Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3290

Appeal MA14-346

Exhibition Place

February 24, 2016

Summary: A request was made under the *Act* to Exhibition Place for a copy of a lease agreement between it and a third party. Exhibition Place decided to disclose the lease, in part. The third party appealed Exhibition Place's decision, arguing that certain portions of the lease that Exhibition Place had decided to disclose (the disputed information) are exempt from disclosure pursuant to the exemption for third party information at section 10(1) of the *Act*. In this order, the adjudicator finds that the disputed information was not "supplied" by the third party to Exhibition Place and that, as a result, the section 10(1) exemption does not apply to it. She upholds Exhibition Place's decision and orders it to disclose the disputed information to the requester.

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

Orders Considered: Orders MO-1706, MO-2271, PO-2435 and PO-2384.

OVERVIEW:

[1] The issue in this appeal is whether portions of a lease executed between Exhibition Place and a third party are exempt from disclosure under the exemption for third party information at section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The Board of Governors of Exhibition Place (Exhibition Place) received a request

under the *Act* for access to a lease agreement between a named company and Exhibition Place.

[3] Exhibition Place located the lease agreement (the lease) and notified a third party (the other party to the lease), who objected to its disclosure. Exhibition Place then issued a decision in which it granted access to the lease in part, with portions withheld on the basis of the discretionary exemption for economic and other interests of Ontario at section 11 of the *Act*. However, Exhibition Place did not disclose the record, pending notification of any appeal by the third party within the 30-day appeal period.

[4] The third party (now the appellant) appealed Exhibition Place's decision to disclose any portions of the record, citing the mandatory exemption for third party information at section 10(1) of the *Act* as the basis for its objection. During mediation, however, the appellant agreed that certain portions of the lease could be disclosed. Exhibition Place then provided a redacted copy of the lease to the requester, with some portions withheld based on Exhibition Place's reliance on section 11 of the *Act* and other portions withheld based on the appellant's claim of an exemption under section 10(1).

[5] After reviewing the redacted lease, the requester advised the mediator that she is not appealing Exhibition Place's decision to withhold portions of the lease in accordance with section 11. That information, therefore, is not at issue. The requester confirmed that she still seeks access to the information that the appellant claims to be exempt under section 10(1) of the *Act*; this is the information at issue in this appeal.

[6] As further mediation was not possible, the file was moved to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry under the *Act.* I began my inquiry by seeking and receiving representations from the appellant. I then shared the appellant's representations with the requester and Exhibition Place and invited them to file representations, but they did not do so.

[7] In this order, I find that section 10(1) does not apply to the information at issue. As a result, I uphold Exhibition Place's decision and order it to disclose the information at issue to the requester.

RECORD:

[8] The record is a lease agreement between the appellant and Exhibition Place. The information remaining at issue consists of the portions of the lease that the appellant claims are exempt from disclosure under section 10(1). I will refer to those portions in this Order as the "information at issue", the "disputed portions" or the "disputed information".

ISSUES:

[9] The issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the disputed portions of the lease.

DISCUSSION:

[10] The appellant relies on sections 10(1)(a) and (c) of the *Act*, 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; or

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

[12] For section 10(1)(a) or (c) to apply, the appellant, as the party resisting disclosure, 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;

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 paragraphs (a) and/or (c) of section 10(1) will occur.

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[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.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[13] I will now consider each part of the test in turn.

Part 1: type of information

[14] The appellant submits that the disputed portions of the lease constitute commercial information as contemplated in section 10(1) of the *Act*. "Commercial information" has been discussed in prior orders as relating 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.[3]

[15] I find that the entire lease pertains to a commercial arrangement between the appellant and Exhibition Place to lease certain premises from Exhibition Place. I find, therefore, that the disputed portions of the lease contain commercial information.

Part 2: supplied in confidence

Supplied

[16] 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.[4]

[17] 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.[5]

[18] The contents of a contract involving an institution and a third party do not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, are 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.[6]

[19] 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

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[3] Order PO-2010.
[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.
[6] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

information supplied by the third party to the institution.[7] The immutability exception applies where the contract contains information supplied by the third party that is not susceptible to negotiation. Examples of such information include financial statements, underlying fixed costs and product samples or designs.[8]

Representations

[20] In support of its contention that the disputed information was "supplied" to Exhibition Place, the appellant submits that both the "inferred disclosure" and "immutability" exceptions apply.

[21] In support of its argument that the "inferred disclosure" exception applies, the appellant submits that disclosure of the disputed information would permit third parties and, in particular, persons familiar with the industry in which it operates, to make inferences with respect to the appellant's business strategy and plans regarding the use and development of the leased premises, the investments to be made into the building and other similar information.

[22] In particular, the appellant argues that disclosure of sections of the lease which refer to its term would permit its future business plans to be inferred. It argues, further, that the permitted and prohibited uses of the leased premises "speak volumes" as to appellant's intentions and as such, represent a form of trade secret crucial to the success of its business. It submits that in the entertainment and venue context, these provisions are often the subject of heavy negotiations, but are based on non-negotiated commercial realties and business plans.

[23] The appellant submits that the information that can be inferred from the disputed information is not the product of negotiations between the appellant and Exhibition Place. It submits that this information is similar to a business' costs for labour or supplies, and is proprietary and sensitive. It submits that the information has been "supplied" to Exhibition Place in the sense that the contractual provisions contained in the lease allow one to make accurate inferences with respect to it.

