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

ORDER MO-2248

Appeal MA-050174-1

Municipal Property Assessment Corporation

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF APPEAL

BACKGROUND

The Municipal Property Assessment Corporation (MPAC) is a non-share capital, not-for-profit corporation established under the *Municipal Property Assessment Corporation Act* (the *MPAC Act*). MPAC is the sole provider of assessment services for the Province of Ontario, the biggest assessment jurisdiction in North America. Every municipality in Ontario is a member of MPAC, and the organization is governed by a 15-member board of directors appointed by the Minister of Finance. The Board includes municipal representatives, property taxpayers and members representing provincial interests.

MPAC administers a uniform, province-wide property assessment system based on current value assessment. One of its duties is to prepare an assessment roll for each municipality in Ontario. Municipalities use the information in the assessment roll to calculate property taxes. Section 14 of the *Assessment Act* sets out the information that MPAC is required to include on the assessment roll that it provides to each municipality. This information includes:

- A description of the property sufficient to identify it;
- The names and surnames, in full, of all persons liable to assessment in the municipality;
- The person's religion, if they are Roman Catholic;
- The type of school board the person supports under the *Education Act*;
- The number of acres, or other measures showing the extent of the person's land;
- The current value of the parcel of land;
- The value of the land leased to tenants; and
- The name of every tenant who is a supporter of a school board.

Sections 10 and 11 of the *Assessment Act* require property owners and other assessed persons to provide information to MPAC assessors. Section 13 of the *Assessment Act* makes it an offence to refuse to comply with MPAC's lawful demand for information. In other words, property owners and other occupiers (e.g., tenants) in Ontario face a statutory compulsion to disclose information about themselves and their properties to MPAC.

Under sections 39(1) and (2) of the *Assessment Act*, MPAC must deliver the assessment roll to the clerk of the municipality, who then must make it available for inspection by the public during office hours.

MPAC also collects other personal information about property owners and occupiers pursuant to its duties under other statutes, including the *Municipal Elections Act*, the *Education Act*, the *Municipal Act, 2001*, and the *Provincial Land Tax Act*.

MPAC has a Business Development Group that sells various property assessment information products to the public in electronic format. The electronic property assessment information sold by MPAC is stripped of personal information and is subject to license agreements that limit the purposes for which the information may be used, including a prohibition against sale or transfer

to others. The fee charged is based on a standard pricing structure developed by MPAC. The current fee for an assessment roll report is $14.00 per property and includes the current value assessment, depth, frontage, legal description, property address, property code and description, realty portion, roll number, roll year, realty tax class, realty tax qualifier, site area, site area-unit of measure, tenant tax liable and unit class.

MPAC is covered by the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*, *MFIPPA*). Section 7(1) of the *MPAC Act* provides that:

> The Corporation [i.e. MPAC] shall be deemed to be an institution for the purposes of the *Municipal Freedom of Information and Protection of Privacy Act* and that *Act* applies with necessary modifications with respect to the Corporation.

Consequently, any person may request access to records that are in the custody or under the control of MPAC.

THE REQUEST

MPAC received a request under the *Act* from a journalist for:

> … access to an electronic copy of the current assessment roll (2004 roll) for the Cities of Hamilton and Burlington, and the town of Grimbsy.

MPAC denied access to the responsive records pursuant to sections 10(1), 11(a), 11(c), 11(d) and 15(a) of the *Act*. The requester (now the appellant) appealed MPAC's decision to this office. During mediation, the appellant raised the application of section 14(1)(c) of the *Act*, which provides for the disclosure of personal information collected and maintained for the purposes of creating a publicly available record. No further mediation was possible and this file was moved to adjudication.

At the beginning of the adjudication process, the appellant raised the possible application of the public interest override in section 16 of the *Act* to the records at issue. I sought and received representations, first from MPAC and then from the appellant. Both MPAC and the appellant were provided with copies of each other's non-confidential representations and were given an opportunity to make representations in reply, which they did.

RECORDS:

The records consist of four compact discs containing an electronic version of the property assessment rolls for Burlington, Grimsby and Hamilton.

DISCUSSION:

MPAC's position is that the issue of whether the appellant has a right to access electronic assessment rolls has already been decided by the Divisional Court's decision in *Municipal*

Property Assessment Corporation v Ontario (Assistant Information and Privacy Commissioner) (2004), 71 O.R. (3d) 303 [*MPAC v IPC*] and IPC Orders MO-1953 and MO-2030.

