible, the appeal proceeded to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced the inquiry by inviting representations from the county and affected party, initially. The affected party declined to submit representations.

[6] I received representations from the county. However, in its representations the county raised the application of the discretionary exemption at section 11 (economic and other interests). Subsequently, the county issued a revised decision to the appellant claiming that sections 11(c), (d), and (e) apply to the withheld information. Accordingly, the late raising of a discretionary exemption and the application of section 11 were added as issues in this appeal. I invited and received representations from the county on these additional issues. I then shared the county's representations addressing all the issues in this appeal with the appellant, and I invited her representations in response, which I received.

[7] In this order, I find that sections 10(1) and 11 do not apply, and order the county to disclose the appraisal report to the appellant, except for the portions that I find may contain personal information. If the appellant wishes to pursue access to the identified portions of the record, she must advise the IPC within 30 days of receiving the disclosed record, and I will continue my inquiry into that issue.

RECORDS:

[8] The information at issue in this appeal consists of the withheld portions of a 92-page appraisal report of land and a long-term care home with appendices.

ISSUES:

- A. Does the mandatory third party information exemption at section 10(1) apply to the withheld portions of the appraisal report?
- B. Is the county entitled to raise the discretionary exemption at section 11 late?
- C. Does the discretionary economic or other interests exemption at section 11 apply to the withheld information?

DISCUSSION:

A. Does the mandatory third party information exemption at section 10(1) apply to the withheld portions of the appraisal report?

[9] The county claims that the mandatory exemption at sections 10(1)(a) and (c) of the *Act* applies to the information at issue in this appeal. The appellant argues that it does not.

[10] Section 10(1) states, in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

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

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

[11] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹ 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.²

[12] For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

¹ *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.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

- a. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
- b. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- c. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[13] The types of information listed in section 10(1) have been discussed in prior orders. The ones that are relevant in this appeal are:

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

- (i) is, or may be used in a trade or business,
- (ii) is not generally known in that trade or business,
- (iii) has economic value from not being generally known, and
- (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.³

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.⁶

³ Order PO-2010.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

Representations

[14] As noted above, I invited representations from the affected party, the consultant who prepared the record for the county, but it declined to submit any.

[15] The county submits that the withheld portions of the report illustrate valuation methodologies of the affected party and certain information it uses to perform valuations. The county submits that this withheld information is the affected party's trade secret for the following reasons:

- The affected party uses this information in the course of its businesses providing property value appraisals;
- The affected party maintains this information for its own use and does not disclose it to its commercial competitors;
- The affected party uses this information to provide value to its clients, and thus itself; and
- The affected party maintains this information as secret.

[16] The appellant argues that the withheld information does not amount to a trade secret or commercial or financial information. The appellant notes, however, that the definitions for commercial and financial information are very broad. The appellant submits that the withheld information does not contain the affected party's trade secret, because copies of other unredacted appraisal reports prepared by the affected party are publicly available online.⁷

Analysis and findings

[17] After reviewing the record at issue and the representations of the parties, I am satisfied that the record contains commercial and financial information. The withheld information relates to the potential buying and selling of the land and/or care home. It also contains information about the assessment value of the care home and land, and comparable properties, along with the appraisers' final valuation. I find that this type of information falls within the definitions of commercial and financial information as defined above.

[18] With respect to the county's submission that the record contains information that is the trade secret of the affected party, I am not satisfied that it does. The county submits that the withheld portions of the appraisal report contains "valuation methodologies", which are trade secrets. However, I find that the report does not contain information consisting of a "formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or

⁷ The appellant submitted links to these reports online.

mechanism." Even if I did find that there were "valuation methodologies" in the report, I would still not be persuaded that the information qualifies as a trade secret, because there is insufficient evidence before me that it has economic value from not being generally known. As noted by the appellant, there are copies of other unredacted appraisal reports prepared by the affected party publicly available online. Therefore, as the second and fourth parts of the test to establish whether information consists of "trade secrets" are not met, I find that the record does not contain trade secrets.

