

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3019

Appeal MA12-568

The Corporation of the City of London

February 28, 2014

**Summary:** The appellant sought access to monthly event reports for Centennial Hall in London, that were prepared for the city by a third party management company, which had entered into private agreements with other third parties for each of the events listed in the reports. The city denied access to the reports on the basis that they were exempt from disclosure under section 10(1) (third party information). The city's decision is upheld.

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

**Orders and Investigation Reports Considered:** Orders PO-1983, PO-2328 and PO-2781.

### OVERVIEW:

[1] The City of London (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to the following records relating to the management contract for Centennial Hall (the Hall):

- a) Monthly financial statements provided by [specified management company] to the city for the past 5 years.
- b) Annual financial statements provided by [specified management company] to the city for the past 5 years.

- c) All other statements, reports and correspondence from [specified management company] to the city for the past 5 years.
- d) Results of any audits performed by the city on [specified management company] over the past 5 years.
- e) All budget submissions provided by [specified management company] to the city for the past 5 years.
- f) Breakdown of the number and types of events at Centennial Hall for the past 5 years.
- g) Breakdown of the number of tickets, ticket prices and gross revenue per event at Centennial Hall for the past 5 years.
- h) Details of any and all revenues generated by [specified management company] from Centennial Hall for the past 5 years, including without limitation box office receipts, hall rental, concessions, equipment leasing, advertising, and administration or management fees.
- i) All correspondence from the city to [specified management company] for the past 5 years.

[2] The city located 338 pages of records responsive to the request and clarified that in respect of part (d) of the request, it does not perform audits of the Hall, but it does possess copies of audits of the management company conducted by an external auditor. The city also asked the requester to clarify whether part (i) of its request sought access to records of correspondence from its business units or from its Finance Division alone. Finally, the city advised that although it had not yet made a final access decision, the mandatory exemptions in sections 10(1) (third party information) and 14(1) (invasion of privacy) could apply to the responsive records.

[3] Pursuant to section 21 of the *Act*, the city notified the third party management company (third party) whose interests could be affected by disclosure of the records, and invited its views on disclosure. The third party objected to disclosure of any of its information contained in the records, with the exception of the audited statements, which it agreed could be disclosed to the appellant.

[4] The city then issued a decision granting partial access to the records. The city granted complete access to 33 pages of annual audited statements. It granted partial access to the 53 pages of the Hall's calendar of events, relying on the mandatory exemption in section 14(1) to withhold certain personal information relating to private events contained therein. It also relied on the mandatory exemption in section 10(1) to withhold in full 49 pages of records containing the financial details of events at the Hall for the time period in question.

[5] The requester, now the appellant, appealed the city's decision.

[6] During mediation, the appellant confirmed it was not pursuing access to the personal information that was withheld from the 53 pages of records containing the

Hall's calendar of events. As a result, these records and the mandatory exemption in section 14(1) are no longer at issue in the appeal.

[7] A mediated resolution of the appeal was not possible and the appeal was moved to adjudication for an inquiry under the *Act*.

[8] I sought and received representations from the parties and shared these in accordance with section 7 of this office's *Code of Procedure* and *Practice Direction Number 7*.

[9] In this order, I uphold the decision of the city.

## **RECORDS:**

[10] The records at issue in this appeal are the 49 pages of monthly reports containing the financial details of the events held at the Hall from December 2008 to July 2012.

## **DISCUSSION:**

[11] The sole issue for me to determine in this appeal is whether the mandatory exemption at 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,

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

[12] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.<sup>1</sup> 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.<sup>2</sup>

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<sup>1</sup> *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.).

<sup>2</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[13] For section 10(1)(a) 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 commercial or financial 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**

[14] The types of information listed in section 10(1) have been discussed in prior orders:

*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.<sup>3</sup> The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.<sup>4</sup>

*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.<sup>5</sup>

[15] I adopt these definitions for the purpose of this appeal.

[16] The city submits that the records contain both commercial and financial information because they contain details about the events hosted in the Hall including, event names, attendance at the event, the rental rate and tax, and other revenues and costs associated with each event. The city asserts that the information is commercial because it provides details about the services sold to each Hall renter, and financial because it shows the charges made for each of the services sold and the gross and net revenues received by the third party.

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<sup>3</sup> Order PO-2010.

<sup>4</sup> Order P-1621.

<sup>5</sup> Order PO-2010.

