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

ORDER MO-2330

Appeal MA06-272-2

The Corporation of the City of Oshawa

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NATURE OF THE APPEAL:

The Corporation of the City of Oshawa (the City) received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) dated July 17, 2006:

> You will recall my previous Freedom of Information requests asking for the final contracts, related to the construction and operation of the downtown arena, [commonly known as the "Downtown Sports and Entertainment Facility"] between the City of Oshawa and (1) [a named Sports and Entertainment company], (2) [a named design and building company], and (3) [a named junior hockey team in the Ontario Hockey League].
>
> At the time of my first request, your interim response was that no final contracts had been signed. Your response to my second request was that the contract with the [named hockey team] is confidential. As you are aware, I have filed an appeal to your decision.
>
> As you have still not provided me with copies of the contracts, related to the construction and operation of the downtown arena, between the City and [the named Sports and Entertainment company and named design and building company], I am enclosing yet another official Freedom of Information Request.

On July 28, 2006, the City advised that the time limit for responding to this request had been extended to September 25, 2006, in accordance with section 20 of the *Act*. The requester appealed the City's extension of time and this office opened appeal MA06-272. During mediation, the City issued a decision dated August 25, 2006, and accordingly, the file was closed.

In its decision of August 25, 2006, the City advised that, following third party notification (pursuant to section 21(1) of the *Act*), access to the named design and building company agreement had been denied pursuant to sections 10(1)(a) and (c) of the *Act*. With respect to a final executed agreement between the City and the named Sports and Entertainment company, the City advised that the record does not exist.

The requester (now the appellant) appealed the City's decision and appeal MA06-272-2 was opened.

The City's initial position was that there were no responsive records pertaining to the Sports and Entertainment company, since a final agreement had not been duly executed. Legal counsel for the City at that time advised that draft agreements with this company were not considered to be responsive to this request. However, during the course of mediation, a final agreement was subsequently executed and the appellant indicated that the draft agreements were no longer at issue in this appeal. The appellant agreed to submit a new request to the City for the final agreement between the City and the Sports and Entertainment company, since it was outside of the scope of the current request. Accordingly, any agreements between the City and the named Sports and Entertainment company are no longer at issue in this appeal.

The named design and building company (the affected party) advised the mediator that it objects to the disclosure of records relating to the agreement between it and the City. No further mediation was possible, and this file was moved to the adjudication stage of the appeal process.

This office began the inquiry process by issuing a Notice of Inquiry to the affected party and the City, initially, inviting them to submit representations on the facts and issues in this appeal. The City replied, indicating that it would not be submitting representations on the issues raised in the Notice. Representations were received from the affected party.

The file was subsequently transferred to me to complete the adjudication process. After reviewing the affected party's representations, I find that it is not necessary to seek submissions from the appellant.

RECORDS:

The record at issue consists of an Agreement dated April 11, 2005, between the Corporation of the City of Oshawa and the affected party.

DISCUSSION:

The City and affected party claim that the mandatory exemption in sections 10(1)(a) and (c) apply to the record at issue. Sections 10(1)(a) 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;
>
> (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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third

parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record [Orders P-203 and MO-2287].

For section 10(1)(a) or (c) to apply, the City and/or affected party 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) or (c) of section 10(1) will occur.

As noted above, the City has declined to make submissions on the possible application of section 10(1). Therefore, the onus rests with the affected party to satisfy the three-part test set out above.

Part 1: type of information

In order to satisfy part 1 of the test, the affected party must establish that the record contains one or more of the types of information listed in section 10(1). Previous orders of this office have defined each of these types of information as follows:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
>
> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

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].

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 [Order PO-2010].

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]

- an account of an alleged incident at a child care centre [P-121]

- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

The affected party submits:

> The Agreement between the [City] and [the affected party] contains information that is a trade secret or scientific, technical, commercial, financial or labour relations information. The Agreement contains confidential information regarding the contract price and payment. The Agreement contains trade secrets including policies and procedures.

The affected party's representations do not provide any detail regarding its claim that the record contains trade secrets other than that set out above. It also provides no evidence that the record contains scientific or labour relations information.

Having reviewed the record, which is a 106-page agreement between the affected party and the City using a "Standard Construction Document" form, I note that it details the work to be performed, the contract price and method of payment, as well as a number of standard contract terms. I find that the information in this record, in its entirety, relates to the buying, selling and exchange of merchandise and services. I find, therefore, that the record at issue contains "commercial information." The record also contains specific financial details of the arrangement between the parties, and I find that this qualifies as "financial information" within the meaning of section 10(1). Further, I find that Appendix 3 contains information that falls within the definition of "technical information." I have insufficient evidence before me to conclude that any of the information qualifies as "trade secrets" as that term is defined above, and find that neither this term nor the other two terms referred to above are applicable in the circumstances.

As the record reveals "commercial," "financial" and "technical" information, I find that the first part of the three-part section 10(1) test has been met.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the affected party must establish that the information was "supplied" to the City 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].

On this issue, the affected party states:

> Information was directly supplied to the [City] by [four named] third parties.
>
> Third parties supplied the information with a reasonable expectation of confidentiality.
>
> As previously stated, the financial information was supplied in confidence, as [the multi-discipline group of architects, engineers and consultants, of which the affected party is a member] is a privately owned company.

Having reviewed the agreement, I find that while it is possible that the other third parties referred to in the affected party's representations might have had some involvement in the development of the agreement, the agreement itself does not pertain to them; rather, it is an agreement solely between the affected party and the City, and contains information that could only reasonably be connected to this affected party.

Moreover, although section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions, the mere fact that the affected party is a privately owned company is insufficient to establish its application. The affected party must satisfy all three parts of the test referred to above.

As noted previously, the record at issue is an agreement. It comprises the executed agreement (the first 7 pages), additional contract documents (pages 8-85) and eight appendices (pages 86-106).

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 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 submitted by third parties, 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.

Although the affected party's submissions did not specifically refer to the two exceptions noted above, I have considered whether any of the information contained in the agreement might reasonably fall within either one, in the particular circumstances of this case.

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 the "negotiation process" as it relates to Service Level Agreements (SLAs) between the Ontario Family Health Network and various consultants:

> … 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 agree with these comments. Further, I find that the agreement at issue in the current appeal sets out the terms and conditions under which the work for the Downtown Sports and Entertainment Facility was to be undertaken. The agreement is signed by representatives of both the City and the affected party. Although the agreement may contain terms proposed by the affected party, they have clearly been transferred into a document that was intended to reflect the agreement reached between it and the City. The agreement encompasses all of the attachments as noted above. It is apparent from my review of each section of the agreement, that the terms set out in each one are the product of the negotiation process between the City and the affected party. I conclude, therefore, 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 record at issue, 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 the record at issue in this appeal was not supplied to the City for the purposes of section 10(1). As all three parts of the test under this exemption must be established, I find that section 10(1) does not apply to it.

ORDER:

1. I order the City to disclose the record at issue to the appellant, by providing him with a copy of it by **August 25, 2008 but not before August 20, 2008**.

2. In order to verify compliance with order provision 1, I reserve the right to require the City to provide me with a copy of the record disclosed to the appellant.

Original signed by: July 21, 2008
Laurel Cropley
Adjudicator