[19] Having said that, since I have found that the record contains information qualifying as commercial and financial information, I find that part one of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[20] The requirement that the information have been "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁸

[21] Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁹

In confidence

[22] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁰

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

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and

⁸ Order MO-1706.

⁹ Orders PO-2020 and PO-2043.

¹⁰ Order PO-2020.

- prepared for a purpose that would not entail disclosure.¹¹

Representations

[24] The county submits that the withheld information is contained in an appraisal report, which was prepared by the affected party and delivered to the county. The county submits, therefore, that the information was “supplied” by the affected party.

[25] The county submits that the withheld information was supplied “in confidence” to it by the affected party. The county submits that as a precondition to performing its appraisal work, the county entered into a written agreement with the affected party. The county submits that the agreement includes terms stipulating that the county may not duplicate or disclose the appraisal report, in whole or in part, without the prior written consent of the affected party. The county notes that the affected party has not consented to disclosure of the withheld information to the appellant.

[26] The county submits that the terms of the written agreement clearly indicate that the affected party intended to submit the appraisal report to the county in confidence and thereby had an explicit expectation of confidentiality.

[27] The appellant concedes that the affected party supplied the withheld information to the county, but the appellant argues that it was not supplied “in confidence”. The appellant submits that a redacted version of the report was posted online for a limited time, and it was not marked as “confidential”.

Analysis and findings

[28] Both parties agree and I find, after reviewing the representations of the parties and the record at issue, that the withheld information was supplied by the affected party to the county. The county hired the affected party to produce the appraisal report. The withheld information consists of appraisal values, formulas and other information that was calculated or gathered by the affected party for the purposes of preparing the appraisal report. After the report was completed, it was provided to the county. Therefore, I find that the affected party supplied the withheld information to the county.

[29] I also find that the withheld information was supplied “in confidence”. The county provided the written agreement between it and the affected party for the appraisal report, which stipulates that the county may not duplicate or disclose the appraisal report, in whole or in part, without the prior written consent of the affected party. As noted above, the affected party did not consent to the disclosure of the withheld information. While the appellant argues that a redacted version of the report was posted online, that fact alone is not determinative of whether the affected party

¹¹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

had a reasonable expectation of confidentiality.

[30] Based on the evidence before me, I accept that the withheld portions of the report at issue in this appeal have never been publicly available and that they have been treated consistently by the affected party and the county in a manner that indicates a concern for confidentiality. Therefore, I find that the affected party had a reasonable expectation of confidentiality, and I am satisfied that the withheld information was supplied "in confidence" by the affected party to the county.

Part 3: harms

[31] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.¹²

[32] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹³ The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹⁴

Representations

[33] The county submits that it has discussed the request with the affected party in the context of seeking the affected party's consent for disclosure. The county submits that the affected party has not consented to disclosure. The county submits that based on those discussions and the confidentiality terms related to the execution of the appraisal agreement, disclosure of the affected party's confidential information would prejudice the affected party's position among its commercial competitors. The county further submits that disclosure of the withheld information may prejudice the affected party in carrying on negotiations for other appraisal work, and could result in undue loss to the affected party and undue gain to the affected party's commercial competitors.

[34] The appellant argues that the county has not established the harms under sections 10(1)(a) and (c). The appellant submits that there is no reasonable expectation of harm to the affected party if the withheld information is disclosed, because there are

¹² *Accenture Inc. v. Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

¹³ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, cited above.

¹⁴ Order PO-2435.

other publicly available commercial appraisal reports posted online. The appellant further submits that these reports comply with the publicly available industry standards for commercial appraisers in Canada set by the Appraisers Institute of Canada (AIC). In support of her arguments, the appellant submitted excerpts of similar publicly available appraisal reports and a link to a copy of the Appraisal Institute of Canada's "Canadian Uniform Standards of Professional Appraisal Practice".

Analysis and findings

[35] Based on my review of the withheld information and the representations of the parties, I find that part 3 of the test for exemption under section 10(1) is not met.

