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

ORDER M-809

Appeal M_9600092

Board of Governors of Exhibition Place

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NATURE OF THE APPEAL:

The requester filed a request with the Board of Governors of Exhibition Place (the Board) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to information related to contracts and agreements, including amendments and any related records between the Canadian National Exhibition Association (CNEA) and a named promotional company. In particular, the requester sought access to the CNEA produced documents called "Fair Period Concert Reconciliations" for the period 1984 to 1994 together with a specified memorandum.

The Board notified the promotional company and subsequently issued a decision to the requester, granting access to the records. The promotional company (now the appellant) appealed the decision to disclose the records to the requester.

The requester, who is a member of the press, indicated that he is not seeking any information related to any collective labour or union agreements. Therefore, this information, where it appears in the records, is not at issue.

The records that remain at issue consist of 88 pages and include correspondence, three contracts, a reconciliation statement, a summary and a memorandum.

The Commissioner's office provided a Notice of Inquiry to the Board, the requester and the appellant, inviting the parties to comment on the application of section 10(1) of the Act (third party information). Only the appellant and the requester submitted representations.

In its representations, the appellant raised certain issues which I will address as preliminary matters below. The Board provided submissions on these preliminary matters.

PRELIMINARY MATTERS:

The appellant raised the following issues:

- that the Board has no jurisdiction to make a decision on the records
- that some of the records found to be responsive by the Board were not requested by the requester
- that discretionary exemptions apply to the records

JURISDICTION OF THE BOARD

In its representations, the appellant refers to the Notice of Inquiry which states that "the institution was incorrectly identified as the Municipality of Metropolitan Toronto on the Confirmation of Appeal". The appellant submits that the records requested are internal documents of CNEA or relate to agreements between the appellant and CNEA. The appellant

submits, therefore, that since none of the records "relate to or are possessed by the Board", it has no authority to make an access decision on these records.

The Board advises that the Board was established in 1983, under the Municipality of Metropolitan Toronto Act, as amended by Bill 195, for the purpose of managing and operating Exhibition Place. The Board states that the CNEA plans and manages the operation of Exhibition Place, under the direction and control of the Board. The Board points out that it is an "institution" under the Act, that the records sought by the requester are in its custody and that the Board has both the discretion and the jurisdiction to make access decisions on the records.

The Board states further that decision-making authority for the purpose of this appeal, was delegated to the Manager of Corporate Access and Privacy, Municipality of Metropolitan Toronto. A copy of this delegation has been provided to this office.

I have reviewed the submissions of the parties. With respect to the erroneous identification of the institution, the appellant is correct in that the Confirmation of Appeal had shown the Municipality of Metropolitan Toronto as the institution whose decision was under appeal. This was subsequently rectified in the Notice of Appeal where the Board of Governors of Exhibition Place was shown as the correct institution.

The Board is an institution under the Act and in my view, has both the authority and the obligation to make access decisions. I am satisfied that the delegation from the head of the Board to the Manager of Corporate Access and Privacy, Municipality of Metropolitan Toronto, was properly delegated and exercised. I find, therefore, that the Board has the jurisdiction and mandate to make access decisions on the records at issue in this appeal.

RESPONSIVENESS OF THE RECORDS

The appellant states that the following records were not specifically asked for by the requester and, therefore, are not responsiveness to the request:

- letters from CNEA (pages 7 and 8)
- memoranda to the Board and the Board of Directors of CNEA (pages 9, 10, 14, 15 and 16)
- spreadsheet summaries entitled "Fair Period Concerts" (pages 87 and 88)
- memorandum from CNEA (pages 89-91)

The Board submits that while the request does not specifically list the records identified by the appellant, the information in the records is directly relevant to that sought by the requester. The Board states that it clarified the request through meetings with the requester and as a result, the responsive records were identified.