The line of decisions cited by MPAC originate with Order MO-1693. In Order MO-1693, this office ordered MPAC to disclose a copy of the current year's assessment roll for the Province of Ontario in electronic format to the requester. In making his decision, then Assistant Commissioner Mitchinson held that he was bound by the Ontario Divisional Court's decision in *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O. R. (3d) 773. In that particular case, a journalist sought access to an electronic database containing the names, addresses and telephone numbers of municipal election campaign contributors. Order MO-1693 was quashed by the Divisional Court in *MPAC v IPC*. Consequently, MPAC was not required to disclose the record at issue.

The Divisional Court ruled that the then Assistant Commissioner erred in finding that *Gombu v. Ontario* was indistinguishable and that section 39 of the *Assessment Act* expressly authorized the disclosure of the electronic version of the assessment roll sought by the collection agency and stated:

> In *Gombu*, s. 88(5) of the *Municipal Elections Act* mandates disclosure of the electronic record. In this case, however, the *Assessment Act* contains no such mandate. The *Assessment Act* neither obligates nor authorizes MPAC to do anything besides making the municipal rolls available to the clerk … To override the important privacy interests addressed in *MFIPPA*, MPAC must have express authorization to disclose.

In *MPAC v IPC*, the Divisional Court also confirmed MPAC's statutory authority to sell assessment data to the public under section 12(5) of the *MPAC Act* and section 53(5) of the *Assessment Act* and stated:

> MPAC is … authorized to sell information to members of the public for a fee set by MPAC and upon terms set by MPAC. The information that MPAC sells to the public under this authority is, however, stripped of personal information; it is also subject to license agreements that limit the purposes for which information may be used, and prohibit its sale or transfer to others.

Since the Divisional Court's decision in *MPAC v IPC*, I upheld MPAC's decision to deny access to electronic property assessment information it sells for revenue-generation purposes under sections 11(c) and 11(d) of the *Act* in Orders MO-1953 and MO-2030.

In Order MO-1953, I dealt with an appeal of MPAC's decision to deny a requester access to nine fields from a database known as the Ontario Assessment System (OASYS), which MPAC refers to as its master file. The requester sought access to the suite number, street number, street name, street type, street direction, city, postal code, property type and XY coordinates. MPAC denied the requester access to the records. In that order, I found that MPAC relied on OASYS to generate revenue and thus disclosure of the information at issue could reasonably be expected to prejudice its economic interests or competitive position (section 11(c)), or be injurious to its

financial interests (section 11(d)). Consequently, I upheld MPAC's decision to deny access to the records and dismissed the appeal.

In Order MO-2030, I dealt with an appeal of MPAC's decision to deny the requester access to the names, addresses and property data of constituents in each Toronto city councilor's ward, either through OASYS (which contains 159 fields of data) or through Municipal Connect, an online service for municipalities to obtain assessment related data. I dismissed the appeal and found that if OASYS data is disclosed in bulk for free in response to access requests under the *Act*, MPAC will be deprived of this revenue stream, which could reasonably be expected to prejudice its economic interests or competitive position (section 11(c)) or be injurious to its financial interests (section 11(d)).

It is in this context that I address the issue of whether sections 11(c) and 11(d) of the *Act* apply to the records at issue and in doing so will decide whether Orders MO-1953 and MO-2030 are applicable in the circumstances of this appeal or whether these decisions can be distinguished.

ECONOMIC AND OTHER INTERESTS

MPAC claims that sections 11(c) and 11(d) apply to the requested electronic assessment rolls. These sections state:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

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.

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].

To establish a valid exemption claim under section 11(d), an institution must demonstrate a reasonable expectation of injury to its financial interests.

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.)].

Accordingly, in order to meet the requirements of the section 11(c) or (d) exemption claims, MPAC must provide detailed and convincing evidence sufficient to establish a reasonable expectation or probability of one or more of the harms described in either of these sections if the records are disclosed to the appellant.

Summary of MPAC's Representations

MPAC submits that the provisions of the *Assessment Act* require MPAC to prepare an assessment roll for each municipality and deliver the assessment roll to the municipality's clerk, who in turn, must make it available to the public for inspection.

MPAC goes on to explain that municipalities who request an electronic copy of its portion of the assessment roll must sign a licence agreement that states that the municipality will only use the information contained in the assessment roll it receives for its planning requirements. Accordingly, municipalities having access to an electronic copy of the assessment roll have agreed not to provide the assessment roll to anyone.

