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

ORDER MO-2338

Appeals MA06-439 and MA07-65

City of Toronto

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NATURE OF THE APPEAL:

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 three identified Marina leases. Upon receipt of the request and in accordance with the notification requirements under section 21(1) of the *Act*, the City notified a Marina (the third party) of the request and invited it to make representations on the disclosure of the records.

The third party responded that it objected to disclosure of the records. The City then issued a decision to the third party stating that a decision has been made to grant access, in part, to the leases. The decision also stated that specific financial information related to the third party would not be released, and informed the third party of the right to appeal the decision.

The City also issued an access decision to the requester advising that "a decision has been made to grant access, in part, to the information you have requested", and noted that the third party had 30 days to appeal this decision.

The third party appealed the decision to disclose the records in part, and appeal file MA06-439 was opened by this office. The requester (now the appellant) also appealed the City's decision to sever the records in part, and appeal file MA07-65 was opened. Because these two files involve the same parties and deal with the same records, they were processed together, and both are dealt with in this order.

During mediation, the parties confirmed that the sole record at issue in these appeals is the current lease between the City and the third party.

Also during mediation, the City confirmed that it was relying on the exemptions in sections 10(1)(a) and (c) (third party information), 11(a) and (c) (economic interests) and 14(1) (personal privacy) to withhold portions of the records. The City subsequently provided the appellant with a decision letter reflecting this decision.

The appellant confirmed that she was not pursuing access to the information for which section 14(1) was claimed (an address contained on page 21 of the Record), and this section was removed as an issue in this appeal.

Mediation did not resolve the remaining issues, and these files were transferred to the inquiry stage of the process. A Notice of Inquiry, identifying the facts and issues in the appeals, was initially sent to the City and the third party. The City provided representations in response. In its representations the City indicated that it was no longer applying certain exemptions to certain pages, and it also provided reasons in support of the exemption claims made for the remaining pages. The third party initially requested a lengthy extension of time to submit representations, and this time extension request was denied by the adjudicator assigned to this file. No representations were received from the third party.

The Notice of Inquiry, attaching a copy of the non-confidential portions of the City's representations, was then sent to the appellant. The appellant did not provide representations in response.

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

PRELIMINARY MATTERS

Scope of the appeal

Following the transfer of the file, a representative of this office contacted the appellant, and the appellant confirmed that she was not interested in pursuing access to certain information in the records. Specifically, she indicated that she was not pursuing access to records which set out the qualifications and experience of various identified individuals (pages 90-97 of the attachments to the lease). Accordingly, pages 90-97 are not at issue in this appeal.

Furthermore, the appellant indicated that she was not pursuing access to any specific financial information contained in the records. In the City's initial decision, it had identified the information which it considered to be exempt from disclosure under sections 10(1) and/or 11. On my review of those initial severances, I note that the City had carefully severed information which I consider to be "financial information" [including dollar amounts and percentages (which the appellant is not seeking access to)] from the record. Specifically, the City initially severed portions of pages 3, 4, 15, 17, 18, 26, 39, 40, 70, 77, 78, 80, 81, 84, 88, 103, 104, 105, 110, 111, 112, 113 and 115, and all of pages 79, 85, 86 and 89.

On my review of these pages of the record initially severed by the City, I am satisfied that all of them (except for portions of the severances on pages 77, 80 and 110) contain the type of financial information which the appellant has indicated that she is not pursuing access to. Accordingly, except for portions of the severances on pages 77, 80 and 110, the information severed by the City in its initial decision is no longer at issue in this appeal, and I will not review whether sections 10(1) and/or 11 apply to those severances.

Some severances on pages 77, 80 and 110 contain financial information and are not at issue in this appeal; however, other severed portions of those pages do not contain financial information (specifically, the severed information in item 2 of page 77, in the sixth and the last paragraphs of page 80, and in the second paragraph of page 110) and they remain at issue in this appeal. Accordingly, I will review the possible application of the exemptions to those portions of those pages of the records.