The issue of responsiveness of records was canvassed in detail by Inquiry Officer Anita Fineberg in Order P-880. That order dealt with a re-determination regarding this issue which resulted from the decision of the Divisional Court in Ontario (Attorney-General) v. Fineberg (1994), 19 O.R. (3rd) 197.

In the Fineberg case, the Divisional Court characterized the issue of the responsiveness of a record to a request as one of relevance. In her discussion of this issue in Order P-880, Inquiry Officer Fineberg stated as follows:

> In my view, the need for an institution to determine which documents are relevant to a request is a fundamental first step in responding to the request. It is an integral part of any decision by a head. The request itself sets out the boundaries of relevancy and circumscribes the records which will ultimately be identified as being responsive to the request. I am of the view that, in the context of freedom of information legislation, "relevancy" must mean "responsiveness". That is, by asking whether information is "relevant" to a request, one is really asking whether it is "responsive" to a request. While it is admittedly difficult to provide a precise definition of "relevancy" or "responsiveness", I believe that the term describes anything that is reasonably related to the request.

I agree with these conclusions and adopt them for the purposes of this appeal. I have reviewed the information on the pages of the record identified by the appellant. I accept the position of the Board and agree that, irrespective of the wording of the request, an institution is obliged to identify responsive records in keeping with the spirit and intent of the legislation. I am satisfied that the Board sought and obtained clarification from the requester and consequently, had a good understanding of the request. I find that the information is reasonably related to the subject matter of the request. Therefore, I find the records are responsive to the request.

RAISING OF DISCRETIONARY EXEMPTIONS BY AN AFFECTED PARTY

The appellant submits that the head should have exercised her discretion to withhold access to the records under the discretionary exemptions provided by the following sections under the Act:

- section 7 (advice to government)
- sections 8(1)(a) and (b) and 8(2)(a) (law enforcement)
- section 8(1)(f) (right to a fair trial)
- section 11(a), (c) and (d) (valuable government information and economic and other interests)
- section 12 (solicitor-client privilege)
- section 15(a) (information published or available)

The appellant submits that a number of events have transpired since the Board's decision which make the above discretionary exemptions applicable to the records. The appellant has provided details on the events and the cause of such events which he believes to be pertinent to a decision to deny access to the requester.

In my view, the submissions relate to the issue of whether an affected party may raise a discretionary exemption when it was not claimed by the institution which received the request for access to information.

The Act includes a number of discretionary exemptions within sections 7 to 15 which provide the head of an institution with the discretion to refuse to disclose a record to which one of these

exemptions would apply. These exemptions are designed to protect various interests of the institution in question. If the head feels that, despite the application of an exemption, a record should be disclosed, he or she may do so. In these circumstances, it would only be in the most unusual of situations that the matter would come to the attention of the Commissioner's office since the record would have been released.

The Act also recognizes that government institutions may have custody of information, the disclosure of which would affect other interests. Such information may be personal information or third party information. The mandatory exemptions in sections 14(1) and 10(1) of the Act respectively are designed to protect these other interests. Because the Office of the Information and Privacy Commissioner has an inherent obligation to ensure the integrity of Ontario's access and privacy scheme, the Commissioner's office, either of its own accord, or at the request of a party to an appeal, will raise and consider the issue of the application of these mandatory exemptions. This is to ensure that the interests of individuals and third parties are considered in the context of a request for government information.

Because the purpose of the discretionary exemptions is to protect institutional interests, it would only be in the most unusual of cases that an affected party could raise the application of an exemption which has not been claimed by the head of an institution. In my view, depending on the type of information at issue, the interests of such an affected party would usually only be considered in the context of the mandatory exemptions in section 10(1) or 14(1) of the Act.