In an affidavit attached to its representations, MPAC's Manager of Legislation and Policy Support Services and FOI Coordinator, advises that MPAC has a responsibility to its members – namely, all Ontario municipalities that make up its membership – to attempt to generate revenue in order for municipalities and taxpayers to benefit from lower fees for core assessment services. In an effort to meet these goals, MPAC advises that it created a Business Development Group to seek new revenue sources and maintain existing revenue sources. One of the revenue sources maintained by the Business Development Group is called "propertyline" which allows users to purchase property information on a property-by-property basis for all properties in the province. Users may also request custom orders from the Business Development Group. The cost assessed to users is based on a standard fee schedule.

MPAC submits that disclosure of the information at issue could reasonably be expected to prejudice its economic interests and competitive position (section 11(c)) in addition to being injurious to its financial interests (section 11(d)) in several ways:

- The sale of property assessment information is MPAC's main asset and constitutes its entire business. Accordingly, it is reasonable to expect that MPAC would suffer a loss in its revenue stream and bottom line, which in turn, would be passed on to municipalities and taxpayers if it is required to disclose the requested information in bulk electronic form pursuant to the *Act*;

- MPAC would be deprived of the significant amount in fees that a request for this size would generate and if the information at issue is disclosed to the appellant, it is reasonable to expect that other customers would seek to obtain free property assessment information by making requests under the *Act*;

- If MPAC is ordered to disclose the requested information, it would not be able to prevent users from manipulating or disseminating the information as disclosure under the *Act* is "disclosure to the world";

- MPAC has expended considerable time and effort in developing the electronic databases that house comprehensive property information, and the cost of the work would be lost if the assessment roll is ordered disclosed to the public at large; and

- It is reasonable to expect that MPAC's competitive position would be harmed as disclosure of the information through the *Act* would allow private companies to circumvent purchasing the information through the Business Development Office. As a result, potential competitors would be able to acquire bulk access to the information at issue, free of charge, creating an unfair competitive advantage.

Finally, MPAC submits that the Divisional Court's decision in *MPAC v IPC* and my findings in MO-1953 and MO-2030 already provides a complete answer to the issues raised in this appeal. Namely, that *MPAC v IPC* and Order MO-1953 found that disclosure of an electronic copy of the assessment roll could reasonably be expected to prejudice MPAC's economic interests or competitive position (section 11(c)), or be injurious to its financial interests (section 11(d)) and Order MO-2030 found that the public availability of information contained in the paper assessment rolls did not justify disclosing similar information in electronic form.

Summary of the Appellant's Representations and MPAC's Response

The appellant's representations state that the exemptions found at sections 11(c) and 11(d) are included in the *Act* "… in order to protect the legitimate competitive interests of institutions and to protect their financial interests. They were hardly intended to protect enterprises set up by institutions without proper authority, as is the case here." In support of this position, the appellant argues that MPAC lacks clear statutory authority to establish a business to raise

additional revenues and sell property assessment information to the public and that MPAC allows municipalities to use the roll for non-planning purposes, such as providing public access.

With respect to the applicability of sections 11(c) and 11(d), the appellant submits that MPAC's claim of economic harm is exaggerated taking into consideration the fact that the information he seeks is already available to the public at municipal offices across Ontario. The appellant also submits that the circumstances in this appeal are distinguishable from those in Orders MO-1953 and MO-2030 as the information at issue in those appeals "was for a much broader database containing far more information than is contained in the assessment roll". The appellant also submits that the circumstances in Order MO-1953 and MO-2030 differ from those in this appeal and that his request should be considered "… in a much different context, in that MPAC's entire assessment system is under intense public scrutiny and there are significant public interest reasons for disclosure…"

I will first outline the appellant's submissions regarding the application of sections 11(c) and 11(d) of the *Act* and then will move on to discuss the appellant's other concerns.

Application of sections 11(c) and 11(d) of the Act

The appellant starts his submission with a reference to Order MO-1564, which I adopted in Orders MO-1953 and MO-2030. In Order MO-1564, this office found that MPAC's business activities fell within the rationale for the "valuable government information" exemption articulated by the Williams Commission. In that order, then Assistant Commissioner Tom Mitchinson stated:

> In my view, the activities undertaken by MPAC within the scope of its mandate are the type of activities described by the Williams Commission. MPAC has been given the statutory authority to earn surplus income for the purpose of reducing the charges levied to municipalities for assessment services. To do so, in my view, it is reasonable to expect that MPAC would try its best to become a dynamic and entrepreneurial organization, applying its expertise in ways that would enhance its reputation and, in turn, increase its revenue through the sale of its products.

