

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3545

Appeal MA16-590

The Corporation of the Municipality of Mississippi Mills

December 21, 2017

Summary: The Corporation of the Municipality of Mississippi Mills (the municipality) received a request for access to appraisal information. At the close of mediation, only the actual appraisal values in an appraisal report remained at issue. The municipality relied on sections 11(a), 11(c) and 11(d) (economic and other interests) to deny access to the requested information. In this decision the Adjudicator orders the municipality to disclose to the appellant the appraisal value of one property but upholds its decision to withhold the other appraisal values.

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

Orders Considered: Orders MO-2532 and MO-3482-I.

OVERVIEW:

[1] The Corporation of the Municipality of Mississippi Mills (the municipality) received a three-part request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act* or *MFIPPA*) for access to appraisal information for five identified properties as well as information pertaining to a specific project. In particular, the requester sought:

1. Copies of all appraisals received by the municipality for five specified lots.

2. Copies of all estimates relied on by the municipality to create the "Gemmill Park Component Costs" presented at a Public Meeting on August 9, 2016
3. A copy of the Canada 150 Grant Application submitted by the municipality for the Gemmill Park project.

[2] The municipality identified records responsive to the multi-part request and issued a decision letter. The municipality granted full access to the records responsive to items 2 and 3 of the request and relied on sections 11(c) and 11(d) (economic and other interests) to deny access to the records responsive to item 1.

[3] The requester (now the appellant), appealed the municipality's decision.

[4] During mediation, the appellant advised the mediator that he was satisfied with the municipality's response to items 2 and 3 of his multi-part request and that he only sought access to an appraisal report that the municipality identified as being responsive to item 1 of his request. The mediator relayed the appellant's concerns to the municipality and the municipality issued a supplementary decision letter disclosing additional information to the appellant. The municipality's supplementary decision was accompanied by an Index of Records setting out a general description of the responsive pages of the appraisal report at issue and its position on disclosure, as well as clarifying the exemptions that it claimed were applicable. As set out in the index, the municipality took the position that the exemptions at sections 10(1) (third party information), 11(a), 11(c) and 11(d) (economic and other interests) and 14(1) (personal privacy), applied to information in a responsive appraisal report that it sought to withhold. After reviewing the index, the appellant advised the mediator that he was not seeking access to the information in the responsive appraisal report that the municipality relied on sections 10(1) and 14(1) of the *Act* to withhold. Accordingly, access to that information and the application of section 10(1) and 14(1) of the *Act* are no longer at issue in the appeal.

[5] Mediation did not resolve the appeal and it was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

[6] During my inquiry into the appeal, I sought, and received, representations from the municipality and the appellant. Representations were shared in accordance with Section 7 of the IPC's *Code of Procedure and Practice Direction 7*. In the appellant's representations he states that he had amended his access request to be for only the appraised value of each property with no other details from the appraisals. Accordingly, I will only be addressing access to this information, which appears on page 2 of the responsive appraisal report at issue.

[7] In this decision I order the municipality to disclose the appellant the appraisal value of one property but uphold its decision to withhold the other appraisal values.

RECORDS:

[8] Remaining at issue in this appeal is the withheld information which appears on page 2 of an appraisal report.

ISSUES:

- A. Do the discretionary exemptions at sections 11(a), 11(c) and/or 11(d) apply to the information at issue?
- B. Did the institution exercise its discretion under sections 11(c) and/or 11(d)? If so, should this office uphold the exercise of discretion?

DISCUSSION:

Issue A: Do the discretionary exemptions at sections 11(a), 11(c) and/or 11(d) apply to the information at issue?

[9] Sections 11(a), (c) and (d) read:

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;

[10] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.¹

¹ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

The municipality's representations

[11] With respect to the application of section 11(a), the municipality submits that the appraisal report at issue contains "financial" and "commercial" information:

... The appraisal provides information relating to the value of the property. The documents refer to specific data detailing how the property is valued and the monetary return the municipality can expect on a sale. ...

... The purpose of the appraisals is solely for the purposes of selling the properties in question. The documents provide information on the value of each property and the amount the municipality should expect to receive if it sold the properties. ...

