

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3206

Appeal MA14-215-2

Municipality of Kincardine

June 5, 2015

Summary: The municipality received a request for information relating to the sale of its wholly-owned telecommunications company. It denied access to the responsive records, claiming the exemptions in sections 6(1)(b), 7(1), 10(1) and 11. The appellant raised the possible application of the public interest override provision in section 16. In this order, the adjudicator does not uphold the application of section 6(1)(b) to the records. However, the undisclosed information from the graphs in records 10 and 12 was found to be exempt under section 11(a) and the bullet points in record 13 was held to be exempt under section 7(1). Finally, the public interest in disclosure was found not to outweigh the purpose of sections 7(1) and 11(a).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 6(1)(b), 7(1), 10(1), 11(a) and 16; *Municipal Act, 2001*, R.S.O. 1990, c. M.45, as amended, section 239(2)(c).

Orders and Investigation Reports Considered: Orders MO-3166-I and MO-3193-F.

OVERVIEW:

[1] The appellant submitted a request to the Municipality of Kincardine, pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA.*), for access to:

Bruce Telecom Business Plan presented to Council on or about the 29th of July, 2013 and referred to by the mayor in media and citizen's inquires with regard to the sale of Bruce Telecom.

[2] In a decision dated May 2, 2014, the municipality identified one record as responsive to the request and granted partial access to it, severing certain information from the record (at pages 10, 12 and 13) on the basis that the undisclosed information was exempt under the discretionary exemptions in sections 6(1)(b) (closed meeting), 7(1) (advice or recommendations) and 11(a), (c) and (d) (economic or other interests), as well as the mandatory exemption in section 10(1) (third party information) of the *Act*.

[3] The appellant appealed the municipality's decision. During mediation, the municipality confirmed that it is relying upon sections 239(2)(a) and (c) of the *Municipal Act*, in conjunction with its section 6(1)(b) claim and that it was no longer relying on the application of the mandatory section 10(1) exemption to the severed information. Also during mediation, the appellant asserted that there exists a compelling public interest in the disclosure of the records. As a result, the "public interest override" provision in section 16 of the *Act* is also an issue in the appeal.

[4] Because further mediation was not possible, the appeal was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the municipality, initially. A complete copy of the municipality's representations was then provided to the appellant, who also submitted representations.

[5] In this order, I do not uphold the municipality's decision to deny access to the severed information at issue on the basis that it is subject to the section 6(1)(b) exemption. I find that the bullet points on page 13 of the record qualify for exemption under section 7(1), while the undisclosed portions of the graphs on pages 10 and 12 are exempt under section 11(a). Further, I find that the public interest override provision in section 16 has no application to this information.

RECORDS:

[6] The only information at issue consists of the severances made to pages 10, 12 and 13 of a presentation made to a closed session of the municipality's Council on July 29, 2013.

ISSUES:

A. Is the severed information in pages 10, 12 and 13 of the record exempt under section 6(1)(b) of the *Act*?

- B. Is the severed information in pages 10, 12 and 13 of the record exempt under section 7(1) of the *Act*?
- C. Is the severed information in pages 10 and 12 of the record exempt under section 11(a), (c) or (d) of the *Act*?
- D. Did the institution exercise its discretion under sections 7(1) and 11(a)? If so, should this office uphold the exercise of discretion?
- E. Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 7(1) and 11(a) exemptions?

DISCUSSION:

Issue A: Is the severed information in pages 10, 12 and 13 of the record exempt under section 6(1)(b) of the *Act*?

[7] Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

[8] For this exemption to apply, the institution must establish that

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting.¹

[9] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;² and

¹ Orders M-64, M-102 and MO-1248.

² Order M-184.

- “substance” generally means more than just the subject of the meeting.³

[10] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.⁴

[11] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.⁵

[12] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, the municipality must establish that the purpose of the meeting was to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting.⁶

[13] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution’s *in camera* meeting, not merely the subject of the deliberations.⁷

Representations

[14] The municipality submits that its Council met in a closed meeting on July 29, 2013. The purpose of the meeting was to discuss the contents of the records at issue in the appeal and to discuss the future of Bruce Telecom, including the possible sale of Bruce Telecom’s assets. Bruce Telecom is a municipal service board owned by the municipality in accordance with its formation by-law, designated as By-law 2006-266.

