



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

# **ORDER MO-2490**

**Appeal MA08-402**

**Exhibition Place**



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## NATURE OF THE APPEAL:

The requester submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Board of Governors of Exhibition Place (Exhibition Place) for access to:

... all information, documents and records including but not limited to: notes, reports, background materials, memoranda, communications, correspondence, leases, offers to lease and amendments to leases related to [a named third party] which includes any such agreement between Exhibition Place, its parents or subsidiaries and [a named third party] its parents or subsidiaries.

Through discussions between the requester's representative and Exhibition Place, the request was narrowed to three lease documents signed by the identified third party and Exhibition Place.

As Exhibition Place was of the opinion that section 10(1) (third party information) of the *Act* may apply to the lease agreements, it notified the named third party of the request pursuant to section 21 of the *Act*. Section 21 requires notification of parties whose interests may be affected by disclosure of information that might be subject to the third party information exemption at section 10(1) of the *Act*. Section 21 provides an opportunity for an affected party to make submissions on the proposed disclosure before a final decision respecting access is made. In response to the notification, the affected party advised Exhibition Place of its view that section 10(1) would not apply to the records.

Exhibition Place subsequently issued a decision letter granting partial access to the records requested. Access to specific words and financial figures contained in the lease agreements was denied pursuant to sections 11(c) and 11(d) (valuable government information) of the *Act*.

The requester did not file an appeal with this office within the requisite 30-day time limit. However, with the consent of Exhibition Place, this office subsequently accepted the requester's appeal and opened a file to address the issues raised by the appeal of the access decision. A mediator was appointed to explore resolution of the appeal, but a mediated resolution was not possible. Accordingly, the appeal was transferred to the adjudication stage where it was assigned to me to conduct an inquiry.

I began my inquiry by sending a Notice of Inquiry outlining the facts and issues to Exhibition Place, initially, and seeking its representations, which I received. In the representations provided, Exhibition Place raised the possible application of the discretionary exemption in section 11(e) for the first time.

Following the resolution of issues related to the sharing of Exhibition Place's representations, I sent a modified Notice of Inquiry to the appellant, with a copy of the non-confidential portions of the representations, inviting submissions in response. The appellant did not submit representations.

## **RECORDS:**

At issue in this appeal are the withheld portions of an interim lease dated September 22, 2000, a lease dated December 7, 2000, and a lease assignment dated 2001 [no month & day specified].

## **DISCUSSION:**

### **LATE RAISING OF A DISCRETIONARY EXEMPTION**

When I sent the modified Notice of Inquiry to the appellant, I noted that Exhibition Place had provided representations respecting the application of the discretionary exemption at section 11(e) for the first time in its representations. The Confirmation of Appeal that this office sent to Exhibition Place on December 4, 2008 had set January 13, 2009 as the deadline for claiming additional discretionary exemptions. Consequently, I invited the appellant to provide representations both on the possible application of section 11(e) and the late raising of the discretionary exemption. In the usual course, I would have also sought reply representations from Exhibition Place with respect to the late raising issue. However, as stated above, the appellant did not submit representations for my consideration in this appeal. Notwithstanding this fact, given my findings respecting Exhibition Place's claim under section 11, generally, I am satisfied that it is unnecessary to address the late raising issue further for the purposes of this order.

### **ECONOMIC AND OTHER INTERESTS**

Exhibition Place claims that sections 11(c), (d) and (e) apply to the severed portions of the three lease records. The relevant parts of section 11 state:

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;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;
- (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf 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 ...

For sections 11(c) and (d) to apply, Exhibition Place must demonstrate that disclosure of the record “could reasonably be expected to” lead to the specified result. To meet this test, Exhibition Place 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 need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 11 [Orders MO-1947 and MO-2363]. Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act* [Order MO-2363].

#### **Sections 11(c) and (d)**

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 [Orders P-1190 and MO-2233].

However, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution’s economic interests, competitive position or financial interests for the purpose of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

It is arguable that section 11(d) is broader in scope than section 11(c), however, both sections take into consideration the consequences that would result to an institution if a record was released (Order MO-1474).

#### **Section 11(e)**

In order for section 11(e) to apply, Exhibition Place must show that:

1. the record contains positions, plans, procedures, criteria or instructions
2. the positions, plans, procedures, criteria or instructions are intended to be applied to negotiations

3. the negotiations are being carried on currently, or will be carried on in the future, and
4. the negotiations are being conducted by or on behalf of an institution. [Order PO-2064]

The terms “positions, plans, procedures, criteria or instructions” are referable to pre-determined courses of action or ways of proceeding [Orders PO-2034 and PO-2598]. Background information that may have formed the basis for positions taken during negotiations are distinguishable from the positions themselves, and such background information is not exempt under section 11(e) [Order M-862]. The term “plans” is used in sections 18(1)(e), (f) and (g). Previous orders have defined “plan” as “... a formulated and especially detailed method by which a thing is to be done; a design or scheme” [Orders P-348 and PO-2536].