The appellant takes the position that these comments have no application in the circumstances of this appeal. The appellant's representations state:

> The activity referred to in order MO-1564 was the sale of specialized market analysis tools, which flow directly from MPAC's expertise. In this case, the record involved is a record of public information, and indistinguishable in form from the assessments produced by hundreds of similar assessment jurisdictions throughout North America. The record and MPAC's activities referred to in order MO-1564 have absolutely nothing to do with the records at issue in this appeal, and the [then] assistant commissioner's comments in relation to "activities undertaken by MPAC" had then, and have now, no relationship to the activities referred to in this matter. They are so fundamentally different that one cannot reasonably apply Mitchinson's words to the current context.

The appellant submits that sections 11(c) and (d) of the *Act* do not apply to the electronic roll largely because property assessment information obtained through the *Act* would have little value to requesters requiring up-to-date assessment information. The appellant submits that the *Act* provides that institutions have up to 30 days to respond to a request under the *Act*. Accordingly, it is unlikely that a property owner would make a request under the *Act* for assessment information when he or she could search MPAC's online database and pay a nominal fee. The appellant also questions the likelihood that a property owner would file a request under the *Act* for assessment information taking into account that it is possible that the information at issue may not be current due to an appeal or reconsideration of the assessed value.

The appellant also submits that it is unlikely that disclosure of the electronic roll to the appellant could reasonably result in MPAC facing competition as a competitor would have to spend significant sums of monies, without any reasonable prospect of return taking into consideration the problems of the timeliness and currency of the information, to establish the systems necessary to compete with MPAC. The appellant also questions whether the information at issue has any financial value as the information can be accessed for free at municipal offices across Ontario.

MPAC's reply representations state that the additional information at issue in Orders MO-1953 and MO-2030, is not sufficiently different to support a conclusion that the circumstances of this appeal are distinguishable. MPAC also submits that the appellant's position that the context of his request differs from MO-1953 and MO-2030 in that MPAC's assessment system is currently under public scrunity "…does not distinguish prior orders or make them non-applicable; rather, it goes to the potential applicability of the section 16 public interest override."

With respect to the applicability of *MPAC v IPC*, MPAC's representations state:

> *MPAC v. IPC* also remains relevant and binding on the issues concerning electronic versus paper records. The decision notes at paragraph 20 that there is no blanket rule that if a paper record is required to be disclosed, then the electronic version of the record must be disclosed as well. The Divisional Court specifically noted that it is not correct to interpret the *Gombu* decision as saying that the electronic version of the disclosed paper records should also be disclosed. The Appellant appears to be trying to apply an interpretation of *Gombu* (*i.e.* that if paper records must be disclosed, it follows that electronic records should too) that was explicitly rejected by the Divisional Court in *MPAC v. IPC*. The Divisional Court decision is, of course, binding on the IPC. The public availability of the assessment roll (in hard copy in individual municipal offices) does not lead to an inevitable conclusion that a complete electronic version must be disclosed.

MPAC lacks clear statutory authority to establish a business to raise additional revenues and sell property assessment information to the public

The appellant acknowledges the Divisional Court confirmed MPAC's authority to sell assessment information in *MPAC v IPC* but states that the "…issue has not been decided in any

meaningful way and yet it is fundamental to whether section 11 applies…" The appellant's representations state:

> MPAC's assertion that the authority exists has merely been accepted with little more than a cursory review of the basis of that authority. When examined more closely, there is simply no case to be made that MPAC has such statutory authority. In fact, a review of the statutes involved, and the legislative history of their enactment, leads to the opposite conclusion.

In support of his position, the appellant presents a lengthy submission that reviews relevant statutes and legislative history. The appellant submits that section 12(5) of the *MPAC Act* which provides that MPAC may "…levy a charge to be paid by other persons for whom it performs duties under this or any other Act" only authorizes MPAC to charge fees for services. Accordingly, MPAC is not authorized to charge fees for products or activities by reason that section 12(5) appears under the heading "Payment for Services". The appellant also submits the term "duties" in section 12(5) of the *MPAC Act* suggests that MPAC can only charge fees for services it is mandated to provide under provincial legislation. The appellant compiled a list of MPAC's duties as enumerated in various provincial legislation and states:

> Clearly, MPAC's duties encompass a specified list of things it must do in support of the various public activities, including taxation and the prosecution of elections. Nowhere in any provincial act is there even a hint of any duty related to the sale of assessment information or the creation of a business doing so.

The appellant then turns to section 9(2) of the *MPAC Act* which states that MPAC "…may engage in any activity consistent with its duties that its board of directors considers to be advantageous to the Corporation". The appellant argues that the plain reading of the words "consistent with its duties" suggest that the sale of assessment information must be "compatible or in harmony" with MPAC's statutory duties and does not authorize MPAC to charge fees for activities. The appellant's representations state:

> It is hard to imagine how establishing a business charging exorbitant prices for information collected at taxpayer expense could even begin to be "in harmony" with the duties enumerated in the various acts, which all have to do with providing assistance to various other authorities and responding to various requests from individuals and organizations.

