Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2233

Appeal MA-050069-1

Municipal Property Assessment Corporation

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NATURE OF THE APPEAL:

In 2002, the Ministry of Natural Resources (MNR), the Municipal Property Assessment Corporation (MPAC) and Teranet Enterprises Inc. (Teranet) reached an agreement to gather information about Ontario's estimated four million land parcels and bring this knowledge together into a standardized digital database - the Ontario Parcel database. The parties signed a master agreement known as the Ontario Parcel Master Agreement.

A member of the media submitted a request to MPAC under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), seeking access to:

> … a copy of the most recent contract(s) between the Municipal Property Assessment Corporation and Teranet Inc, a subsidiary of Teramira Holdings Inc, with regard to the provision of data by Teranet to MPAC, either by way of a licensing agreement or via an outright sale. If there is more than one contract, please provide the most recent version of each.

The requester further noted that his request was "for all the information in any records that are least partially responsive to the request."

MPAC identified the responsive records as the Ontario Parcel Master Agreement (the Agreement) and two amendments to the agreement. It denied the requester access to this record and cited the exemptions in sections 10(1), 11(a), 11(c) and 11(d) of the *Act*.

The requester (now the appellant) appealed MPAC's decision to this office. During the intake stage of the appeal, MPAC provided this office with a copy of the records at issue. This office, subsequently, identified Teranet Enterprises Inc. (Teranet) and the Ministry of Natural Resources (MNR) as parties to the agreement.

Under the *Act*, MPAC is known as the "institution" and Teranet and MNR are known as "affected parties." During the mediation stage of this appeal, the mediator contacted the affected parties, who confirmed that they did not consent to the disclosure of any information about them in the records.

No further mediation was possible, and the appeal was moved to the adjudication stage. In my initial Notice of Inquiry, I invited MPAC to submit representations on the application of sections 10 and 11 and also invited the affected parties' representations on the application of section 10. In its representations, MPAC revised its original decision and identified portions of the records that it was now willing to disclose to the appellant. MPAC also withdrew its claim that section 11(a) applied to the records at issue. Teranet and MNR submitted representations and confirmed that they consented to the disclosure of the portions of the records MPAC indicated it was prepared to disclose to the appellant. I then asked MPAC to send a severed version of the records to the appellant. MPAC sent a letter to the appellant stating that a severed version of the records would be disclosed to him once he paid the fee calculated by MPAC.

I subsequently sent a Notice of Inquiry to the appellant along with the complete representations of MPAC, MNR and Teranet. Initially, the appellant responded that he required time to obtain a severed copy of the records from MPAC. The appellant, however, advised this office at a later date that he had not obtained a copy of the severed records as he had not paid or appealed the requested fee. The appellant, however, indicated that he was prepared to proceed with this appeal and submit representations, which he did. In his representations, the appellant confirmed that he was not raising the application of the public interest override in section 16 of the Act. The non-confidential portions of the appellant's representations were shared with MPAC and the affected parties, who then provided reply representations.

RECORDS:

The records consist of three documents: the Agreement and two amendments. The following portions of the records are at issue in this appeal:

Record 1 - Ontario Parcel Master Agreement

- Subsection 3.6 and 3.7 - Building the Ontario Parcel
- Subsection 4.3 - Maintenance and Support
- Section 9 - Delays and Non Performance
- Subsection 11.4 - Management
- Section 12 - Intellectual Property
- Section 13 - Licences and Sublicenses
- Section 14 - Licensing of Licensees
- Section 17 - Limitation of Liability
- Section 18 - Indemnities
- Section 19 - Services Levels
- Section 20 - Engagement of Subcontractor
- Section 21 - Revenue Sharing and Payment Obligations
- Section 25 - Term and Termination
- Subsection 28.2 and 28.16 - General
- Schedule 1 Definitions - Aggregate Liability Cap, Build Error, Educational Licensee, Grandfathered Agreements, Jointly Owned specifications, Maintenance Error, Per - Party base Cap, Per-Party Cap and Per-Party IP Extended Cap
- Schedule 2 - Base Index Map Product
- Schedule 3 - Pre-Basic Index Map Product Specifications
- Schedule 4 - Assessment & Crown Parcel Map Data Specifications
- Schedule 5 - Ontario Parcel Index Specifications
- Schedule 6 - Names of Build Subcontractors
- Schedule 8 - Internet Key Terms of Use
- Schedule 10 - Build Obligations
- Schedule 11 - Build Timetable
- Schedule 12 - Delivery Specifications and Support Obligations

