

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2852

Appeal MA11-221

Hamilton Entertainment and Convention Facilities Inc.

March 5, 2013

Summary: The appellant sought copies of current contracts between Hamilton Entertainment and Convention Facilities Inc. (HECFI) and various service providers and sports teams. HECFI initially denied access to the responsive records in their entirety, pursuant to the mandatory third party information exemption in section 10(1) of the *Act*, but later granted partial disclosure of several of the contracts based on third party consent. The adjudicator finds that section 10(1) does not apply and orders disclosure of the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1); *City of Hamilton Act, 1985*, Chapter PR23, as amended by the *City of Hamilton Act, 1998* and *City of Hamilton Act, 1991*.

Orders and Investigation Reports Considered: Orders MO-1706, MO-2490, MO-2614, MO-2753, PO-2371, PO-2758.

Cases Considered: *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (B.C.S.C.).

OVERVIEW:

[1] This order addresses the issues raised by an individual's request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to Hamilton

Entertainment and Convention Facilities Inc. (HECFI)¹ for its “current contracts” with four specified third parties, as well as “any other contractual agreements (current and pending).”

[2] HECFI issued an interim decision letter on April 5, 2011, providing a fee estimate of \$90.00 and advising that disclosure of the contracts identified as responsive to the request might affect the interests of third parties. On April 12, HECFI sent the requester a second letter indicating that it had notified the businesses or entities whose interests might be affected by disclosure of their contracts (the affected parties), as required under section 21(1) of the *Act*.² After considering the views of the affected parties who responded to the notification, HECFI issued an access decision to the requester on May 25, 2011, denying access to the contracts, in their entirety.

[3] The requester (now the appellant) filed an appeal of HECFI’s decision with this office, which appointed a mediator to explore settlement of the issues. During mediation, HECFI confirmed that it is relying on the third party information exemption in section 10(1) of the *Act* to deny access to the records. In addition, the scope of the appeal was narrowed to the contracts with the four entities that had been specifically named in the request.³ One of the contracts was cancelled subsequent to the date of the access request and although it was no longer a “current” contact, HECFI and the appellant agreed that the record would still be included within the scope of the appeal. Finally, because two of the affected parties consented to the release of portions of their contracts,⁴ records 1 and 2, HECFI issued a revised decision disclosing those portions to the appellant. At the end of mediation, the appellant confirmed that he continues to seek access to the withheld portions of all four contracts. Also outstanding at the end of the mediation was the fact that this office had not been provided with a clean, unsevered copy of one of the amending agreements to record 1.

[4] The issues remaining in dispute at the end of mediation were transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator formerly assigned to this appeal started her inquiry by sending a Notice of Inquiry outlining the issues and seeking representations from HECFI and the four affected parties.

¹ Incorporated to “maintain, operate, manage, market and promote Hamilton Place, the Hamilton Convention Centre and the Victor K. Copps Trade Centre-Arena, as social, cultural, educational and recreational facilities for the benefit of the City of Hamilton and in the public interest;...”. Source: preamble to *City of Hamilton Act, 1985*, Chapter PR23, as amended by the *City of Hamilton Act, 1998* and *City of Hamilton Act, 1991*.

² Section 21(1)(a) provides third parties with an opportunity to make submissions to an institution with respect to the possible disclosure of information that may fit within section 10(1) of the *Act*.

³ The contracts that were removed from the scope of this appeal were ones that had been signed by third parties with the City of Hamilton, which is a separate institution under the *Act*.

⁴ Section 10(2) of the *Act* provides for disclosure of records if the person to whom the information relates consents to the disclosure.

[5] The only affected party to provide representations in response to the adjudicator's Notice of Inquiry was the company whose contract with HECFI is record 1.⁵ Although the party whose contract is record 2 did not respond to the Notice of Inquiry, its response to HECFI's notification at the access request stage is contained in the appeal file.⁶ HECFI did not provide representations, but indicated that it continues to rely on section 10(1) to withhold the information at issue.

[6] It was necessary for the former adjudicator to resolve issues around the sharing of the affected party's representations with the appellant through a sharing order, which was issued in accordance with the confidentiality criteria in the *IPC Code of Procedure* and Practice Direction 7 (Sharing of Representations).