The appellant then moves on to review section 53(5) of the *Assessment Act* which provides that MPAC "may disclose any information acquired by it and may do so on such terms as it determines." The appellant's representations state that:

> … the only possible interpretation of section 53(5) of the Assessment Act is that MPAC is permitted to disclose, or reveal, any of the information it collects. The reference to 'terms" cannot refer to financial terms, as that issue is already settled in Section 12(5) of the MPAC Act which only permits the charging of fees for duties performed under various pieces of legislation.

> Therefore, section [53(5)] must refer to other conditions that might apply to the disclosure of information. This is fully consistent with the intent of section 53 of the assessment act, which sets out various conditions under which information can be disclosed. Simply put, the section is about when MPAC can disclose information and when it cannot. To interpret 53(5) as some blanket provision allowing for the sale of information is to twist its meaning beyond reason.

The appellant also submits that there is no explicit legislative authority to support MPAC's position that it has a responsibility to raise additional revenues to offset the costs municipalities are required to pay for assessment rolls. In support of his position that there was no legislative intent to obligate MPAC to raise additional funds by establishing a business, the appellant provided copies of excerpts of the relevant legislative debates and a copy of the budget update in which the government announced the transfer of responsibility of assessment services from individual municipalities to a province-wide system of assessment.

Finally, the appellant refers me to sections of the *Liquor Control Act of Ontario, Electricity Act, Ontario Place Corporation Act,* and *Niagara Parks Act* as examples of legislation which contain explicit provisions to establish agencies to operate a commercial business in support of his position that if the legislature intended MPAC to sell assessment information to the public, it would have specifically made provision for this type of activity.

MPAC's reply representations reiterate that this office and the Divisional Court have already confirmed that MPAC is authorized to sell assessment-related information for a fee. MPAC's reply representations also address the appellant's position that the sale of assessment information for a fee curtails a long standing tradition of the public having access to assessment roll information:

> First, the public has no statutory right under the *Assessment Act* to "obtain" this information for more than one municipality at a time, contrary to the request the Appellant has made in this case. Access to multiple jurisdictions is simply not contemplated, as each municipality gets assessment information only for itself, and not for other municipalities in the province. The public has no greater right to access that information than the municipalities themselves.

MPAC delivers an electronic assessment roll to municipalities and allows municipalities to use the roll for non-planning purposes, such as providing the public access.

The appellant also asserts that MPAC does not consistently deliver a paper roll to municipalities and allows municipalities to use the electronic version of the roll for non-planning purposes. In support of his position, the appellant provided a copy of a property system report he obtained using a self-serve computer at a municipal office. The appellant also provided copies of signed contracts between MPAC and a municipality which provide that one of the purposes of providing the electronic roll is for public information purposes. The appellant submits that these contracts prove that MPAC is aware that the electronic roll is being used to provide information to the public in addition to planning purposes. The appellant's representations state:

> In its arguments, MPAC is essentially trying to have its cake and eat it too. On the one hand, it prefers to create and maintain the roll information in electronic form, and readily provides the information to municipalities in that form who then use it to discharge their responsibilities with regard to taxation and public access, yet when it comes to access to the information by the members of the public under [the *Act*] it advances the fiction that the roll is a paper record and that the only access permissible is to that record.

In its reply representations, MPAC submits that access to property assessment information by way of a computer at a municipal office that requires users to search on a property-by-property basis by address or roll number is not equivalent to access to the CDs containing the entire assessment roll in electronic format.

MPAC further stated that the assessment roll is a hard copy document that is delivered to municipalities and that it makes an electronic version of the roll available to the municipality, if requested, once the hard copy roll is delivered. MPAC's reply representations acknowledge that the assessment roll is produced by extracting data elements from electronic databases but that its elements do not change the nature of the roll as a "physical, hard copy product…" Finally, MPAC submits that the electronic roll is provided under licence, which has required amendment, in some cases to ensure that municipalities strip personal information from portions of the electronic roll it allows members of the public to search and access.

Analysis and Findings

The crux of the appellant's position is that the development of case law has allowed MPAC to apply sections 11(c) and 11(d) of the *Act* to "… effectively overrule the public's established right to obtain assessment roll information" and in turn charge "exorbitant prices for information collected at taxpayer expense."