- Schedule 13 - Maintenance Obligations
- Schedule 15, A-D
- Schedule 16, A-B
- Schedule 17C
- Schedule 18 - List of Grand-Fathered Agreements
- Schedule 20 - Maintenance Payments
- Schedule 21 - Revenue Sharing and Remittance Fees
- Schedule 22 - Excluded Products
- Schedule 23 - Service Levels

Record 2 – Amendment No. 1 to the Ontario Parcel Master Agreement - dated April 18, 2002

- Section C - Go Forward Decisions
- Section D - Issues Related to Build Subcontractor Agreements
- Section E - Sections 1.0, 2.0, 3.0, 5.0, 7.0, 9.0, 10.0 - 20.0
- Schedule 3 - Pre-Basic Index Map Product Specifications (revised)
- Schedule 5 - Ontario Parcel Index Specifications (duplicate)
- Schedule 12 - Delivery Specifications and Support Obligations

Record 3 - Amendment No. 2 to the Ontario Parcel Master Agreement - dated May 7, 2002

- Sections 2.0, 3.0 and 4.0

DISCUSSION:

THIRD PARTY INFORMATION

As noted above, MPAC now relies on sections 10(1), 11(c) and 11(d) of the *Act* to deny the appellant access to the remaining portions of the records at issue. I will commence my discussion with the application of the mandatory exemption in section 10 of the *Act*.

In its representations, MPAC clarified that it relies on sections 10(1)(a), 10(1)(b) and 10(1)(c) to deny the appellant access to the information at issue. These sections read:

> 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;

> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency …

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

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

MPAC describes the records in this appeal as an agreement which governs the commercial and contractual relationship between MPAC, MNR and Teranet. MPAC takes the position, and the affected parties agree, that the records qualify as "commercial, financial and technical information" as defined in past orders of this office. Those orders have provided the following guidance on determining whether records qualify as commercial, financial or technical information:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

> *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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *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 [Order PO-2010].

Though the appellant's representations concede that some portions of the records at issue appear to contain "technical specifications, namely the information contained in schedules 2 to 5", his representations do not directly address the issue as to whether the information at issue constitutes commercial, financial and technical information under the *Act*.

I have reviewed the records and am satisfied that the information at issue qualifies as commercial, financial and/or technical information for the purposes of section 10(1) and agree with MPAC that the records govern the commercial and financial relationship between the parties in addition to setting out technical specifications of certain aspects of their relationship.

Part 2: supplied in confidence

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

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 [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure. [Order PO-2043]

"*Supplied*"

MPAC distinguishes the information at issue in this appeal with the type of contractual information this office has found not qualifying as "supplied" in the past, such as contractual terms described in *pro forma* terms proposed by an institution in a request for proposals (Order PO-2018) and contractual terms describing the terms of supply of an already-established service (Order MO-1706). MPAC submits that the information at issue in this appeal is "the product of the parties supplying confidential intellectual property necessary to build an entirely new, collaborative system" and states:

> [t]his commercial contract is unique and can be distinguished from ordinary contracts between an institution and a third party. In this case, the Agreement is a 378-page document (plus amendments) that sets out in great detail the composition of a confidential joint venture based on the intellectual capital of each of the parties to the Agreement. The Agreement does not just govern the relationship between the parties, as many commercial agreements do – it sets out details of the venture based on information supplied by each of the parties on the basis of an explicit guarantee that it would be kept in confidence. Once the system was built, the Agreement further guarantees that the parties would continue to fiercely guard each other's intellectual property through comprehensive confidentiality terms regarding each party's business, the joint venture, and the Agreement itself – which described the joint venture, or the Ontario Parcel system, in significant detail.

Teranet submits that the information at issue contains information it directly supplied to MPAC and information that if disclosed, would reveal or permit the drawing of accurate inferences with respect to the information it supplied to MPAC. Teranet argues that the information it supplied to MPAC includes jointly owned proprietary information supplied by the parties to facilitate completion of the agreement, including multiple specifications and pricing. Teranet also submits

that the commercial and financial information contained in the records is information which is duplicated from other Teranet documents.

