

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3266-F

Appeal MA13-391

Exhibition Place

November 26, 2015

Summary: This is the final order in the appeal in which the sole issue is whether a portion of a record relating to the evaluation of a proposal submitted to Exhibition Place is exempt under section 10(1) (third party information) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). In this order, the adjudicator finds that the information at issue is exempt under section 10(1)(a) of the *Act*, and dismisses the appeal.

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

OVERVIEW:

[1] This is the final order in this appeal, which disposes of the remaining issue as a result of an appeal of a decision made by Exhibition Place. Originally, the City of Toronto (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to all correspondence and communications relating to an advertising sign located on the Canadian National Exhibition (CNE) grounds. The city determined that Exhibition Place may have custody and control of some of the requested records and forwarded a portion of the request to it for response, pursuant to section 18 of the *Act*.

[2] Exhibition Place and the requester clarified the request to include all records pertaining to a particular Request for Proposal (RFP) process for an outdoor billboard

operator, including the proposals of the non-winners, by-law amendments, correspondence, emails and minutes of meetings.

[3] Exhibition Place located responsive records and granted the requester partial access to them. Exhibition Place advised the requester that it withheld portions of the records, claiming the discretionary exemptions in section 7 (advice or recommendations), 11 (economic or other interests) and 12 (solicitor-client privilege) and the mandatory exemption in section 10 (third party commercial information).

[4] The requester, now the appellant, appealed Exhibition Place's decision to this office.

[5] During the mediation of the appeal, the appellant advised the mediator that it was no longer seeking access to the information withheld under section 10 of the *Act*.

[6] On December 31, 2014, the adjudicator assigned to the appeal, Adjudicator Justine Wai, issued Interim Order MO-3147-I, and found that record 142 may be exempt under the mandatory exemption in section 10(1) of the *Act*, which had not been previously claimed by Exhibition Place. Record 142 is Exhibition Place's RFP evaluation document. Interim Order MO-3147-I contained the following order provisions (among others):

- I order Exhibition Place to provide written notice to the third party identified in Record 142 of the potential disclosure of the portions of the record in which they may have an interest, for which the section 7 exemption claim was not upheld. This notice must be provided by the third party by **February 2, 2015** and a copy of it sent to my attention.
- I order Exhibition Place to issue a decision letter to the appellant and the third party regarding access to Record 142 in accordance with section 21(7) of the *Act*, with a copy sent to my attention.
- I remain seized of the issues in this appeal pending final determination of all outstanding issues.

[7] The appeal was then transferred to me for final disposition. In accordance with Interim Order MO-3147-I, Exhibition Place notified a third party (the affected party) in regard to record 142 and subsequently issued a new decision letter to the appellant, granting partial access to it. Exhibition Place withheld portions of page 3 of the record, claiming the application of the mandatory exemption in section 10(1) (third party information). The appellant advised this office that he continues to seek access to the withheld information.

[8] I then provided Exhibition Place, the appellant and the affected party with the opportunity to provide representations regarding the application of section 10(1) to page 3 of record 142. Exhibition Place provided representations. When contacted by

this office, the affected party advised that its comments were incorporated into Exhibition Place's representations. The appellant advised this office that it would not be making representations.

[9] In its representations, Exhibition Place advised that it is willing to disclose the withheld information in the lower section of page 3 of the record because this information relates to the scoring of the RFP. Given Exhibition Place's position on this issue and the fact that the affected party's comments formed part of Exhibition Place's representations, the information in the lower part of page 3 of the record is no longer at issue. If it has not done so already, Exhibition Place should disclose this information to the appellant, and I will order it to be disclosed.

[10] With respect to the remaining information at issue, for the reasons that follow, I uphold Exhibition Place's decision and dismiss the appeal.

RECORD:

[11] The remaining information at issue is contained in the upper half of page 3 of record 142.

DISCUSSION:

[12] The sole issue is whether the information at issue is exempt from disclosure under section 10(1)(a).

[13] Section 10(1) states, in part:

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;

[14] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.¹ 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

¹ *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.) (*Boeing Co.*).

parties that could be exploited by a competitor in the marketplace.²

[15] 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.

Part 1: type of information

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

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.³

[17] Exhibition Place submits that the withheld information is “financial information” for the purposes of section 10(1) because it contains the affected party’s detailed financial figures regarding lump sum payments, base rent and percentage of revenue. This information, Exhibition Place states, was taken from the affected party’s RFP submission and relates directly to proposed costs and rental figures for the operation of an outdoor billboard.

[18] Having reviewed both Exhibition Place’s representations and the information at issue, I agree with Exhibition Place and find that the information consists of “financial information” as contemplated in section 10(1). The information sets out various lump sum payments, base rent and percentage of revenue figures, constituting specific data relating to money and its use or distribution. Essentially, the information at issue sets out the affected party’s pricing practices with respect to its proposed operation of a billboard.⁴

[19] Consequently, the first part of the three-part test in section 10(1) has been met.

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ Order PO-2010.