In support of his position, the appellant distinguishes the decisions of this office supporting MPAC's position on the basis that the information at issue in this appeal differs from the information in those appeals. For example, the appellant submits that this office's finding in Order MO-1564, that MPAC's business activities fall within the rationale for the "valuable government information" exemption articulated by the Williams Commission, has no application to the circumstances of this appeal as the information at issue in that appeal related to the data and tools MPAC uses to calculate property assessment values. I disagree with the appellant's position and find that the sale of property assessment information is a business activity that falls within the rationale for the "valuable government information" exemption articulated by the Williams Commission.

In making my decision I carefully reviewed the appellant's representations, including his statutory analysis. I reject his position that MPAC lacks clear statutory authority for its position that it has a responsibility to earn surplus income and is authorized to sell property assessment information to the public. MPAC's statutory authority to sell assessment-related information to the public is clearly set out in section 12(5) of the *MPAC Act* and section 53(5) of the *Assessment*

Act. Further, in Order MO-1564, this office recognized that "MPAC has been given the statutory authority to earn surplus income for the purpose of reducing the charges levied to municipalities for assessment services". The Divisional Court confirmed MPAC's statutory authority in *MPAC v IPC* to sell property assessment information to the public. With respect to the appellant's submission regarding the statutory interpretation of the *MPAC Act*, I note that section 9 of the *Interpretation Act* provides that the "… marginal notes and headings in the body of an Act and references to former enactments form no part of the Act but shall be deemed to be inserted for convenience of reference only".

The appellant also submits that the circumstances in this appeal are "clearly distinguishable" from those in Orders MO-1953 and MO-2030 on the basis that the information at issue in this appeal consists "… of public information, and indistinguishable in form from the assessments produced by hundreds of similar assessment jurisdictions throughout North America". In this appeal, the appellant is seeking access to the electronic assessment roll for three municipalities which includes information regarding the names of property owners and other information collected for compiling the assessment roll. In Order MO-1953, the appellant sought access to nine fields of data from the OASYS database for all of Ontario and was not interested in obtaining access to the names of property owners. In Order MO-2030, the appellant sought access to the names, addresses and property data of constituents in each Toronto city councilor's ward, either through the OASYS database or through Municipal Connect, a property assessment database available to municipalities who pay the subscription fee. MPAC submits that the additional information at issue in Orders MO-1953 and MO-2030 is not a distinction alone that is sufficient to support the appellant's position. I agree and find that Orders MO-1953 and MO-2030 are applicable to this appeal as both this appeal and the orders relate to electronic property assessment information MPAC sells for revenue-generation purposes.

In response to the appellant's position that the requested information constitutes public information, MPAC submits "that access to the electronic version of the roll which the Appellant described (through kiosk access in municipal offices) does not constitute access to the electronic roll in the way in which the Appellant is requesting access in his FOI request." Again, I agree with MPAC's position and I find one cannot compare a property-by-property search of electronic assessment information available at municipal offices with the appellant's request for bulk electronic access to the assessment roll information. The appellant's submission that the requested information at issue does not qualify for exemption by reason of it being already available to the public is the same argument the appellant in Order MO-2030 raised. The appellant in Order MO-2030 argued that the *Gombu* decision holds that information that exists in the public domain in paper format should be automatically disclosed electronically. I rejected this argument in Order MO-2030 and stated:

> I do not accept that because some assessment information is publicly available in electronic form through the Toronto Property System, disclosure of the broader information contained in the OASYS database or through Municipal Connect would not result in an unjustified invasion of personal privacy. The Toronto Property System has built-in limitations and barriers that are designed to protect individual privacy. For example, the system does not allow users to conduct searches based on an individual's name. Moreover, users must go to municipal

> civic offices to access the Toronto Property System and can only obtain the information listed above. In contrast, providing municipal councilors with access to a CD of the OASYS database or direct access to Municipal Connect in their offices would enable them to download, manipulate, merge and use the personal information attached to many of the 623,389 Toronto properties, for innumerable and limitless purposes.

I have carefully considered the representations of the parties and am of the view that if MPAC is required to disclose the requested electronic assessment rolls to the appellant under the *Act*, it would be deprived of the significant amount of fees that a request of this size would generate. Further, MPAC would be required to release the same information to whoever seeks access to an electronic assessment roll under the *Act*, which could reasonably be expected to jeopardize MPAC's ability to earn money in the marketplace. In MO-2030, I found that the OASYS database, which includes all the information found in assessment rolls, enables MPAC to generate reports and products which it sells to mortgage brokers, financial institutions, and planners, which in turn, generates millions of dollars in revenues. Accordingly, I find that disclosure of property assessment information at issue in this appeal, in bulk and for free, in response to access requests under the *Act*, would deprive MPAC of this revenue stream, which could reasonably be expected to prejudice its economic interests and be injurious to its financial interests.