[15] The municipality relies upon section 7 of its By-law 2008-126 which enables Council to dispense with the need for public notice of a meeting “where provision of notice will interfere with the ability of Council to conduct business with respect to a matter permitted for a closed meeting.”

³ Orders M-703 and MO-1344.

⁴ Order MO-1344.

⁵ Order M-102.

⁶ *St. Catharines (City) v. IPCO*, 2011 ONSC 2346 (Div. Ct.).

⁷ Orders MO-1344, MO-2389 and MO-2499-I.

[16] The municipality submits that the July 29, 2013 meeting at which Council discussed the record at issue was closed to the public in accordance with the provisions of section 239(2)(c) of the *Municipal Act, 2001*, which reads:

A meeting or part of a meeting may be closed to the public if the subject matter being considered is,

a proposed or pending acquisition or disposition of land by the municipality or local board;

Analysis and findings

[17] In Order MO-3166-I, I considered the application of section 6(1)(b) to another record that was reviewed by Council at its July 29, 2013 closed meeting. That record, a valuation report, was the subject of the appeal that gave rise to Order MO-3166-I which was filed by a different individual from the appellant in the current appeal. In that decision, I reviewed the circumstances surrounding the holding of the July 29, 2013 meeting *in camera* and the impact of an Investigator's Report which determined whether the meeting was properly constituted. I found that:

Following the conclusion of my inquiry, the appellant provided me with a copy of a Closed Meeting Investigator's Report which was submitted to the municipality on July 22, 2014. The Investigator's Report was prepared by an outside consulting firm and was begun pursuant to a complaint made to the municipality under section 239.2 of the *Municipal Act*. The complaint alleged that certain closed meetings held between February 6, 2013 and January 20, 2014 were "in contravention of the open meetings provision of the *Municipal Act, 2001*, as amended by Bill 130."

Section 239 of the *Municipal Act* mandates that all meetings of councils or local boards be open to the public unless they satisfy certain exceptions set out in section 239(2). As indicated above, the municipality relies upon section 239(2)(c) which enables a council or local board to go *in camera* if the subject matter being considered is "a proposed or pending acquisition or disposition of land by the municipality or local board. The Investigation Report carefully reviews the events surrounding the closed July 29, 2013 Council meeting and evaluates the municipality's claim that the subject matter of the meetings was "the security of the property of the municipality", as described in section 239(a), as well as section 239(c), as was argued in this appeal.

The authors of the Investigation Report dismissed the municipality's arguments based on its interpretation of the term "security of the property", adopting a "plain meaning" definition and interpretation set out

by this office in Order MO-2468 instead. As a result, the authors of the Investigation Report found that the municipality was unable to rely on the exception in section 239(a) as the discussions did not relate to the physical protection of a municipal asset from loss or damage.

The Investigation Report's drafters go on to address the possible application of section 239(c), though the municipality did not originally rely upon it. The report concludes with a consideration of the possible application of that exception:

The Municipality was not selling only the land owned by the Municipality as the sole shareholder of Bruce Telecom. It was selling the entire ongoing operation of a municipal asset.

We do not believe that the *Municipal Act* exemption dealing with the acquisition or disposition of land should be used so broadly as to encompass closed session discussions of an entire municipal operation, merely because that operation is situated on lands. If that were the case, a municipality or local board could discuss, behind closed doors, the sale of an entire municipal service (for example, all community centres) without the benefit of public disclosure or discussion, merely because the service operates on lands owned by the municipality or local board.

This is clearly not the intent of the *Municipal Act*. Had the Legislature intended to shield the sale of a municipal operation from public discussion or disclosure, it would have provided for that explicitly in the legislation.

