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

# ORDER MO-2117

## Appeal MA-060055-1

## City of Windsor

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

## NATURE OF THE APPEAL:

The City of Windsor (the City) received the following request under the *Act*:

> Copy of agreement for parking spaces in the municipal garage attached to [an identified building] relating to spots designated for [an identified company].

The City applied the exemptions found in sections 10(1)(a)(b) and (c) (third party information) and 11(c) (economic and other interests) to deny access to the agreement in its entirety.

The requester (now the appellant) appealed the City's decision.

During mediation, the appellant added section 16 of the *Act* (public interest in disclosure) as an issue in the appeal.

No issues were resolved during mediation and the file was transferred to the adjudication stage. I began my Inquiry by sending a Notice of Inquiry to the City and to the company that signed the parking agreement with the City (the affected party), setting out the facts and issues and soliciting representations. I received representations from both the City and the affected party. After reviewing both sets of representations I decided not to send a Notice of Inquiry to the appellant.

## RECORDS:

The record at issue is an agreement between the City and the affected party regarding parking spaces in a garage adjacent to an identified building. Under the terms of the agreement, the City agrees to rent the spaces to the affected party.

## DISCUSSION:

### THIRD PARTY INFORMATION

Section 10(1) (a), (b) and (c) 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;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

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 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**

The City submits that the record contains information that is commercial. The term "commercial information" has been defined in prior orders as follow:

> *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].

The City submits that the information in the record is commercial information:

> The Municipality's position is that the information is of a commercial nature. It relates to the cost of exchange of a marketable commodity, i.e. the rate for parking spaces in a parking garage.

From my review of the record, I find that the record contains commercial information. The record sets out an agreement under which the City agrees to rent parking spaces to the affected

party. Accordingly, I find that the record meets the requirement for part 1 of the test for the application of section 10.

**Part 2: supplied in confidence**

***General***

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].

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 [Order PO-2020].

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
- 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 [Order PO-2043].

***Representations***

The City and the affected party take the position that the record was supplied to the City. The City submits the following:

> It is acknowledged that IPC Orders have generally determined that the provisions of a contract are mutually generated rather than supplied by the third party, even where the contract is preceded by little or no negotiation. There are exceptions to this general principle and the Municipality submits that this is such a case. The contract is between the Municipality as the operator of the parking facility and the [affected party] operator of the retail and office development in which the parking facility is located. The agreement is not only for the benefit of the [affected party] but also for the benefit of a tenant of the [affected party]. It can be inferred that the price for the service was negotiated in confidence because the [affected party] requires the information be kept confidential in order to maintain a competitive position relative to other potential tenants in the facility.

The affected party made no representations as to whether the terms of the lease were "supplied" to the City. With regard to whether the terms of the lease were supplied "in confidence", the affected party stated that:

> …the commercial agreement was negotiated in confidence at the request of the City. The City has not to this day consented to the disclosure of any parking related information.

***Finding***

I have examined the record very carefully and do not agree with the City that this record is an exception to this office's position that the terms of a contract will not normally qualify as having been "supplied", as expressed by Adjudicator Bernard Morrow by in Order MO-1706:

> In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".

The record at issue is a contract for the rental of parking spaces. The terms of the contract were clearly negotiated: costs, rights, and other details had to be determined between the parties. The City's representations indicate that "it can be inferred that the price for service was negotiated …," and the affected party goes further by acknowledging that "the commercial agreement was negotiated …." As noted in Order MO-1706, contractual terms that are the result of negotiations

are not "supplied". Accordingly, I find that the record is the product of a negotiated process and therefore does not contain information that was supplied by the affected party.

I now turn to the City's argument that one of the exceptions to the approach in Order MO-1706 applies. The recognized exceptions apply to information that is "immutable" and not subject to negotiation, or that its disclosure would permit accurate inferences concerning information that was actually supplied in confidence (see Order PO-2485). The fact that the affected party would sublease the parking space to a tenant of the building does not invoke one of these exceptions, nor does it change the fact that the lease was the subject matter of negotiation between the City and the affected party.

Accordingly, I find that the record was not "supplied" to the City and that the record does not meet the second part of the three-part test under section 10(1).

Since the record does not meet part 2 of the test, it is not necessary to consider the "harms" component in part 3, but for the sake of completeness, I will do so.

**Part Three: harms**

***Introduction***

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 [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

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 [Order PO-2020].

***Representations***

The City and the affected party both take the position that the disclosure of the record would significantly prejudice the competitive position of the affected party by revealing parking information which would affect negotiations with future tenants.

The City provided the following with respect to the harms issue in support of its position that the record qualifies under section 10(1):

> The harm to be avoided is to the [affected party's] competitive position in the market for potential tenants. The information discloses important commercial information about the [affected party]. It would negatively impact the [affected

> party's] negotiating strengths or weaknesses with potential tenants and its ability to compete with other operators in the business of retail and office development. This harm is real and not speculative. Once the information is disclosed, the [affected party's] position in the marketplace will be compromised.
>
> The [affected party] has advised the Municipality that if the information were provided it would likely not provide further information to the municipality in regard to the identified building. This will prejudice the City's ability to entice tenants to lease in the downtown core and in this building.

