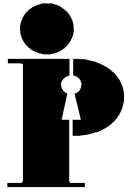

Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-2614

Appeal MA09-266-2 and Appeal MA09-360

Toronto Centre for the Arts

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NATURE OF THE APPEAL:

The Toronto Centre for the Arts (the centre) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to four named corporations. The requester subsequently narrowed the scope of the request to include only the following information:

> records relating to the terms of facility leases and related contracts between [a named production company] and The Board of Directors of the North York Performing Arts Centre in respect to the Toronto Centre for Arts.

In response, the centre identified the responsive records related to the request. Before releasing the documents to the requester, the centre notified an affected party under section 21 of the *Act* to obtain its views regarding disclosure of the records. The affected party objected to the disclosure of portions of the records.

After considering the affected party's representations, the centre issued a final decision that granted partial disclosure of the records to the requester. The centre advised that it was withholding portions of the records on the basis of the mandatory exemption in sections 10(1)(a), (b) and (c) (third party information) and the discretionary exemptions in sections 11(c), (d) and (e) (economic or financial interests).

The requester (the original requester) appealed the centre's decision to withhold any information. The centre's decision to disclose portions of the records is also subject to an appeal by the affected party (the affected party) which was processed as Appeal MA09-360. This order disposes of both appeals.

During mediation, the centre located additional responsive records. In addition to the master and two standard licensing agreements it had previously located, the centre located four amending agreements. The centre provided the original requester with an index describing the new records. The centre again notified the affected party to obtain its views regarding disclosure of the additional records. The affected party again objected to the disclosure of portions of the additional records.

In a supplementary decision, the centre advised the original requester that it would provide partial disclosure to the additional records and it was withholding portions of the records on the basis of sections 10(1)(a), (b) and (c) and sections 11(c), (d) and (e). The original requester also appealed this supplementary decision.

Subsequent to the mediator's report being sent to the parties, the affected party contacted the centre and advised them it was willing to disclose additional portions of the records. After these discussions, the centre issued a further revised decision to the original requester advising of the additional disclosure. After issuing this decision, the centre disclosed a copy of the records to the original requester. The original requester has also appealed this revised decision.

The mediator sent out a revised mediator's report. Subsequent to this, the centre advised the original requester that it was claiming an additional discretionary exemption that it had not identified in its original decision letter. The centre advised that it wished to add section 11(a) (valuable government information) to the exemptions that it was claiming. Accordingly, the late-raising of a discretionary exemption was added as an issue in this appeal[1].

Further, the original requester also indicated to the mediator that the information is in the "broader public interest" and that the issue is of significant public interest, thereby raising the possible application of section 16 (compelling public interest).

A second revised mediator's report was sent to the parties and the file was moved to the adjudication stage of the appeals process where an adjudicator conducts an inquiry under the *Act*.

During the inquiry into this appeal, I sought representations from the centre, the affected party and the original requester. I received representations from the centre and the affected party only. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure* and Practice Direction 7.

RECORDS:

The records remaining at issue consist of the withheld portions of the following:

- Master Licensing Agreement dated March 7, 2008
- First Amending Agreement for Master License Agreement dated January 9, 2009
- Third Amending Agreement for Standard License Agreement dated January 9, 2009
- Standard License Agreement dated December 21, 2007
- Standard License Agreement dated December 21, 2007
- Amending Agreement for Standard License Agreement dated January 31, 2008
- Second Amending Agreement for Standard License Agreement dated July 15, 2008

DISCUSSION:

THIRD PARTY INFORMATION

As the affected party submits that section 10(1) applies to exempt a large portion of the records not claimed exempt by the centre, I will proceed to consider this exemption first.

[1] The centre withdrew its application of section 11(a) during my inquiry and thus this exemption will not be discussed further in this order.

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.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

The centre and the affected party submit that the withheld portions of the records include both commercial and financial information. The affected party submits that the withheld information relates to the rental arrangement it has with the centre, the services that it provides as a result of the use of the centre and, accordingly, qualifies as "commercial information". Further, the affected party submits that the records contain "financial" information as it references pricing information.

Previous orders of this office have defined these two terms as:

> *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].

I adopt these definitions for the purposes of this appeal. The records at issue are the licensing agreements between the affected party and the Board of Directors for the North York Performing Arts Centre (the Board). I find that the information at issue relates to the exchange of services and rental space for payment and that it qualifies as commercial information under section 10(1). Further, I also find that some of the information qualifies as financial information as it relates to the exchange of money between the affected party and the Board under the agreements. Accordingly, the affected party has met the first part of the test for the application of section 10(1).

Part 2: 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. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.)].