Further, potential competitors could make requests under the *Act* to obtain the information at issue, for free, thus avoiding the expenses MPAC incurred in establishing its business and use the information to generate property assessment reports and products at a reduced cost. In making my decision, I reject the appellant's position that an electronic copy of the assessment roll would have little value to competitors on the basis that some of the property assessment information may not be current or may take longer to obtain. The practical reality is that if MPAC is required to disclose the information at issue in this appeal, there is nothing stopping competitors from making requests under the *Act* for the same information on an ongoing and regular basis.

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)].

MPAC's representations submit that it considered, in good faith, relevant considerations such as the applicability of section 11, the public availability of the information at issue and the expectations of property owners concerning the collection of their personal information. The appellant was provided with an opportunity to make representations as to whether MPAC considered irrelevant factors in their exercise of discretion to withhold 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 their exercise of discretion was proper.

PUBLIC INTEREST OVERRIDE

Section 16 states:

> An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

A public interest is not automatically established where the requester is a member of the media [Orders M-773, M-1074]. The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984]. Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances.

MPAC submits that the appellant has failed to demonstrate that there is "any matter of public debate that will be answered by production of the records, nor that there is any public issue of any significance". MPAC submits that the appellant's request seeks to gain cheaper and more convenient access to information that is already available to the public for inspection. MPAC's representations also state that:

> …a public interest in the *non*-disclosure of the information arises because of the unique powers granted by the legislature to permit the assessment corporation to *compel* the production of personal information under section 11 of the *Assessment Act*. Section 13 of the *Assessment Act* actually makes it an *offence* for an individual to fail to provide or produce information in response to a request for information from MPAC or its assessors. It would be entirely unfair and an unjustified invasion of personal privacy to create a scheme whereby individuals are *compelled* to provide sensitive personal information to fulfill specific statutory purposes – at risk of committing an offence if they do not comply – and then authorize mass disclosure of that information for a purpose not legislated nor comtemplated by the individuals who provide the information. MPAC does not release personal information, income or expenses information except where required by statute to do so. Mandated disclosure would effectively re-write the legislative scheme.
>
> MPAC submits that once it releases the electronic assessment roll, MPAC would lose control of the information. That is, the Appellant would be free to access any and all information collected by MPAC with respect to all property owners in the cities for which the roll is requested. He would be free to reproduce it in any fashion or to share it with others, including in mass media. This poses a serious threat to individual privacy, and MPAC submits that it is reasonable to expect that individuals in the Province would be very surprised, if not shocked, by the disclosure of their personal information to a reporter without their consent – particularly when they were assured that the information they provided would be protected by *MFIPPA*.

The appellant submits that there is a compelling public interest in the disclosure of information relating to property tax assessments. In support of his position, the appellant refers me to Order MO-1564 in which the then Assistant Commissioner stated:

> MPAC performs an important public function, and does so from a monopoly position established by statute. The fact that 1/3 of MPAC's board is comprised of individual property taxpayers is evidence of a public interest in its operation. In my view, there is an inherent public interest in some level of transparency provided by MPAC through the disclosure of information sufficient to satisfy property owners throughout the province that their assessments have been made on the basis of sound and defensible criteria.

The appellant's position is that he requires access to the electronic version of the assessment rolls available to properly scrutinize the fairness and integrity of the property tax system managed by MPAC. The appellant's representations state:

> MPAC's annual report for 2005 found that residential properties along in Ontario were assessed at nearly $1 trillion. If there was even a 1 per cent variance in the accuracy of those assessments, the variance would be worth nearly $10 billion. It is unlikely the variance, however large it is, would be evenly distributed across all properties, meaning that some would be paying too much tax and some too little. MPAC in fact acknowledges that its assessments vary from actual values by more than that, more on some classes of properties than others. The public interest in an independent evaluation of MPAC's assessments is compelling indeed. The job of ensuring the system is accurate cannot be left to the corporation alone. Independent scrutiny is vital and can only be accomplished through access to the assessment data.

