

Information and Privacy Commissioner,
Ontario, Canada



Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2728

Appeal MA11-92

Exhibition Place

April 30, 2012

Summary: The appellant made a request to the City of Toronto for a copy of a contract between Exhibition Place and a named company. The city transferred the request to Exhibition Place, which granted access to the contract, in part. Exhibition Place withheld portions of the contract, claiming they were exempt under sections 10 and 11 of the *Act*. During the inquiry stage of this appeal, the affected party notified the adjudicator that it had previously provided the appellant with a complete copy of the contract. In this order, the adjudicator finds that, given that the appellant already has a complete copy of the contract, the appeal is moot and is, therefore, dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended.

Orders and Investigation Reports Considered: MO-2049-F, MO-2218, MO-2525, MO-2571, PO-2756, PO-2879-R, PO-2910 and PO-3057-I.

Cases Considered: *Borowski v. The Attorney General of Canada*, [1989] 1 SCR 342, (SCC).

OVERVIEW:

[1] This order disposes of the issues raised as a result of a decision made by Exhibition Place in response to a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following information:

...**all records and files** that will provide unredacted access to a complete and signed copy, including all schedules and attachments, along with a copy of **any and all** addendums, amendments, changes or deletion whatsoever made to the contract executed between the Board of Governors of Exhibition Place and [named company] relating to Request for Proposal NO. 0801-09-7106, signed between the aforementioned parties on or about September/October 2010.

[2] The request was initially made to the City of Toronto (the city), which subsequently transferred the request to Exhibition Place because it determined that Exhibition Place had a greater interest in the records, pursuant to section 18 of the *Act*.

[3] Upon receiving the request, Exhibition Place notified an affected party who had an interest in the records. After receiving submissions from the affected party, Exhibition Place granted partial access to the responsive record, denying access to portions of the record, claiming the application of the exemptions in sections 10 (third party information) and 11 (economic and other interests) of the *Act*. The requester, now the appellant, appealed Exhibition Place's decision to this office.

[4] During the course of the mediation of the appeal, the appellant advised the mediator that he sought access to all of the withheld portions of the record.

[5] Exhibition Place advised the mediator that it would not disclose any additional portions of the record without the consent of the affected party. The mediator notified the affected party for the purpose of obtaining consent to disclose additional information to the appellant. The affected party advised the mediator that it would not consent to the disclosure of any additional information contained within the record at issue.

[6] The appellant subsequently advised the mediator that he would like to pursue this appeal to the adjudication stage of the inquiry process. The appeal then proceeded to the adjudication stage of the appeal process, where an adjudicator conducts an inquiry. The adjudicator assigned to this appeal sought and received representations from Exhibition Place and the affected party. The file was then transferred to me to complete the inquiry.

[7] Upon review of the affected party's representations, I noted that it raised the possible application of the personal privacy exemption in section 14(1) as an issue. As a

result, I provided the affected party with another opportunity to provide representations on the possible application of section 14(1). In response, the affected party provided representations on section 14.

[8] Subsequently, the affected party notified this office that it had learned the identity of the appellant in this appeal, a party with whom it was in litigation and that prior to the access request, it had provided the appellant with a full, unredacted copy of the record that is the subject matter of this appeal in accordance with its disclosure obligations in the litigation. The affected party also advised that it was taking the position that the appeal was now moot, and provided representations on the issue of mootness.

[9] I then issued to the appellant a further revised version of the Notice of Inquiry which included the issue of mootness, seeking his representations. The affected party's three sets of representations, including its representations on mootness, and Exhibition Place's representations were shared with the appellant in accordance with the IPC's *Practice Direction 7*. I received representations from the appellant.

[10] For the reasons that follow, I find that the appeal is moot and I will not be making a determination on the application of the exemptions claimed by Exhibition Place to the record. As a result, the appeal is dismissed.

RECORDS:

[11] The record at issue in this appeal consists of the withheld portions of a contract between Exhibition Place and a named company dated July 1, 2010. Specifically, parts of pages 7, 8 and Schedule F remain at issue in this appeal.

DISCUSSION:

Is the appeal moot?

[12] The affected party submits that this appeal is moot because it had already provided the appellant with a complete copy of the record at issue prior to the access request as part of its disclosure obligation in the litigation between these parties. The affected party advised that it is involved in litigation with the appellant and the record at issue was listed on its Affidavit of Documents and subsequently disclosed to the appellant. The affected party also affirmed that the copy provided to the appellant was a true copy of the contract that is the sole record at issue in this appeal and that it has not been amended.