There are two exceptions to this general rule which are 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 is not susceptible of change, such as the operating philosophy of a business, or a sample of its products. [Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above)].

In light of this office's past findings on the "supplied" nature of information in agreements, the affected party argues that this office has misinterpreted the meaning of the word "supplied" in the section 10(1) exemption. The affected party submits that:

> …the meaning of the word "supplied" is unclear. In order to resolve this ambiguity, one should refer to both the section's French counterpart and its underlying purpose.
>
> …
>
> The requirement that legislation be enacted in both English and French has important implications. Most importantly, neither version of a bilingual statute enjoys priority or paramountcy over the other. This corollary of bilingual enactment is known as the "equal authenticity rule."
>
> …
>
> The interpretive process begins with a search for the shared meaning between the two versions that is consistent with the context of the legislation and the legislative intent.

Accordingly, the affected party encouraged me to interpret section 10(1) by placing less emphasis on the "supplied" aspect of the exemption, and greater emphasis on the protection of information treated as confidential by third parties. The affected party states:

> Viewed against the backdrop of its French counterpart and its intended purpose, the ambiguity inherent in the meaning of the word "supplied" as it is used in the introductory wording of the exemption has, respectfully, been misinterpreted. Specifically, the word "supplied" in subsection 10(1) has been read in a manner

> that reduces the protection the exemption offers to third parties on the basis of the type or class of document at issue. This interpretation is an overly restrictive one, ignoring both the section's French counterpart and its purpose. The section's French counterpart, which omits any reference to the concept of the requested information having been "supplied" to a government body, instead makes clear that the exemption should turn on the substance, not the form, of the information at issue – if the information at issue is confidential, whether explicitly or impliedly, then it should be treated as such. In accordance with the equal authenticity and shared meaning rules, this version of the *Act* should guide the manner in which the English version is interpreted. More fundamentally, this version of the Act is consistent with the role that a third party exemption was designed to play. The Williams Commission Report envisioned this section protecting third party commercial information to the extent that such information should be treated confidential as a result of the harm it may cause if released, not the on the basis of the form in which the information is contained.

In *Canadian Medical Protective Association* v. *John Doe*, 298 D.L.R. (4th) 134, the Divisional Court made the following comments about the French version of the section 17(1) exemption [the provincial equivalent to section 10(1)], in obiter:

> The CMPA's submission regarding the French language version of a statute was not put before the Adjudicator and, therefore, the CMPA should not be permitted to raise a new interpretive argument at this stage. In any event, the French version of s. 17(1) may be read in a way that implicitly includes the notion of "supplied", as the purpose of s. 17(1) incorporates the idea that the exemption is designed to protect information "received from" third parties, a notion that conforms with the concept of "supplied". Thus, the presence or absence of the verb "supplied" in the French version is not determinative, and the English and French versions may be read harmoniously.

I adopt the Court's rationale for the purposes of this appeal. I do not accept the affected party's argument that there is ambiguity in the meaning of the word "supplied" in section 10(1). The purpose of the section 10(1) exemption is to protect the information assets of third parties where that information is provided to the government. The requirement that these information assets be supplied to the government by third parties is borne out in the Williams Commission Report and I see no reason to deviate from this office's requirement that information be directly supplied by the affected party to the institution, or that disclosure of the information would result in the ability of a requester to draw an accurate inference about the nature of the information supplied.

The affected party submits that disclosure of the information at issue would reveal its commercial and financial information that supplied to the centre on a confidential basis "…in the context of developing a plan to provide a unique theater experience for both theatre-goers and Rights Holders." The affected party further submits:

> …the severances from the records could be used to draw accurate inferences as to the information supplied to the centre by [the affected party]. These severed

> provisions are sensitive business terms and rental rate information that relate directly to [the affected party's] confidential financial models. Consequently, the release of these severed terms would permit the competitors of [the affected party] to make accurate inferences about [the affected party's] confidential business plans.
>
> Specifically, the severances would, if revealed, permit accurate inferences to be drawn as to the provisions for which [the affected party] was willing to bargain. These inferences would reveal the bargaining strength of [the affected party], the points of negotiation at which [the affected part] is vulnerable, and the risk and revenue tolerances of [the affected party]. Knowing what [the affected party] is willing to agree to with respect to the financial terms outlined in the Records amounts to having access to [the affected party's] internal business sensitivities. This sort of information is highly confidential, and if disclosed, competitors could undermine [the affected party's] negotiating position and inflict undue harm on [the affected party] by using this information to the disadvantage of [the affected party].

The affected party provides an affidavit in support of its position that the Master License Agreement was a customized contract between itself and the Board for the use of the Toronto Centre for the Arts. Further, in negotiating the agreements which are at issue, the affected party submits that it supplied sensitive business information and strategies to the centre on a confidential basis.

