



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

ORDER MO-2509

Appeal MA08-390 and MA08-392

Exhibition Place



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NATURE OF THE APPEAL:

An individual made a request to the City of Toronto under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for:

...a copy of the long-term lease agreement or other agreements between the City [of Toronto] or Exhibition Place and [organization #1] and [organization #2]. As well, any other long-term agreement for financing or lease with any other entity as it pertains to the Ricoh Coliseum at Exhibition Place.

The City of Toronto subsequently transferred the request to Exhibition Place under section 18 of the *Act*, as Exhibition Place appeared to have a greater interest in the subject matter of the record.

Before issuing its decision on access, Exhibition Place notified the two organizations referred to in the request (the affected parties). Both affected parties objected to the disclosure of any information in the records. Exhibition Place decided to grant the requester partial access to the lease. Access was denied to severed portions of the lease pursuant to sections 11(c) and (d) (economic interests). Exhibition Place denied access to the sub-lease, in its entirety, on the basis that the affected parties are not subject to the *Act*. The affected parties were advised of this decision as well.

The lawyer representing one of the affected parties involved in both the lease and sub-lease appealed Exhibition Place's decision on the basis that section 10 (third party information) of the *Act* applies to the lease, in its entirety. Appeal file MA08-392 was opened for this appeal. To be clear, only one of the affected parties appealed Exhibition Place's decision (affected party appellant).

The requester appealed Exhibition Place's decision to deny both the lease and the sub-lease. Appeal file MA08-390 was opened for this appeal.

During mediation, the affected party appellant consented to the disclosure of a severed copy of the lease and the sub-lease. Accordingly, Exhibition Place issued a revised decision to the original requester granting partial access to the lease and sub-lease. Exhibition Place denied access to the severed portions of both leases under sections 11(c) and (d) of the *Act*.

As mediation did not resolve these appeals, the files were moved to the adjudication stage of the appeal process where an adjudicator conducts an inquiry under the *Act*. Initially, I sent a single Notice of Inquiry for both appeals to Exhibition Place, the affected party appellant and the affected party. I received representations from the affected party and Exhibition Place only. The affected party appellant was contacted by this office about whether she intended to make representations. She confirmed that she would not be making representations.

I then sent the original requester a Notice of Inquiry, along with a copy of Exhibition Place's representations. The original requester also provided representations.

Finally, I provided the original requester's representations to Exhibition Place, the affected party appellant and the affected party. I received representations in reply from Exhibition Place only.

This order disposes of the issues in both appeals. I will refer to the appellant in Appeal MA08-392 as the affected party appellant and the appellant in Appeal MA08-390 as the original requester appellant.

RECORDS:

The information at issue in these appeals is contained in the severed portions of the following two records:

Lease - pages 18, 19, 24, 27, 30, 47, 48, 55, 56, 3 of Schedule D, 1 of Schedule H

These pages consist of the following information:

- Parking Operating Costs
- Put option
- Annual Lease Rent
- Equity Contribution and Redevelopment Financing under "Redevelopment of the Premises"
- Payment of Additional Rent
- Tenant's and Landlord's Insurance under "Insurance"
- Capital Budget and Plan information

Sub-lease - pages 21, 28, 29, 49, 50, 59, 81, 82, 3 of Schedule D, 1-2 of Schedule H, and 1 of Schedule N2

These pages consist of the following information:

- Portion of rent
- Parking Operating costs
- Annual Basic Rent
- Annual Percentage Rent
- Subtenant's Insurance
- Expenses
- Termination by Subtenant
- Application of Insurance Proceeds
- Rent Chart
- Non-Disturbance Agreement with Bank...

DISCUSSION:

THIRD PARTY INFORMATION

The affected party appellant submits that disclosure of the information at issue could reasonably be expected to significantly prejudice its competitive position. I will first deal with the issue of whether section 10(1)(a) applies to the records. Section 10(1)(a) states:

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,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

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

Part 1: type of information

The affected party appellant submits that the records contain both its financial and commercial information. Past orders of this office have defined financial and commercial information as:

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].

I find that the two records at issue, the lease and sub-lease relate to the rental arrangement between Exhibition Place and the affected party appellant; as well as the affected party appellant and the affected party for use of the Ricoh Coliseum. The information that has been withheld includes the dollar amounts described in the terms of the lease and sub-lease. I find that this qualifies as information relating to the exchange of services and/or information relating to the use or distribution of money. Accordingly, I find that the information in the record meets the definition of both “financial” and “commercial information” for the purposes of section 10(1). As the requirement for Part 1 of the section 10(1) test has been established, I will now proceed to consider part 2 of the test.

Part 2: supplied in confidence

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

Supplied

The requirement that it be shown that the information was “supplied” to the 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 or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

The affected party appellant submits that the lease was negotiated in confidence, “..as it is a highly unusual lease with complex revenue sharing provisions”. However, I note that it does not specify that the information at issue was “supplied” for the purposes of section 10(1).

