

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4235

Appeal MA20-00448

Township of Alnwick/Haldimand

August 11, 2022

Summary: This order deals with an appeal of an access decision made by the Township of Alnwick/Haldimand (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The record at issue is an Aggregate Specialist's Report (ASR) relating to an aggregate pit and the closure of a road allowance. The township denied access to the ASR, claiming the application of the mandatory exemption in sections 10(1)(a) and 10(1)(c) (third party information), as well as the discretionary exemption in sections 11(a) and 11(c) (economic and other interests of the township). The appellant appealed to the IPC and during the inquiry, the appellant narrowed the scope of the request such that personal information and "monetary evaluations" contained in the ASR were no longer at issue. In this order, the adjudicator finds that the ASR is not exempt from disclosure under either section 10(1) or 11 of the *Act*. She orders the township to disclose the ASR to the appellant, with the exception of the information no longer at issue.

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

Orders Considered: Interim Order MO-3482-I and Order PO-3269.

OVERVIEW:

[1] This order disposes of the issues raised as the result of an appeal of an access decision made by the Township of Alnwick/Haldimand (the township) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The request

was for a copy of all documentation and correspondence relating to a named aggregate pit, including records relating to the closure of the road allowance between two specified addresses, as well as a copy of a specified Aggregate Specialist's Report.

[2] In response, the township located records and issued a decision to the requester granting full access to them. The requester, now the appellant, appealed the township's decision to the Information and Privacy Commissioner of Ontario (the IPC) on the basis that the township had not disclosed to them the specific Aggregate Specialist's Report they requested.

[3] During the mediation of the appeal, the appellant advised the mediator that they continue to pursue access to the Aggregate Specialist's Report (the ASR) stating that the report the township provided to them in response to the access request was a Council Report, and not the ASR they had requested.

[4] The mediator clarified with the township that the appellant was seeking the ASR. The township subsequently located the ASR and issued a supplementary decision to the appellant, denying access to it in full. The township claimed the application of the mandatory exemptions in sections 10(1)(a) and (c) (third party information), as well as the discretionary exemptions in sections 11 (a), (b), (c), (d), (e), (f) (economic and other interests of an institution) and (g) (proposed plans, projects or policies of an institution) of the *Act*. The appellant then advised the mediator that they wished to appeal the township's supplementary decision. Further mediation did not resolve the issue.

[5] The appeal then moved to the adjudication stage of the appeals process where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and sought and received representations from the township. In its representations, the township identified two affected parties. The first affected party is a consultant who was hired by the township to prepare the ASR (affected party A). The second affected party is the representative of the owner of the aggregate pit (affected party B).

[6] The township clarified in its representations that it is relying on sections 10(1)(a), 10(1)(c), 11(a) and 11(c) in denying access to the ASR. As a result, sections 11(b), (d), (e), (f) and (g) of the *Act* are no longer at issue.

[7] I then sent the township's representations to the appellant and the two affected parties. Portions of the township's representations were withheld, as they met the IPC's confidentiality criteria set out in *Practice Direction 7*. While I will not be setting out the confidential portions of the township's representations in this order, I have taken them into consideration.

[8] The appellant was given the opportunity to provide representations on the exemptions in sections 10(1) and 11. The two affected parties were also given the opportunity to provide representations on section 10(1). The appellant and affected

party A submitted representations to the IPC. Affected party B provided a short statement, which is referred to in Issue A, below.

[9] In their representations, the appellant provided some additional context. It states that the township used the ASR to assist it in making a one-time decision regarding the closure of a road allowance. The appellant's position is that the closure of this road allowance would facilitate the expansion of the aggregate pit by the company that owns the pit.

[10] Regarding the ASR itself, the appellant states that they are not pursuing any personal information or resumés that may be contained in it. As a result, this type of information is no longer at issue in this appeal.¹ In addition, the appellant states that they are not requesting any "monetary evaluations" that may be contained in the ASR.² Consequently, these monetary evaluations are no longer at issue in this appeal.