[12] The municipality further submits that the information in the appraisal report belongs to the municipality:

The appraisals have a value to the municipality resulting from the municipality's expenditure of money to obtain the appraisals. Further, the value to the municipality is also derived from the information not being generally known. The value of the documents is the information as to the value of the properties. The value to the municipality would be reduced and potentially eradicated if it was generally known. The municipality is attempting to obtain the highest value in a sale. If the contents of the appraisals are generally known, it will have a direct impact on the selling process and the municipality's ability to negotiate its best price.

[13] The municipality further submits that the appraisal report has monetary value:

The documents have an intrinsic value in that the disclosure would deprive the municipality of the monetary or potential monetary value of the information. Should the documents be disclosed, potential buyers would have information that could affect the amount of any offers to purchase. A potential buyer would have information on the value the municipality places on the properties. A buyer may not offer a higher amount knowing this information. The municipality submits that the records have monetary value.

[14] With respect to the application of sections 11(c) and 11(d) the municipality submits that it has an economic interest in obtaining the highest value for the properties on any sale and that any information that would allow potential buyers to predict or have knowledge of what offer the municipality may accept will impact that economic interest.

[15] It submits:

... As an example, should the municipality decide to list a property significantly higher than the appraised value, knowledge of the appraisal will impact any offer a potential seller may make. If the municipality decides to obtain a second appraisal which provides a higher valuation, disclosure of the first appraisal will impact the municipality's ability to sell for the higher price. This puts the municipality at a disadvantage and prejudices its ability to sell the properties for the highest value. It will significantly impact the municipality's ability to negotiate a sale.

The appellant's representations

[16] The appellant agrees that the appraisal report contains commercial information but relies on the decision of Adjudicator Daphne Loukidelis in Order MO-3482-I in support of his position that the information in the appraisal report does not "belong to" the municipality² nor has monetary value or potential monetary value.³ Referencing paragraph 86 of Adjudicator Loukidelis' decision and an email chain that he received in response to another access to information request to another institution, the appellant asserts that the municipality's confidentiality concerns are substantially diminished because "[i]ts CAO has clearly publicly disclosed appraisal values for [two lots]".

[17] The appellant further submits that the municipality has failed to meet its burden to provide "detailed and convincing evidence about the potential for harm" because, in his view, the status of three of the subject properties has changed:

- The municipality has decided to sell only approximately 60% of a specified lot. The appraisal is on all of the land.
- The municipality is no longer selling another specified lot.
- A specified property has been sold.

[18] Finally, he submits that the appraisals are two years old and don't need "protection" and that the real estate values in Mississippi Mills have increased since 2015 and continue to increase.

The municipality's reply representations

[19] In reply, the municipality submits that it is not the appraisal methods in question but rather the appraisal itself that is proprietary to the municipality.

[20] With respect to the appellant's argument regarding the disclosure of information

² The appellant references paragraphs 84 and 85 of Adjudicator Loukidelis' decision.

³ The appellant references paragraph 86 of Adjudicator Loukidelis' decision.

by a third party the municipality submits that this should not result in the municipality losing the protection of the *Act*. Finally, regarding the age of the appraisal, the municipality submits that it:

... should not be prejudiced by the length of time it takes for the appeal process to proceed. At the time of the request, the appraisals were not outdated in any respect. In addition, an Order requiring the municipality to disclose the information simply because the documents are outdated would set a precedent that would be harmful to the municipality in the future.

Analysis and findings

Section 11(a)

[21] 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.

[22] The types of information listed in section 11(a) have been discussed in prior orders. In this appeal I accept the municipality's position that the information at issue is commercial information, described in past orders as follows:

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.⁴ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁵

[23] Accordingly, I find that the first part of the section 11(a) three-part test has been met.

[24] 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.

⁴ Order PO-2010.

⁵ Order P-1621.

[25] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,⁶ 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.⁷

[26] In my view, the municipality has failed to adduce sufficient evidence to establish that the information at issue “belongs” to it for the purposes of part 2 of the section 11(a) test. Though there is no dispute that the municipality retained an appraiser, the municipality’s representations fall short of demonstrating that its interest in the appraisal amounts at issue is one that the law would recognize as a proprietary or substantial interest. In my view, simply spending money to have the appraisal report prepared is not sufficient. I find that the appraisal report does not either “belong to” the town nor does it have inherent monetary value as contemplated by section 11(a)⁸.