The information at issue contains the dollar amounts of various terms of the lease and sub-lease. The actual terms of the lease and sub-lease are not at issue. A number of previous orders of this office have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was “supplied” within the meaning of section 10(1). Because the information in a contract is typically the product of a negotiation process between two parties, the contents of contracts involving an institution and an affected party will not normally qualify as having been supplied (see, for example, Orders P-36, P-204, P-251, P-1545 and PO-2018). In the present appeal, the affected party appellant concedes that the lease was the result of negotiation between the parties. Based on my review of the lease and the representations of the affected party appellant, I find that the information at issue was not “supplied” for the purposes of section 10(1).

Similarly, I find that the information at issue in the sub-lease was also not “supplied” for the purposes of section 10(1). Again, the information at issue is the actual dollar amounts of the financial information of the sub-lease, and not its terms. Based on the representations of the affected party appellant I find that this information was also negotiated between itself and the affected party and was not “supplied”.

I find that the affected party appellant has failed to meet the requirements of part 2 of the section 10(1) test, as the information at issue was not supplied to Exhibition Place. I find that the information at issue does not qualify for exemption under section 10(1) of the *Act*.

I will proceed to now consider whether the information should be withheld under section 11.

ECONOMIC AND OTHER INTERESTS

Exhibition Place submits that sections 11(c), (d) and (e) of the *Act* apply in the circumstances of this appeal. These sections state:

A head may refuse to disclose a record that contains,

- (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;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution;

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 (Toronto: Queen’s Printer, 1980) (the Williams

Commission Report) 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.

For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, the institution must provide “detailed and convincing” evidence to establish a “reasonable expectation of harm”. Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers’ Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(c) and (d)

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 [Order P-1190].

However, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution’s economic interests, competitive position or financial interests for the purpose of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

Section 11(e)

In order for section 11(e) to apply, the institution must show that:

1. the record contains positions, plans, procedures, criteria or instructions,
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations,
3. the negotiations are being carried on currently, or will be carried on in the future, and

4. the negotiations are being conducted by or on behalf of an institution [Order PO-2064].

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536].

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598].

The term “plans” is used in section 11(e). Previous orders have defined “plan” as “. . . a formulated and especially detailed method by which a thing is to be done; a design or scheme” [Orders P-348 and PO-2536].

Representations

In support of its section 11 claims, Exhibition Place submits that disclosure of the information at issue would lead to:

- Current private sector partners modifying their behaviour and either deciding to not do business with Exhibition Place or to decrease the amount they would be willing to pay to lease the Ricoh Coliseum (section 11(c) and (d)).
- Future proponents having information about Exhibition Place’s strategies, proposed rental rates, operating costs would use this information to negotiate a lower price to lease the Ricoh Coliseum thus resulting in a loss to Exhibition Place (section 11(e)).

Exhibition Place specifically states:

One of Exhibition Place’s primary functions is to preserve and maintain its capital assets and preserve heritage structures, such as the Ricoh Coliseum, in a state of good repair. Private sector participation in this development has been pursued from the outset. Partnership with the private sector is of great importance to Exhibition Place and achieves numerous public objectives. Disclosure of the severed portions of the documents will, in fact, directly harm the ability of Exhibition Place to receive information required for the optimal preservation and management of its assets, thereby adversely affecting Exhibition Place’s economic and financial interests.

In response to Exhibition Place’s position, the original requester appellant submits that disclosure of the information at issue would not result in the harms contemplated in sections 11(c) and (d). The original requester appellant emphasizes that the information in the lease and sub-lease are part of binding contracts between the three parties and disclosure will not have the effect of terminating these contracts. The appellant concludes by stating:

The respective rights to operate and earn a living are set out and protected in the lease; in the meantime, the only impact of full disclosure at this time is that the public will have the benefit of knowing the old terms to assist with their due diligence when making a proposal for the next term. Even upon financial disclosure, such terms will be merely historical in nature and [Exhibition Place] is in full control of its asset and has the sole discretion to agree or not to agree to any new terms contained in any new proposals for the next term.

In response to the original requester appellant's submission, the Exhibition Place submitted a mathematical representation of what it thinks would occur should the information at issue be disclosed. As explanation, Exhibition Place states:

By releasing the requested information, New Purchasers will know the minimum value Exhibition Place has accepted for the Ricoh Coliseum. In future dealings, New Buyers will start at the lowest value that Exhibition Place has accepted, adding in the smallest premium the individual New Buyer believes would best their competitors. Disclosing the requested information, would permit the New Buyers to have as much information as possible to afford them the best chance of figuring out what the smallest increase to the current value of the Ricoh Coliseum contract they could offer in future negotiations to best their competitors. Disclosure of the requested information may be economically favourable for the Requester; it is not in Exhibition Place's best interest.

Exhibition Place also presents two other scenarios in which there is no disclosure and Exhibition Place ends up making more money from the non-disclosure. Based on its calculations, Exhibition Place concludes, "there is no possible scenario in which the disclosure of the requested information would result in a higher potential value being received by Exhibition Place."

Analysis and finding

Based on my review of the records and the representations of the parties, I find that none of the claimed exemptions apply to the withheld information.