[7] In response to the modified Notice of Inquiry sent by this office, the appellant advised that he would not be submitting representations. The appellant indicated that he continues to rely on the positions taken during the initial stages of this appeal, including requirements imposed by the *City of Hamilton Act*⁷ on HECFI.

[8] Following the completion of the inquiry, this appeal was transferred to me to write the order. As HECFI had not yet provided a clean, unsevered copy of the first amending agreement to record 1 as required, further efforts were made to secure a copy from HECFI. When these efforts proved unsuccessful, I requested a fresh copy of this portion of record 1 directly from the relevant affected party, who provided it promptly. I also subsequently obtained additional submissions from the same party on the status of an issue raised in its initial representations.

[9] In this order, I find that section 10(1) of the *Act* does not apply to the records, and I order HECFI to disclose the records, in their entirety, to the appellant.

RECORDS:

[10] At issue in this appeal are contracts between HECFI and four entities: a food services provider (record 1, information withheld from 23 of 37 pages);⁸ a ticketing services company (record 2, information withheld from 7 of 45 pages); a sports club (record 3, entire 9 pages); and a sports team (record 4, entire 25 pages).

⁵ For ease of reference, this party is referred to as "the affected party" throughout this order, notwithstanding there being three other affected parties. The company whose contract is record 2, and which provided submissions to HECFI at the access request stage, is referred to as the "second affected party."

⁶ This affected party's submissions respecting its contract with HECFI pre-date IPC mediation efforts and do not address the later disclosures of large portions of record 2, by consent. However, I have considered these submissions, generally.

⁷ *City of Hamilton Act, 1985*, Chapter PR23, as amended by the *City of Hamilton Act, 1998* and *City of Hamilton Act, 1991*.

⁸ This contract contains five amending agreements.

ISSUE:

[11] Does the mandatory exemption for confidential third party information in section 10(1) of the *Act* apply to the contracts at issue in this appeal?

DISCUSSION:

Preliminary Issue: Limits of this inquiry

[12] Although the appellant did not submit representations in response to the Notice of Inquiry sent by the former adjudicator, he did advise this office that he wished to proceed with the appeal. He also advised that his "original position for access to the information cited in my request has not changed." In view of these comments, I will address the issue raised by the appellant's "original position" as a preliminary matter.

[13] When filing this appeal, the appellant contended that the information he seeks access to forms part of HECFI's reporting responsibilities to Hamilton City Council and ought to be "part of the public record and available to members of the general public. The appellant relies on "Bill PR 34" as the basis for this position.⁹

[14] In Order MO-2753, issued in June 2012, Senior Adjudicator Sherry Liang addressed this same argument, but in the context of appeals regarding fees levied by HECFI in response to different requests by the appellant.¹⁰ In support of his position in those appeals that he should not have to pay the fees levied by HECFI, the appellant asserted that since the records should be publicly available as a consequence of HECFI's reporting obligations to Hamilton City Council, he should only have to pay "minimal photocopying fees" to receive them through his access to information request. At page 4 of Order MO-2753, Senior Adjudicator Liang wrote the following:

... The appellant bases this view on his interpretation of sections 22-27 of the *City of Hamilton Act, 1985*, which he suggests requires the requested records to be created and made available to the public.

The appellant also provides evidence that he believes establishes that the information should exist in a particular format that enables HECFI to disclose it at no cost.

Given these submissions by the appellant, the limits of this inquiry must be clarified. ... The issue to be determined therefore is not whether

⁹ "Bill PR 34" refers to a particular set of provisions in the *City of Hamilton Act, 1985*, Chapter PR 23, as amended by the *City of Hamilton Act, 1998* and *City of Hamilton Act, 1991*. This section provides for the creation and operation of HECFI.

¹⁰ Appeals MA11-220 and MA11-222. In those appeals, the appellant provided representations to this office respecting the issues of fee and fee waiver under section 45 of the *Act*.

additional records should or do exist, but rather whether HECFI has charged a reasonable fee for processing the requests in relation to records already identified as existing and responsive to the requests, and in accordance with the fee provisions in section 45 of the *Act* (and Regulation 823). The second issue is whether HECFI ought to have granted a fee waiver to the appellant in the circumstances of these appeals. **As to the *City of Hamilton Act, 1985*, I have no jurisdiction to ensure compliance with that statute** [emphasis added].