The centre submits that disclosure of the information at issue would permit the drawing of accurate inferences about the information supplied to it by the affected party for the purposes of negotiating the agreements. The centre states:

> ..both the "Inferred Disclosure" and "Immutability" exceptions apply as during the negotiations, business information and strategies of the third party were presented to the Centre on a confidential basis, to ensure that mutually appropriate contractual terms were negotiated…. The Centre submits that the information in question would be subject to both the "Inferred Disclosure" and "Immutability" exemptions, as a result as disclosure of portions of these agreements will permit the determination by assiduous inquirers of information relating to [the affected party's] commercial relationships with entities other than the Centre, which are not otherwise known to the public.

Based on my review of the records and consideration of the representations of the affected party and the centre, I find that the information at issue in the agreements was not supplied for the purposes of section 10(1) of the *Act*.

In Order PO-2632, Adjudicator Daphne Loukidelis set out this office's approach with respect to the determination of whether information has been supplied for the purposes of section 10(1) in the context of an agreement, stating:

Many previous orders have reached the conclusion that contracts between government and private businesses do not reveal or contain information "supplied" by the private business since a contract is thought to represent the expression of an agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1) [Order PO-2018].

In Order PO-2226, former Assistant Commissioner Tom Mitchinson considered the appeal of a decision regarding a request for access to various sale agreements entered into by the Ontario government and Bombardier Aerospace relating to de Havilland Inc. As in the present appeal, the records at issue in Order PO-2226, consisted of a complex, multi-party agreement with other smaller agreements that flowed from the main one, all of which were multi-faceted with customized terms and conditions. In that appeal, the former Assistant Commissioner was not persuaded by the evidence that the records were "supplied" to the Ministry or would reveal information actually supplied to the Ministry, and had the following to say about the complex multi-party agreement at issue:

> [I]t is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and-forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as "the informational assets of non-government parties", but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

Further, Adjudicator Steve Faughnan provided the following summary with respect to the interpretation of "supplied" in Order PO-2384:

> As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, **agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation.** In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".
>
> As discussed in Order PO-2371, one of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, 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" within the meaning of section 17(1) … **The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed** [see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), Orders PO-2433 and PO-2435] [emphasis added].

In Order PO-2435, the Ministry of Health and Long-Term Care argued that proposals submitted by potential vendors in response to government RFPs, including per diem rates, are not negotiated because the government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish rejected that position and observed that the government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

> 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 release by [Management Board Secretariat (MBS)], 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 a [Vendor of Record] 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 MBS 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 MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.

I agree with the reasoning articulated in Order PO-2632 and the orders excerpted above and will apply it in my analysis of the information at issue.

Both the affected party and the centre submit that disclosure of the information at issue will permit the drawing of accurate inferences about the underlying non-negotiated, confidential information received by the centre from the affected party. In turn, they argue that disclosure will reveal confidential information shared between the affected party and the Rights Holders[2]. However, neither the centre nor the affected party specifies what information from the records

[2] "Rights Holders" is the term coined by the affected party to describe third party producers who own the rights to certain theatre productions. The affected party enters into agreements with these "rights holders" to assist them with the presentation of these theatre productions in Toronto.

they object to having disclosed. The affected party submits that certain terms in the definition section of the Master License Agreement, as well as other terms and financial information were supplied to the centre. I find that this has not been established through the evidence tendered and I am unable to discern the underlying, non-negotiable information that was claimed to have been supplied by the affected party to the centre. Further, I am unable to discern the information that was allegedly supplied by the rights holders to the affected party which was then incorporated into the agreement.

I further reject the centre's argument that the "immutability" exception applies. I find that neither the centre nor the affected party has established that the information at issue was not susceptible to change at the time the agreements were signed. Further, neither of these parties has established that disclosure would allow the drawing of an accurate inference of the immutable information supplied by the affected party to the centre. In my view, the information at issue consists of the type of information which Adjudicator Faughnan in Order PO-2384 described as information that was susceptible to change but was not changed in the negotiation process. Accordingly, I find that the information at issue was not supplied for the purposes of section 10(1) of the *Act*. As each part of the test in section 10(1) must be met and the affected party and the centre have not met the test in part 2, I find that the information remaining at issue in the records is not exempt under section 10(1).

I will now consider whether the information is exempt under section 11 of the *Act*.

ECONOMIC AND OTHER INTERESTS

The centre submits that sections 11(c), (d) and (e) apply to exempt the information at issue. These sections read:

> 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 . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) and (d) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The 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].

The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests [see Orders MO-2363 and PO-2758].

