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

ORDER MO-2287

Appeals MA07-34 and MA07-36

City of Windsor

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NATURE OF THE APPEAL:

The Windsor Spitfires (the Spitfires) are a junior hockey team in the Ontario Hockey League. In October 2006, the City of Windsor (the City) and the Spitfires signed a "Facility Licence Agreement" with respect to a new arena being constructed with public money in the City's east end. The Spitfires will be the main tenant in the new 6,500-seat arena, which has been named the Windsor Family Credit Union Centre (the WFCU Centre), and is slated to open in December 2008.

Shortly after signing this agreement, the City received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The first requester filed a three-part request with the City for a number of records, including the following:

> All agreements, including but not limited to any leases, rent inducement agreements, lease improvements agreements, concession, advertising and ticket agreements, arena naming agreements, [and] management agreements between the City of Windsor, the Windsor Spitfires and their associated organizations, companies and partners relating to the east end arena.

The second requester filed a similar request with the City for the following records:

> Copy of agreement(s) between the City of Windsor and the Windsor Spitfires relating to leases for the proposed east-end arena, including concessions, liquor and food sales, restaurant, naming rights or anything else not listed here.

The City located four records responsive to the two requests. It then issued a third party notice to the Spitfires pursuant to section 21 of the *Act* and invited them to submit representations as to whether the records should be disclosed to the requesters. In response, the Spitfires submitted representations to the City. In particular, they claimed that the mandatory exemption in section 10(1) (third party information) of the *Act* applies to the records, and the City should, therefore, refuse to disclose them to the requesters.

After considering the Spitfires' representations, the City issued decision letters to both the Spitfires and the two requesters, stating that it had decided to disclose the records in their entirety.

The Spitfires (now the appellant) appealed the City's decisions to this office, which opened Appeals MA07-34 and MA07-36. These appeals were not settled in mediation and were moved to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry under the *Act*.

The same records are at issue in both appeals. Consequently, I decided to consider both appeals together and started my inquiry by issuing a Notice of Inquiry to the appellant and the City. In response, the appellant submitted representations to this office. The City decided not to submit any representations. I then issued the same Notice of Inquiry to the two requesters, along with a copy of the appellant's non-confidential representations. One of the requesters submitted representations to this office and one did not.

RECORDS:

I have summarized the records at issue in the two appeals in the following chart:

Record number	Title/Description of record	City's decision	Exemption claimed by appellant
1	Facility Licence Agreement (42 pages)	Disclose in full	Section 10(1)
2	First Amendment to the Facility Licence Agreement (5 pages)	Disclose in full	Section 10(1)
3	Lease Amending Agreement (21 pages)	Disclose in full	Section 10(1)
4	Side Letter Agreement Regarding Facility Licence Agreement (2 pages)	Disclose in full	Section 10(1)

DISCUSSION:

THIRD PARTY INFORMATION

The appellant, which objects to the City's decision to disclose the records at issue to the two requesters, claims that the mandatory exemption in section 10(1) of the *Act* applies to these records.

Section 10(1) 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;
>
> (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
>
> (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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].

Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Third parties who rely on the exemption provided by section 10(1) of the *Act*, share with the institution the onus of proving that this exemption applies to the record or parts of the record (Order P-203).

In the circumstances of this appeal, the City decided to disclose the records at issue, but the Spitfires (the appellant) appealed that decision. Consequently, the onus is on the appellant to prove that the section 10(1) exemption applies to the records at issue.

For section 10(1) to apply, the appellant 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 paragraphs (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In order to satisfy part 1 of the test, the appellant must prove that each record contains one or more of the types of information listed in section 10(1).

The appellant submits that the records at issue all contain "commercial information" and "financial information." The requester that provided representations submits that, "Most of the agreements involve the City of Windsor, which has used almost $70 million in taxpayer funds to build an arena that will be mainly used by the Windsor Spitfires. The agreements did not go out for a public bid and are not commercial in that sense."