MPAC's reply representations submit that the fact that the information at issue relates to property assessment and tax calculations does not automatically demonstrate a compelling public interest. MPAC goes on to state:

> … while the data the Appellant is requesting *may* allow him to fulfill some sort of objective of overall analysis, MPAC could essentially do this work for him by aggregating the data in any reasonable format he requests, and/or in a wide variety of formats or configurations. This would alleviate the various concerns MPAC raised, pursuant to *MFIPPA*, with respect to disclosure of the roll in its entirety in electronic form. Any public interest in such disclosure cannot be said to outweigh the purposes of *MFIPPA* exemptions, given that an easy alternative to violating *MFIPPA* exists.
>
> Finally, as stated in MPAC's Original Representations, any public interest in this case, if one is found to exist, has been satisfied because all of the information requested by the Appellant is publicly available. That is, a very significant amount of information is available for public inspection, thereby adequately protecting and serving the public interest consideration.

In his reply representations, the appellant rejects MPAC's position that an independent evaluation of the property assessment system could effectively take place using aggregated data prepared by MPAC. The appellant's position is that he requires raw data to conduct an independent evaluation. The appellant's reply representations did not address MPAC's position that a compelling public interest exists in the non-disclosure of the information at issue.

Analysis and Findings

As noted above, previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make

effective use of the means of expressing public opinion or to make political choices [Order P-984]. Though I accept the appellant's position that there is a public interest in obtaining information that would inform the public about the property tax assessment system, the issue I am to decide is whether there is a relationship between the specific property assessment records requested by the appellant and the *Act*'s central purpose of shedding light on the operations of government. In making my decision, I must consider whether the property tax assessment information already in the public domain adequately addresses the public interest concerns raised by the appellant.

Throughout its representations MPAC submits that the information contained in the electronic version of the assessment roll is in the public domain and that the appellant's request under the *Act* seeks to circumvent a regularized system of access in which the appellant could purchase bulk property assessment information by placing a custom order through its Business Development Group.

As previously discussed, sections 39(1) and (2) of the *Assessment Act* require MPAC to deliver the assessment roll to the clerk of a municipality, who then must make the paper copy of the assessment roll available for inspection by the public during office hours. Accordingly, the paper copy of the electronic information requested by the appellant is available for inspection at the municipal offices of the municipalities of Hamilton, Burlington and Grimbsy. The appellant is of the view that he should have access to the assessment roll in the form it is delivered to municipalities and in support of his argument submits that MPAC does not consistently deliver a paper roll to municipalities in accordance to the *Assessment Act*. The appellant also argues that various municipal offices throughout the province allow members of the public to search the electronic assessment roll through kiosks. With respect however, the issue to be considered is not whether MPAC delivers or makes available the assessment roll in accordance with the *Assessment Act* or *Planning Act* but rather whether or not the information sought by the appellant is available in the public domain. If the information at issue is available in the public domain, the question then is whether this information, including its format, adequately addresses the public interest concerns raised by the appellant?

I have carefully reviewed the representations of the parties and find that the appellant has not established that there is a compelling public interest in the disclosure of bulk property assessment information in electronic format. In making my decision, I took into consideration that paper copies of assessment rolls are available for inspection at municipal offices, an electronic search of assessment information on a property-by-property basis can be conducted at municipal offices and an electronic copy of an entire assessment roll, with the personal identifiers removed, could be obtained by placing a custom order. Though I accept the appellant's position that a manual search of the paper assessment rolls or a property-by-property electronic search would make it difficult for him to conduct a through systemic review of the property assessment system, the practical limitations identified by the appellant does not constitute a compelling public interest when an alternative, albeit more costly, access route exists through MPAC's Business Development Office's custom order service. Accordingly, I find that the information at issue is in the public domain and it is available in a format that addresses the public interests, namely that property owners can access information to satisfy themselves that their assessments have been made on the basis of sound and defensible criteria

and a comprehensive systemic review of the property assessment system could take place by obtaining raw or aggregated data from MPAC's Business Development Office.

In any event, even had I found a compelling public interest in the disclosure of the record to the appellant, I have not been provided with convincing evidence that this public interest outweighs the purpose of the exemption found at sections 11(c) and (d). As noted above, I am satisfied that disclosure of the MPAC assessment database, in bulk and for free, would deprive MPAC of an important revenue stream. The loss of this income would in turn be passed on to municipalities and ultimately taxpayers. I am not satisfied that public scrutiny of the assessment system, while desirable, can only be achieved by forcing MPAC to forego this revenue.

As I have found that the information at issue is exempt under sections 11(c) and 11(d) of the *Act* and that the public interest override in section 16 does not apply, it is not necessary for me to consider the applicability of sections 10(1), 11(a), 14(1)(c) or 15(a) of the *Act*.

ORDER:

I uphold MPAC's decision.

Original signed by: November 29, 2007
Brian Beamish
Assistant Commissioner