... the existence of a statutory duty to maintain or publicly disclose records in a particular form, apart from the provisions of this *Act*, *might* be a relevant factor on the reasonableness of a fee estimate or a decision on a fee waiver request...¹¹

[15] In her analysis, the senior adjudicator did not “preclude the possibility that where another statute requires an institution to make specific information available to the public in a specific format, this may be relevant to [a] decision on the reasonableness of fees charged under the *Act*.” Ultimately, however, Senior Adjudicator Liang found that the provisions of the *City of Hamilton Act, 1985* did not assist the appellant in his fee and fee waiver arguments.

[16] Here, the appellant’s appeal form also alludes to reliance on Chapter PR 23 of the *City of Hamilton Act, 1985*. However, the appellant tendered no evidence of any specific provisions of the *City of Hamilton Act, 1985* mandating public availability of HECFI’s contracts with third parties. Furthermore, in my view, there is an important distinction to be made between this appeal and Order MO-2753. Specifically, even if the *City of Hamilton Act, 1985* contained provisions mandating public availability of HECFI’s contracts with third parties, I am not persuaded that such provisions ought to be considered “a relevant factor” in a determination of whether a *mandatory exemption* in the *Act* applies. While the issues of fee and fee waiver raise questions of “reasonableness” and discretion, section 10(1) of the *Act* does not. If the information at issue is exempt under section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*, according to the test outlined in the next section of this order, then the institution *must* withhold it.

[17] To reiterate, therefore, my jurisdiction in this appeal is limited to a review of the exemption claim under section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act*. I will not be reviewing the *City of Hamilton Act, 1985*, as I have no authority to do so.

¹¹ Paragraphs 18 to 22 on page 4 of Order MO-2753.

Is the withheld information exempt under section 10(1) of the *Act*?

[18] HECFI claims that the withheld records, or portions of records, are subject to the mandatory exemption in section 10(1) of the *Act*. The affected party that responded to notification relies on all four paragraphs of section 10(1) in opposing disclosure of the severed portions of its contract with HECFI (record 1).

[19] The relevant parts of section 10(1) state:

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;

(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; or

(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.

[20] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.¹² 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.¹³

[21] Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.¹⁴

¹² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

¹³ Orders PO-1805, PO-2018, PO-2184, and MO-1706.

¹⁴ Order P-203.

[22] In this appeal, the parties resisting disclosure of the records at issue are HECFI and four third parties with whom HECFI signed the contracts. Consequently, the onus of proving that section 10(1) applies to the records lies with these parties. However, as noted previously, HECFI and three of the four third parties did not provide representations in support of establishing the application of section 10(1) of the *Act* at the adjudication stage. In the circumstances, I have only the affected party's submissions respecting the undisclosed portions of record 1, the second affected party's comments upon notification by HECFI, the appellant's comments from earlier in the appeal process, and the records themselves for review.

[23] Although portions of the affected party's representations were withheld from the appellant during the inquiry conducted into this appeal, I conclude that at least some portions of these submissions must be summarized in this order. Representations that might reveal the specific content of an undisclosed portion of record 1 remain confidential. However, I am satisfied that setting out other brief portions, or summaries, of the affected party's previously withheld representations in this order would not offend the confidentiality criteria due to the passage of time since they were submitted. Further, doing so is essential to adequately explaining my reasons for decision.¹⁵

[24] For section 10(1) to apply, I must be satisfied that each part of the following three-part test is met:

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) or (d) of section 10(1) will occur.

[25] For the reasons set out below, I find that section 10(1) does not apply to the records.

Part 1: type of information

[26] The affected party submits that record 1 contains trade secrets, technical, commercial, financial and labour relations information. According to the affected party, disclosure would reveal or permit the inference of trade secrets relating to its specialized food management and operational techniques which have been developed over many years in the business of the management and provision of food and

¹⁵ See Order PO-2987.

beverage services. The affected party submits that the records contain technical information relevant to its methods of operations and food services equipment utilization.