[11] For the reasons that follow, I find that the remaining information in the ASR is not exempt from disclosure under either section 10(1) or 11 of the *Act*. As a result, I order the township to disclose the ASR to the appellant, with the exception of Attachment 7 and the monetary evaluations contained in pages 1, 3, 6 and 7 of the ASR.

RECORD:

[12] The information at issue is contained in the 38 page ASR, consisting of reports, maps, photos, site plans and related attachments.

[13] Although I will refer to the ASR generally in this order, the following information in the ASR is not at issue in the appeal and the township's decision to withhold it is therefore unaffected by this order: Attachment 7 and the monetary evaluations on pages 1, 3, 6 and 7.

ISSUES:

- A. Does the mandatory exemption at sections 10(1)(a) and/or 10(1)(c) apply to the ASR?
- B. Does the discretionary exemption at sections 11(a) and/or 11(c) apply to the ASR?

¹ Attachment 7 of the ASR is the resumé of the consultant who authored the ASR.

² There are monetary evaluations on pages 1, 3, 6 and 7 of the body of the ASR.

DISCUSSION:

Issue A: Does the mandatory exemption at sections 10(1)(a) and/or 10(1)(c) apply to the ASR?

[14] The township is claiming the application of sections 10(1)(a) and 10(1)(c) to the ASR. These sections state:

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

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

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

[15] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.³ 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.⁴

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

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

Part 1: type of information

[17] The IPC has described the type of information protected under section 10(1) as including “commercial information,” which is described as information that relates only

³ *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.*).

⁴ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large or small.⁵ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁶

Representations

[18] The township submits only that the ASR contains monetary information, including a monetary evaluation in relation to the proposed sale of a road allowance. The two affected parties' representations do not address either explicitly or implicitly what type of information is contained in the ASR.

[19] The appellant disagrees and submits that the ASR contains only factual information about the quantity and quality of aggregate in the aggregate pit and the adjacent land.

Analysis and findings

[20] For section 10(1) to apply, the party or parties arguing against disclosure (in this case the township and affected parties A and B) must satisfy each part of the three-part test.

[21] As previously stated, the appellant has stated that they are not seeking any "monetary evaluations" contained in the ASR. As a result, the monetary evaluations which are the central focus of the township's arguments, are no longer at issue in the appeal, as they have been removed from the scope of the request.

[22] However, having reviewed the parties' representations and the ASR, I find that the information in the ASR meets parts one of the three-part test in section 10(1). Although I have not been persuaded by the parties resisting disclosure that the information in the ASR qualifies as a trade secret, or scientific, technical, commercial, financial or labour relations information as defined by past IPC orders, I find based on my review of the ASR itself that it contains commercial information.

[23] The ASR is a report that affected party A created to provide the township with an approximate dollar figure (or monetary evaluation) for a specified road allowance. The ASR contains supporting information that affected party A relied on in coming to his conclusion regarding the monetary evaluation of the road allowance.

[24] In Interim Order MO-3482-I, the records at issue related to the appraisal of identified high density developments in the City of Toronto. One of the exemptions claimed was section 11(a) of the *Act*, the first part of which requires a consideration as to whether a record contains trade secrets or financial, commercial, scientific or

⁵ Order PO-2010.

⁶ Order P-1621.

technical information. The analysis used in part one of section 11(a) is the same as used in part one of section 10(1). Adjudicator Daphne Loukidelis accepted the institution's argument that the appraisal records contained commercial information, because they consisted of a review of the market value of land at a specific time and the basis upon which the appraisers applied professional skill to analyze it. I agree with the adjudicator's approach, and adopting it here, I accept that the ASR was created for the purpose of providing the township with a monetary evaluation of the road allowance and find that because it relates solely to the potential selling of the road allowance, it qualifies as commercial information for the purposes of section 10(1).

[25] As a result, I find that part one of the three-part test in section 10(1) has been met. I will now go on to consider whether part two of the test is met.

