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

ORDER MO-2329

Appeal MA-060220-1

The Corporation of the City of Oshawa

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NATURE OF THE APPEAL:

The City of Oshawa (the City) received three requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) from one individual for access to agreements between the City and three named companies in relation to the construction and operation of the downtown sports and entertainment facility in Oshawa, Ontario, commonly known as the "Downtown Sports and Entertainment Facility". The first request was dated October 5, 2005 and resulted in a decision dated November 4, 2005, which was not appealed by the requester. The second request was dated May 31, 2006 and is the subject of this appeal. The third request was dated July 17, 2006 and is the subject of Appeal MA06-272-2.

The request dated May 31, 2006 reads:

> You will recall my previous Freedom of Information request asking for the final contracts, related to the construction and operation of the downtown arena, between the City of Oshawa and (1) [a named Sports and Entertainment company], (2) [a named design and building company] and (3) the [a named junior hockey team in the Ontario Hockey League.]
>
> At that time, your interim response was that no final contracts had been signed.
>
> I now renew my request for the above three final contracts and/or any Letters of Intent pertaining to these matters.

The City issued a decision dated June 8, 2006, advising that it had notified the organization named in part 3 (the affected party) of the request (pursuant to section 21(1) of the *Act*), and that this affected party objected to disclosure of the responsive record pursuant to section 10(1) of the *Act*. Accordingly, the City's decision was to deny access to the record responsive to part 3 of the request.

The requester (now the appellant) appealed the City's decision to deny access, and this office opened appeal MA-060220-1. During mediation, the affected party advised the Mediator that it objects to the disclosure of all records relating to this appeal.

As the City did not respond to parts 1 and 2 of the appellant's three-part request, he submitted a further request for records responsive to the other two parts of the request, which ultimately led to a related appeal, namely, Appeal MA06-272-2, as noted above. As a result, the contracts between the City and the named Sports and Entertainment company, and the named design and building company, are not at issue in the current appeal.

No further mediation was possible, and this file was moved to the adjudication stage of the appeal process.

This office began the inquiry process by sending a Notice of Inquiry to the City, as well as the affected party previously notified by the City. A supplementary Notice of Inquiry was subsequently sent to the City and the affected party inviting them to submit representations on

the facts and issues set out in that Notice. The City declined to make representations on the issues raised in the original and Supplementary Notices, although it provided this office with a copy of the affected party's response to its section 21(1) Notice. The affected party did not respond to either Notice.

The file was subsequently transferred to me to complete the adjudication process.

RECORDS:

The record at issue in this appeal is a contract dated February 1, 2006 between the affected party and the City.

DISCUSSION:

THIRD PARTY INFORMATION

The City and affected party claim that the mandatory exemption in section 10(1)(a) applies to the record at issue. 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;

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 and MO-2287).

For section 10(1)(a) to apply, the City and/or affected 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) of section 10(1) will occur.

As noted above, the City has declined to make submissions on the possible application of section 10(1), and the affected party did not respond to the Notices. The affected party's only submissions regarding the application of section 10(1) are contained in an e-mail that it sent to the City in response to the section 21(1) Notice that the City sent to it. The affected party's response consists of the following paragraph:

> Disclosure of the business deal, including the rights and obligations would prejudice, inter alia, our competitive position vis a vis other OHL Teams, third party service and promotion providers, facility managers and others and we therefore strongly object to the release of any deal information. To the extent that the [affected party's] ownership is attempting to forge collateral business deals, release of this information might prejudice our ability to negotiate.

Part 1: type of information

In order to satisfy part 1 of the test, the affected party must establish that the record contains one or more of the types of information listed in section 10(1). The affected party's submissions do not specify which category of information applies, other than to state that the record relates to "a business deal".

Based on my review of the record, which comprises the executed Facility Licence and Lease Agreement, including three attachments, and an additional executed Agreement relating to the rights and obligations of the parties to the agreement upon the purchase and sale of the franchise, I am satisfied that the information contained in it falls within the definition of "commercial" information. Previous orders have defined commercial information as follows:

> *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].