[36] The appraisal report at issue relates to one specific long-term care home owned by the county. From my review of the report, it appears that the appraisers conducted a physical inspection of the property and reviewed information related to the property, such as zoning information, and the size and layout of the property, all of which is publicly available. The report also contains predictable methodology and standard language that is commonly accepted practice in the appraisal industry. The authors of the report even acknowledge this by stating:

3. The appraisal was performed accordance with the Investment Valuation Regulations for the appraisal of real estate investments, as set out by Office of the Superintendent of Financial Institutions (OSFI) and the new CUSPAP standards.

...

7. Our analyses, opinions, and conclusions were developed, and this report has been prepared, in conformity with the Canadian Uniform Standards of Professional Appraisal Practice of The Appraisal Institute of Canada and the requirements of the Code of Professional Ethics and the Standards of Professional Appraisal Practice.

[37] Outside of the information noted above, the appraisal report also contains a list of previously sold properties for comparison purposes. The information related to these properties include publicly available property information, such as the address, the purchase price, the vendor, and other property descriptions.

[38] From my review of the withheld portions of the appraisal report and the county's representations, I am not persuaded that there is a connection between disclosure of the withheld information and the harms in sections 10(1)(a) and (c) that the county has argued. Specifically, I am not satisfied that the release of an appraisal report about one specific long-term care home owned by the county could reasonably be expected to cause significant prejudice to the affected party's competitive position or contractual negotiations, or undue loss to the affected party or undue gain to the appellant or any other entity.

[39] While the county argues that the affected party could suffer these harm if the withheld information is disclosed, I note that the county has only repeated the harms under sections 10(1)(a) and (c) of the *Act* and has not elaborated on how these harms could reasonably be expected to result from the disclosure of the withheld information. The county's representations do not provide sufficiently detailed evidence to establish this connection, which is required to establish part three of the test. Instead, I find its representations amount to speculation of possible harms, and I am not persuaded that the harms in sections 10(1)(a) and (c) are inferable from the information itself. Accordingly, I find that the county has not established that either of the harms outlined in sections 10(1)(a) or (c) could reasonably be expected to result from disclosure of the withheld information.

[40] All parts of the three-part test must be met for the mandatory exemption at section 10(1) to apply. Since the county has not established that there is a reasonable expectation of harm that could reasonably be expected to result from the disclosure of the withheld information, the third part of the test has not been met, and I find that section 10(1) does not apply to the information at issue in this appeal.

B. Is the county entitled to raise the discretionary exemption at section 11 late?

[41] As noted above, after this appeal proceeded to the adjudication stage, the county raised the application of the discretionary exemption at section 11 (economic or other interests), and issued a revised decision to the appellant claiming it.

[42] The *Code of Procedure* (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. 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.

[43] 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.¹⁵

¹⁵ *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*

[44] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.¹⁶ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.¹⁷

Representations

[45] The county submits that the appellant has not been prejudiced in any way by the late raising of the discretionary exemptions in sections 11(c), (d), and (e) of the *Act*. The county argues that there is no prejudice to the appellant, because the information over which the section 11 discretionary exemption is claimed is also the subject of its mandatory section 10(1) exemption claim. The county further argues that while the section 11 exemption was not claimed at the time of the county's initial response to the access request, the appellant was still aware that the county was claiming the withheld information is exempt from disclosure pursuant to exemptions under the *Act*.

[46] The county also argues that there is no prejudice to the appellant, because the section 11 exemption was raised by the county in its initial representations, and the appellant could fully address this exemption in her response to the county's representations.

[47] The county argues that it would be prejudiced if it cannot claim the section 11 exemption, because it applies to the withheld information. The county submits that it has maintained the withheld information in confidence throughout the process of considering the sale of the care home property. The county further submits that the omission of the section 11 exemption from its original response to the access request was an oversight, which it sought to correct by raising the issue as soon as it was identified in the process of preparing the county's initial representations.