Part 2: supplied in confidence

[26] 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.⁷

[27] 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.⁸

[28] 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.⁹

[29] 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

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ Order PO-2020.

- prepared for a purpose that would not entail disclosure.¹⁰

Representations

[30] The township submits that affected party A supplied the ASR to its Public Works Superintendent in order to assist in determining the sale value of a road allowance. The township further submits that the ASR was discussed in a closed session of the township's Council under section 239(c) of the *Municipal Act*,¹¹ and because of this, the affected parties would have assumed that the ASR was confidential. The township also notes that the ASR was never brought forward in an open session of Council.

[31] The affected parties' and the appellant's representations do not address whether the ASR was supplied in confidence to the township.

Analysis and findings

[32] Based on the township's representations and my review of the ASR itself, I am satisfied that affected party A supplied the ASR to the township's public works superintendent, meeting the "supplied" requirement in part two of the three-part test in section 10(1).

[33] Conversely, I am not satisfied that the ASR was supplied "in confidence" to the township. The township's evidence is that based on the fact that the ASR was presented to council at a closed meeting, affected party A would have assumed that the ASR was supplied in confidence. Affected party A provided no evidence as to whether he supplied the ASR to the township "in confidence."

[34] I find in these circumstances that the parties have not provided sufficient evidence that affected party A had an expectation of confidentiality based on reasonable and objective grounds. In particular, affected party A itself provided me with no evidence that it communicated to the township that the ASR was confidential and that it was to be kept confidential, or that affected party A treated the ASR consistently in a manner that indicated a concern for confidentiality, or that the ASR was prepared for a purpose that would not entail disclosure.

[35] As a result, while I find that affected party A supplied the ASR to the township, I am unpersuaded that the ASR was supplied to the township "in confidence" for the purposes of section 10(1). As a result, I find that part two of the three-part test in

¹⁰ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC).

¹¹ R.S.O. 2001. This section of the *Municipal Act* refers to a proposed or pending acquisition or disposal of land by the municipality or local board. On a related note, section 6(1)(b) of the *Act* is a discretionary exemption that permits a head to refuse to disclose a record that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public. I note that the township did not claim section 6(1)(b) of the *Act* to the ASR and this exemption is not at issue in this appeal.

section 10(1) has not been met. Although it is not necessary for me to do so, for the sake of completeness I will go on to consider whether part three of the test has been met.

Part 3: harms

[36] 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

[37] 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

[38] With respect to the harms contemplated in section 10(1)(a),¹⁵ the township submits that the aggregate business is very competitive and it should not release information that may be detrimental to the aggregate pit company that is the subject matter of this access request.

[39] Turning to the harms contemplated in section 10(1)(c),¹⁶ the township's position is that the ASR contains information about the aggregate company that could cause it undue hardship and, therefore, the ASR should not be made public. The township also submits that it contacted the two affected parties, who did not provide consent to

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.

¹⁵ Section 10(1)(a) states:

A head shall refuse to disclose a record that reveals [...] commercial [...] information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected:

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

¹⁶ Section 10(1)(c) states:

A head shall refuse to disclose a record that reveals [...] commercial [...] information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected:

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

disclose the ASR.

[40] Affected party A submits that it considered the access request but decided that “under no circumstances” do they wish to disclose any information to the appellant, in part because the appellant has not disclosed their name and the purpose of the request and in part for the “greater good” because, if disclosed, the information would be used for inappropriate purposes. Affected party A also advised that their business is no longer in operation.

[41] Affected party B (the aggregate pit owner’s representative) states that it will not be providing any information to the IPC on the subject matter of the record, stating:

. . . I wish to make it clear that if the individual that has been running this self-serving/for personal gain & gratification poison pen campaign is revealed, then I will be more than happy to shed a clear light on the matter.

