

Information and Privacy Commissioner,  
Ontario, Canada



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

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## **FINAL ORDER MO-3193-F**

Appeal MA14-99

Municipality of Kincardine

May 6, 2015

**Summary:** Interim Order MO-3166-I reviewed the municipality's decision to deny access to a consultant's report concerning the possible sale of a municipally-owned telecommunications company. In that interim order, the adjudicator upheld the municipality's decision to apply section 7(1) (advice or recommendations) to most of the record, but also found a portion of the record to be "a valuation report" within the meaning of the exception in section 7(2)(c). The adjudicator also found that the other exemptions claimed did not apply to this portion of the record, and ordered that it be disclosed. The public interest override in section 16 was also found to have no application to the record. However, in the absence of any representations concerning its exercise of discretion, Interim Order MO-3166-I ordered the municipality to exercise its discretion to apply the section 7(1) exemption also ordered the municipality to provide representations on its exercise of discretion.

The municipality provided representations on its exercise of discretion, and also sought a reconsideration of Interim Order MO-3166-I on the basis that there was an error in the decision. In this final order, the municipality's exercise of discretion is upheld. In addition, the reconsideration is allowed and the portion of the record originally ordered disclosed is found to be exempt under sections 11(c) and (d). The public interest override provision in section 16 is found to have no application.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 11(c) and (d) and 16.

**Orders and Investigation Reports Considered:** PO-1887-I and MO-1228

## **OVERVIEW:**

[1] This appeal arose from a request to the Municipality of Kincardine (the municipality) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a consultant's report regarding the valuation of a local telecommunications company. The municipality located the responsive record and denied access to it, claiming the application of the following exemptions in the *Act*:

- section 6(1)(b) (closed meeting)
- section 7(1) (advice or recommendations)
- sections 10(1)(a) and (c) (third party information)
- sections 11(a), (c) and (d) (valuable government information)

[2] On March 4, 2015, I issued Interim Order MO-3166-I in which I partially upheld the municipality's decision to withhold access to a consultant's report on the valuation of a telecommunications company owned by it, Bruce Telecom. I upheld the municipality's decision to deny access to the majority of the record on the basis that it contained information that qualified for exemption under the discretionary advice or recommendations exemption in section 7(1) of the *Act*. I then went on to find that pages 13 to 16 of the record fell within the mandatory exception to the section 7(1) exemption which is set out in section 7(2)(c) of the *Act*. I also determined that pages 13 to 16 of the record were not exempt under the mandatory third party exemption in section 10(1) of the *Act*, the discretionary exemption in section 6(1)(b), or the discretionary exemption protecting the town's economic interests in sections 11(a), (c) or (d) of the *Act*.

[3] In addition, I also found that the public interest override in section 16 did not apply to the record. However, in the absence of any representations concerning its exercise of discretion, I ordered the municipality to exercise its discretion to apply the section 7(1) exemption, and to provide representations on its exercise of discretion. I remained seized of this appeal pending the final determination of the municipality's exercise of discretion.

[4] In accordance with order provision 3 of Interim Order MO-3166-I, the municipality has provided me with representations on its exercise of discretion. The municipality has also asked for a reconsideration of my finding in Interim Order MO-3166-I that a portion of the record did not qualify for exemption under the *Act*, on the basis that there was an error in the decision.

[5] In this final order, I allow the reconsideration request, and find that the portion of the record originally ordered disclosed is exempt under sections 11(c) and (d). I also uphold the municipality's exercise of discretion and find that the public interest override provision in section 16 does not apply to the record.

## **DISCUSSION:**

### **Should I reconsider my decision in Interim Order MO-3166-I with respect to pages 13-16 of the records?**

[6] This office's reconsideration process is set out in section 18 of the *Code of Procedure*. In particular, section 18.01 of the *Code* sets out the grounds for a reconsideration request. It states:

The Commissioner may reconsider an order or other decision where it is established that there is:

- (a) a fundamental defect in the adjudication process;
- (b) some other jurisdictional defect in the decision; or
- (c) a clerical error, accidental error or omission or other similar error in the decision.

[7] The municipality takes the position that my finding in Interim Order MO-3166-I contains an accidental error or omission for the purpose of section 18.01(c) of the *Code*. It states that the finding in Interim Order MO-3166-I that certain exemptions do not apply to the records is based on my understanding that a sale of Bruce Telecom had been completed between the municipality and a third party purchaser. The municipality advises that the sale of Bruce Telecom has not taken place, and asks for a reconsideration of my decision in Interim Order MO-3166-I on that basis.