The representations of MPAC, Teranet and MNR also refer to the confidentiality provision set out in section 24 of the Agreement to support their position that the remaining information at issue was supplied in confidence. MPAC submits that section 24 requires all of the parties to use reasonable efforts to protect each other's confidential information. The term "confidential information" is defined in section 24 of the Agreement as all data and information related to the business of MPAC, MNR or Teranet and their affiliates including their respective finances, marketing plans, proprietary and trade secrets, technology and accounting records in addition to all data and information related to the Licenses and Sub-Licensees of any party. In my view, however, this reference to confidentiality in fact goes to the "in confidence" portion of part 2. It has no impact on the analysis of whether the information was "supplied", which I am undertaking here.

The appellant's representations submit that the majority of the information at issue:

> … appears to be the various terms and conditions negotiated between the parties, as well as ancillary information such as lists of old agreements, payments and timetables. This is not information provided by a third party, but the result of the negotiations between the parties.

Analysis/Findings

Other than Teranet's general submission that portions of the information at issue contain information it directly supplied to MPAC or information duplicated from other Teranet documents, I have not been provided with any specific evidence demonstrating that the information at issue was directly supplied by the affected parties to MPAC, regardless of whether this is a typical contract or an unusual one. Rather, the representations of the parties themselves support my finding that the information at issue was not supplied by them. For example, MPAC describes the agreement as a '…composition of a confidential joint venture based on the intellectual capital of each of the parties to the Agreement." Further, the representations of the parties to the agreement do not identify the specific "proprietary information" which was created and supplied by Teranet or MNR to MPAC, directly or indirectly.

In taking the position that information in the records was "supplied" by the affected parties to MPAC, I would expect the parties to identify specific portions of the records. The three records consist of approximately 500 pages, comprised of the main agreement, two amendments and multiple schedules. On reading the records, it is clear that most of their provisions and schedules were the product of negotiation. I have not been directed to any specific portions of the agreements, amendments or appendices that meet the "supplied" test. Instead, I have only been provided with very general comments. For example, in support of its position that it had supplied information to MPAC, Teranet submitted the following:

> Teranet submits that the Agreements contain both information that was supplied and that would permit accurate inferences regarding information actually supplied. Such information includes jointly owned propriety information supplied by the parties to facilitate completion of the Agreements including multiple specifications and pricing. The commercial and financial information contained in the Agreements is duplicated in other Teranet records. The disclosure of the Agreements would permit the drawing of accurate inferences with respect to Teranet's business strategies with the parties to the Agreements. Also the Agreements contain distinctive methods and specifications for property mapping that were specifically developed for the Ontario Parcel project, disclosures of the Agreements would disclose specific information developed by the parties.

I note that Teranet's representations do not then identify specific portions of the agreements and their schedules to which these very general observations apply. It appears to have been left to the Adjudicator to sift through the massive record to determine what constitutes "jointly owned proprietary information" or "multiple specifications and pricing". I have carefully reviewed the records and the representations provided to me. I find that the evidence provided is not sufficient to point to a conclusion that any particular information in the records was "supplied" by the affected parties to MPAC. I also note that information "jointly owned" by MPAC and Teranet, referred to by Teranet in its submissions, or "intellectual capital" owned by MPAC, referred to in its submissions, could not qualify as having been "supplied" to MPAC. I am at a loss to understand how MPAC could "supply" information to itself that it already owns or jointly owns. Also, section 17 is intended to protect the business assets of non-institutions. By its own terms, it clearly does not apply to information owned or generated by the institution receiving the request (in this case, MPAC).

Moreover, and in any event, I am not satisfied that the "supplied" requirement has been met for another reason. As noted above, the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying *non-negotiated* confidential information supplied by the affected party to the institution." The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

It is clear that the records at issue are contractual documents. Accordingly, unless one of the exceptions applies, the information in the records was not "supplied" to MPAC within the meaning of section 10(1). The records themselves also support the view that they are the product of negotiations. For instance, the first nine pages of the Master Agreement consists of an index and table of contents and then goes into detail about how the parties intend to build, maintain, support, terminate and resolve disputes relating to the joint project. The agreement also sets out

the parties' responsibilities relating to delays, non-performance, licenses, liability, subcontractors, and revenue sharing. Such terms are the type that one would expect appear in a normal, contractual relationship. In fact, much of the agreement can be fairly described as standard contractual terms. This is also true of the schedules and the amendments to the agreement.