I have reviewed the records at issue and agree with the appellant that they contain both "commercial information" and "financial information."

The meaning of these terms has 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 [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].
>
> *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 [Order PO-2010].

The Facility Licence Agreement (Record 1) is a contract between the City and the Spitfires for the WFCU Centre. It addresses matters such as facility user charges, food and beverage sales, and merchandise and advertising. The First Amendment to the Facility Licence Agreement (Record 2) and Side Letter Agreement (Record 4) contain changes or additions to the original agreement. The information in these records relates to the buying, selling and exchange of merchandise and services. I find, therefore, that these records contain "commercial information."

The Facility Licence Agreement also includes a term that sets out the amount of rent that the Spitfires must pay to the City for using the new arena. This information clearly relates to money and refers to specific data. I find, therefore, that this record contains "financial information."

The Lease Amending Agreement (Record 3) is an amendment to the original leasing agreement between the City and the Spitfires for the existing arena (the Windsor Arena) used by the team. It essentially extends the terms of the original leasing agreement to September 1, 2008. The original leasing agreement, which is appended to the Lease Amending Agreement, addresses

matters such as box office services, the sale of food concession and souvenirs, lounge proceeds, and advertising revenues. The information in this record relates to the buying, selling and exchange of merchandise and services. I find, therefore, that this record contains "commercial information."

The original leasing agreement also includes the amount of rent that the Spitfires must pay to the City for use of the Windsor Arena. I find, therefore, that this record contains "financial information."

Given that all of the records reveal "commercial information" and/or "financial information," I find that the appellant has satisfied part 1 of the three-part section 10(1) test.

Part 2: supplied in confidence

For section 10(1) to apply, the appellant must also satisfy part 2 of the three-part test, which is that the information must have been "supplied" to the institution "in confidence," either implicitly or explicitly. Consequently, I will start by determining whether the appellant "supplied" the information in the records at issue to the City. If I find that this information was "supplied" to the City, I will then determine whether it was supplied "in confidence."

Supplied

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]. This approach was upheld by the Divisional Court in the *Boeing* case, cited above.

Orders MO-1706 and PO-2371 discuss two exceptions to the general rule that 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). These may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit an accurate inference to be made with respect to underlying *non-negotiated* confidential information supplied by a third party to the institution.

The "immutability" exception applies to information that is immutable or not susceptible of change.

In its representations, the appellant does not address the previous orders of this office that have found that 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). Instead, it simply asserts that it supplied the information in the records at issue to the City in confidence, both implicitly and explicitly:

> All information supplied by the Windsor Spitfires to the City before, during and after negotiation of the Agreement including, without limitation, the information contained in the Agreement and any subsequent amendments thereto, was supplied by the Windsor Spitfires with the strictest of confidence. Without limiting the generality of foregoing, the said information was, at all times, supplied by the Windsor Spitfires with the reasonable expectation that members of the public domain would not be privy to the same. The foregoing expectations of confidentiality and non-disclosure were codified: (a) by the implied actions of both parties before, during and after negotiations; (b) by verbal and written communications by the Windsor Spitfires at all stages of negotiations including, without limitation, during the City Council meeting wherein the Agreement was presented, discussed and approved; and (c) in the final written form of the Agreement (Section 19.5).

The requester that provided representations cites Orders MO-2117 and MO-1706 and submits that the information in the records at issue was the "subject of negotiations" and was therefore not "supplied" to the City by the Spitfires:

> As was cited in a previous case, Order MO-2117, "The provisions of a contract, in general, have been treated as mutually generated, rather than supplied by a third party …" Also Order MO-1706 states, "Except in unusual circumstances (for example, where a contractual term incorporates a company's secret formula for manufacturing a product, amounting 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."

I have carefully reviewed the records at issue and considered the representations of the parties. In my view, the information in these records was not "supplied" to the City by the Spitfires, for the reasons that follow.