[27] As all three parts of the test must be met for section 11(a) to apply, I find that the information at issue does not qualify for exemption under section 11(a) of the *Act*.

Sections 11(c) and (d)

[28] 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.⁹ This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position.¹⁰

[29] For sections 11(c) or (d) to apply, the institution must provide detailed and

⁶ Order P-636.

⁷ 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.

⁸ See Order M-862.

⁹ Orders P-1190 and MO-2233.

¹⁰ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹¹

[30] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹²

[31] A number of Orders of this office have addressed the possible application of sections 11(c) and/or 11(d) (or their provincial counterparts, sections 18(1)(c) and/or 18(1)(d) of the *Freedom of Information and Protection of Privacy Act (FIPPA)*) to appraisal or valuation information.¹³ In the case of an appraisal or valuation of property that is subject to a pending sale or negotiation that has not been completed, typically there is a finding that the information is subject to exemption. If the property has been sold and the transaction completed, or if the property is no longer subject to sale or an ongoing negotiation or has been transformed to such an extent that the appraisal or valuation is no longer relevant, the exemption(s) are found not to apply¹⁴.

[32] In Order MO-3482-I, Adjudicator Daphne Loukidelis was addressing the use of property valuation records for the purposes of establishing a "park levy" and although much of the reasoning is applicable here, in my view the decision of Adjudicator Loukidelis in Order MO-2532, is more directly on point. In Order MO-2352 Adjudicator Loukidelis was addressing the application of section 11(c) to appraisal information relating to land owned by the appellant in that appeal. The appraisal report was specifically obtained for the purpose of the purchase of land, and the transaction had not closed. She canvassed past Orders of this office in the following way:

Past orders of this office have addressed the exemption of real estate appraisal information under section 11 of the *Act*. In Order MO-1392, former Senior Adjudicator David Goodis found that section 11(c) applied to an appraisal regarding a property purchased by the Toronto and Region Conservation Authority (TRCA). He stated:

I am satisfied that if the appraisal figures in Records 1 and 2 were disclosed at any time prior to the closing of the transaction,

¹¹ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹² Order MO-2363.

¹³ See for example Orders MO-1228, MO-3193-F and PO-1887-I.

¹⁴ See for example Orders MO-3362-F

disclosure could reasonably be expected to harm the economic interests or competitive position of the TRCA. This finding would be consistent with previous orders of this office [see, for example, Orders MO-1228, MO-1258]. In these cases, there was evidence of harm with respect to future negotiations.

As suggested in the passage above, the former Senior Adjudicator distinguished between disclosure of appraisal information prior to the conclusion of negotiations and its disclosure upon completion, concluding that once the purchase price was known, the value of the information for future similar negotiations was greatly diminished or even eliminated. This approach was adopted by Adjudicator Bernard Morrow in Order MO-2247, where he upheld the decision of the Township of Severn to deny access to appraisal information regarding shore land owned by the Township. In my view, the following comments of Adjudicator Morrow are applicable in the present appeal and I adopt them here:

While I understand the appellant's desire to negotiate a price that is in line with the fair market value of the land, there is no evidence before me that the Township, in conducting these negotiations, is required to agree to a price at or near the appraised value. It would seem to me that the appraisal is used to establish a benchmark for the value of the land. I concur with the Township that it is entitled to seek the best price possible for the benefit of the municipality when negotiating land deals.

I also agree with the conclusion in these orders that the appraisal information - and how it is used by the institution that has obtained it - is an aspect of the institution's negotiation strategy that qualifies for exemption under section 11(c) of the *Act*.

[33] I adopt the reasoning of Adjudicator Loukidelis for the purposes of this appeal, which in my view is equally applicable to section 11(d).