We have reviewed the record of all of the closed sessions of Council throughout the period February 6, 2013 to January 20, 2014. We conclude that none of the discussions would permit the meeting(s) to have been closed as an exemption to the open meetings provisions of the *Municipal Act* under section 239(2)(c) dealing with the acquisition or disposition of land by a municipality or local board. [emphasis in original]

I adopt the rationale of the authors of the Investigation Report with respect to the application of the exception in section 239(2)(c). I find that section 239(2)(c) of the *Municipal Act* cannot be relied upon to operate as an exception to the general provision requiring that all meetings of a

municipal council be held in public. I agree with the investigator's findings that the subject matter of the discussions of the closed meeting of council did not relate to "a proposed or pending acquisition or disposition of land by the municipality" within the meaning of section 239(2)(c). Because I have determined that section 239(2)(c) of the *Municipal Act* does not authorize the holding of the meeting in the absence of the public, the second part of the test under section 6(1)(b) has not been satisfied. Since all three parts of the test must be met in order for the exemption to apply, I find that section 6(1)(b) has no application to the records at issue.

[18] In the present appeal, the records discuss the future prospects of Bruce Telecom generally and were relied upon by the Council in making its decision about the sale of this municipal asset. Again, I concur with the investigator's findings that the municipality is unable to rely on section 239(2)(c) of the *Municipal Act* as a basis for holding the July 29, 2013 meeting *in camera*. I find that the subject matter of the deliberations of the closed meeting of Council did not relate to a "proposed or pending acquisition or disposition of land by the municipality". As a result, as was the case with Order MO-3166-I, the second part of the test under section 6(1)(b) has not been met and the exemption cannot apply to the information remaining at issue in the records.

Issue B: Is the severed information in pages 10, 12 and 13 of the record exempt under section 7(1) of the *Act*?

[19] Section 7(1) states:

A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of an officer or employee of an institution or a consultant retained by an institution.

[20] "Advice" and "recommendations" have distinct meanings. "Recommendations" refers to material that relates to a suggested course of action that will ultimately be accepted or rejected by the person being advised, and can be express or inferred. "Advice" has a broader meaning than "recommendations". It includes "policy options", which are lists of alternatives courses of action to be accepted or rejected in relation to a decision that is to be made, and the public servant's identification and consideration of alternative decisions that could be made.

[21] "Advice" includes the views or opinions of a public servant as to the range of policy options to be considered by the decision maker even if they do not include a specific recommendation on which option to take.⁸ "Advice" involves an evaluative

⁸ See above at paras. 26 and 47.

analysis of information. Neither of the terms "advice" or "recommendations" extends to "objective information" or factual material.

[22] Advice or recommendations may be revealed in two ways:

- the information itself consists of advice or recommendations
- the information, if disclosed, would permit the drawing of accurate inferences as to the nature of the actual advice or recommendations.⁹

[23] The application of section 7(1) is assessed as of the time the public servant or consultant prepared the advice or recommendations. Section 7(1) does not require the institution to prove that the advice or recommendation was subsequently communicated. Evidence of an intention to communicate is also not required for section 7(1) to apply as that intention is inherent to the job of policy development, whether by a public servant or consultant.¹⁰

[24] Examples of the types of information that have been found *not* to qualify as advice or recommendations include

- factual or background information¹¹
- a supervisor's direction to staff on how to conduct an investigation¹²
- information prepared for public dissemination.¹³

Analysis and Findings

[25] The municipality argues that the severed information in pages 10, 12 and 13:

. . . includes the advice and/or recommendations of the President and Chief Executive Officer [of Bruce Telecom] informed by his expertise and professional assessment of the material risks associated with [Bruce Telecom's] financial outlook and operating issues that would affect the Municipality, and most importantly, includes the President and Chief Executive Officer's recommendations on the preferred courses of action, alternatives, outlook going forward and strategies available to the Board of Directors of [Bruce Telecom] (and to the Municipality) which resulted from his experience and expertise.

⁹ Order P-1054.

¹⁰ *John Doe v. Ontario (Finance)*, cited above, at para. 51.

¹¹ Order PO-3315.

¹² Order P-363, upheld on judicial review in *Ontario (Human Rights Commission) v. Ontario (Information and Privacy Commissioner)* (March 25, 1994), Toronto Doc. 721/92 (Ont. Div. Ct.).

¹³ Order PO-2677.