The records at issue are all contracts or related amendments that were reached between the City and the Spitfires. Three of these records relate to the new hockey arena (the WFCU Centre) that is under construction, including the Facility Licence Agreement (Record 1), the First Amendment to the Facility Licence Agreement (Record 2) and the Side Letter Agreement (Record 4). The Lease Amending Agreement (Record 3) relates to the existing hockey arena

(the Windsor Arena) used by the Spitfires and includes the original leasing agreement between the City and the Spitfires for this arena.

None of the parties provided details about the process that led to the agreements between the City and the appellant. However, the appellant's representations refer to "the implied actions of both parties *before, during and after negotiations*" and the "verbal and written communications by the Windsor Spitfires *at all stages of negotiations*." In other words, the contents of the agreements were subject to negotiation and mutually generated, which means that this information cannot be considered "supplied" for the purposes of section 10(1) of the *Act*, subject to the two exceptions set out above.

With respect to the first exception ("inferred disclosure"), there is no evidence before me that would suggest that disclosure of any of this information would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied by the appellant to the City. I find, therefore, that the "inferred disclosure" exception does not apply to the information in the records at issue.

With respect to the second exception ("immutability"), the contractual terms between the City and the appellant in all of the agreements were negotiated and therefore clearly susceptible of change. This includes, for example, the provisions in the Facility Licence Agreement (Record 1) that cover matters such as facility user charges (e.g., rent), food and beverage sales, and merchandise and advertising. I find, therefore, that the "immutability" exception does not apply to the information in the records at issue.

In short, I find that the information in the agreements was the product of a mutual negotiation process between the City and the appellant. It cannot, therefore, be said that the appellant "supplied" the information in these agreements to the City. Consequently, I find that the appellant has failed to satisfy part 2 of the three-part section 10(1) test. Although the appellant submits that it supplied the information in the agreements to the City "with the strictest of confidence," it is not necessary to consider the "in confidence" element of part 2 of the three-part test, because I have already found that the appellant has failed to satisfy the preliminary requirement that it "supplied" the information in the agreements to the City.

In its representations, the appellant also submits that the harms contemplated in part 3 of the three-part section 10(1) test could reasonably be expected to occur if the information in the agreements is disclosed to the two requesters. In particular, it asserts that disclosure of this information "will materially prejudice the competitive position of the Windsor Spitfires and interfere with contractual rights which it possesses" [section 10(1)(a)] and "will result in undue loss, including financial loss, to the Windsor Spitfires" [section 10(1)(c)].

However, the appellant must satisfy all three parts of the section 10(1) test to establish that the records at issue are exempt from disclosure. If the appellant fails to meet any part of this test, the section 10(1) exemption does not apply. Given that I have found that the appellant has failed to satisfy part 2 of the three-part test, the records at issue do not qualify for exemption under section

10(1) of the *Act*. It is, therefore, not necessary to consider whether the appellant has satisfied part 3 of the section 10(1) test.

CONCLUSION

I find that the records at issue do not qualify for exemption under section 10(1) of the *Act*, and they must be disclosed to the requesters. In my view, this finding is consistent with the purposes of the *Act*, which are set out in section 1. This provision gives the public a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific."

The City has expended a significant amount of public funds in recent years to encourage the Spitfires to stay in Windsor, including building a new arena. Consequently, the taxpayers of Windsor have a right to scrutinize the contractual arrangements reached between the City and the Spitfires, to ensure that their elected officials and public servants have acted responsibly and in the public interest. To its credit, the City recognized this principle and its two decisions to disclose the records at issue to the requesters are in accordance with the *Act*.

ORDER:

1. I uphold the City's two decisions to disclose the records at issue to the requesters. I dismiss the Spitfires' appeals of these decisions.

2. I order the City to disclose the records at issue to the requesters by **May 2, 2008** but not before **April 28, 2008**.

Original signed by: March 28, 2008
Colin Bhattacharjee
Adjudicator