[8] After receiving the municipality's reconsideration request, I invited the appellant to provide me with his views on whether I ought to reconsider my decision in Interim Order MO-3166-I, as well as the possible application of sections 10(1) and 11(a), (c) and (d) to pages 13-16 of the records. The appellant responded to my letter with written submissions; however, he did not specifically address the reconsideration request.

[9] In Interim Order MO-3166-I I found that pages 13-16 of the record at issue did not qualify for exemption under section 11(c) or (d) because "the sale of Bruce Telecom has now been completed and, as a result, [the concerns raised by the municipality] are no longer valid." In its reconsideration request the municipality has confirmed that the sale of Bruce Telecom has not been completed. In my view, my reference in Interim Order MO-3166-I to the "completed" sale of Bruce Telecom constitutes an accidental error or omission as contemplated by section 18.01(c) of the *Code*. As a result, I am satisfied that the municipality has established sufficient grounds for me to reconsider my decision in Order MO-3166-I, and will reconsider my decision that pages 13-16 do not qualify for exemption.

**Is the valuation information in pages 13-16 exempt from disclosure under sections 11(c) or (d) of the *Act*?**

[10] I have decided to first determine whether the valuation information in pages 13-16 of the records qualifies for exemption under section 11(c) and (d) of the *Act*, which 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;

[11] 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 (the Williams Commission Report)<sup>1</sup> 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.

[12] 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.<sup>2</sup>

[13] 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

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<sup>1</sup> Toronto: Queen’s Printer, 1980.

<sup>2</sup> *Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

positions.<sup>3</sup> The section 11(c) and (d) exemptions require only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position or be injurious to its financial interests.<sup>4</sup>

[14] In Interim Order PO-1887-I, former Assistant Commissioner Tom Mitchinson addressed the application of the equivalent provision to section 11(d) in the provincial *Act* to land valuation information respecting a pending sale of property and made the following findings:

Having reviewed the records, I am satisfied that disclosure of information which relates to the terms of the conditional agreement of purchase and sale, which has not yet closed, qualifies for exemption under section 18(1)(d) of the *Act*. I accept that until the purchase and sale of the property has been finalized it is possible that the sale will not take place, and that the ORC may have to find a new purchaser for the property. If that were to occur, disclosure of the terms negotiated between the ORC and the current prospective purchaser could place the ORC in a disadvantageous position with future potential purchasers. Given that the ORC is charged with responsibility for the proper administration of the land holdings of the Government of Ontario, I find that premature disclosure of this type of information could reasonably be expected to be injurious to the financial interests of the Government of Ontario.

...

Records 44B, 46B, 61B and 62B are all evaluation reports and feasibility studies involving the property. Previous orders of this Office have found that the disclosure of appraisal reports, in circumstances where the sale of the subject property has not yet closed, could prejudice the owner's financial interests. In Order MO-1228, Adjudicator Holly Big Canoe reviewed the application of section 11(d) of the *Municipal Freedom of Information and Protection of Privacy Act* (similar to section 18(1)(d) of the *Act*) with respect to a property appraisal and stated:

The City submits that section 11(d) applies to Record 3 (the Report). To establish a valid exemption claim under section 11(d), the City must demonstrate a reasonable expectation of injury to its financial interests.

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The City of Ottawa elected to obtain the services of a Real Estate Appraiser and Consultant to carry out a

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<sup>3</sup> Orders P-1190 and MO-2233.

<sup>4</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

comprehensive appraisal of the Lansdowne Park site to determine an appropriate market value per unit of development based on the development proposals being considered for the site.

The purpose of the appraisal in question was in short to establish a benchmark for the City to assess its contribution and/or return from the potential redevelopment of the site.

The City also indicates that the Report was requisitioned specifically with the intent that it would form the basis for instructions to City staff in negotiating the final agreement should Council decide to proceed to that stage with the recommended developer.

The City submits that the recommended proposal and developer for the Revitalization Project has not yet been approved by Council nor has a decision yet been made to sell any portion of the Park at a particular price. The City submits that until Council has met and approved the sale of the property and the sale has been closed, disclosure of the Report could be expected to prejudice the financial interest of the City in attempting to obtain a fair return for the sale of the Park property. Disclosure at this time could also reasonably be expected to adversely affect the negotiations with the developer, according to the City.

The Report contains specific information relating to existing and proposed income generating strategies, various pricing scenarios as they pertain to the recommended and potential uses, and information which reveals potential profit and loss data in relation to the various options for redevelopment. The report also contains specific information on lease rates, lease and sales negotiations strategies and makes reference to potential overhead and operating expenses related to the development proposals which are currently under review by Council. In my view, disclosure of this detailed information at this stage in the process could weaken the City's negotiating position and interfere with its ability to obtain a fair return on its property. Accordingly, I am satisfied that disclosure of Record 3 could reasonably be expected to be injurious to the financial interests of the City, and section 11(d) applies.