[48] The appellant submits that the section 11 exemption was not claimed by the county in its initial decision and it was not included in the IPC's initial Notice of Inquiry. The appellant submits that her interpretation of the IPC's *Code* is that the county must claim added exemptions within 35 days of being notified of an appeal, which she argues the county did not do.

Analysis and findings

[49] For the reasons below, I allow the county to raise the application of the discretionary section 11 exemption to the withheld information.

and Privacy Commissioner) [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).

¹⁶ Order PO-1832.

¹⁷ Orders PO-2113 and PO-2331.

[50] While the appellant takes issue with the county's late raising of the discretionary section 11 exemption outside the 35-day period stipulated in the *Code*, the timing of the claim alone is not determinative of whether the late raising of a discretionary exemption is permitted.

[51] As noted above, in determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.¹⁸ The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.¹⁹

[52] First, as noted by the county, the withheld information that the county claims is exempt from disclosure under section 10(1) is the same information over which the county claims the discretionary section 11 exemption. Therefore, the appellant knew from the outset of this appeal that the county was claiming that the withheld information is exempt from disclosure under the *Act*.

[53] Second, the county raised the application of section 11 in its initial representations, before I sought the appellant's representations. I shared the county's representations, including its supplemental representations on section 11, with the appellant inviting her representations in response. Therefore, the appellant had an opportunity to respond to the county's section 11 claim.

[54] Given the above, I am satisfied that the appellant will not be prejudiced by allowing the county to raise the application of section 11 to the withheld information.

[55] I also considered the potential prejudice to the county if I do not allow it to claim the section 11 exemption to the withheld information. I find that the town may be prejudiced by not permitting it to claim section 11, which is intended to protect certain economic interests of institutions. Section 11 is parallel to section 10(1) under the *Act*. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of third parties is protected under section 10(1).

[56] Balancing all this, and in the specific circumstances of this appeal, I am satisfied that the appellant will not be prejudiced and the integrity of the adjudication process will not be compromised if I allow the county to raise the application of the discretionary section 11 exemption beyond the 35-day period. Therefore, I allow the county to claim the section 11 exemption, and will now consider whether it applies to the withheld information.

¹⁸ Order PO-1832.

¹⁹ Orders PO-2113 and PO-2331.

C. Does the discretionary economic or other interests exemption at section 11 apply to the withheld information?

[57] The county claims that sections 11(c), 11(d), and 11(e) applies to the withheld information to exempt it from disclosure. These sections state:

A head may refuse to disclose a record that contains,

(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;

(e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

[58] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.²⁰

[59] For sections 11(c), (d) or (e) to apply, the institution must provide detailed 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.²¹

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

Representations, analysis and findings

[61] Based on my review of the withheld information and the representations of the parties, I find that sections 11(c), (d) and (e) do not apply to exempt the withheld information from disclosure.

²⁰ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

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

²² Order MO-2363.

[62] The county submits that it commissioned the appraisal report to establish the market value of the care home and land in advance of a potential sale of the care home, and because a sale would likely take place on the open market. The county argues that disclosure of the withheld information could reasonably be expected to prejudice both the economic interests of the county and its competitive position.

[63] The appellant did not go into detail about the county's section 11 claim, but she maintains that sections 11(c), (d) and (e) do not apply to the withheld information.

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

[64] The county notes that the withheld information is, at its core, the appraisal value of the care home property, including information that would allow that value to be calculated. The county argues that disclosure of this information would be detrimental to any attempt made by the county to sell the property on the open market.

[65] The county submits that as a public institution, it must obtain a selling price that represents fair market value, which is the best price possible that would be paid between a willing seller and a willing buyer, at arm's length from each other, on the open market. The county notes that typically, in a private sale of land, the buyer has no access to any information regarding the property, except for information the buyer obtains on its own, or information the seller voluntarily discloses. The county further notes that a private seller is not obligated to release any information about its own determination of the price it would like to obtain for its property. The county argues, therefore, that disclosure of the withheld information (i.e. the value of the care home property) would result in a buyer having information that would render the county unable to secure a competitive sale price for the care home property. The county further argues that failure to do so would erode the value of the property being sold as a public asset and would run contrary to the obligations of the county as a steward of public resources. The county argues that this obligation is a core economic interest of the county, which would be prejudiced by the disclosure of the withheld information.