[27] The affected party also submits that the records contain commercial information, including pricing, products, equipment, the description of services, right and obligations of the parties to the contract and insurance information. Respecting financial information, the affected party maintains that such information appears in its contract with HECFI in the form of pricing, costing, commission, payment terms, financial arrangements and capital investment information.

[28] The affected party notes that it is a unionized employer at HECFI and that the records contain labour relations information that might jeopardize existing collective bargaining negotiations. According to the affected party, in a labour relations context, "an arbitrator would allow limited disclosure of our confidential service contracts ... [with] financial and pricing information contained therein ... redacted..."

[29] With regard to record 2, the second affected party submits that its contract with HECFI contains commercial and financial information in the form of charges, fees and royalties.

Analysis and findings

[30] Based on my review of the four contracts, I am satisfied that all of them contain commercial and financial information for the purpose of the first part of the test for exemption under section 10(1) of the *Act*.

[31] The meaning and scope of these two types of information have been discussed in past orders of this office, 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].

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].

[32] Each of the four contracts at issue contain provisions outlining the terms, obligations and conditions of the buying, selling or exchange of services or merchandise by HECFI with respect to the four affected parties. In essence, these records represent the formalizing of commercial relationships between HECFI and the four affected parties. Accordingly, I find that the records contain commercial information for the purpose of part one of section 10(1).

[33] I am also satisfied that the four records, or portions of records, at issue in this appeal contain the financial information of the affected parties for the purposes of the first part of the test under section 10(1), as they relate to financing or money matters, including specific details about the affected parties' costs and pricing structures.

[34] In summary, I find that the requirements of part 1 of the section 10(1) test have been established for the records at issue in that all of them contain commercial information, and some of the information also qualifies as financial. This being the case, it is not strictly necessary for me to determine whether the records also contain trade secret, scientific, technical, or labour relations information.

[35] However, because the affected party also argues against disclosure of "labour relations" information, I will address its arguments about this type of information. Based on my review of the remaining undisclosed information from record 1, I am not persuaded that it contains labour relations information, at least as that term has been interpreted by this office. Past orders have established that labour relations information for the purpose of part one of section 10(1) is information concerning the collective relationship between an employer and its employees.¹⁶ While the remaining undisclosed portions of record 1 may contain terms or other information that could have an effect on labour relations, I find that these portions do not clearly set out or address the employer-employee relationship between the affected party and its employees. Accordingly, I find that record 1 does not contain information that qualifies as labour relations information for the purpose of part one of the third party information exemption in section 10(1) of the *Act*.

Part 2: supplied in confidence

Supplied

[36] In order for me to find that the second part of the test under section 10(1) has been met, I must be satisfied by the evidence that the affected parties "supplied" the information at issue to HECFI in confidence, either implicitly or explicitly.

[37] 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

¹⁶ Orders P-653 and PO-2010.

third parties.¹⁷ 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.¹⁸

[38] The contents of a contract involving an institution and a third party will not usually qualify as having been “supplied” for the purpose of section 10(1) because they are viewed as mutually generated, rather than “supplied” by the third party. This is the case even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. Another way of expressing this is that, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to be “supplied.”¹⁹ This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above, and several other decisions.²⁰

[39] 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.²¹

Representations

[40] The affected party submits that the business strategy, costing and other information provided with its successful proposal – and reflected in the resulting contract that is record 1 – was supplied to HECFI in confidence. According to the affected party,

The food services industry is very competitive. It was understood by [the affected party], or implied by the relationship with HECFI and the confidentiality surrounding the commercial bidding process and contracting process, that all information provided to HECFI throughout these processes were supplied in confidence.

¹⁷ Order MO-1706.

¹⁸ Orders PO-2020 and PO-2043.

¹⁹ Orders MO-1706, PO-2371, PO-2384.

²⁰ *Supra*, footnote 12. 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.).

²¹ Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

The information submitted to HECFI during the commercial bidding process stage is the same information incorporated into the Records. Consequently, such information was supplied in confidence to HECFI.