With respect to the exceptions to this principle, Teranet refers to the "inferred disclosure" exception in its representations (reproduced above) relating to the drawing of accurate inferences about what was actually supplied, but as I have already pointed out, does not link this to any particular information in the records, nor is this apparent from my review of the records. Neither MPAC nor Teranet argues that the other exception, for information that is "immutable", applies in this case.

Accordingly, for all these reasons, I find that information at issue does not meet the "supplied" component of part 2 and is therefore not exempt under section 10(1).

As a result of my finding, it is not necessary for me to determine whether the information at issue satisfies the "in confidence" component of part 2, or to assess the "harms" component of this exemption under part 3. I will now go on to consider whether section 11 of the *Act* applies to the information at issue.

ECONOMIC AND OTHER INTERESTS

Section 11(c) and (d) of the *Act* read:

> 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;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) or (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

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 [Order P-1190]. This exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position [PO-2014-I].

Representations

MPAC's submission is twofold. First, MPAC submits that disclosure of the records at issue could reasonably be expected to prejudice its economic interests and be injurious to its financial interests as MPAC's ability to generate income would be hampered. Second, disclosure could reasonably be expected to prejudice its competitive position as MPAC would face greater competition and its ongoing business relationship with Teranet would be compromised. MPAC describes its relationship with Teranet as follows:

> The *MPAC Act* gives MPAC the right to engage in revenue-generating opportunities to offset amounts payable by municipalities. In connection with such activities, MPAC is expected to conduct its affairs in a cost-effective manner while adhering to good business practices.
>
> Teranet operates an automated land registration system and an automated mapping system in the Province. Teranet, MPAC and MNR recognize the need for and value of a province-wide ownership, assessment, and crown map. To this end, the parties have created various databases collectively referred to as the "Ontario Parcel." These databases feed MPAC's own databases, which MPAC uses to provide efficient and comprehensive statutory assessment services to its customers and to generate revenue, as authorized by statute, to offset the costs of MPAC's services.

With regard to the application of sections 11(c) and 11(d), MPAC submits that the information at issue constitutes "commercially-valuable information and initiatives" that qualify for exemption. In support of its position, MPAC states:

> The *MPAC Act* authorizes MPAC to generate revenue in a manner consistent with MPAC's statutory duties pursuant to the *Assessment Act* and Regulations. MPAC has a responsibility to its customers, the municipalities and the province of

> Ontario, to recover costs and generate revenue for its bottom line. One of the ways that MPAC generates revenue is by charging set fees for convenient electronic access to a host of different types of property information – a service MPAC can only provide as a result of its ongoing relationship with Teranet.

MPAC also refers me to the portion of their representations which discusses anticipated harms under section 10 of the *Act*. The relevant portions of MPAC's argument under section 10 states:

> Disclosure of the records would signal to private enterprises that it is risky to do business with an institution that is subject to *MFIPPA* if confidential information and agreements are required to be disclosed and free to be published to the world at large despite carefully negotiated, critical confidentiality clauses in commercial contracts with municipal institutions are meaningless and subject to override at the instance of an access request. This type of precedent would discourage organizations from entering into commercial relationships and providing services to MPAC, which will affect MPAC's competitive position and its future contract negotiations – not only with Teranet, but with other current and future suppliers. This could ultimately deprive MPAC of the benefit of significant information and resources which are essential to provide effective services efficiently in a competitive market.
>
> …
>
> There is a reasonable expectation that Teranet (and other parties) would no longer supply data to MPAC if MPAC cannot uphold its contractual commitment to keep certain information confidential. Should third parties such as Teranet cease to enter into commercial relationships with MPAC, which are very much in the public interest, and cease to supply their intellectual property and copyrighted information to MPAC, an essential source of MPAC's information will be missing. MPAC would run a material risk that its databases would be less complete and less current, and its products and services would ultimately be less useful to municipalities and institutions, as well as to individual members of the public.

The representations Teranet submitted on the application of section 10(1) also speak to MPAC's position that section 11 of the *Act* applies. Teranet's representations state that disclosure "… will result in Teranet no longer supplying the same type or similar information to MPAC in the context of future commercial negotiations." Teranet also submits that disclosure would negatively impact MPAC in any future negotiations as competitors would be armed with "financial information including budgeted operation costs, confidential pricing information and costs for maintenance services, together with business strategies" which would afford them with an unfair advantage to structure their bids to undercut Teranet and MPAC's financial interests. Though MNR did not provide specific representations on the application of sections 11(c) and 11(d), it indicated that it supported MPAC's position.