Similarly, in the circumstances of this appeal, I am satisfied that the disclosure of Records 46B, 44B, 61B and 62B prior to the closing of the sale could reasonably be expected to be injurious to the financial interests of the Government of Ontario, and I find that these records qualify for exemption under section 18(1)(d) of the *Act*.

[15] I adopt the reasoning of the former Assistant Commissioner for the purposes of the present reconsideration and will apply these principles in making my determination as to the merits of the municipality's arguments respecting the application of sections 11(c) and (d).

[16] In its original representations respecting the application of section 11(c) to the valuation information in the records, the municipality submitted that the disclosure of "confidential information relating to [Bruce Telecom's] profitability, pricing, status in comparison to competitors etc. could reasonably be expected to prejudice the Municipality's economic interests." It referred, in particular, to its view that the release of the information could affect the proceeds to be obtained by the municipality.

[17] It also provided representations respecting the application of section 11(d) to the effect that the disclosure of the information could adversely affect the proceeds to be obtained and, therefore, result in harm to the municipality's financial interests.

[18] Adopting the reasoning set out in Order PO-1877-I and MO-1228, I find that the disclosure of the valuation information set out in pages 13-16 of the record could reasonably be expected to result in prejudice to the municipality's economic interests and injurious to its financial interests, as contemplated by sections 11(c) and (d), respectively. In light of the fact that the sale of Bruce Telecom has not yet taken place, the disclosure of information relating to its value could reasonably be expected to impair the municipality's ability to secure the best price possible upon a sale of its assets. I find that if a prospective purchaser were to have access to the valuation information in pages 13-16, the municipality's ability to obtain the maximum return on the sale would be lessened and its financial and economic interests would be adversely affected. As a result, I find that pages 13-16 of the record are exempt under sections 11(c) and (d).

**Is there a compelling public interest in the disclosure of the information in pages 13-16, as contemplated by section 16 of the *Act*?**

[19] In Order MO-3166-I, I addressed the possible application of the "public interest override" provision in section 16 to those portions of the record which were subject to exemption under section 7(1), which did not include pages 13-16 of the record. I will not revisit that finding in this reconsideration decision, but will address only the possible application of section 16 to the information in pages 13-16. Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, **11**, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [my emphasis]

[20] 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.

[21] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, the IPC will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption.<sup>5</sup>

*Compelling public interest*

[22] 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.<sup>6</sup> 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 or enlightening the citizenry about the activities of their government or its agencies, 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.<sup>7</sup>

[23] The word "compelling" has been defined in previous orders as "rousing strong interest or attention".<sup>8</sup> Any public interest in *non*-disclosure that may exist also must be considered.<sup>9</sup> A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of "compelling".<sup>10</sup>

[24] As noted in Order MO-3611-I, the appellant raises a number of serious concerns with the sale of Bruce Telecom by the municipality, including the lack of transparency around the decision and what may, in his view, have been an inordinately low price agreed to by the municipality. He has also provided me with an article published in a

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<sup>5</sup> Order P-244.

<sup>6</sup> Orders P-984 and PO-2607.

<sup>7</sup> Orders P-984 and PO-2556.

<sup>8</sup> Order P-984.

<sup>9</sup> *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

<sup>10</sup> Orders PO-2072-F, PO-2098-R and PO-3197.



local newspaper raising questions about the propriety of the sale at the time of its announcement.

[25] The municipality argues that there is a compelling public interest in the non-disclosure of the information in the records. It argues that disclosure would be detrimental to Bruce Telecom:

. . . as it would create employee and customer uncertainty that could be capitalized by competitors, potential acquirers and others. This would be particularly concerning whether or not the sale process is completed, since competitors, and other future purchasers could take advantage of having been exposed to confidential strategic advice provided by the Consultants and other confidential business information about BT.

[26] I find that there is a compelling public interest in the disclosure of the information contained in those portions of the records which are exempt under section 11. The appellant has provided me with evidence to substantiate his position that there has been public discussion and concerns raised about the sale of Bruce Telecom by the municipality. I find that the public interest referred to is sufficient to be categorized as compelling, within the meaning of section 16.

[27] However, in light of the fact that the sale has not yet been completed, I find that there exists an equally compelling public interest in the non-disclosure of the valuation information in pages 13-16 which I have found to be exempt under sections 11(c) and (d). I find that there exists a public interest in ensuring that the municipality realizes the maximum return possible on the sale and that it could reasonably be expected that disclosure of the valuation information could prejudice the economic interests or be injurious to its financial interests. Should a prospective buyer obtain access to the valuation information, I find that it could use this inside information to better position itself in its negotiations with the municipality on a price for the assets of Bruce Telecom. In my view, the public interest in ensuring the best possible price is obtained is at least as compelling as the public interest that exists in the disclosure of this information.