[66] The county relies on past IPC orders that have held that an institution may withhold, under section 11(c), appraisal reports of properties subject to a transaction that had not yet closed. In support of this, the county cites Orders MO-2532, MO-3061, and MO-3545. The county argues that the same reasoning should be adopted in this appeal.

[67] With respect to section 11(d), the county argues that any sale of the care home property in the competitive market would generate revenue that would support the county's operations, particularly the county's ongoing redevelopment of its other long-term care home facilities. The county argues that if it were unable to obtain the best sale price possible, the corresponding loss of revenue would require the county to seek funds through other sources, such as its municipal tax levy, or otherwise would have to forego some of the planned redevelopment activities.

[68] I agree with the county that past IPC orders have held that an institution may withhold appraisal reports of properties subject to a transaction that has not yet closed under section 11(c). However, in this appeal, the county has provided no evidence to demonstrate that the care home property is subject to a transaction that has not yet closed.

[69] In Order MO-3545, cited by the county, Adjudicator Steven Faughnan summarized the IPC's past orders dealing with appraisal information as follows, at paragraph 31:

A number of Orders of this office have addressed the possible application of sections 11(c) and/or 11(d) (or their provincial counterparts, sections 18(1)(c) and/or 18(1)(d) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*) to appraisal or valuation information. In the case of an appraisal or valuation of property that is subject to a pending sale or negotiation that has not been completed, typically there is a finding that the information is subject to exemption. If the property has been sold and the transaction completed, or if the property is no longer subject to sale or an ongoing negotiation or has been transformed to such an extent that the appraisal or valuation is no longer relevant, the exemption(s) are found not to apply. [Emphasis added].²³

[70] I find this reasoning applicable to the circumstances of this appeal and I adopt it. From its representations, there is no specific evidence that the county has decided to sell the care home property or that there are ongoing negotiations for the sale of the care home property. The date of the appraisal report is April 30, 2017. The county's supplemental representations were received by the IPC in May 2019. In these representations, the county describes the sale of the care home property as a "potential" sale. This means that the county had not yet decided to sell the care home property as of May 2019, two years after the date of the appraisal report.

[71] Furthermore, as noted above, for sections 11(c) or (d) to apply, the county must provide detailed 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.²⁴

[72] Given that the county had not yet decided to sell the care home property and the fact that there is no evidence before me of any ongoing negotiations for its sale, I find that the harms the county argues would result from disclosure of the withheld information are speculative. In my opinion, given the age of the report, disclosure of the withheld information, which includes the appraised value of the care home property from 2017, could not reasonably be expected to prejudice the county's ability to

²³ The adjudicator cited Orders MO-1228, MO-3193-F, PO-1887-I, and MO-3362-F.

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

negotiate a fair price in the future, should it decide to sell the property.

[73] Accordingly, I find that disclosure of the withheld information could not reasonably be expected to give rise to the harms in sections 11(c) and (d) in the circumstances of this appeal. Therefore, I find that the sections 11(c) and (e) exemptions do not apply to the withheld information.

Section 11(e): positions, plans, procedures, criteria or instructions

[74] The county argues that disclosure of the withheld information would interfere with the county's determination of the best possible sale price of the care home property. The county further argues that the process of selling a property in the competitive market involves a negotiation of the terms of sale, most particularly the sale price for the property. The county argues, therefore, that the withheld information would be part of the county's positions, plans, and criteria for concluding a competitive sale of the care home property, "should one be undertaken".

[75] Based on my review of the withheld information and the representations of the parties, I find that section 11(e) does not apply to the withheld information.