### **Order MO-2271 – Exhibition Place (issued February 8, 2008)**

In the initial Notice of Inquiry, I asked Exhibition Place to comment on Order MO-2271 where Adjudicator Laurel Cropley addressed the issues raised in another appeal of an Exhibition Place decision to grant full access to a lease agreement with a third party. In that appeal, as in this, Exhibition Place had notified the third party of a request for access to the lease as the possible application of the mandatory exemption in section 10(1) was being considered. In that appeal, the notified third party objected to the disclosure of the lease agreement. Notwithstanding the third party’s objection, Exhibition Place granted access to the record, in its entirety.

In the Notice of Inquiry, I observed that Adjudicator Cropley had dismissed the third party appeal and thereby upheld Exhibition Place’s decision to grant access. I also noted that Exhibition Place had not claimed the discretionary exemption in section 11, as it had in the present appeal. I stated:

I am asking Exhibition Place to provide submissions on section 11 with specific reference to the circumstances of Order MO-2271. In particular, what is distinct about the lease agreements at issue in this appeal that distinguishes them from the lease agreement in Order MO-2271 for which Exhibition Place did not claim exemption under section 11?

### **Representations**

Exhibition Place describes the context of its reliance on section 11 of the *Act* in the following manner:

One of Exhibition Place’s primary functions is to preserve and maintain its capital assets and preserve heritage structures ... in a state of good repair. ... Partnership with the private sector is of great importance to Exhibition Place and achieves numerous public objectives. The ability of Exhibition Place to initiate and successfully complete projects ... depends on commercial sensitivity, including the keeping of financial information confidential. If the private sector cannot be

comfortable that they will be dealt with fairly, in confidence and in a business like manner they may not be attracted to invest in these projects. This would have a significant economic impact on finances and lost development opportunities at Exhibition Place.

Exhibition Place takes the position that maintaining the confidentiality of leasing financial terms, rental rates and operating costs is crucial to its competitive position in the real estate market and also its ability to ensure a decent financial return on its investments.

According to Exhibition Place, it

... has dealings with third parties which have not been concluded. Therefore, there always exists the possibility of the transaction falling through, in which case, Exhibition Place might initiate a new round of negotiations. Exhibition Place submits that if this were the case, the information contained in the records could be used by proponents in their submissions at the financial disadvantage of Exhibition Place.

Exhibition Place argues that the “economic interests” of third parties negotiating deals with it are directly opposed to the economic interests of Exhibition Place and the public. Further, Exhibition Place submits that:

Without any knowledge as to Exhibition Place’s minimum acceptable price potential purchasers would be foolish to deny Exhibition Place’s offer (as the price is the maximum acceptable to the purchaser). However, if the severed information is disclosed, the comparative advantage of Exhibition Place in information decreases [sic], and the maximum value that the purchasers would be willing to pay will decrease. Exhibition Place submits that the willingness of an individual to pay does not only depend on his or her intrinsic valuation of the object, but on psychological reference points, such as knowledge of “reserve prices” or previous prices spent to obtain the good. In fact, since the disclosure of the severed information would provide potential partners with information effectively establishing the minimum Exhibition Place will accept for the sale of the good, “reserve price,” their maximum value will then fall to that level, minimizing the potential for profit by Exhibition Place.

Respecting the newly asserted claim for exemption under section 11(e), Exhibition Place submits that “careful review” of the information contained in the records could reasonably reveal its strategies and deliberations in arriving at the acceptance of the financial terms, the proposal rental rates and operating costs.

Finally, and with respect to my request to address the facts and findings of Order MO-2271, Exhibition Place submits that the failure to claim section 11 in that appeal was the result of internal miscommunication, rather than any distinction between the nature of the records at issue in the two appeals.

As noted previously, I did not receive representations from the appellant in this appeal.

### **Analysis and Findings**

Exhibition Place relies on sections 11(c), (d) and (e) to deny access to certain portions of the records describing its leasing arrangements with regard to the redevelopment of the Ontario Government Building on the Exhibition Place grounds. For the reasons that follow, I find that none of the claimed exemptions apply to the withheld information.

Sections 11(c) and (d) take into consideration the consequences that would result to an institution if the withheld information is released [Order MO-1474]. As stated previously, however, the mere fact that an institution, or individuals or corporations doing business with it, may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not necessarily prejudice the institution's economic interests, competitive position or financial interests for the purpose of sections 11(c) and (d) [See Orders MO-2363 and PO-2758].

While I accept that it is in the public interest for institutions to negotiate favourable contractual and commercial arrangements, I am not satisfied by the evidence before me that disclosure of the information at issue could reasonably be expected to lead to the harms identified by Exhibition Place under sections 11(c) and (d).

The information Exhibition Place seeks to withhold from the leasing records consists of the term of the lease, the amount of the annual rent expressed in two forms ("basic" and "participation"), with minimum and maximum figures for the latter, and the amount of money to be allocated to leasehold improvements.

