

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4344

Appeal MA21-00156

City of Guelph

March 10, 2023

Summary: The City of Guelph received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to an appraisal report for a specified property. The city issued a decision granting partial access to the responsive report withholding information under section 11 (economic and other interests) of the *Act*. The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario. In this order, the adjudicator upholds the city's decision and dismisses the appeal.

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

Order Considered: Order MO-3545.

OVERVIEW:

[1] This order determines the issue of access to the withheld portions of an appraisal report for a specified property. The specified property has a well-known history of industrial activity, and since purchasing the property in 1997, the City of Guelph (the city) has performed several studies and cleanup activities as required by the Ministry of Environment, Conservation and Parks (the ministry).

[2] In 2017, the city completed environmental site assessments in support of the potential redevelopment of the site from industrial to residential land use purposes, and entered into a memorandum of understanding (MOU) to create a mixed-use

development at the site with two third parties. The city also entered into a Non-Disclosure Agreement (NDA) with third party #1 in May 2018. The MOU expired on December 31, 2020, and the city began working on next steps to move ahead with site redevelopment. The city is in the final stages of filing a Record of Site Condition with the ministry and is preparing to put the property back on the market.

[3] The city received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the most recent appraisal of the specified property. The city issued a decision denying access to the responsive appraisal report, in full, under sections 11(c) and (d) (economic and other interests) of the *Act*.

[4] The appellant appealed the city's decision to the Information and Privacy Commissioner of Ontario (IPC) and a mediator was appointed to explore resolution.

[5] During mediation, the city issued a revised decision granting partial access to the appraisal report withholding portions under sections 11(c) and (d) of the *Act*. The appellant continued to seek access to the withheld portions of the appraisal report.

[6] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage, where an adjudicator may conduct an inquiry under the *Act*. I commenced an inquiry, and I sought and received representations from the parties about the issues in the appeal.

[7] In this order, I uphold the city's access decision and dismiss the appeal.

RECORD:

[8] The information at issue in this appeal consists of the withheld portions of a 147-page appraisal report (appraisal report) of the specified property.

DISCUSSION:

Does the discretionary exemption at section 11 for economic and other interests of the institution apply to the information at issue?

[9] The city claims that sections 11(c) and 11(d) apply to the withheld information in the appraisal report to exempt it from disclosure. In the discussion that follows, I find that section 11(c) applies. Because I find that section 11(c) applies, I only set out the city's section 11(d) arguments to the extent that they may apply to section 11(c).

[10] Section 11(c) states:

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;

[11] 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*.¹

[12] 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.²

[13] 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*.³

Representations of the parties

[14] The city submits that disclosure of the withheld information could reasonably be expected to prejudice the economic interests and competitive position of the city. The city states that the withheld information consists of the market value of the specified property and the calculations and comparable sales data used to determine its market value. The city notes that the purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace, and the city argues that it has applied this exemption to protect its economic interests and competitive position, because it plans to bring the specified property to the open market.

[15] The city submits that as a public institution, it must act in the best interests of the public, and when negotiating land sales for city-owned property, the public is best served if the city obtains the best possible purchase price that is willing to be paid by a potential purchaser on the open market. The city further submits that in other similar transactions, a potential purchaser would not have access to the withheld information in the appraisal report, only any information that the seller voluntarily discloses, or the buyer obtains on its own.

¹ *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.

² *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

³ Order MO-2363.

[16] The city argues that disclosure of the withheld information at this stage would weaken the city's bargaining position and could reasonably be anticipated to negatively affect the city's ability to negotiate the best purchase price, because the specified property is subject to pending sale and negotiations that have not been completed. The city notes that this reasoning is supported by a number of IPC orders (Orders MO-3545, MO-2246, MO-2532).

[17] The appellant states that he would agree with the city's position and support it, except that he alleges the unredacted appraisal report has already been disclosed to the public. He further alleges that the city has disclosed the unredacted appraisal report to at least one, if not both, of the specified third parties. The appellant argues that since, at the very least, third party #1 already has a copy of the appraisal report, it is no longer confidential.

[18] The appellant states that the city did not follow the normal course of real estate disposition, which is to get an appraisal for internal and confidential purposes, and then list the property for sale. He states that in this case, the city entered into a MOU with third party #1, and he argues that the MOU has no legal authority. He notes that for two years, the city held meetings with third party #1 on zoning, costs, etc., and that third party #1 could have purchased the specified property, but it did not.