The affected party expresses concern about its retail prospects if its parking availability were to be made public:

> …disclosure of said information would prejudice the competitive position of the owner of the property [the affected party]…in future retail leasing negotiations. Indeed, retail prospects assume that the parking adjacent to the Property is also owned by the [affected party]. In past leasing discussions and negotiations the [affected party] has had to overcome the negative impact created by this lack of joint ownership, which prevents him from offering parking and obliges leasing prospects to enter into separate discussions with the City in regards to parking requirements.

***Finding***

For the most part, the harms outlined in the City and affected party's representations relate primarily to sections 10(1)(a) and (c). As noted above, detailed and convincing evidence of harm must be provided to establish a reasonable expectation of harm. Having carefully reviewed the record, I am not persuaded that disclosing this information could reasonably be expected to result in any of the harms outlined in sections 10(1)(a) or (c) of the *Act*. The information on the availability of parking adjacent to the building is not something that the affected party could reasonably expect to keep undisclosed from prospective tenants or competitors in the Windsor marketplace. On the contrary, by its own representations, the affected party acknowledges that the lack of ownership is an issue that has had to be addressed in the past, suggesting either that the facts of ownership are known in the community or that disclosure of the lack of parking facilities owned by the affected party is provided prior to a tenant signing a lease.

The position of the affected party amounts to saying that the record should not be disclosed as its release would indicate the real owner of the parking space. This is an unusual argument. First, the ownership of this garage is probably quite apparent from its signage, but even if it is not, any curious party could have a title search performed on the parking lot and find, through publicly available sources, the identity of the actual owner. Second, I am unable to conclude that clarity as to who owns the property can be construed as a "harm".

The fact that the affected party does not own parking space adjacent to their building may impact on negotiations with tenants. However, any "harm" caused by this situation is based on the reality of property ownership in the area and not on whether the lease entered into by the City is made public.

The City also refers to information no longer being provided to it by the affected party, and points to this causing harm to its own ability to lease space in this building. This argument could relate to section 10(1)(b), which refers to "similar information" no longer being provided where the continued supply of that type of information is in the public interest. In particular, the City's submission indicates that the affected party "would likely not provide further information to the municipality in regard to the identified building," but does not link the information that would allegedly be withheld with the contents of the record. The City already knows who owns the building, and it is inconceivable that the affected party, if it wishes to continue its parking arrangements with the City, would not continue to negotiate parking agreements as necessary. On this basis, I am not persuaded that there is a reasonable expectation of this occurring.

In summary, I find that a reasonable expectation of the harms in section 10(1)(a), (b) or (c) has not been established. As parts 2 and 3 of the test are not met, the record does not qualify under section 10(1) of the Act.

**ECONOMIC AND OTHER INTERESTS**

Section 11(c) states:

> 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;

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.

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].

***Representations***

The City of Windsor is concerned about the potential harm to downtown Windsor as well as the City's interest in its parking lot:

> The City has a vested economic interest is seeing that tenants locate in its downtown core. The potential harm is not speculative as competitors, if gaining access to the information will be able to use it to the competitive detriment of the City. They will be able to utilize it to command an advantage when negotiating with the [affected party] for leasable spaces in the building, which will, in turn impact on the City's economic interests in its parking facility.

***Finding***

For section 11(c) 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.)].

The City claims that competitors could use information contained in the lease to gain an advantage over the City when negotiating with the affected party for leasable spaces in the building. However, no evidence has been presented regarding the nature of the parking market in Windsor's downtown core. The existence of parking spaces or lots owned by competitors has not been commented on nor has any evidence been provided regarding the competitive nature of the parking market in Windsor. In my view, this is relevant to the issue of whether disclosure of the lease would prejudice the economic position of the City or its competitive position. For example, in view of the business carried on by the tenant of the affected party, parking spaces would need to be adjacent to the building. I have no evidence before me as to whether individuals or companies other than the City own any parking spaces that meet this description or would meet the very specific needs of the tenant. Similarly, I have no evidence to suggest that the City will suffer a competitive disadvantage should the terms of the lease be disclosed.

In summary, I do not find the City's submissions on economic harm to be nearly detailed and convincing enough to meet the section 11(c) test. Accordingly, I find that this exemption does not apply to the record at issue.

**PUBLIC INTEREST IN DISCLOSURE**

In light of the fact that I have determined that the exemptions claimed by the City do not apply to the record at issue it is unnecessary at this time to examine if Section 16 applies to override the exemption.

**ORDER:**

1. I order the City to disclose the responsive record to the appellant by sending a copy to the appellant no later than **December 15, 2006** but not before **December 8, 2006**.

2. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to order provision 1.

Original signed by: November 10, 2006
Brian Beamish
Assistant Commissioner