In my view, the evidence provided is not sufficiently detailed or convincing to establish the harms claimed to Exhibition Place's economic, financial or competitive interests. For example, the withheld information at issue in this appeal relates specifically to the agreed upon terms of lease agreements that are nearly 10 years old, and not to Exhibition Place's current financial information generally. In the circumstances, I find the argument that "disclosure of the severed information would provide potential partners with information effectively establishing the minimum Exhibition Place will accept" to be unpersuasive. Accordingly, I am not persuaded that this information could be used by other parties in future unspecified transactions or negotiations to the economic or financial disadvantage of Exhibition Place [Order PO-2632]. Further, in my view, the submissions provided do not support a finding that such unspecified transactions could fall through or that new negotiations could be affected by disclosure.

In Order PO-2758, Senior Adjudicator John Higgins reviewed the decision of McMaster University to deny access under section 18(1)(c) [the provincial equivalent to section 11(c)] to the terms of vending contracts it had signed with various third parties. In that appeal, the institution and third parties presented similar arguments about the harms that could be expected with disclosure of the information as were put before me in the present appeal. Senior Adjudicator Higgins reviewed these arguments in the following manner:

Referring to the records at issue in this appeal, McMaster submits:

By revealing certain detailed negotiated financial payments contained in the Records such as rent, royalty payments, payment arrangements and other commercial terms, McMaster's negotiating position is severely compromised when negotiating new agreements. The same can be said in instances where McMaster is attempting to negotiate renewal terms of existing agreements.

McMaster argues that this is the case because:

... the competitor would have knowledge of the actual pecuniary and commercial terms negotiated between McMaster and the original Service Provider. A precedent of a "floor" or ceiling would be established for any prospective supplier in advance of negotiations.

In dismissing these arguments, the Senior Adjudicator stated:

... McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

I agree with the reasoning of the Senior Adjudicator in Order PO-2758 and adopt it for the purposes of my analysis in this order. As stated, I am not persuaded that disclosure of the information in these records could reasonably be expected to compromise or prejudice Exhibition Place's bargaining position in relation to other possible leasing opportunities or its efforts to optimize contractual arrangements with other potential partners. I am similarly unconvinced that disclosure of the information at issue could reasonably be expected to be injurious to Exhibition Place's financial interests. As Exhibition Place has failed to provide me with sufficiently detailed evidence to establish a link between the disclosure of the information and a reasonable expectation of either of the harms section 11(c) or 11(d) is intended to protect against, I find that the exemptions do not apply.

Exhibition Place also submits that section 11(e) of the *Act* applies to the information, arguing that its disclosure "could reasonably reveal its strategies and deliberations in arriving at the leasing terms." In my view, based on the plain wording of this section and my consideration of the information at issue, such an argument must fail. For the section to apply, the withheld portions of the records at issue must actually contain "positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution." On my review of the leasing records, the information withheld by Exhibition Place



does not contain nor does it constitute “positions, plans, procedures, criteria or instructions.” Rather, as stated previously, the information consists of numbers and figures relating to rent, dates and leasehold improvements. As the first part of the test for exemption under section 11(e) has not been met, I find that it does not apply to this information.

On a final note, I would like to address Exhibition Place’s argument that protecting its development prospects required it to withhold the information related to this commercial arrangement because the private sector must be “dealt with fairly, in confidence and in a business like manner.” As an institution under the *Act*, Exhibition Place has certain rights and responsibilities which, in this context, means providing access to information under its control “in accordance with the principles that information should be available to the public;” and that “necessary exemptions from the right of access should be limited and specific.” The *Act* expressly recognizes that the confidential business information of third parties should be protected through the application of the third party information exemption in section 10(1). It is worth noting that in this appeal, the third party with whom the leasing arrangements were made took the position that section 10(1) did not apply to exempt the records. In my view, this suggests that there is awareness on the part of individuals or corporations doing business with government institutions that sometimes their business objectives must be balanced with the concurrent objective of transparency in public matters. It also recognizes that taxpayers have an important interest in knowing the terms of the agreements entered into by institutions [see PO-2435 and PO-2758]. Moreover, this office’s decisions acknowledge that public review of, and commentary on, the financial arrangements entered into by government institutions is consistent with open and accountable government and does not represent the type of financial injury contemplated by section 11 of the *Act* [Orders MO-2363 and MO-2468-F].

Given my finding that section 11 does not apply, I will order the information disclosed to the appellant.

**ORDER:**

1. I order Exhibition Place to disclose the records at issue to the appellant, in their entirety, by sending them to the appellant no later than **February 9, 2010**.
2. To verify compliance with this order, I reserve the right to require Exhibition Place to send me a copy of the records disclosed pursuant to order provision 1.

Original Signed by: \_\_\_\_\_  
Daphne Loukidelis  
Adjudicator

\_\_\_\_\_  
January 5, 2010