[28] I conclude that while there may exist a compelling public interest in the disclosure of the contents of pages 13-16, there is an equally compelling public interest in the non-disclosure of the same information. For this reason, I find that section 16 has no application to it and I will not consider it further.

**Did the municipality exercise its discretion under sections 7(1), 11(c) and (d)? If so, should this office uphold the exercise of discretion?**

[29] The section 11(c) and (d) exemptions are discretionary, and permit 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.

[30] In Order MO-3166-I, the municipality did not provide me with representations respecting the exercise of its discretion for those portions of the record which were exempt under section 7(1). Accordingly, I included the following order provisions respecting this issue:

3. I order the municipality to exercise its discretion to apply section 7(1) of the *Act* to withhold the remaining portions of the record in accordance with the discussion of that issue above and to provide representations to me detailing the result of its exercise of discretion, in writing, by **April 8, 2015**. If the municipality continues to withhold all or part of the information that remains at issue, I order it to provide in its representations an explanation of the basis for exercising its discretion to do so.
4. If the municipality decides, after exercising its discretion, to disclose additional information to the appellant, it must issue a new access decision in accordance with sections 19, 20, 21, and 22 of the *Act*, treating the date of its decision to disclose the information as the date of the request.
5. I may share the municipality's representations on its exercise of discretion with the appellant unless they meet the confidentiality criteria identified in *Practice Direction Number 7*. If the municipality believes that portions of its representations should remain confidential, it must identify these portions and explain why the confidentiality criteria apply to the portions it seeks to withhold.
6. I remain seized of this appeal pending the final determination of the municipality's exercise of discretion or any related issues that may arise.

[31] With its reconsideration request, the municipality also provided me with representations respecting its exercise of discretion to deny access to the record under both sections 7(1) and 11(c) and (d). These submissions were shared with the appellant. The municipality states that it considered several relevant factors in deciding to exercise its discretions not to disclose the information that is subject to the section 7(1) exemption. Specifically, it submits that it sought to protect the subjective information provided to it in the record prepared by the consultants, based on their own analysis of "Bruce Telecom's unique situation using tailored benchmarks, assessment

procedures and valuation techniques, all of which were applied in light of certain assumptions made by the Consultants, instead of being mere observations gathered by them.”

[32] In addition, the municipality indicates that it also considered the purpose of section 7(1) when it relied upon this exemption. The most important consideration relied upon when making its decision was “the nature of the information and the extent to which it is significant and sensitive to the Municipality.” It submits that it required the information in the record “to make an informed decision about its continued ownership of [Bruce Telecom] or whether to undertake other strategies, and the financial repercussions associated with each alternative course of action.”

[33] With respect to its decision not to disclose the information in pages 13-16, which I have found above to be exempt under sections 11(c) and (d), the municipality relies upon the considerations described above, it “analyzed the nature of [the information in pages 13-16] and the extent that this information is significant and sensitive to the municipality, [Bruce Telecom] and the consultants.”

[34] The appellant makes arguments pertaining to the manner in which the sale was conducted and that the municipality did not comply with the requirements of the *Municipal Act* when it authorized the sale. His representations do not, however, directly address the manner in which the municipality exercised its discretion not to disclose the record to him.

### *Findings*

[35] Based on the representations of the municipality on its decision to apply both sections 7(1) and 11(c) and (d) to the record, I am satisfied that it exercised its discretion in a proper manner. Specifically, I find that the circumstances surrounding the sale of Bruce Telecom militate against a decision to disclose the information contained in the record. The fact that the sale has not yet proceeded, coupled with the fact that the record directly addresses information that could prove extremely valuable to a prospective purchaser, lead to the conclusion that the decision to not disclose was made for good commercial reasons.

[36] Accordingly, I uphold the municipality’s exercise of its discretion and dismiss this aspect of the appeal.

### **ORDER:**

1. I reverse my finding in Interim Order MO-3166-I that pages 13-16 do not qualify for exemption under the *Act*.

2. I uphold the municipality's decision to deny access to the complete record, including the valuation information at pages 13-16.
3. I uphold the municipality's exercise of discretion not to disclose the record, based on its reliance on sections 7(1) and 11(c) and (d).

Original Signed By: \_\_\_\_\_ May 6, 2015 \_\_\_\_\_  
Donald Hale  
Adjudicator