Additional pages of the records

The record remaining at issue in this appeal is a 25-page lease entered into between the City and the third party, with a number of attachments to the lease. One of the attachments (Schedule "C") is a copy of the original Request for Proposal (RFP) sent out by the City. In the package of records initially provided to this office, some alternate pages of this RFP were omitted (apparently due to an inadvertent oversight when double-sided pages were photocopied). The

City has now provided a full copy of the RFP to me (which includes additional pages numbered 34(a), 35(a), 36(a), 37(a), 38(a), 39(a), 40(a), 41(a), 42(a), 43(a), 44(a), 51(a), 52(a), 54(a), 55(a), 56(a), 58(a), 59(a), 60(a), 63(a) and 64(a)). In this appeal, the City and the third party were both parties to the original lease, which included the complete RFP as an attachment. In this order I will address access to the full record remaining at issue (including all pages of the RFP), notwithstanding that not all of the pages were initially provided to this office. In addition, on my review of the additional pages recently provided to this office, I find that portions of pages 35(a) and 36(a) also contain financial information which the appellant has indicated that she is not pursuing access to. Accordingly, I will not review whether sections 10(1) and/or 11 apply to those portions of those pages.

RECORD:

The record at issue is a lease between the City and the third party, along with a number of attachments. The lease is 25 pages in length and has an additional 111 pages of attachments.

As identified above, the financial information severed from pages 3, 4, 15, 17, 18, 26, 39, 40, 70, 77, 78, 80, 81, 84, 88, 103, 104, 105, 110, 111, 112, 113 and 115, and all of pages 79, 85, 86 and 89, as well as portions of pages 35(a) and 36(a), are no longer at issue in this appeal, and are removed from the scope of the appeal. In addition, the appellant is not pursuing access to pages 90-97, nor to a small portion of page 21, and these pages or portions of pages are also removed from the scope of the appeal.

Of the pages remaining at issue, the City takes the position that portions of pages 77, 80 and 110 qualify for exemption under sections 10(1)(a) and (c), and sections 11(c) and (d).

The third party has appealed the City's decision to disclose any portions of the record, and therefore appears to take the position that all of the remaining information qualifies for exemption under section 10(1)(a) and (c).

DISCUSSION:

THIRD PARTY INFORMATION

As identified above, the City denied access to the portions of the record remaining at issue on the basis of sections 10(1)(a) and (c) of the *Act*. The third party also took the position that the record was exempt under those sections, which read:

> 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, where 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;

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 and MO-1706].

For section 10(1) to apply, the City and 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.

I will now review the record at issue and the representations of the parties to determine if the three-part test under section 10(1) has been established.

Part one: type of information

The City (in its representations) and the third party (in its appeal letter) both take the position that the lease and the attachments at issue contain commercial and financial information for the purpose of the first part of the three-part test.

The term "commercial" information has been defined in prior orders 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].

The record at issue is a commercial lease between the City and third party. Based on the representations of the City and my review of the record, I am satisfied that the record contains "commercial" information that falls within the scope of the definition set out above, as it relates to the buying, selling or exchange of merchandise or services.

Since the information at issue qualifies as "commercial", I find that the requirements of Part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

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

Representations

The City's representations in support of its position that the third party supplied the information to the City include representations addressing the financial information it had originally objected to releasing, and which is no longer at issue in this appeal. Although the third party did not provide representations in response to the Notice of Inquiry, in its original letter objecting to disclosure of the record the third party stated that, in its discussions with the City, it was under the impression that the lease would be confidential.

The City's representations state:

> Although normally the contents of a lease agreement will not qualify as having been supplied for the purposes of 10(1) but rather as mutually generated, the City submits that the financial/commercial information at issue, i.e., financial data and commercial data of the third party was supplied to the City and was not negotiated. In addition, the disclosure of certain information would allow one to draw accurate inferences about the third party's projected financial status.

The City also refers to the third party's statement that it was under the impression that the lease would be confidential, and confirmed that the City has always treated the information at issue as confidential.

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 record at issue in this appeal is a lease agreement entered into between the City and the third party. This office has addressed the issue of whether the contents of an agreement or contract between a third party and a government institution have been "supplied" for the purpose of section 10(1) on a number of occasions. Below is a review of a number of orders which address this issue.