[42] The appellant submits that the ASR was site-specific, containing factual information that would not apply anywhere else. Consequently, the appellant argues, given the specific nature of the ASR, the disclosure of the information in it is of no benefit to the aggregate company’s competitors.

Analysis and findings

[43] As previously stated, 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. Parties should provide detailed evidence to demonstrate the harm.

[44] The township’s position is that disclosure of the information in the ASR could “be detrimental” to (section 10(1)(a)), and cause undue hardship to (section 10(1)(c)) the company that owns the aggregate pit. I find the township’s representations to be vague and speculative and essentially a re-statement of the harms set out in the *Act*. In particular, I find that the township has not provided sufficiently detailed evidence to explain how the disclosure of the information in the ASR could reasonably be expected to either prejudice significantly the aggregate pit company’s competitive position or interfere with its negotiations, or cause it undue loss.

[45] The affected parties’ concerns are focused on finding out the identity of the appellant and the reason for the request for the ASR. Their representations do not address at all how the disclosure of the ASR could reasonably be expected to cause the harms in sections 10(1)(a) and/or 10(1)(c). On the issue of the identity of a requester or the reasons for an access request, I note that in Order PO-3269, Senior Adjudicator Frank DeVries stated the following:

The identity of a requester or the reasons why records are requested are generally not relevant to issues concerning access to records. As set out in Order PO-1998:

Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the *Act* is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put.

[46] The findings in Order PO-3269 are equally applicable in this appeal. I find in the circumstances that the identity of the appellant and the reason for the request for the ASR is irrelevant to determining whether the exemption in section 10(1) applies to it. I also find that neither affected party A nor affected party B have provided detailed evidence as to how disclosure of the ASR could reasonably be expected to cause the harms to the aggregate pit company (or affected party A¹⁷ for that matter) set out in section 10(1).

[47] In order to determine whether disclosure of the ASR could reasonably be expected to cause the harms in section 10(1), I reviewed it. Much of the information contained in the ASR is general factual information about the road allowance and the surrounding area. There are also emails in one of the attachments to the ASR, which I find are of a general nature. In addition, I find that there is information in the ASR that is publicly available, such as the following:

- a roadmap,
- a map of quarries, downloaded from the Ontario government website,
- a list of pit companies with their maximum annual tonnage, downloaded from the Ontario government website,
- site plans,
- real estate advertisements, downloaded from a newspaper flyer, and
- a policy and procedure for stopping up, closing and sale of a municipal highway, downloaded from another township's website.

[48] Having reviewed and considered the ASR myself, in the context of the surrounding circumstances, I am unable to conclude that the harms in either section

¹⁷ As set out in their representations, affected party A's business is no longer in operation.

10(1)(a) or 10(1)(c) could reasonably be expected to occur if it is disclosed.

[49] In sum, I find that neither the township nor the affected parties have provided sufficient evidence to establish the harms in either section 10(1)(a) or 10(1)(c) could reasonably be expected to occur if the ASR is disclosed. I further find on my review of the ASR itself that the harms in sections 10(1)(a) and/or 10(1)(c) could not reasonably be expected to occur if it is disclosed. As a result, I find that the ASR is not exempt from disclosure under either section 10(1)(a) or 10(1)(c).

[50] The township is also claiming the exemption in section 11 to the ASR, which I consider below.

Issue B: Does the discretionary exemption at sections 11(a) and/or 11(c) (economic interests of an institution) apply to the ASR?

[51] The township is claiming the application of sections 11(a) and 11(c) to the ASR. These sections 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;

[52] 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*.¹⁸

Section 11(a): information that belongs to government

[53] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

[54] For information to "belong to" an institution, the institution must have some

¹⁸ *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.

proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[55] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,¹⁹ customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.²⁰

[56] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.²¹ The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.²² Nor does the fact, on its own, that the information has been kept confidential.²³

Section 11(c): prejudice to economic interests

[57] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.²⁴

[58] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position.²⁵

¹⁹ Order P-636.

²⁰ Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

²¹ Orders M-654 and PO-2226.