[17] The third party also asserts that the information is commercial because it relates to the buying and selling of services, and financial because it reveals pricing practices. It states the information includes performance fees, rental fees, attendance numbers, and bar revenues from events.

[18] The appellant does not address this part of the test in its representations.

[19] I agree with the city and the third party that the event information in the records reveals both commercial and financial information. The records contain details of the commercial transactions between the third party and other third parties who rented the Hall for events, including the rental rate charged by the third party, the bar revenue generated, and the gross and net revenue for each event. I find that all of this information falls within the definition of "commercial information" in satisfaction of the first part of the test. I further find that the records reveal the pricing practices of the third party and profit data, both of which qualify as financial information under the first part of the section 10(1) test.

## **Part 2: supplied in confidence**

[20] 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.<sup>6</sup>

[21] 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.<sup>7</sup>

[22] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.<sup>8</sup>

[23] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential

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<sup>6</sup> Order MO-1706.

<sup>7</sup> Orders PO-2020 and PO-2043.

<sup>8</sup> Order PO-2020.

- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.<sup>9</sup>

### ***Representations***

[24] The city states that it owns the Hall, and the third party manages and operates the Hall under contract with it. The city continues that the third party is responsible for the management of all functions and activities of the Hall, including the daily operation and maintenance of the Hall. The city explains that the third party is responsible for all promotional and marketing activities and approves all rentals in accordance with the schedule of rates listed in By-law A-46, the city's Fees and Charges By-law. The city states that the third party is permitted to amend rental rates to a maximum of 10% without consulting it.

[25] The city submits that the reports at issue were prepared by the third party, which then supplied the reports to its Finance Division. The city states that the third party supplied the reports for internal audit purposes only, and not for public disclosure. The city explains that its Finance Division uses some of the monthly totals from these reports and summarizes them in performance indicators in annual budget documents which are publicly available on its web site; however, the source reports are not published.

[26] The third party states that the reports at issue contain confidential information relating to private contracts between it and other parties. The third party asserts that it does not act on the city's behalf or as the city's agent and the city is not a party to the private contracts which are reflected in the records. The third party submits that in Order PO-2020, information relating to contracts between multiple third parties, as in this appeal, were found to have been supplied in confidence, thereby meeting the second requirement of the section 10(1) test.

[27] The appellant argues that the records were not supplied in confidence, either implicitly or explicitly. It asserts that the records were supplied by the third party to the city under the management agreement entered into between the two. Along with its representations, the appellant provides me with a copy of the agreement between the city and the third party. It refers me to clause 12 of the agreement and notes that although this clause requires the third party to keep certain information received from

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<sup>9</sup> Orders PO-2043, PO-2371 and PO-2497.

the city confidential, this obligation is not reciprocal. The appellant argues that there is no language in the agreement that suggests that any information the third party provides to the city is confidential; and by extension, it argues that there is no explicit confidentiality obligation on the city's part.

[28] The appellant concludes by stating the following:

The fact that the parties turned their minds to the issue of confidentiality when the agreement was signed, and no obligation of confidentiality was included for information flowing from [the third party] to the city, is inconsistent with there being any implicit confidentiality in the supply of the information.

### ***Analysis and findings***

[29] The monthly reports at issue in this appeal that describe the third party's commercial and financial information relating to its management of the Hall were prepared by the third party. The reports contain information that only the third party possesses, specifically, financial and commercial information from its agreements with other third parties who have rented the Hall. On this basis alone, I find that the information at issue was supplied by the third party.

[30] I also note that the information at issue was provided by the third party to the city pursuant to the reporting requirements set out in the agreement between the two parties. Specifically, clause 6(r) of the agreement requires the third party to disclose a statement of gross revenue in a prescribed form on the fifteenth day of each month and to keep its accounts open for inspection by the city and the city's auditors. This reporting by the third party is required in order for the compensation provisions in clause 3 to have effect. The agreement thus requires the third party to disclose its commercial and financial information from its contracts with other third parties to the city for audit and compensation purposes. Previous orders of this office have found information provided by third parties to institutions pursuant to reporting requirements to be supplied for the purpose of part two of the section 10(1) test.<sup>10</sup> I adopt the same approach in this appeal.