Contracts/agreements

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 a third party, even where the contract substantially reflects terms proposed by a third party and where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706, PO-2371]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the *Divisional Court in Boeing v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851; motion for leave to appeal dismissed, Doc.M32858 (C.A.).

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 to change, such as the operating philosophy of a business, or a sample of its products.

In Order PO-2435, Assistant Commissioner Brian Beamish also addressed the issue of whether information provided by one party but incorporated into a contract was "supplied". In that order the Ministry acknowledged that the records at issue in that appeal were contracts, but explained why it believed they still qualify as "supplied". It argued: "Although the Record … consists of contacts, the per diem information in the Appendices of each of these contracts was not a negotiated item….. Proposals submitted by potential vendors in response to government RFPs are not negotiated; a vendor's per diem rates in particular, as contained in their proposals, cannot be a negotiated item. The Ministry either accepts or rejects the proposal in its entirety."

Assistant Commissioner Brian Beamish rejected that approach to part two of the test, and stated:

> As in Order MO-1706, just because [the terms of a contract] may substantially reflect the terms of the RFP, it does not necessarily follow that they were "supplied" by the third parties within the meaning of section 17(1).
>
> 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 [the Ministry], 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 [an agreement] with that consultant. To 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 [the Ministry] is a form of negotiation. In addition, the fact that the negotiation of an acceptable per diem may have taken place as part of [the Ministry] process cannot then be relied upon by the Ministry … to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather, it is the amount being charged by the contracting party for providing a particular individual's services.
>
> Further, upon close examination of each of [these agreements], 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 this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

I adopt the approach to contracts and agreements set out in the orders referenced above, and will apply that approach to the circumstances of this appeal.

Analysis and findings

The record at issue in this appeal is a lease agreement, including the attachments thereto, entered into between the City and the third party.

As identified above, the record at issue is a 25-page lease, along with 111 pages of attachments. On the basis of the information contained in the record, I am satisfied that the attachments are incorporated into and form part of the lease. Based on the authorities discussed above, (and subject to my review of whether any portions of the lease or attachments contain information which may fall into the "inferred disclosure" and "immutability" exceptions), I conclude that all of the information contained in the record consists of mutually generated, essential terms that I find to be the product of a negotiation process between the City and the third party.

I make this finding notwithstanding the fact that one of the attachments (Schedule "D") consists of a proposal which was apparently prepared by the third party and initially provided by it to the City. In my view, by incorporating this document into the agreement, and by having it form part of the agreement, the proposal can no longer be considered to have been "supplied" by the third party. Rather, this document constitutes the agreed, negotiated terms of the agreement.

I have also carefully reviewed the portions of the lease and the attachments remaining at issue to determine whether any portions of them fit within the situations in which the usual conclusion, that the terms of a negotiated contract were not "supplied", would not apply (the "inferred disclosure" and "immutability" exceptions, referred to above). On my careful review of the

remaining portions of the record, I find that the exceptions do not apply to any of the information contained in them.

Although the parties have not provided specific representations on the "inferred disclosure" and "immutability" exceptions, based on the discussion set out in order PO-2384, 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" for the purpose of section 10(1). Accordingly, I carefully considered whether any of the information remaining at issue, including the portions of pages 77, 80 and 110 which were severed by the City in its initial decision and which I have found do not contain "financial information", falls within these terms. On my review of the information remaining at issue, I find that none of the information fits within the exceptions.

Therefore, in the circumstances of this appeal, I find that the portions of the record remaining at issue were not "supplied" by the third party for the purposes of part 2 of the section 10(1) test.

In summary, I find that that the City and the third party have failed to meet the requirements of part 2 of the section 10(1) test, as the information contained in the portions of the agreement remaining at issue was not supplied to the City. As all three parts of the three-part test set out in section 10(1) must be met, I find that the records do not qualify for exemption under section 10(1).

ECONOMIC AND OTHER INTERESTS

As noted above, the City has claimed the application of sections 11(a) and (c) to the records remaining at issue. These exemptions state:

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
>
> (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.