This Information and the advice and recommendations that it contains, is not 'objective information' since the Record is based upon the President and Chief Executive Officer's specific and detailed analysis of [Bruce Telecom's] unique situation based on his business experience and expertise, a detailed projected five-year forecast of financial indicators, including Earnings Before Interest, Taxes, Depreciation, Amortization ("**EBITA**") and Free Cash Flow ("**FCF**") were prepared.

[26] The appellant's representations do not address the application of section 7(1) to the undisclosed information in the records.

[27] The undisclosed information in the records consists of forecasted performance for Bruce Telecom over a five year period. Two of the records consist of graphs demonstrating the author's projected five-year outlook for the company. The undisclosed information contained in the third document consists of two bullet points following a heading entitled "Additional opportunities to consider".

[28] In my view, none of the information contained in the two records which consist of graphs, pages 10 and 12, qualifies as either "advice" or "recommendations" for the purposes of section 7(1). They do not indicate a suggested or alternative course of action; rather these documents simply demonstrate in graph form the author's projections as to the future performance of Bruce Telecom. Neither do these records set forth a range of policy options or "an evaluative analysis of information", as they lack an evaluative element which would indicate an analysis that would lead to a future course of action. For these reasons, I find that the undisclosed information on the graphs do not qualify for exemption under section 7(1).

[29] The remaining undisclosed information consists of two undisclosed bullet points following the heading (which was disclosed) which reads "Additional opportunities to consider". I find that the information in the two bullet points on page 13 constitutes advice or recommendations within the meaning of section 7(1). They consist of a "list of alternative courses of action to be accepted or rejected in relation to a decision that is to be made". While the actions set forth are not specifically recommended in the record, I find that they qualify as a "range of policy options to be considered by the decision maker", in this case the municipal Council.

[30] I further find that this information does not qualify for any of the exceptions to the section 7(1) exemption that are described in section 7(2). In conclusion, I find that the bullet point information on page 13 is exempt under section 7(1), while the undisclosed portions of the graphs on pages 10 and 12 are not.

Issue C: Is the severed information in pages 10 and 12 of the record exempt under section 11(a), (c) or (d) of the *Act*?

[31] The municipality claims that the record at issue is exempt under the discretionary exemptions in sections 11(a), (c) and (d), which state:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution.

[32] 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)¹⁴ 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.

[33] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 11.¹⁵ Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.¹⁶

¹⁴ Toronto: Queen’s Printer, 1980.

¹⁵ Orders MO-1947 and MO-2363.

¹⁶ Order MO-2363.

Section 11(a): information that belongs to government

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

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

[35] The municipality submits that the information remaining at issue in records 10 and 12 consists of financial and commercial information that belongs to it and has monetary value.

Part 1: type of information

[36] The types of information listed in section 11(a) have been discussed in prior orders:

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.¹⁷

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.¹⁸ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.¹⁹

[37] The municipality submits that the undisclosed information in pages 10 and 12 relates to Bruce Telecom's financial indicators, referred to as its EBITA (Earnings Before Interest, Taxes, Depreciation, Amortization) and its FCT (Free Cash Flow). Clearly, this information satisfies the definition of both commercial and financial information as it is concerned with cost accounting and the calculation of Bruce Telecom's profit and loss data, as well as its monetary value. As a result, I find that part one of the test under section 11(a) is met.

¹⁷ Order PO-2010.

¹⁸ Ibid.

¹⁹ Order P-1621.

Part 2: belongs to

[38] For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[39] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,²⁰ customer or supplier lists, price lists, or *other types of confidential business information*. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.²¹ [my emphasis]

[40] The municipality submits that because it continues to own Bruce Telecom, the information compiled in the records belongs to it. I agree that because of the municipality’s ownership position with respect to Bruce Telecom, the undisclosed information in records 10 and 12 belongs to it, within the meaning of that term in section 11(a).

Part 3: monetary value

[41] To have “monetary value”, the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.²²

[42] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.²³ Nor does the fact, on its own, that the information has been kept confidential.²⁴

[43] In this case, the municipality requested Bruce Telecom, which it owns, to prepare the documents identified as records 10 and 12. The information consists of five-year projections for Bruce Telecom indicating its forecasted financial future. At the

²⁰ Order P-636.