[24] With respect to the "immutability" exception, the appellant cites previous orders of this office that have found that this exception applies to information that is immutable or not susceptible to change, such as the operating philosophy of a business, or a sample of its products. It submits that the disputed information reveals its intentions and plans, and that these plans are intimately and inextricably linked to its overarching business model and operating philosophy.

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[7] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[8] *Miller Transit*, above at para. 34.

Analysis and findings

[25] As noted above, the provisions of a contract are generally treated as mutually generated, rather than "supplied" by a 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. In Order MO-1706, Adjudicator Bernard Morrow stated:

> [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.

[26] In Order MO-2271, Adjudicator Laurel Cropley considered the application of section 10(1) to a lease between Exhibition Place and a third party. In rejecting the third party's argument that certain terms of the lease were "supplied" to Exhibition Place, Adjudicator Cropley relied on Order PO-2435, in which Commissioner Brian Beamish stated:

> 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. The 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.

[27] Adjudicator Cropley also concluded that neither the immutability nor the inferred disclosure exceptions applied to the lease with Exhibition Place, commenting as follows:

> Looking at the disputed information on its own, and in conjunction with the Agreement as a whole, I find that it simply sets out the agreed upon terms under which the lease was given. The appellant acknowledges that the Agreement was negotiated and its representations suggest that the information contained in it about the appellant's business use of the property was required in order for the Agreement to be completed. Moreover, 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…
>
> I find that the Agreement sets out the terms and conditions under which the lease has been entered into and is signed by representatives of both Exhibition place and the appellant. I conclude 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*.

[28] Based on my review of the disputed portions of the lease, I conclude that they are the product of negotiations between the parties and were not "supplied" to Exhibition Place by the appellant within the meaning of that term as it is used in section 10(1). While the disclosure of the terms of the lease might permit general inferences to be made about the appellant's business plans, it does not follow that those business plans were "supplied" to Exhibition Place. In my view, it is not enough that certain terms of a contract may, by inference, reveal the parties' general plans, since this would be true of most if not all contracts. Similarly, the appellant submits that while provisions setting out permitted and prohibited uses are often the subject of heavy negotiations in the entertainment and venue context, these provisions are based on non-negotiated commercial realities and business plans. However, I observe that all parties to contracts would be expected to have their own interests in mind when negotiating contractual terms. I do not accept that any commercial realities and business plans that could be inferred from the disputed provisions constitute information that was "supplied" to Exhibition Place. I find, therefore, that the "inferred disclosure" exception does not apply.

[29] I also find that the "immutability" exception does not apply. The appellant argues that the disputed information reveals its intentions and plans, and that these plans are intimately and inextricably linked to its overarching business model and operating philosophy. It relies on previous orders of this office that have found that the "immutability" exception applies to information that is immutable or not susceptible to change, such as the operating philosophy of a business. However, the information in dispute is not the operating philosophy of the appellant's business, nor am I persuaded that it would reveal the operating philosophy of the appellant's business. Even if it would, I find again that the fact that general inferences can be drawn about the appellant's interests does not mean that this is information that was "supplied" to Exhibition Place for the purposes of the section 10(1) exemption. In my view, the disputed portions of the lease reflect information that was susceptible to negotiation and terms that were in fact negotiated by the parties. As stated by Adjudicator Steve Faughnan in Order PO-2384:

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively

> "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1). Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) [section 10(1) of the municipal *Act*] is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[30] Based on my review of the disputed information, it is evident that it simply reflects the agreed-upon terms that were the result of negotiation between the parties. The appellant acknowledges that the lease was negotiated. In Order PO-2435, Commissioner Brian Beamish made the following comments regarding Service Level Agreements (SLAs) between the Ontario Family Health Network and various consultants:

> Further, upon close examination of each of these SLAs, 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 his reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.
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> 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).

[31] Similarly, I find, after reviewing the disputed information, that it consists of various clauses that were subject to negotiation by the parties. I find, therefore, that the immutability exception does not apply.

[32] I conclude that the disputed information was not "supplied" to Exhibition Place and that the appellant has failed to meet the requirements of Part 2 of the section 10(1) test.

[33] In its representations, the appellant discusses various harms that it submits can reasonably be expected to occur if the disputed information is disclosed. However, section 10(1) does not exempt from disclosure all information that will cause harm if disclosed. To be exempt from disclosure under section 10(1), information must have been "supplied" to the institution. As I have found that the disputed information was not supplied to Exhibition Place, I do not need to consider Part 3 of the test, that is, whether its disclosure could reasonably be expected to result in either of the harms set out in sections 10(1)(a) and (c).

[34] I conclude that the disputed information is not exempt from disclosure pursuant to section 10(1) of the *Act*.

ORDER:

1. I uphold Exhibition Place's decision to disclose the disputed portions of the lease.

2. I order Exhibition Place to disclose the disputed portions of the lease to the requester by sending her a copy by **April 1, 2016** but not before **March 24, 2016**.

3. In order to verify compliance with provision 2, I reserve the right to require Exhibition Place to provide me with a copy of the record which is disclosed to the requester.

Original Signed by: February 24, 2016

Gillian Shaw
Adjudicator