The appellant submits that Teranet has an exclusive contract with the Ontario government to operate a land registration system, property tax assessment system and digital mapping system that runs until 2017 and as a result, neither Teranet or MPAC face any meaningful competition. The appellant also submits that the representations of MPAC, Teranet and MNR fail to provide a single example of an actual competitor that could be reasonably expected to exploit the information at issue.

MPAC's reply representations state:

> While MPAC concedes, as pointed out by the Appellant, that its role as the province's assessment corporation is exclusive and mandated by legislation, the Agreement at issue is *not* related to those services … the Agreement at issue is not related to the electronic land registry system, but rather, has to do with the creation and maintenance of digital maps of the province of Ontario. The Agreement allows the parties (MPAC, Teranet, and the Ministry of Natural Resources) to more efficiently collect and maintain the data needed to create a province-wide parcel data set, which will avoid duplicating efforts and standardize the digital data collection for improved products and services. The Ontario Parcel data is effectively a "one-stop" source of parcel mapping, created pursuant to the terms of the Agreement. Information in the Agreement results from the parties' confidential sharing and investment of their intellectual property.
>
> MPAC and Teranet face competition with respect to this "value-added" and revenue-generating activity (as distinct from MPAC's legislatively-mandated assessment activities). Various companies could and do create, maintain, or update digital maps … and MPAC and Teranet have no exclusive license to do so. MPAC's sale of digital parcel information is not protected by any legislation, and any competitor is free to enter the market with MPAC and Teranet for customers (such as municipalities and property owners). The information in the Agreement would be valuable to a competitor in a variety of ways, including: to attempt to duplicate the parcel mapping system; to take advantage of efficiencies that the parties to the Agreement developed; or to compete with any of the parties to the Agreement to provide services to their existing or potential customers.

Teranet was also provided with an opportunity to respond to the appellant's position that it does not face meaningful competition. Teranet submits that the information at issue does not relate to its exclusive licence to operate the electronic land registry system until 2017 but rather sets out the business relationship between Teranet, MPAC and MNR regarding the "creation and, more importantly, the maintenance of, digital maps of the province of Ontario." Teranet argues that it does not have an exclusive licence to create and maintain a digital map of Ontario and that any public or private entity could maintain or update a digital map of Ontario. Teranet also identified six Ontario based companies who offer digital map maintenance services to support their position that they and MPAC faced competition in the map maintenance industry. Teranet

also identified a municipality who has retained one of the identified six companies to provide maintenance services.

Analysis and Findings

As set out above, MPAC and the affected parties agreed at the mediation stage of this appeal that significant portions of the records at issue could be disclosed to the appellant. This is a recognition that the exemptions found at sections 11(c) and (d) of the *Act* were not applicable to the Agreement and the amendments as a whole. In other words, sections of the records could be disclosed to the appellant without impacting MPAC's economic interests. I must therefore decide whether the exemptions have been properly claimed for the portions of the records that have been withheld.

In determining this question, I must decide whether MPAC provides digital mapping services to municipalities in a competitive environment and if so, whether disclosure of the information at issue would prejudice its economic interests and competitive position (section 11(c)) and/or be injurious to its financial interests (section 11(d)), all in relation to digital mapping services. The appellant submits that the information at issue relates to a business activity in which MPAC faces no meaningful competition as Teranet has an exclusive contract with the Ontario government to operate a land registry system and property tax system, which includes a digital mapping system. MPAC and Teranet submit that the exclusive contract does not govern digital mapping systems and identified potential competitors based in Ontario. I have carefully considered the representations of the parties and am satisfied that MPAC provides digital mapping services in a competitive environment. I have been provided with evidence that MPAC does not have the exclusive right to produce a digital map of the province and that other companies do offer digital map maintenance services in Ontario. Accordingly, I will go on to decide whether disclosure of information relating to this particular business activity could reasonably be expected to prejudice MPAC's economic interests or competitive position.

The representations of MPAC, Teranet and MNR submit that disclosure of the information at issue could reasonably be expected to prejudice MPAC's economic interests and competitive position (section 11(c)) and be injurious to its financial interests (section 11(d)) as a result of increased competition in the digital mapping industry and a compromised business relationship. The appellant's position is that most of the withheld information does not qualify for exemption under the *Act*.