²¹ Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

²² Orders M-654 and PO-2226.

²³ Orders P-1281 and PO-2166.

²⁴ Order PO-2724.

time these records were prepared, the municipality was considering the sale of Bruce Telecom. A sale was agreed to in 2013 but it has not yet been completed. As a result, the municipality argues that the information has intrinsic value to a potential purchaser as it “represents and maps out the current and future financial outlook, earnings, cost savings, profitability and business potential of BT.”

[44] I agree with the position taken by the municipality with respect to the third part of the test under section 11(a). I find that the undisclosed information in records 10 and 12 has intrinsic value to a potential purchaser of Bruce Telecom and that the municipality continues to have a substantial interest in protecting this information from misappropriation by another party.

[45] As all three parts of the test under section 11(a) have been satisfied with respect to the undisclosed information in records 10 and 12, I find that they are exempt from disclosure on that basis, subject to my review of the municipality’s exercise of discretion and my consideration of the application of section 16 to the information. Because I have found the information to be exempt under section 11(a), it is not necessary for me to also consider whether it is exempt under sections 11(c) or (d).

Issue D: Did the institution exercise its discretion under sections 7(1) and 11(a)? If so, should this office uphold the exercise of discretion?

General principles

[46] The section 7 and 11 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.

[47] 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.

[48] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.²⁵ This office may not, however, substitute its own discretion for that of the institution.²⁶

²⁵ Order MO-1573.

²⁶ Section 43(2).

Relevant considerations

[49] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:²⁷

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[50] In its representations respecting the application of the public interest override provision in section 16 to the records, the municipality sets out its reasons for deciding

²⁷ Orders P-344 and MO-1573.

not to disclose the information to the appellant. First, it indicates that the sale of Bruce Telecom was not completed and the information in the records could be used by a potential purchaser to its commercial advantage in any future sale that may be contemplated. It also submits that the financial ramifications to the municipality if the information is disclosed could potentially be quite serious. For these reasons, the municipality decided to exercise its discretion not to disclose the information to the appellant.

[51] Based on the representations of the municipality with respect to the application of each of the discretionary exemptions claimed for the records, I am satisfied that it exercised its discretion in a proper manner, relying only upon relevant considerations involving its concern for ensuring that it obtain the best price possible for the sale of Bruce Telecom. I find that the municipality examined the appellant's right of access and properly assessed it against the public's right to ensure that it obtains the greatest return if and when the sale takes place. Accordingly, I uphold the municipality's exercise of discretion under sections 7(1) and 11(a).

Issue E: Is there a compelling public interest in the disclosure of the records that clearly outweighs the purpose of the section 7(1) and 11(a) exemptions?

[52] 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]

[53] 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.

[54] 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.²⁸

²⁸ Order P-244.

Compelling public interest

[55] 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.²⁹ 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.³⁰

[56] A public interest does not exist where the interests being advanced are essentially private in nature.³¹ Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist.³²

[57] A public interest is not automatically established where the requester is a member of the media.³³

[58] The word “compelling” has been defined in previous orders as “rousing strong interest or attention”.³⁴

[59] Any public interest in *non*-disclosure that may exist also must be considered.³⁵ A public interest in the non-disclosure of the record may bring the public interest in disclosure below the threshold of “compelling”.³⁶

[60] A compelling public interest has been found to exist where, for example:

- the records relate to the economic impact of Quebec separation³⁷
- the integrity of the criminal justice system has been called into question³⁸
- public safety issues relating to the operation of nuclear facilities have been raised³⁹

²⁹ Orders P-984 and PO-2607.

³⁰ Orders P-984 and PO-2556.

³¹ Orders P-12, P-347 and P-1439.

³² Order MO-1564.

³³ Orders M-773 and M-1074.

³⁴ Order P-984.

³⁵ *Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.).

³⁶ Orders PO-2072-F, PO-2098-R and PO-3197.

³⁷ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 484 (C.A.).

³⁸ Order PO-1779.