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 [Order P-1190].

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, the institution 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].

Section 11(e) was intended to apply in the context of financial, commercial, labour, international or similar negotiations, and not in the context of the government developing policy with a view to introducing new legislation [Orders PO-2064 and PO-2536].

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].

The term "plans" is used in section 11(e). 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].

The centre makes the following arguments supporting its position that disclosure could reasonably be expected to prejudice its economic interests or competitive position and be injurious to its financial interests:

- The affected party would no longer supply the information at issue to the centre as its competitive position would be harmed. This would negatively affect the centre's ability to obtain full and frank disclosure in making such arrangements.

- Centre's ability to manage its resources under the current agreement and its ability to strategize would be prejudiced.

- Future potential partners would not be willing to enter into arrangements or enter into agreements on terms favourable with the centre if their information is not protected.

- Value of current arrangements will be prejudiced as current partners will find the arrangements less attractive if their information is disclosed.

- Disclosing lease values will affect the amount that the centre will be able to get in the future.[3]

The centre concludes that it has an obligation to maximize the value it receives for its' facilities and disclosure of the financial information at issue would not be favourable to the centre's economic or financial interests.

Regarding the application of section 11(e), the centre submits that the information at issue contains its predetermined course of action or plan of proceeding as the information withheld relates to revenues, duration and potential renewal of the agreements. The centre states:

> …the release of the portions of the requested documents would reveal, either directly or indirectly, the Centre's internal positions, plans, procedures and criteria on various issues which are the subject of negotiations relating to the use of the Centre's facilities. The Centre's knowledge of the costs payable, and timing of such payments permits the Centre to ensure the most favourable outcome for the Centre in negotiations with [the affected party]. If other parties had such information, it would provide the potential that third parties could prejudice the Centre's advantage with respect to negotiating with [the affected party]. The Centre is of the belief that the disclosure of the redacted information would prejudice the Centre in future negotiations, as individuals contrary to the Centre in financial interest would be able to use this information to structure their affairs to their advantage.

While I accept the centre's position that it has an obligation to maximize the value it receives for its' facilities, I am unable to find that disclosure of the information at issue could not reasonably be expected to result in the harms set out in 11(c) or 11(d) of the *Act*. The centre has not provided me with the type of detailed and convincing evidence necessary that it is reasonable to expect the harms in sections 11(c) and (d) could occur.

The centre's arguments focus on the effect of disclosure on its current arrangement with the affected party and its future arrangements with the affected party and other businesses who may seek to enter into similar type agreements with the centre for use of that venue. In my view, the centre's arguments on these harms are speculative at best as they do not contain sufficiently detailed evidence of the circumstances surrounding theatre productions and venue rentals in the city and a link between the information in the agreements. Further, I find the centre's arguments that future business partners will negotiate the minimum rates for lease of the venue should the information in the records be disclosed to be unsubstantiated.

I find support for my finding in Order PO-2758. 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

[3] The centre states: "In fact, since the disclosure of the severed information, would provide potential partners with information effectively establishing the minimum the Centre will accept for the sale of the good, their maximum value will then fall to that level, minimizing the potential profit by the Centre.

about the harms that could be expected to flow from the disclosure of the information, much the same as those that 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.
> [emphasis added]

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 above, I am not persuaded that disclosure of the information in these records could reasonably be expected to compromise or prejudice the centre's bargaining position in relation to other possible 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 the centre's financial interests.

As the centre 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.

Finally, I will address the centre's claim that disclosure of the information at issue would disclose its positions, plans, procedures, criteria or instructions intended to be applied to negotiations such that the information should be withheld under section 11(e). As stated above, in order for section 11(e) to apply, the centre must show that the record contains "positions, plans, procedures, criteria or instructions". In my view, the information at issue does not contain positions, plans, procedures, criteria or instructions. Rather, the records contain figures relating to revenues and rental rates, terms of duration and potential renewal of agreements. Disclosure of this information only relates to specific terms of the agreements and do not disclose the centre's positions, plans, procedures, criteria or instructions. As the first part of the test for exemption under section 11(e) has not been met, I find that this exemption does not apply to the information at issue.

Because I am not upholding the application of the exemptions claimed, it is not necessary for me to consider whether the public interest override in section 16 applies to the records.

ORDER:

1. I order the centre to disclose the records at issue to the original requester appellant by sending a copy of the records to the original requester appellant by **May 31, 2011** but not later than **June 7, 2011**.

2. To verify compliance with this order, I reserve the right to require the centre to send me a copy of the records disclosed pursuant to order provision 1.

Original Signed By: ____________________ April 26, 2011

Stephanie Haly
Adjudicator