For sections 11(c) and 11(d) to apply, MPAC must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, MPAC must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Having reviewed the records and the representations of the parties, I am satisfied that disclosure of information providing details into how the digital parcel map is to be constructed or the contents of the digital map would provide MPAC's competitors with valuable information that

would prejudice MPAC's competitive position and be injurious to its financial interests. Knowing how MPAC and the affected parties are constructing the digital map would assist another company with producing a competitive product and could have a real impact on MPAC's ability to market that product.

On the other hand, information relating to the business relationship between MPAC and the affected parties or that relates to the administration of the digital map would not have that effect. Information setting out details such as responsibility for delays and contractual non-perfomance, revenue sharing or the term of the agreement and termination provisions will not, in my view, assist another company with marketing a competitive product that may impact MPAC's revenue stream. On this basis, I have decided that the section 11(c) and (d) do not apply to this kind of information in the records. As well, though not the basis for my decision, I note that there are good public policy grounds why this type of information, set out in a contract entered into by a government organization, should be publicly disclosed.

With these conclusions in mind, I find that only schedules 2, 3, 4, 5, 10 and 12 of record 1 qualify for exemption under sections 11(c) and 11(d) *Act*. I also find that schedules 3, 5 and 12 found in record 2 (Amendment No. 1 to the Ontario Parcel Master Agreement) also qualifies for exemption under sections 11(c) and 11(d) of the *Act*.

As noted, disclosure of the information contained in these parts of the records could provide a competitor with insight and knowledge of the product being created by the parties. This, in turn, could significantly prejudice MPAC's economic interests and its competitive position. For example, schedule 2 contains research information and the results of a client survey and focus group. Schedules 3 to 5 set out detailed build and maintenance specifications for the Ontario Parcel Index and schedules 10 and 12 set out how the Ontario Parcel is to be built, identifies the specific type and sequence of information and how the information is to be delivered and formatted. Schedules 3, 5 and 12 of Amendment No. 1 deal with information in the Agreement that I have found to be exempt. Accordingly, disclosure of this information could reasonably be expected to prejudice MPAC's economic interests and competitive position as increased or better informed competition could hamper MPAC's ability to generate income. Further, disclosure could reasonably be expected to result in jeopardized financial and economic interests as a result of MPAC losing contracts to competitors.

I find that the remaining portions of the records do not qualify for exemption under sections 11(c) and 11(d) of the *Act*. In making my decision, I find that MPAC, Teranet and MNR have failed to provide me with sufficiently detailed evidence to establish that these portions of the agreement could reasonably be expected to result in the harm contemplated by sections 11(c) and 11(d) of the *Act*.

In my view, the evidence presented on MPAC's behalf is generalized and highly speculative and does not satisfy the "detailed and convincing" evidentiary standard accepted by the Court of Appeal in *Ontario (Workers' Compensation Board)*. Further, my review of the records does not support MPAC's position. As noted above, these remaining sections outline the business relationship among the parties and detail the operational and administrative arrangements for the digital parcel mapping project. The Ontario Parcel Master Agreement sets out the parties'

contractual obligations relating to timelines, delays, non-performance, dispute resolution, property rights, licences, sublicences, limitation of liability, indemnification clauses, acceptable service levels, subcontractor arrangements, revenue sharing and payment arrangements, the term of the agreement and termination provisions. These sections do not discuss the actual product being developed by the parties to the agreement and disclosure of these provisions will not attract the harm set out in section 11.

The Schedules to the Agreement generally describe in more detail some of the definitions, and contractual terms and list additional information such as the municipalities subject to grand-father agreements. Finally, two of the schedules MPAC seeks to withhold from the appellant (Schedules 6 and 17C) contain no information as they are merely cover pages indicating that information is to added to the agreement at a later date.

MPAC and the affected parties have not provided me with persuasive evidence on how the disclosure of these parts of the records could provide other companies with a competitive advantage or be injurious to MPAC's competitive position. To reiterate, provisions relating to the terms of the agreement and conditions for termination are routinely found in contracts of this nature. Disclosure of these terms will not place a competitor in a better position to produce a product that will compete with that of MPAC, resulting MPAC being placed at a competitive disadvantage or suffering financial injury. This finding is consistent with the approach taken by MPAC and the affected parties in agreeing to disclose many sections of the Agreement at mediation. This represents a recognition that sections of the Agreement can be disclosed without MPAC experiencing the harms set out in section 11(c) and (d).