I note that the information in this record is very similar to one of the records described by Adjudicator Colin Bhattacharjee in Order MO-2287. In that order, Adjudicator Bhattacharjee considered whether section 10(1) applied to a Facility Licence Agreement between the City of Windsor and the Windsor Spitfires, also a junior hockey team in the Ontario Hockey League. He described the nature of the record and his findings as follows:

> 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."

It is apparent on the face of the record in the current appeal that it pertains to a commercial arrangement entered into between the City and the affected party for the Downtown Sports and Entertainment Facility. The information in this record relates to the buying, selling and exchange of merchandise and services. As the record reveals "commercial information", I find that the first part of the three-part section 10(1) test has been met.

Part 2: supplied in confidence

In order to satisfy part 2 of the test, the affected party must establish that the information was "supplied" to City by it "in confidence", either implicitly or explicitly.

Supplied

The requirement that information be "supplied" to an 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 (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 several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which 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 accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected

party to the institution." The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products (MO-2287).

The affected party's submissions to the City did not address this issue.

As noted above, the record is identified as a Licence and Lease Agreement. It contains a number of standard clauses typically found in agreements, as well as terms specific to the agreement reached between the affected party and the City.

In assessing whether the Facility Licence Agreement, which as I indicated above, is very similar to the type of contract at issue in the current appeal, along with the other contracts at issue in that appeal, were supplied in Order MO-2287, Adjudicator Bhattacharjee came to the following conclusions:

> 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.
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> 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.

I find that this analysis is equally applicable to the contract at issue before me and agree with the conclusions. Looking at the contract at issue in this appeal, as a whole, as well as its constituent parts, I find that it sets out the agreed upon terms under which the licence/lease was given. The affected party alludes to the negotiation process in its submissions. 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 licence/lease has been entered into and is signed by representatives of both the City and the affected party. 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*.

Moreover, in the absence of representations on this issue, and based on my review of the Agreement, I find that there is nothing in the body of this document that would fall into the "inferred disclosure" or "immutability" exceptions as set out above.

Accordingly, I find that that appellant has failed to meet the requirements of Part 2 of the section 10(1) test, as neither the Agreement, nor any of its terms were supplied to the City. Although this finding is sufficient to dispose of this appeal, I would like to make two additional comments regarding the other components of the three-part test.

In its e-mail to the City in response to the section 21(1) Notice, the affected party refers to its expectation of confidentiality, and suggests that it would hold the City liable for "improperly" disclosing the record. I note that the confidentiality provision in the agreement specifically contemplates the possible disclosure of the Agreement (or parts of it) in accordance with applicable law. The *Act* is clearly "applicable law" in the circumstances. In notifying the affected party of the request under section 21, the City fulfilled its obligations under the *Act*.

Had the City decided, upon considering the affected party's submissions, that section 10(1) did not apply, it could have issued a decision to disclose the record in accordance with that section of the *Act*. Properly notified of the decision, the affected party would have been in a position to appeal that decision. As an appellant or as an affected party, as is the case in the current appeal, the affected party has been provided an opportunity to participate and have its views heard and considered. Consequently, the decision to disclose and any disclosure made in compliance with an order of this office are not "improper".

In addition, the affected party has expressed concerns about the anticipated harms to its competitive and negotiating positions. In Order MO-1393, Adjudicator Sherry Liang wrote:

> … I acknowledge that the affected party has identified a concern that disclosure of the contractual terms will prejudice it in its negotiations with potential tenants of the new development. The affected party also objects to the disclosure of the "intimate details of our operation (costs and constraints) to our direct competition." There may indeed be harm to the affected party from the disclosure of the information. Nevertheless, section 10(1) of the *Act* does not shield this information from disclosure unless it is clear that it originated from the affected party and is therefore to be treated as the "informational assets" of the affected party and not of the Town. In these circumstances, the record is not exempt from the *Act*'s purpose of providing access to government information.

I agree with these comments. As I noted above, all three parts of the test under this exemption must be established. Having found that the Agreement was not supplied to the City, I find that section 10(1) does not apply to it.

ORDER:

1. I order the City to disclose the record at issue to the appellant, by providing him with a copy of it by **August 22, 2008 but not before August 18, 2008.**

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

Original Signed by: July 17, 2008
Laurel Cropley
Adjudicator