- disclosure would shed light on the safe operation of petrochemical facilities⁴⁰ or the province's ability to prepare for a nuclear emergency⁴¹
- the records contain information about contributions to municipal election campaigns.⁴²

[61] A compelling public interest has been found *not* to exist where, for example:

- another public process or forum has been established to address public interest considerations⁴³
- a significant amount of information has already been disclosed and this is adequate to address any public interest considerations⁴⁴
- a court process provides an alternative disclosure mechanism, and the reason for the request is to obtain records for a civil or criminal proceeding⁴⁵
- there has already been wide public coverage or debate of the issue, and the records would not shed further light on the matter⁴⁶
- the records do not respond to the applicable public interest raised by appellant.⁴⁷

[62] The appellant's arguments focus on his contention that the deal struck by the municipality for the sale of Bruce Telecom was a poor one and that the public has a right to know "what information was used to determine if the municipal operation, Bruce Telecom, should be sold." The appellant argues that without the disclosure of the five-year outlook information contained in records 10 and 12, the public is unable to determine "if in fact the propose[d] upgrades [to its infrastructure] could be funded within the operations of Bruce Telecom therefore making the municipality's argument about the financial risk irrelevant or lower than revealed to the public."

³⁹ Order P-1190, upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.), Order PO-1805.

⁴⁰ Order P-1175.

⁴¹ Order P-901.

⁴² *Gombu v. Ontario (Assistant Information and Privacy Commissioner)* (2002), 59 O.R. (3d) 773.

⁴³ Orders P-123/124, P-391 and M-539.

⁴⁴ Orders P-532, P-568, PO-2626, PO-2472 and PO-2614.

⁴⁵ Orders M-249 and M-317.

⁴⁶ Order P-613.

⁴⁷ Orders MO-1994 and PO-2607.

[63] The municipality submits that there exists a public interest in the non-disclosure of the information contained in records 10 and 12. It argues that disclosing the information could potentially harm its economic interests and would limit fair and open competition in the marketplace for Bruce Telecom, particularly as the sale remains uncompleted.

[64] Based on the arguments of the appellant, I am satisfied that, in the communities served by Bruce Telecom, particularly the municipality, there exists a public interest in the circumstances surrounding its sale. The appellant has provided me with evidence to establish that the communities served by Bruce Telecom are seeking to learn more about the process that led to its sale and the factors considered by the municipality in making its decision to sell. I find that the disclosure of the contents of the records would serve to better inform the public of the reasons behind the municipality's decision to sell Bruce Telecom. Further, based on the information provided by the appellant in this and the evidence tendered in an earlier appeal which gave rise to Orders MO-3166-I and MO-3193-F, I conclude that the public interest in the disclosure of information pertaining to the sale of Bruce Telecom is compelling.

Purpose of the exemption

[65] 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.

[66] An important consideration in balancing a compelling public interest in disclosure against the purpose of the exemption is the extent to which denying access to the information is consistent with the purpose of the exemption.⁴⁸

[67] I have found above that the undisclosed information in records 10 and 12 is exempt from disclosure under section 11(a) on the basis that its disclosure would result in the release of commercial information belonging to the municipality that has monetary value. The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.⁴⁹

[68] I find that the compelling public interest in the disclosure of the information in records 10 and 12 does not clearly outweigh the purpose of the exemption in section 11(a). The municipality has certain commercial and financial interests which are protected as a result of the application of section 11(a) to the information in records 10

⁴⁸ Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)*, [1999] O.J. No. 488 (C.A.).

⁴⁹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

and 12. These commercial and financial interests are particularly relevant because the sale of Bruce Telecom has not been proceeded with and another sale process may at some point have to be undertaken. By disclosing the contents of records 10 and 12, I find that the municipality's bargaining power with any potential purchaser of Bruce Telecom will be significantly diminished. As a result, I find that the compelling public interest in the disclosure of this information does not outweigh the purpose of section 11(a), protecting the commercial and financial interests of the municipality and that section 16 has no application to this information.

[69] For similar reasons, I find that any public interest in the bullet point information which I have found to be exempt under section 7(1) in record 13 is not sufficiently compelling to outweigh the commercial and financial interests of the municipality which are reflected in its contents. Accordingly, I find that section 16 has no application to this information as well.

ORDER:

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

Original Signed By:
Donald Hale
Adjudicator

June 5, 2015