Having regard to the above, I find that the information contained in schedules 2, 3, 4, 5, 10 and 12 attached to the Ontario Parcel Master Agreement (Record 1) and schedules 3, 5 and 12 found in Record 2 are the only portions of the records that satisfy the requirements for exemption under sections 11(c) and 11(d) of the *Act*. As a result of my finding, I will go on to consider whether MPAC properly exercised its discretion to withhold these portions of the records from the appellant.

EXERCISE OF DISCRETION

The section 11 exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

The information I found exempt under sections 11(c) and 11(d) contains research information and detailed build and maintenance specifications. The appellant was provided with an opportunity to make representations as to whether MPAC considered irrelevant factors in their exercise of discretion to withhold portions of the records at issue. The appellant did not provide any representations on this issue and there is no evidence before me suggesting that MPAC consider irrelevant factors. Accordingly, I am satisfied that MPAC considered relevant factors and its exercise of discretion was proper.

ORDER:

1. I uphold MPAC's decision to withhold access to portions of the records I found exempt under sections 11(c) and 11(d) of the *Act*, more specifically, schedules 2, 3, 4, 5, 10 and 12 of the Agreement, and schedules 3, 5 and 12 of record 2 (Amendment No. 1 to the Ontario Parcel Master Agreement).

2. I order MPAC to disclose the remaining portions of the records to the appellant not earlier than **November 9, 2007** and not later than **November 15, 2007**. For the sake of clarity, I have created a chart (attached) that sets out the portions of the records MPAC is to disclose to the appellant.

3. In order to verify compliance with this Order, I reserve the right to require a copy of the information disclosed by MPAC pursuant to order provision 2.

Original Signed by: October 10, 2007
Brian Beamish
Assistant Commissioner

Records Found Exempt under Section 11(c) and 11(d)	Records to be Disclosed to the Appellant
Record 1 - Ontario Parcel Master Agreement • Schedule 2 – Base Index Map Product • Schedule 3 – Pre-Basic Index Map Product Specifications • Schedule 4 – Assessment & Crown Parcel Map Data Specifications • Schedule 5 – Ontario Parcel Index Specifications • Schedule 10 – Build Obligations • Schedule 12 – Delivery Specifications and Support Obligations	Record 1 - Ontario Parcel Master Agreement • Subsection 3.6 and 3.7 - Building the Ontario Parcel • Subsection 4.3 - Maintenance and Support • Section 9 - Delays and Non Performance • Subsection 11.4 - Management • Section 12 - Intellectual Property • Section 13 - Licences and Sublicenses • Section 14 - Licensing of Licensees • Section 17 - Limitation of Liability • Section 18 - Indemnities • Section 19 - Services Levels • Section 20 - Engagement of Subcontractor • Section 21 - Revenue Sharing and Payment Obligations • Section 25 - Term and Termination • Subsection 28.2 and 28.16 - General • Schedule 1 Definitions – Aggregate Liability Cap, Build Error, Educational Licensee, Grandfathered Agreements, Jointly Owned specifications, Maintenance Error, Per -Party base Cap, Per-Party Cap and Per-Party IP Extended Cap • Schedule 6 – Names of Build Subcontractors (Cover Page Only) • Schedule 8 – Internet Key Terms of Use • Schedule 11 – Build Timetable • Schedule 13 – Maintenance Obligations • Schedule 15, A-D

	• Schedule 16, A-B • Schedule 17C (Cover page only) • Schedule 18 – List of Grand-Fathered Agreements • Schedule 20 – Maintenance Payments • Schedule 21 – Revenue Sharing and Remittance Fees • Schedule 22 – Excluded Products • Schedule 23 – Service Levels
Record 2 - Amendment to the Ontario Parcel Master Agreement • Schedule 3 – Pre-Basic Index Map Product Specifications (revised) • Schedule 5 – Ontario Parcel Index Specifications (duplicate) • Schedule 12 – Delivery Specifications and Support Obligations	Record 2 - Amendment to the Ontario Parcel Master Agreement • Section C - Go Forward Decisions • Section D - Issues Related to Build Subcontractor Agreements • Section E - Sections 1.0, 2.0, 3.0, 5.0, 7.0, 9.0, 10.0 – 20.0
	Record 3 - Amendment to the Ontario Parcel Master Agreement • Sections 2.0, 3.0 and 4.0