

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2772-F

Appeal MA11-350

Town of Amherstburg

July 31, 2012

Summary: The appellant sought access to a sponsorship agreement between the town and a named company or individual. The town denied access to the agreement as a whole, relying on the mandatory exemption in section 10(1) (third party information), as well as the discretionary exemption in section 11 (economic interests of an institution). An affected party, the company, did not object to disclosure of the agreement, with the exception of one section. This order decides that these exemptions do not apply and directs disclosure of the agreement.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1), 11.

Orders and Investigation Reports Considered: PO-1805, PO-2018, PO-2184, MO-1706, PO-2371, PO-2384, PO-2435, PO-2497, MO-1947, MO-2363, PO-2758.

Cases Considered: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

OVERVIEW:

[1] The Town of Amherstburg (the town) received a request for access to a copy of the sponsorship agreement between the town and a named company and/or a named individual. The town located the agreement between the town and the company (the

affected party). After notifying the company of the request, the town issued a decision denying access to the agreement pursuant to sections 11(c) and (d) (economic and other interests of an institution) and 14(1) (personal privacy) of the *Act*.

[2] The requester (now the appellant) appealed the town's decision. During the course of mediation, the town issued a revised decision advising that section 10 of the *Act* (third party information) was inadvertently left out as an applicable exemption to be applied to the record at issue. The town also advised that it was withdrawing its reliance on section 14(1) and the applicability of that exemption is therefore not an issue in this appeal.

[3] The affected party's representative was contacted during mediation. The affected party provided consent to the release of the entire agreement, with the exception of Article 4. Nevertheless, the town maintains its position that the agreement in its entirety is exempt pursuant to sections 11(c) and (d).

[4] The appellant wishes to have access to the agreement in its entirety.

[5] I invited the town and the affected party to provide representations on the issues initially. The town provided representations; the affected party did not. The town's representations were shared with the appellant in accordance with section 7 of the IPC's *Code of Procedure* and *Practice Direction 7*. The appellant also provided representations which were shared with the town, and the town then provided reply representations.

[6] In this order, I find that the section 10(1) and 11 exemptions under the Act do not apply and order disclosure of the sponsorship agreement.

RECORDS:

[7] The record at issue consists of a six-page Contribution Agreement (sponsorship agreement) dated October 1, 2010.

ISSUES:

- A. Does the mandatory exemption in section 10(1) apply to exempt the record, or part of it, from disclosure?
- B. Does the discretionary exemption in sections 11(c) and (d) apply to the record?

DISCUSSION:

[8] Under section 42 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of it falls within one of the

specified exemptions lies upon the institution. Affected parties who rely on the exemption in section 10 of the *Act* to resist disclosure share with the institution the onus of proving that this exemption applies.

Issue A. Does the mandatory exemption in section 10(1) apply to exempt the record, or part of it, from disclosure?

[9] The town relies on the application of sections 10(1)(a) and (c), which 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;

[10] 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.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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].

[11] For section 10(1) to apply, the institution and/or the third 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), (b), (c) and/or (d) of section 10(1) will occur.

[12] Even assuming that the record contains commercial or financial information, as submitted by the town, I find that the section 10(1) exemption does not apply as there is nothing before me to establish that the information in the agreement was "supplied" to the town.

[13] 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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

[14] There are two exceptions to this general rule which are 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products [Orders MO-1706, PO-2384, PO-2435, PO-2497].

[15] The town's submissions do not address whether the information in the sponsorship agreement was "supplied" by the affected party, or whether disclosure of the information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information. The town's representations on section 10(1) are essentially that the affected party is a commercial enterprise, that it has entered into and may in the future enter into similar sponsorship agreements, and that disclosure of the terms would prejudice the bargaining position of the affected party in the future. As I have indicated, the affected party did not provide representations.

[16] On review of the representations and the record, I see no basis for departing from the general approach of this office on the question of whether the contents of a contract can be said to have been "supplied" by a third party. Further, there is nothing before me to establish that disclosure of any of the information in the agreement would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the town.

[17] I conclude therefore that section 10(1) does not apply to exempt any of the information in the agreement from disclosure.

Issue B. Does the discretionary exemption in sections 11(c) and/or (d) apply to the record?

[18] Sections 11(c) and (d) provide:

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;

[19] The purpose of section 11 is to protect certain economic interests of institutions. For sections 11(b), (c), (d) or (g) 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.)].

[20] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363]. Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

[21] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

[22] The town submits that it continues to seek contributions and sponsorships from the community. If the terms of the agreement are made public, it will be constrained in its bargaining position in negotiating other sponsorship agreements. Potential donors or sponsors may have higher expectations, and the town may not be able to negotiate as favourable terms. This may have an impact on the use of public funds.

[23] The appellant's submissions are directed primarily at section 10, but I find they are also relevant to the section 11 exemption. She states that the town has already disclosed key facts from the sponsorship agreement to the public. Specifically, she

points out that the town has told the public the amount given by the affected party, in return for certain specific rights.

[24] The appellant also submits that the town's representations do not provide any detailed or convincing evidence that its economic interests would be harmed by disclosure but, on the contrary, are speculative and vague. The appellant attaches with her representations information about another sponsorship agreement entered into by the town, last year, which was disclosed in full. She states that there is no difference between the two situations.

[25] I invited the town to reply to the representations of the appellant. The town's reply submissions do not address the section 11 exemption directly, and focus on the commercial interests of the affected party, the difference between the affected party and the other party entering into the other sponsorship agreement, and the appellant's motives. It also takes issue with some of the appellant's reasons for wishing to have this information disclosed.

[26] On my review, I find the town has not provided the "detailed and convincing" evidence establishing a reasonable expectation of harm. Essentially, it argues that in order to maximize future contributions from potential sponsors, it needs to maintain the confidentiality of the terms of this agreement. Although it states in general that it continues to seek sponsorships, it has provided no specific evidence of any history of seeking such sponsorship agreements, of any particular negotiations in which it is engaged or plans to enter into, of any practice of not disclosing the terms of such agreements, or of the extent to which it relies on such agreements. In fact, the one example of a prior sponsorship agreement was provided by the appellant, and it undercuts the town's assertions of harm in the disclosure of this type of information.

[27] Further, the town has not addressed the appellant's submission that the key facts of the sponsorship agreement are already known and has not explained how, given this, disclosure of the rest of the agreement could reasonably be expected to lead to the harms specified in section 11.

[28] Although it was not relied on by the town, I note that in Order MO-2555, Adjudicator Cropley withheld the dollar values of sponsorship agreements entered into between the City of Toronto and certain corporations, applying the exemption in section 11. I find the circumstances in Order MO-2555 different from those before me. As I have indicated, the town did not dispute the appellant's information that the key facts, including the dollar value at the heart of this sponsorship agreement, are already known.

[29] In sum, the evidence before me falls short of establishing that disclosure of the sponsorship agreement could reasonably be expected to prejudice the economic interests or competitive position of the town in seeking sponsorship agreements, or be injurious to the financial interests of the town.

[30] I find therefore that sections 11(c) and (d) do not apply to the record. Given my finding, it is unnecessary to consider the town's exercise of discretion in applying section 11.

ORDER:

1. I order the town to disclose the record to the appellant by providing her with a copy by **September 6, 2012** but not before **August 31, 2012**.
2. In order to verify compliance with order provision 1, I reserve the right to require the town to provide me with a copy of the record which is disclosed to the appellant.

Original signed by:
Sherry Liang
Senior Adjudicator

July 31, 2012