[19] The appellant states that the city has now decided to place the specified property for sale on the open market, which is normally a fair and just process. He argues, however, that the third parties are private entities and if they have a copy of the unredacted appraisal report, that would give them an unfair advantage over other prospective purchasers once the property is listed for sale. The appellant questions whether other private entities, outside of the specified third parties in this appeal, also have a copy of the unredacted appraisal report. He argues that since third party #1, and potentially other private entities, already have a copy of the unredacted report, the only way the sales process can be fair is if the unredacted appraisal is provided to everyone who wants a copy.

[20] The city confirms that outside of third party #1, the appraisal report has not been shared with other private entities. The city submits that it has always and continues to treat the withheld information as confidential and the fact that third party #1, who signed both a MOU and an NDA, has a copy of the appraisal report does not mean that it is no longer confidential information. The city notes that the terms of the NDA states that third party #1 is not permitted to use confidential information, including the appraisal report, for its own benefit or to share it with affiliated companies. The city further notes that the NDA also allows the city to request third party #1 to delete, destroy or return confidential information. The city states that the sale of the specified property will follow the city's process under the Acquisition and Disposition of Real Property and/or any city council direction.

Analysis and findings

[21] Based on my review of the withheld information and the representations of the parties, I find that section 11(c) applies to exempt the withheld information in the appraisal report from disclosure.

[22] The city relies on previous IPC orders that have held an institution may withhold, under section 11(c), appraisal reports of properties subject to a transaction that has not yet closed. The city argues that the same reasoning should be adopted in this appeal.

[23] Indeed, 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). In Order MO-3545, cited by the city, Adjudicator Steven Faughnan summarized the IPC's previous orders dealing with appraisal information as follows, at paragraph 31, he states:

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.⁴

[24] I find this reasoning applicable to the circumstances of this appeal and I adopt it. The appellant does not dispute that the city has decided to sell the specified property on the open market. Based on the evidence before me, I find that the specified property is subject to a pending sale process that has not been completed. I accept that if the city were to disclose the withheld information in the appraisal report, which contains the appraised value of the specified property and related information, this could reasonably be expected to weaken the city's bargaining position and prejudice its ability to obtain the best price for the specified property on the open market. Therefore, I find that disclosure of the withheld information in the appraisal report could reasonably be expected to prejudice the economic interests or the competitive position of the city in the upcoming sale of the specified property.

[25] As noted above, the appellant states that he would agree with the city's position, except that he alleges the unredacted appraisal report has already been disclosed to the public. As I understand his argument, public disclosure would undermine the city's

⁴ The adjudicator cited Orders MO-1228, MO-3193-F, PO-1887-I, and MO-3362-F.

position that any harms could reasonably be expected to occur. Based on the evidence before me, the city has not disclosed the appraisal report to the public. The city has explained that the appraisal report has only been shared with third party #1, and that third party #1 has signed an NDA that would prohibit it from sharing or using the withheld information for its gain. Therefore, I find no merit to the appellant's argument.

[26] For the reasons above, I find that the withheld information in the appraisal report is exempt under section 11(c) of the *Act*.

[27] The section 11 exemption is discretionary (the institution "may" refuse to disclose), meaning that the institution can decide to disclose information even if the information qualifies for exemption. An institution must exercise its discretion. On appeal, I may determine whether the institution failed to do so.

[28] The city submits that it properly exercised its discretion to withhold information in the appraisal report under section 11. The city states that it took into consideration relevant factors, such as whether disclosure will increase public confidence in the operation of the city, and the historic practice of the city with response to similar information, in its exercise of discretion. The city further states that it did not exercise its discretion in bad faith or for an improper purpose.

[29] The appellant did not specifically address the city's exercise of discretion, but he states that fairness requires the city to disclose the withheld information in the appraisal report.

[30] After considering the representations of the parties and the circumstances of this appeal, I find that the city did not err in its exercise of discretion with respect to its decision to deny access to the withheld information in the appraisal report under section 11(c) of the *Act*. I am satisfied that the city considered relevant factors in the exercise of its discretion. In particular, I am satisfied that the city balanced the public's right of access with the city's right to protect its economic interests and competitive position.

[31] Accordingly, I find that the city exercised its discretion in an appropriate manner in this appeal, and I uphold it.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed by: _____
Anna Truong
Adjudicator

_____ March 10, 2023