Section 11(c) and (d) take into consideration the consequences that would result to an institution if the withheld information is released [Order MO-1474]. As stated previously, however, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution's economic interests, competitive position or financial interests for the purposes of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

While I accept Exhibition Place's arguments that it is in the public's interest that it be able to maximize any return it gets from renting the Ricoh Coliseum, I am not satisfied that disclosure of the information at issue could reasonably be expected to lead to the harms identified by Exhibition Place in sections 11(c) and (d).

The information that Exhibition Place seeks to withhold is set out above. From my review, I note that lease and sub-lease were signed in 2005 and thus any information does not represent Exhibition Place's current financial or commercial terms. Further, while I agree that disclosure of this information will reveal to the appellant and competitors of the affected parties how much Exhibition Place is willing to accept for such terms as: rent, parking costs, insurance, I am unable to find that disclosure of this information will reveal to potential tenants "the minimum value Exhibition Place has accepted for the Ricoh Coliseum". As stated above by the affected party appellant, the lease was a result of confidential negotiations because of the "complex revenue sharing provisions." I have been provided with little evidence that suggests that the affected party appellant or the affected party offered Exhibition Place the minimum value for each of the terms. Rather, it is more likely that Exhibition Place and the parties negotiated the terms and I find that Exhibition Place has the power to agree or disagree to any new terms in any future lease agreements. I am not persuaded that disclosure will result in prejudice to Exhibition Place's economic interests or competitive position, or that it would suffer injury to its financial interests.

I find that Exhibition Place has not provided me with sufficiently detailed and convincing evidence to substantiate its position that future investors will just bid or negotiate the minimum value for renting the Ricoh Coliseum instead of negotiating a competitive rate as the market dictates. Further, Exhibition Place has not provided me with the kind of detailed and convincing evidence that would lead to a conclusion that the affected party appellant and/or the affected party will refuse to do business with Exhibition Place because of the disclosure of the lease and sub-lease terms.

I find support for my reasoning in Order PO-2758. In Order PO-2758, Senior Adjudicator John Higgins reviewed the decision of McMaster University to deny access under section 18(1)(c) [the provincial equivalent to section 11(c)] to the terms of vending contracts it had signed with various third parties. In that appeal, the institution and third parties presented similar arguments about the harms that could be expected with disclosure of the information as were put before me in the present appeal. Senior Adjudicator Higgins reviewed these arguments in the following manner:

Referring to the records at issue in this appeal, McMaster submits:

By revealing certain detailed negotiated financial payments contained in the Records such as rent, royalty payments, payment arrangements and other commercial terms, McMaster's negotiating position is severely compromised when negotiating new agreements. The same can be said in instances where McMaster is attempting to negotiate renewal terms of existing agreements.

McMaster argues that this is the case because:

... the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the

original Service Provider. A precedent of a “floor” or ceiling would be established for any prospective supplier in advance of negotiations.

In dismissing these arguments, the Senior Adjudicator stated:

... McMaster’s arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by *paying more* than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.
[emphasis added]

I agree with the reasoning of the Senior Adjudicator in Order PO-2758 and adopt it for the purposes of my analysis in this order. As stated above, I am not persuaded that disclosure of the information in these records could reasonably be expected to compromise or prejudice Exhibition Place’s bargaining position in relation to other possible leasing opportunities or its efforts to optimize contractual arrangements with other potential partners. I am similarly unconvinced that disclosure of the information at issue could reasonably be expected to be injurious to Exhibition Place’s financial interests. I note that Order PO-2758 was also applied most recently in Order MO-2490 where Adjudicator Daphne Loukidelis found that sections 11(c) and (d) did not apply to the lease terms which also involved Exhibition Place.

As Exhibition Place has failed to provide me with sufficiently detailed evidence to establish a link between the disclosure of the information and a reasonable expectation of either of the harms section 11(c) or 11(d) is intended to protect against, I find that the exemptions do not apply.

Finally, I will address Exhibition Place’s claim that disclosure of the information at issue would disclose its positions, plans, procedures, criteria or instructions intended to be applied to negotiations such that the information should be withheld under section 11(e). As stated above, in order for section 11(e) to apply, Exhibition Place must show that the record contains “positions, plans, procedures, criteria or instructions”. In my view, the information at issue does not contain positions, plans, procedures, criteria or instructions. The information at issue contains figures relating to revenues from rent, parking operating costs and insurance costs. Disclosure of this information only relates to specific terms of the lease and sub-lease and do not disclose Exhibition Place’s positions, plans, procedures, criteria or instructions. As the first part of the test for exemption under section 11(e) has not been met, I find that this exemption does not apply to the information at issue.

ORDER:

1. I order Exhibition Place to disclose the records at issue to the original requester appellant by sending them to the appellant by **April 26, 2010**, but not later than **May 3, 2010**.
2. To verify compliance with this order, I reserve the right to require Exhibition Place to send me a copy of the records disclosed pursuant to order provision 1.

Original signed by: _____
Stephanie Haly
Adjudicator

_____ March 25, 2010