Section 11(a): information that belongs to government

In order for a record to qualify for exemption under section 11(a) of the *Act*, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information
2. belongs to an institution, and
3. has monetary value or potential monetary value.

The term "belongs to" in part 2 of the test refers to "ownership" by an institution. It is more than the right simply to possess, use or dispose of information, or control access to the physical record in which the information is contained. For information to "belong to" an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense - such as copyright, trade mark, patent or industrial design - or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

Examples of the latter type of information may include trade secrets, business-to-business mailing lists [Order P-636], customer or supplier lists, price lists, or other types of confidential business information.

In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the courts will recognize a valid interest in protecting the confidential business information from misappropriation by others [Order PO-1805 and Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.)]

In this appeal, although the City has claimed that portions of the record qualify under section 11(a), it has not provided any specific representations on the application of this exemption.

The record at issue is a lease (including its attachments) entered into between the City and the third party. The only portions of that record remaining at issue for which the City has claimed the application of section 11(a) and (c) are the small severances on pages 77, 80 and 110 which I have found do not constitute "financial information". Based upon my review of these severances, and in the absence of representations on the possible application of this exemption, I have concluded that the withheld information in these severances does not "belong to" the City. I find that I have not been provided with sufficient evidence to demonstrate that these mutually generated, agreed upon terms which formed part of a negotiation process, constitute the intellectual property of the City or are a trade secret of the City. Nor have I been provided with

evidence to indicate that the City expended money, skill or effort to develop the information. Therefore, I find that the information sought to be withheld does not "belong to" the City within the meaning of section 11(a) of the *Act*. Part 2 of the test under that section has not, therefore, been met.

As all three parts of the test must be met, this is sufficient for me to find that section 11(a) does not apply.

Section 11(c): prejudice to economic interests

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].

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.)].

With respect to the application of section 11(c), the City's representations read:

> The City is of the view that the disclosure of the proposed severed details contained in the lease agreement could reasonably be expected to prejudice the City's ability to negotiate revenue percentages with prospective lessees. In particular, [certain percentages are] financial information about the amounts remitted and/or to be remitted to the City, and could be used by prospective commercial marina operators in gaining leverage in their dealings and negotiations with the City. This could reasonably prejudice the City's economic interests or be injurious to its financial interests.

As identified above, the only portions of that record remaining at issue for which the City has claimed the application of section 11(c) are the small severances on pages 77, 80 and 110 which I have found do not constitute "financial information". The City's representations focus on the harm which may result from the disclosure of other portions of the record (namely, certain revenue information). That information is no longer at issue in this appeal.

With respect to the small severances on pages 77, 80 and 110 which I have found do not constitute "financial information", I have not been provided with sufficient evidence to support a finding that the harms set out in section 11(c) would result from the disclosure of those portions of the record. Accordingly, I find that they are not exempt from disclosure under section 11(c).

In summary, I find that the portions of the records remaining at issue do not qualify for exemption under sections 11(a) and/or (c) of the *Act*.

Accordingly, with respect to Appeal MA06-439, I uphold the City's decision to disclose the portions of the records remaining at issue. With regard to Appeal MA07-65, I find that the severed information in item 2 of page 77, in the sixth and the last paragraphs of page 80, and in the second paragraph of page 110, does not qualify for exemption under sections 10(1) or 11.

ORDER:

1. I find that portions of pages 3, 4, 15, 17, 18, 21, 26, 35(a), 36(a), 39, 40, 70, 77, 78, 80, 81, 84, 88, 103, 104, 105, 110, 111, 112, 113 and 115, all of pages 79, 85, 86 and 89-97 are no longer at issue in this appeal, and are removed from the scope of the appeal. For greater certainty, I have highlighted those portions of those pages on the copy of those pages sent to the City along with this order.

2. I find that the portions of the record remaining at issue do not qualify for exemption under sections 10(1) or 11, and I order that they be disclosed to the appellant by **September 26, 2008** but not before **September 22, 2008.**

3. 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.

Original signed by: August 22, 2008
Frank DeVries
Adjudicator