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

ORDER MO-2271

Appeal MA-060123-1

Exhibition Place

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NATURE OF THE APPEAL:

The Board of Governors of Exhibition Place (Exhibition Place) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a lease agreement between a named company (the affected party) and Exhibition Place.

In response, Exhibition Place identified one lease agreement (the Agreement) as the responsive record, and notified the affected party under section 21(1) of the *Act*, giving it an opportunity to provide its views regarding disclosure of the record.

The affected party objected to the disclosure of the Agreement on the basis that the information contains commercial information relating to it and that the document was supplied to Exhibition Place in confidence.

After considering the affected party's representations, Exhibition Place issued a decision granting the requester full access to the Agreement.

The affected party (now the appellant) appealed Exhibition Place's decision.

No issues were resolved through mediation and the file was transferred to the adjudication stage of the process.

An adjudicator previously assigned to the file commenced the inquiry by first seeking and receiving representations from the appellant.

He then sought representations from Exhibition Place and the original requester, and provided both parties copies of the appellant's non-confidential representations along with copies of the Notice of Inquiry.

Exhibition Place indicated that it did not intend to make submissions in this case. The original requester also did not make submissions.

The file was subsequently transferred to me to complete the adjudication process.

RECORD:

There is one record at issue, the lease agreement between the appellant and Exhibition Place.

DISCUSSION:

THIRD PARTY INFORMATION

In its representations, the appellant states that it was never its intention to seek to have the entire Agreement withheld from the requester. The appellant adds that it is only concerned that the portions of the Agreement that include confidential business information whose release would result in harm not be released. The appellant lists the particular paragraphs or parts of paragraphs in the Agreement that it wishes to have withheld. The appellant submits that the mandatory exemptions in sections 10(1)(a) and (c) apply to the portions of the record at issue to

which it opposes disclosure. Although it has only claimed these two provisions, the appellant's representations also suggest that it relies on paragraph (b) of section 10(1) as well.

In assessing this issue, I have taken into consideration the specific portions of the Agreement to which the appellant objects to disclosure. I have also considered this information in the context of the entire document. Based on my review of the document as a whole and the specific information identified by the appellant, I find that the appellant has failed to establish the application of section 10(1) to any portion of the Agreement. My reasons follow.

Sections 10(1) (a), (b) and (c) state:

> 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, if 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 interest 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1)(a), (b) or (c) to apply, the appellant must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a) (b) or (c) of section 10(1) will occur.

Part 1: type of information

The appellant takes the position that the Agreement reveals "commercial information". It submits that the "lease reveals not only the price of the rents, but also terms of the agreement which relate to operations and the permitted uses of the property." Previous orders have defined commercial information 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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

I find that the record at issue, in its entirety, pertains to a commercial arrangement entered into by Exhibition Place and the appellant for the use of a building on the site. I find further that the record relates to the appellant's commercial activities. Accordingly, I find that the information in the record meets the definition of "commercial information".

Therefore the requirements of Part 1 of the section 10(1) test have been established.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the appellant must establish that the information was "supplied" to Exhibition Place by it "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an institution reflects the purpose in section 10(1) of protecting the informational assets of third parties (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation (Orders PO-2018, MO-1706).

As noted above, the record is identified as a Lease. It contains a number of standard clauses typically found in lease agreements, as well as terms specific to the agreement reached between the appellant and Exhibition Place. As I indicated above, only specific portions of certain terms are of concern to the appellant, such as the length of the term of the Agreement in paragraph 1, the actual term of the lease found in paragraph 3.1, the actual amount of the rents in paragraph 4.2, reference to specific uses that are and are not permitted under the lease in paragraph 5.2, and a number of other references to the substance of the Agreement that are contained in various paragraphs of the Agreement.

The appellant submits that it supplied the commercially sensitive information in the Agreement to Exhibition Place. It submits further:

> Specifically, the information includes the various uses proposed for the property. This information was provided…in confidence since it outlines the business plan for the property. The contract was shaped specifically to allow certain kinds of use of the property and it is the use of the property itself that forms the essence of the…business…
>
> The information was supplied in confidence implicitly. At the time the information was provided and the agreement was made, [the appellant] had a reasonable expectation of confidentiality. Negotiating and drafting the lease led to necessary disclosure to Exhibition Place regarding the business intentions…There was no suggestion that this information and the precise terms of the agreement would be made public…
>
> The information was not otherwise disclosed or available to the public. It is generally understood between bargaining parties that terms of the final agreement should be handled with care and discretion.

In Order MO- 1706, Adjudicator Bernard Morrow states:

> ... [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

This approach has recently been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs.75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc.M32858 (C.A.).

The rationale for this approach with respect to certain types of information, such as per diem rates, is noted by Assistant Commissioner Brian Beamish in Order PO-2435:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant

> submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.

The appellant did not specifically address the immutability or inferred disclosure aspect of "supplied" component of the test in its submissions. It did submit, however, that the disputed information "gives strong indications, by inference, about not just substantive business strategy, but also about timing." Although these submissions did not specifically refer to the two exceptions noted above, I have considered whether this type of information might reasonably fall within either one, in the particular circumstances of this case.

The appellant does not explain how any of the information in dispute might be perceived as "immutable" or how its disclosure would permit accurate inferences to be made with respect to underlying non-negotiated confidential information. Looking at the disputed information on its own, and in conjunction with the Agreement as a whole, I find that it simply sets out the agreed upon terms under which the lease was given. The appellant acknowledges that the Agreement was negotiated and its representations suggest that the information contained in it about the appellant's business use of the property was required in order for the Agreement to be completed. Moreover, based on my review of this record, it is apparent that its contents reflect the meeting of the minds that generally takes place during the negotiation process. In Order PO-2435, Assistant Commissioner Beamish makes the following comments regarding Service Level Agreements (SLA's) between the Ontario Family Health Network and various consultants:

> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

> In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

I find that the Agreement sets out the terms and conditions under which the lease has been entered into and is signed by representatives of both Exhibition Place and the appellant. I conclude that the body and nature of this document signifies that the terms were subject to negotiation and, therefore, were not "supplied" within the meaning of section 10(1) of the *Act*.

Moreover, based on the reasoning applied by Assistant Commissioner Beamish in Order PO-2435 and my own review of the Agreement, I find that there is nothing in the body of this document that would fall into the "inferred disclosure" or "immutability" exceptions as set out above.

Accordingly, I find that that appellant has failed to meet the requirements of Part 2 of the section 10(1) test, as neither the Agreement, nor any of its terms were supplied to Exhibition Place.

CONCLUSION

The appellant has expressed a number of concerns about the anticipated harms to its competitive position. In Order MO-1393, Adjudicator Sherry Liang wrote:

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

I agree with these comments. As I noted above, all three parts of the test under this exemption must be established. Having found that the Agreement was not supplied to Exhibition Place, I find that section 10(1) does not apply to it.

ORDER:

1. I uphold Exhibition Place's decision to disclose the record at issue.

2. I order Exhibition Place to disclose the record at issue to the requester by sending him a copy by **March 14, 2008** but not before **March 7, 2008**.

3. In order to verify compliance with provision 2, I reserve the right to require Exhibition Place to provide me with a copy of the record which was disclosed to the requester.

Original Signed By: February 8, 2008
Laurel Cropley
Adjudicator