[76] In order for section 11(e) to apply, the county must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution.²⁵

[77] I find that the county has not established that the withheld information, portions of a real estate property appraisal report, consists of or contains "positions, plans, procedures, criteria or instructions", for the purpose of part one of the test in section 11(e). The terms "positions, plans, procedures, criteria or instructions" suggest a pre-determined course of action. In order for this exemption to apply, there must be some evidence of an organized structure or definition to the course of action.²⁶ The IPC has adopted the dictionary definition of "plan" as a "formulated and especially detailed method by which a thing is to be done; a design or scheme".²⁷

[78] As noted above, the withheld portions of the appraisal report contain the appraisal value of the care home property, a property that the county acknowledges in

²⁵ Order PO-2064.

²⁶ Orders PO-2034 and PO-2598.

²⁷ Orders P-348 and PO-2536.

its representations that it has not yet decided to sell. The withheld portions of the appraisal report do not contain an organized structure or a pre-determined course of action, which is required for the section 11(e) exemption to apply. Therefore, as the county has not provided sufficient evidence to establish that the withheld information consists of or contains "positions, plans, procedures, criteria or instructions" and these are not evident in the record before me, I find that the county has not satisfied the test for exemption under section 11(e).

[79] Accordingly, I find that the section 11(e) exemption does not apply to the withheld information. In view of this finding, I find that the withheld information in the record is not exempt under either section 10(1) or section 11 of the *Act*, and I will be ordering its disclosure, subject to my discussion below about there being personal information in the record.

The mandatory personal privacy exemption at section 14(1)

[80] To begin, I note that the county did not claim that the personal privacy exemption at section 14(1) applied to the record, either in its access decision or previously in this appeal. However, since the personal privacy exemption at section 14(1) is mandatory, I must consider its application.

[81] For section 14(1) to apply to a record, it must contain "personal information". From my review of the record at issue in this appeal, I note that pages 91 and 92 may contain personal information according to paragraph (b) of the definition of "personal information" in section 2(1) of the *Act*.

[82] As there has been no prior consideration of the possible application of section 14(1) to the record, I do not have representations from the parties on this issue. It is also unclear whether the appellant seeks access to this information. Therefore, I will order the county to withhold the portions of the record identified by me in the copy sent to the country with this order, pending confirmation from the appellant as to whether she wishes to pursue access to them.

[83] If, after receiving the disclosure ordered by this decision, the appellant continues to seek access to the information on pages 91 and 92 of the record, she must notify the IPC within 30 days of receiving the disclosed record. I will remain seized of the appeal to address this issue, if required.

Conclusion:

[84] In conclusion, I find that sections 10(1) and 11 do not apply to the withheld information to exempt it from disclosure. In light of this finding, I do not need to review the application of the section 16 public interest override to the record. I order that the county disclose the appraisal report to the appellant except for the portions I have identified as possibly containing personal information as that term is defined by the *Act*.

ORDER:

1. I do not uphold the county's decision to withhold the information at issue under the sections 10(1) and 11 exemptions, and I order the county to disclose the record to the appellant, subject to severance of the portions of pages 91 and 92 that I have identified. For the sake of clarity, I have highlighted the portions of the record to be withheld in the copy of the record that accompanies the county's copy of this order.
2. The rest of the report is to be disclosed to the appellant by **April 30, 2021**, but not before **April 26, 2021**.
3. If after receiving the record from the county, the appellant continues to seek access to the information I have identified as potentially containing personal information, the appellant is to notify the IPC within 30 days of receiving the disclosed record. I remain seized of the appeal to address the issues arising from this aspect of my decision, if any.
4. To verify compliance with order provision 1, I reserve the right to require the county to provide me with a copy of the record disclosed to the appellant.
5. The timeline noted in order provision 2 may be extended if the county is unable to comply in light of the current COVID-19 situation. I remain seized of the appeal to address any requests for extension.

Original Signed by: _____
Anna Truong
Adjudicator

_____ March 24, 2021