[41] The affected party also submits that it would be “contrary to the purposes of ... the *Act* if a self-interested party were to use the *Act* as a means to obtain confidential information ...”.

[42] The second affected party’s response to HECFI’s notification does not expressly address the “supplied” requirement, focusing instead on the confidentiality of the information it provided to HECFI.

Analysis and findings

[43] At issue in this appeal are the contracts HECFI signed with corporate partners, either to provide various services at its facilities, or to provide for sporting events or programming at those facilities. As outlined above, however, a long line of orders from this office has held that the terms of a contract between an institution and a third party are not considered to have not been “supplied” for the purposes of this part of the test.

[44] The affected party refers to the confidential supply of information to HECFI throughout the bidding and contracting process, which it argues is manifest in the contract signed by the parties. However, record 1 is not the bid proposal submitted by the first affected party, but rather the contract that resulted from HECFI’s acceptance of the affected party’s bid as the winning one. This office has acknowledged that there are perfectly valid reasons for maintaining the confidentiality of the bid process. However, the mischief sought to be addressed by section 10(1) is not usually raised where information is the product of negotiations,²² but rather only where the information in a contract is demonstrably the same confidential “informational asset” originally supplied by the third party.

[45] In this context, and absent evidence to the contrary, information populating a contract, is considered negotiated, not “supplied,” despite having been initially drafted or delivered by a single party.²³ Indeed,

... information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is “supplied”. The intention of s. 21(1)(b) [BC’s equivalent to section 10(1) of the *Act*] is to protect information of the third party that is not susceptible of change in

²² Order MO-1450.

²³ Orders MO-1706 and PO-2371; see also BC IPC Order 01-20.

the negotiation process, not information that was susceptible to change but, fortuitously, was not changed.²⁴

[46] With regard for the four records before me in this appeal, I accept the possibility that some details or provisions may appear in the same form they were provided to HECFI originally. Notwithstanding this, however, based on the reasoning outlined above and my review of the records themselves, I conclude that the provisions of these contracts represent agreed-upon terms that are considered to be the product of a negotiation process and, hence, were not "supplied."

[47] With regard to the exceptions described previously, I have not been provided with evidence that disclosure of the information in these contracts would permit accurate inferences to be drawn about underlying *non-negotiated* confidential information supplied to HECFI, such as costs for materials, labour or administration. I have also not been provided with, nor do I see from review of the records themselves, evidence that the contracts contain information that is immutable, or was susceptible to change but was not.

[48] Accordingly, I find that the information in records 1 to 4 was not "supplied" by the affected parties for the purpose of this second part of the test for exemption under section 10(1) of the *Act*. Therefore, it is not necessary for me to address the "in confidence" component of part 2 of the section 10(1) test before concluding that this part has not been established.

[49] As all three parts of the test under section 10(1) must be met in order for the exemption to apply, I find that section 10(1) has no application to the records or portions of records that HECFI has withheld, and I order that they be disclosed to the appellant.

[50] As an aside, I note that the affected party expresses concern about "self-interested" parties obtaining confidential information "contrary to the purposes of ... the *Act*." In reality, institutions are required to provide access to information in their custody or 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). However, individuals or corporations doing business with government institutions must recognize that sometimes their business objectives are balanced with the concurrent objective of transparency in public

²⁴ See Order PO-2371, which provides a review of BC Order 01-20. This summary of the BC Commissioner's reasons in Order 01-20 are excerpted from the decision of *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)* [2002] B.C.J. No. 848 (B.C.S.C.).

matters. In turn, the important interest taxpayers have in knowing the terms of the agreements entered into by institutions on their behalf is acknowledged and affirmed.²⁵

ORDER:

1. I order HECFI to disclose the records to the appellant by sending a copy to the appellant by **April 15, 2013**, but not earlier than **April 8, 2013**.
2. In order to verify compliance with this order, I reserve the right to require HECFI to provide me with a copy of the records disclosed to the appellant in accordance with paragraph 1 above.

Original signed by: _____ March 5, 2013
Daphne Loukidelis
Adjudicator

²⁵ Orders PO-2435, PO-2758 and MO-2490.