[31] The reporting requirement noted above also addresses, in part, the appellant's argument that the information was not supplied "in confidence." The appellant argues that there is no explicit or implicit expectation of confidentiality because the management services agreement between the third party and the city does not include such a provision. The appellant argues that the information was not supplied in confidence because clause 12 obligates only the third party to maintain the

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<sup>10</sup> See for example, Orders PO-1983, PO-2328 and PO-2781.

confidentiality of any information it receives from the city, with no reciprocal duty of confidentiality on the city. I am not persuaded by this argument.

[32] The evidence before me is that the third party supplied the reports to the city for the city's internal audit purposes and pursuant to its agreement with the city, and not for public disclosure. The city advises that although some information on monthly totals is extracted from the reports for use in the city's annual budget documents which are publicly available, the source reports are not published. As noted above, the commercial and financial information contained in the reports is derived from private agreements entered into between the third party and other third parties; the city is not a party to these agreements. I have no evidence that the information at issue is publicly available. Based on the above, I am satisfied that the third party had an implicit expectation of confidentiality which was reasonable and based on objective grounds.

[33] I find that the information at issue was supplied in confidence in satisfaction of the second part of the section 10(1) test.

### **Part 3: harms**

[34] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm." Evidence amounting to speculation of possible harm is not sufficient.<sup>11</sup>

[35] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.<sup>12</sup>

[36] 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 10(1).<sup>13</sup> Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.<sup>14</sup>

### ***Representations***

[37] The city submits that disclosure of the detailed commercial and financial information in the reports would significantly prejudice the competitive position of both

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<sup>11</sup> *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

<sup>12</sup> Order PO-2020.

<sup>13</sup> Order PO-2435.

<sup>14</sup> Order PO-2435.



the third party and the Hall. It states that there are many other venues in the city which are capable of hosting events such as concerts, dances, dinner dances, conventions, exhibitions, banquets, trade shows and the like. The city advises that these other venues do not release to the public the details of each of their events because of the competitive nature of their business. It argues that disclosure of the attendance and financial details of each event could lead to a loss of business because the third party's and/or the Hall's competitors would target market the third party's customers to lure business away from them.

[38] The city also notes that an analysis of performing arts centres and theatres recently completed by KPMG on behalf of the City of Hamilton reported that Centennial Hall "the only theatre that is not managed by its respective municipal owner is the one with the lowest annual [municipally funded] subsidy." The city asserts that any loss of business would likely lead to an increase in the municipal subsidy which comes from taxpayers and therefore, it is in the public interest not to disclose the records.

[39] The third party submits that disclosure of the information at issue would be highly prejudicial to its competitive position in the marketplace. It further asserts that if the rates and returns associated with performances that are revealed in the records were disclosed, its competitors could use the information to undercut it in the negotiation of contracts with promoters, performers and customers, and therefore, disclosure could reasonably be expected to prejudice its competitive position.

[40] The appellant does not address this part of the test in its representations.

### ***Analysis and findings***

[41] Bearing in mind that the informational assets of the third party that are at issue here relate to private agreements it has entered into with other third parties, I am satisfied that disclosure of the records could reasonably be expected to prejudice significantly the competitive position of the third party or interfere significantly with its contractual negotiations.

[42] The records contain confidential information about the third party's pricing practices and profits. I accept the evidence before me that information on the pricing practices and profits of other venues in competition with it is not published. I also accept the argument that the performance venue industry is competitive and I find that disclosure of the information would give the third party's competitors a list of its customers for targeted marketing in respect of future venue rentals. Disclosure of the reports would also reveal information about the third party which it in turn could not access from its competitors, thereby placing the third party at a competitive disadvantage. I find it is reasonable to expect that the third party's competitors could use the information to undercut its negotiations with existing and future clients and contracts and render the third party less competitive.

[43] I also note that the city's publication of the rental rates for the Hall and its disclosure that the third party is permitted to vary these rates by a maximum of 10% under the management agreement, go a considerable way towards meeting the objectives of accountability and transparency contemplated by the *Act*.

[44] In summary, I find that disclosure of the commercial and financial information of the third party contained in the monthly reports prepared by it and supplied in confidence by it to the city, could reasonably be expected to significantly interfere with the third party's competitive position and contractual negotiations in satisfaction of all three parts of the test under section 10(1). Accordingly, I further find that the records are exempt from disclosure under section 10(1)(a).

**ORDER:**

I uphold the city's decision and dismiss the appeal.

Original signed by: \_\_\_\_\_  
Stella Ball  
Adjudicator

\_\_\_\_\_ February 28, 2014