[13] The affected party states that there are many decisions of this office that have dealt with the issue of mootness, including Order M-271, in which former Assistant Commissioner Irwin Glasberg stated:

In the ordinary course of events, I would be extremely reluctant to apply the resources of the Commissioner's office to decide an appeal where the appellant is already in possession of the records at issue through legitimate means. In my view, such an exercise would serve no useful purpose.

[14] The affected party submits that Order M-271 stands for the principle that an appeal will have no practical effect and must be denied if the appellant already has the subject document and there are no special factors that would justify adjudication.

[15] The affected party also submits that various orders of this office have cited *Borowski v. Canada*,¹ which is the leading Canadian case on the issue of mootness. *Borowski*, the affected party argues, adds one further factor to the analysis in Order M-217, which is that a court or tribunal may exercise its discretion to adjudicate a moot issue "in cases which raise an issue of public importance of which a resolution is in the public interest." The public interest test set out in *Borowski*, the affected party submits, is a difficult threshold to meet and entails situations where it is necessary to clarify the law on an issue that is of major public importance.

[16] Further, the affected party submits that the appellant has not asserted any special issues or factors and/or any issues of public importance to warrant proceeding with this appeal.

[17] Lastly, the affected party argues that it would be "oppressive" to oblige third parties to waste their resources on a moot appeal, and that this factor should be vigilantly considered by this office in determining whether the present appeal is moot.

[18] In its representations, the appellant did not address the issue of mootness, nor any of the exemptions claimed. The appellant reiterated its request to obtain a copy of the record at issue, in full. The appellant also referred to a previous access request it made to the city for similar information in which access was granted, in full.

Analysis and findings

[19] The issue of mootness arises in appeals where the record has previously been disclosed by the institution, or in some other context. The issue before me, therefore, is whether the appeal is moot with respect to the record at issue because it is already in the appellant's possession. Should I nonetheless proceed to a determination of the

¹ [1989] 1 SCR 342 (SCC).

exemptions claimed for them? For the reasons that follow, I conclude that I should not proceed with such a determination.

[20] In Order P-1295, former Assistant Commissioner Irwin Glasberg considered the question of when an appeal under the *Act* could be considered moot. He stated:

The leading Canadian case on the subject of mootness is the Supreme Court of Canada's decision of *Borowski v. The Attorney General of Canada* [(1989), 57 D.L.R. (4th) 231]. There, the court commented on the topic of mootness as follows:

The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot ...

In the *Borowski* case, Sopinka J., speaking for the court, indicated that a two-step analysis must be applied to determine whether a case is moot. First, the court must decide whether what he referred to as "the required tangible and concrete dispute" has disappeared and the issues have become academic. Second, in the event that such a dispute has disappeared, the court must decide whether it should nonetheless exercise its discretion to hear the case.

[21] The approach taken by former Assistant Commissioner Glasberg, which was to apply the test set out in *Borowski*, has been adopted in several subsequent orders of this office. In particular, adjudicators declined to make a determination in regard to exemptions claimed for records where the requester already had obtained access to the record at issue, rendering the appeal moot. This determination is made where there is not sufficient public interest or importance to decide if the exemptions apply nonetheless.²

² See Orders MO-2049-F, MO-2218, MO-2525, MO-2571, PO-2756, PO-2879-R, PO-2910 and PO-3057-I.

[22] Based on the test for mootness referred to in *Borowski*, I find that the first part of the test has been met as the live controversy, which might have been said to exist between the parties relating to the record, is now at an end because the record has already been disclosed, in its entirety, to the appellant.

[23] Under the second part of the test, I have considered whether the question of access to the record is of sufficient public interest or importance to merit reviewing it regardless of its mootness. The appellant's representations did not address the issue of mootness and it has not provided cogent evidence that the disclosure of the information contained in the record is in the public interest or has some other public importance. Accordingly, I have concluded that no useful purpose would be served by proceeding with my inquiry regarding the application of sections 10 and 11 to the record.

[24] In conclusion, I find that the appeal is moot and I will not be making a determination on the exemptions claimed by Exhibition Place. Accordingly, I dismiss the appeal.

ORDER:

The appeal is dismissed.

Original signed by: _____
Cathy Hamilton
Adjudicator

_____ April 30, 2012