[34] There are four properties at issue in this appeal, which are comprised of a total of five lots. I have considered the content of the email exchange provided by the appellant in support of his position and while it does set out asking prices, it does not indicate that those are appraisal amounts. Furthermore, although the appellant asserts that only 60% of a specified lot may be sold, the email exchange does not support that assertion and he provides no additional evidence in support of that assertion. That said, even if only a percentage of that lot were sold, the basis of the appraised amount would reveal the appraisal value. The municipality did not take issue with the appellant's allegation that a specified property has been sold. I find that because this property has been sold, disclosing the appraisal amount for this property could not

reasonably be expected to result in the section 11(c) or 11(d) harms alleged. Accordingly, I will order this information, which I have highlighted in green on a copy of page of the appraisal report at issue, be disclosed to the appellant. There is no evidence before me to indicate that the three remaining properties may not be sold at a later date. Based on the materials before me I am satisfied that disclosing the appraisal values of the three remaining properties could reasonably be expected to prejudice the economic interests of the municipality or could reasonably be expected to be injurious to its financial interests. As a result, I find that the information pertaining to these three remaining properties qualifies for exemption under sections 11(c) and/or (d) of the *Act*.

Issue B: Did the municipality exercise its discretion under sections 11(c) and/or 11(d)? If so, should this office uphold the exercise of discretion?

General principles

[35] The section 11(c) and 11(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.

[36] 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.

[37] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.¹⁵ This office may not, however, substitute its own discretion for that of the institution.¹⁶

The municipality's representations

[38] The municipality submits that it exercised its discretion in accordance with the *Act* based on proper considerations and did not exercise its discretion in bad faith or for an improper purpose. The municipality submits that, "[i]n particular the exercise of its discretion was to protect a recognized and important consideration, namely protecting the municipality's economic interests".

¹⁵ Order MO-1573.

¹⁶ Section 43(2).

[39] The municipality submits that it only considered relevant factors in exercising its discretion, in particular:

- The information was not the personal information of the requester;
- The specific wording of the exemptions;
- The fact that there is no sympathetic or compelling need for the requester to receive the information;
- The nature of the information sought and the extent to which it is sensitive to the municipality;
- The fact that the information is not historic in nature.

The appellant's representations

[40] The appellant submits that the municipality did not take all the relevant factors into account and it should have considered the following:

- The general public has lost confidence in the municipality. Under the current Council, the municipality has conducted its affairs in secrecy, including improper closed meetings and denial of information requests;
- Disclosure of the appraisals when requested would have gone a long way to improve the public's confidence that the Council and staff were interested in becoming more transparent and accountable;
- He amended his access request to only the appraised value of each property with no other details from the appraisals;
- The appraisals were completed in October or November, 2015 and are now outdated and inaccurate;
- Since the appraisals were completed, one property has been sold, a second is now not going to be sold, and a third will only be partially sold. The appraisals are not accurate or relevant now;
- The CAO of the municipality approached a third party to sell two specified lots and selling prices were presented by a named individual to the third party that had to be based on the appraisals for the land and negotiations followed. The appellant states that the email chain of these negotiations was obtained through a Freedom of Information request so the land values were already available to the public when he made his request.

[41] The appellant further submits that the municipality also exercised its discretion in bad faith arising as a result of ongoing disputes between the appellant and the municipality, which the appellant recounts in his representations.

The municipality's reply representations

[42] In reply the municipality disagrees that it took into account irrelevant factors in making its decision. It denies that it conducts its affairs in secrecy and denies that the general public has lost confidence in the municipality. It submits that it is important for certain information to remain private and being required to disclose the remaining appraisal values will cause significant harm to the municipality.

Analysis and finding

[43] In the circumstances of this appeal, I am satisfied that the municipality considered relevant factors and has properly exercised its discretion in deciding not to disclose the appraisal information that I have not ordered disclosed in this order. I am not satisfied that the appellant has established that the municipality exercised its discretion in bad faith or for an improper purpose. I find that the municipality considered the purposes of the *Act* and has given due regard to the nature of the information in the specific circumstances of this appeal. Accordingly, I will not interfere with the municipality's exercise of discretion in denying access to the information at issue that I have not ordered be disclosed.

ORDER:

1. I order the municipality to disclose to the appellant the information that I have highlighted in green on a copy of a page of the record that I have sent to the municipality along this order, by sending it to the appellant by **January 22, 2018**.
2. In order to verify compliance with provision 1 of this order, I reserve the right to require the municipality to provide me with a copy of the page of the record as disclosed to the appellant.

Original Signed by: _____

Steven Faughnan
Adjudicator

December 21, 2017 _____