²² Orders P-1281 and PO-2166.

²³ Order PO-2724.

²⁴ Orders P-1190 and MO-2233.

²⁵ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[59] For section 11(c) 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.²⁶

[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*.²⁷

Representations on sections 11(a) and 11(c)

[61] Regarding section 11(a), the township's position is that the ASR could have monetary or potential monetary value if disclosed. It goes on to argue that the ASR was prepared for and paid by the township for an evaluation to arrive at a realistic property value for the disposal of a township road allowance, and that the ASR contains more than just the monetary evaluation.

[62] In regard to section 11(c), the township submits that there is monetary information in the ASR, the disclosure of which could "reasonably be injurious to the financial benefit or loss to a person or company," namely the company that owns the aggregate pit.

[63] The appellant submits that section 11 does not apply to the ASR. The appellant reiterates that the ASR was commissioned to assist the township with a one-time decision regarding the closure of a road allowance and goes on to submit that the matter is now closed as the sale of the road allowance took place and that this sale is in the public realm. The appellant goes on to argue that the sale benefitted the township by approximately \$64,000.

Analysis and findings on sections 11(a) and 11(c)

[64] As stated above, for section 11(a) to apply, the township is required to satisfy a three-part test establishing that the information in the ASR: is a trade secret, or financial, commercial, scientific or technical information; belongs to the township; and has monetary value or potential monetary value.

[65] I have already found in Issue A that the ASR contains "commercial information." As a result, I find that the ASR has met part one of the test under section 11(a).

²⁶ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²⁷ Order MO-2363.

[66] Regarding part two of the test under 11(a), which requires that the information “belong to” the township, I note that even though the township spent money to have affected party A prepare the ASR, it does not necessarily follow that the information “belongs to” the township within the meaning of that term in section 11(a) of the *Act*.²⁸ 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.

[67] For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.²⁹ The ASR is the monetary evaluation of the dollar value of the road allowance, which was a value determined by affected party A using a formula that does not “belong to” to the township. Further, the township has not provided any evidence that a specific valuation model for determining the value of the road allowance was developed by the township itself.³⁰

[68] As a result, I find that the part two of the three-part test in section 11(a) has not been met, and that the discretionary exemption in section 11(a) does not apply to the ASR.

[69] Turning to section 11(c), when an institution claims that a record is exempt from disclosure under this section, it must provide detailed evidence about the potential for harm to the economic interests or competitive position of an institution. In this case, the township’s representations refer only to the potential for harm to the company that owns the aggregate pit; a harm which is properly considered under section 10(1), not section 11.

[70] The township has not provided any evidence as to how the disclosure of the ASR could reasonably be expected to harm either the township’s economic interests, its competitive position or its ability to earn money in the marketplace. Under section 42 of the *Act*, where an institution refuses access to a record, the burden of proof that the record falls within one of the exemptions, including section 11(c), lies upon the institution. In these circumstances, I find that the township has not only not provided detailed evidence about the potential for harm to its economic interests should the ASR be disclosed, it has not provided any evidence in this regard. As with section 10, the harms are also not evident to me based on a review of the record itself. As a result, I find that the exemption in section 11(c) does not apply to the ASR.

²⁸ Orders P-1281 and PO-2166.

²⁹ 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.

³⁰ 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.

ORDER:

1. I find that the ASR is not exempt under either section 10(1) or 11, and subject to paragraph 2, I order the township to disclose the ASR to the appellant in its entirety, including the attachments by **September 16, 2022** but not before **September 12, 2022**.
2. Attachment 7 of the ASR and the monetary evaluations at pages 1, 3, 6 and 7 of the body of the ASR are not at issue in this appeal and are not to be disclosed to the appellant. I have included a copy of the body of the ASR with this order to the township and have highlighted the portions that are not to be disclosed to the appellant.
3. I reserve the right to require the township to provide the IPC with a copy of the ASR it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ August 11, 2022