⁴ I note that the affected party was the non-successful proponent in the RFP process.

Supplied in confidence

[20] The requirement that the information was “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁵ 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.⁶

[21] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[22] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- treated consistently by the third party in a manner that indicates a concern for confidentiality;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.⁸

[23] Exhibition Place submits that the information at issue was supplied to it by the affected party within its submission in response to the RFP, and that the affected party had a reasonable expectation of confidentiality with respect to this information, given the competitive nature of the RFP process.

[24] Exhibition Place also advises that, at the time of the request, the affected party objected to the disclosure of its financial information because it would reveal how it chose to bid in the RFP, which is strictly confidential.

[25] The withheld information consists of financial figures setting out the year, lump sum, base rent, percentage revenue and total cost for two scenarios⁹ relating to the

⁵ Order MO-1706.

⁶ Orders PO-2020 and PO-2043.

⁷ Order PO-2020.

⁸ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

⁹ The categories as described were already disclosed to the appellant by Exhibition Place.

operation of a billboard. This information is contained in an evaluation record. I am satisfied that, although the record was created by Exhibition Place staff, the content of the withheld information reflects the financial information that was supplied by the affected party to Exhibition Place in its proposal in response to the RFP. Therefore, while the record itself was not supplied by the affected party to Exhibition Place, the withheld information in it reveals financial information that had been supplied by the affected party to Exhibition Place, or would permit the drawing of accurate inferences with respect to that information, for the purposes of section 10(1). Consequently, I find that the information at issue was “supplied” by the affected party to Exhibition Place for the purposes of section 10(1).

[26] I am also satisfied that this information was supplied with a reasonably-held expectation that it would be treated in a confidential manner by Exhibition Place. The nature of the information itself leads to that conclusion. The information relates to a matter that goes directly to the root of the RFP proposal made by the affected party, describing the pricing practices for the proposed operation of the billboard under the terms of a proposed contract with Exhibition Place. In my view, it is reasonable to find that the affected party intended this information be kept confidential once it was supplied to Exhibition Place.

[27] Consequently, I find that the information at issue was “supplied in confidence” for the purposes of section 10(1) and that the second part of the test in section 10(1) has been met with respect to this information. I will go on to determine whether the third part of the test has been met.

Part 3: harms

[28] The party resisting disclosure must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.¹⁰

[29] 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 the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.¹¹

[30] Exhibition Place submits that the information at issue consists of the affected party’s pricing structure, the disclosure of which could permit a competitor to underbid the affected party in any future RFP, which would prejudice the affected party’s

¹⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

¹¹ Order PO-2435.

competitive position significantly,¹² cause it undue loss,¹³ or result in undue gain to the competitor. The affected party advised Exhibition Place that the disclosure of the information at issue would reveal commercially sensitive material that would otherwise impact its ability to submit future competitive proposals to Exhibition Place and others.

[31] Further, Exhibition Place argues that the sign industry is a small industry with only a few companies owning or operating the majority of signs in the City of Toronto.¹⁴ Exhibition Place goes on to state:

It is conceivable that the Requester could use the information provided by the Third Party in response to the RFP to make inferences about the Third Party, including about its financial status, and the manner in which it chose to bid to the RFP, to gain a commercial advantage in the larger media marketplace.

[32] Lastly, Exhibition Place argues that it is important to companies that do business with it to know that their detailed bids will be held in confidence, and that if their core financial information is disclosed, they may avoid the tendering process in future.

[33] Based on my review of Exhibition Place's representations and the record, I am satisfied that a risk of harm that is well beyond the merely possible or speculative has been established with respect to its disclosure. I find that the record contains sufficient financial information which, if disclosed, could reasonably be expected to prejudice significantly the affected party's competitive position. The information I find exempt consists of detailed pricing information, broken down by year, lump sum and percentage of revenue. In keeping with past decisions of this office in which this type of information has been found to be exempt, I find that the information at issue could be exploited by competitors in the marketplace. I am also satisfied that Exhibition Place has provided adequate evidence that the sign industry marketplace in the City of Toronto is sufficiently limited in scope to the extent that the disclosure of the detailed pricing breakdown could reasonably be expected to prejudice significantly the affected party's competitive position. Accordingly, I find that the detailed financial information at issue qualifies for exemption under section 10(1)(a) of the *Act*. Having made this finding, it is not necessary for me to consider the application of section 10(b) or (c) to this information.

¹² See section 10(1)(a).

¹³ See section 10(1)(c).

¹⁴ For example, Exhibition Place cites information contained on the Out-Of-Home Marketing Association of Canada website (<http://www.omaccanada.ca>).

ORDER:

1. I uphold Exhibition Place's decision to withhold the information in the upper half of page 3 of record 142.
2. I order Exhibition Place to disclose the withheld information in the lower half of page 3 of record 142. by **December 31, 2015** but not before **December 23, 2015**.
3. I reserve the right to require Exhibition Place to provide this office with a copy of the record it discloses to the appellant.

Original Signed by: _____
Cathy Hamilton
Adjudicator

_____ November 26, 2015