In the present case, the Board has not claimed any discretionary exemptions nor has it claimed that section 10(1) applies. The Board states that upon a careful review of the records, it found that no discretionary exemptions applied. The Board indicates that it is also of the view that section 10(1) does not apply to the records at issue. The appellant has appealed the Board's decision to disclose the records and I find, therefore, that the interests of the appellant are taken into account through the exercise of his right to appeal as a third party. Therefore, I find that it is not necessary for me to consider the application of the discretionary exemptions sought to be applied by the appellant.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1) of the Act states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public that similar information continue to be so supplied;

(c) result in undue loss or gain to any person, group, committee or financial institution or agency;

In this case, the Board has decided to disclose the records. Therefore, it is the appellant, as the party resisting disclosure, who must demonstrate that all the requirements of the exemption have been met. The appellant must provide sufficient evidence to establish that the records contain the requisite type of information, was supplied to the Board in confidence and that one of the harms in section 10(1)(a), (b) or (c) could reasonably be expected to occur upon disclosure of the records. All three elements must be satisfied in order for the exemption to apply.

Type of Information

I have reviewed the records and find that they include information about the financial application of a tax exemption, actual and potential revenues and the rights and obligations of the parties. Therefore, I find that the information in the records qualifies as commercial or financial information, within the meaning of section 10(1) of the Act. Accordingly, the first requirement of the exemption has been satisfied.

Supplied in Confidence

Under this section, the appellant must establish that the information in the records was **supplied** to the Board by the appellant, either implicitly or explicitly **in confidence**. The appellant states that the information in the records was supplied "to the CNEA or by the CNEA to [the appellant] in the course of negotiating a commercial business arrangement, which implicitly is done by business people in confidence ...". The appellant submits that the information was supplied to or by the Board implicitly in confidence. The appellant states that some of the records, such as the reconciliation statements, are prepared by the CNEA and reflect the allocation of revenues agreed to between the parties as a result of lengthy negotiations. The appellant submits that even if the information was not supplied to the Board, disclosure of the records will permit the drawing of accurate inferences as to the information that was actually supplied to the Board and vice versa.

Previous orders of the Commissioner have addressed the question of whether information contained in an agreement between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act (Orders 36, P-251 and P-807).

Other orders issued by the Commissioner have held that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 10(1) of the Act, if

its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218 and P-581).

Based on my review of the representations and the records, I find that the information in the letters, memoranda, contracts, summaries and reconciliation statements was not "supplied" by the appellant to the Board; in my view, the records contain information that was both the subject and the product of negotiations between the parties and therefore, does not qualify as having been "supplied" for the purposes of section 10(1) of the Act. The appellant has not provided any evidence to show what parts of the record, if disclosed, would permit the drawing of accurate inferences to reveal information actually "supplied" to the Board. Accordingly, I find that the information in the records was not "supplied" to the Board.

As I have indicated previously, all elements of section 10(1) must be satisfied in order for the exemption to apply. In this case, I have found that while the information at issue qualifies as commercial or financial information, it was not "supplied" to the Board for the purposes of the exemption. Accordingly, the exemption in section 10(1) does not apply to the records.

Public Interest in Disclosure

Both the appellant and the requester have raised the application of section 16 of the Act. The requester states that a public interest exists in the disclosure of the records. The appellant, conversely, argues that a public interest exists in withholding access to the information in the records.
Section 16 reads as follows:

> An exemtpion 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. (Emphasis added)

Section 16 can be raised where one of the exemptions listed in that section has been found to apply. In the present case, I have found that the exemption in section 10 does not apply to the records. Therefore, I do not need to address the application of the so-called "public interest override" in the circumstances of this case.

As I have indicated previously, the requester is not seeking access to any labour or collective agreement information that appears in the records. This information should not be disclosed to the requester.

ORDER:

1. I uphold the Board's decision to grant access to the records. Information relating to labour or collective agreements should not be disclosed.

2. I order the Board to disclose the records, after removing any labour or collective agreement information, by sending a copy of the records to the requester by **August 29, 1996** but not before **August 23, 1996**.

3. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the requester pursuant to Provision 2.

Original signed by: July 25, 1996
Mumtaz Jiwan
Inquiry Officer