Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3033

Appeal MA13-383

City of Windsor

April 14, 2014

Summary: The city received a request for access to a portion of a Services Agreement between the city, its wholly-owned airport and the appellant for the right to operate its aircraft maintenance business at the airport. Specifically, the requester sought access to the rent the appellant would pay to the city over a 20 year period. The city decided to disclose the information and the appellant appealed that decision, claiming that the rent payment provision was exempt from disclosure under the exemption in section 10(1) (third party information). In this decision, the city's decision is upheld and the information at issue is ordered disclosed to the requester.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1).

Cases Considered: *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.); *Miller Transit Limited v, Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139.

OVERVIEW:

[1] The City of Windsor (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy* (the *Act*) for access to the following:

> …the annual lease or rent paid to the city over the next 20 years and beyond by [a specified company].

[2] The city identified a portion of an agreement as responsive to the request. After notifying two affected third parties to seek their views on the disclosure of the responsive information, the city initially issued a decision to the requester advising that it was denying access to the information pursuant to the mandatory third party information exemption in section 10(1) of the *Act.*

[3] The requester filed an appeal of the city's decision and Appeal MA13-190 was opened by this office. The city subsequently issued a revised decision to the requester and the third parties granting access to the responsive information. As the city decided to grant access to the requested information, the requester's appeal (MA13-190) was closed.

[4] One of the affected parties (now the appellant) appealed the city's decision on the basis that the responsive information is subject to the third party exemption in section 10(1). As a result, this office opened Appeal MA13-383, the appeal before me.

[5] Mediation was not successful in resolving the appeal and the file was moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sought and received representations from the appellant, who is the party resisting disclosure of the record.

[6] In this order, I uphold the city's decision to disclose the information at issue to the requester and dismiss the appeal on the basis that section 10(1) does not apply to the information in the record.

RECORDS:

[7] The information remaining at issue consists of section 3.01 of a Services Agreement entered into between the appellant, the city and the agency which operates the airport and is wholly owned by the city.

ISSUES:

[8] The sole issue for me to determine in this appeal is whether the information contained in section 3.01 of the Services Agreement is exempt under the mandatory exemption in section 10(1) of the *Act*.

DISCUSSION:

[9] Section 10(1) states, in part:

> 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

[10] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions[1]. 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[2].

[11] For section 10(1) to apply, the appellant 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.

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[1] *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.).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[12] The appellant argues that the information at issue in section 3.01 of the Services Agreement qualifies as "commercial" and "financial" information within the meaning of section 10(1). These types of information listed in section 10(1) have been discussed in prior orders:

> *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 [Order 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].

[13] The information at issue in section 3.01 represents the contract fee paid by the appellant to the city's airport. Clearly, information of this sort qualifies as both commercial information as it deals with the exchange of services between the parties, as well as financial information as it relates to the appellant's use and payment of money to the city. As a result, I am satisfied that the first part of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[14] 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].

[15] 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 and PO-2043].

[16] The appellant submits that it "supplied" the information in section 3.01 to the city in a Letter of Intent in June 2010 which "explicitly detailed the required terms of an agreement in which [it] would provide [certain enumerated services] to the City of

Windsor. The Letter of Intent supplied by [it] clearly states the terms and conditions that were transcribed in the [Services Agreement]."

[17] 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[3].

[18] In this case, the information contained in section 3.01 of the Services Agreement originated with the appellant, as evidenced by the contents of the Letter of Intent it has provided to me. However, following the authorities described above, even where the terms of a contract were incorporated without change from the proposal or draft that originated with one party or the other, it is still treated as having been "mutually generated" and not "supplied" for the purposes of section 10(1).

[19] In a recent decision, *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*,[4] the Divisional Court upheld this office's approach to the interpretation of section 10(1), particularly its treatment of information that is incorporated into a contract which originated with one of the parties to it. The Court found, at paragraph 27, that:

> The IPC adjudicator's approach in this case was consistent with the approach taken in other cases interpreting the same provision in FIPPA. Those cases have held that, absent evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of negotiations, not "supplied" by the third party under s. 10(1) of the Act. This approach was approved of in *Boeing* at paras 18-19 as follows:
>
> > The Commissioner has consistently found that information in a contract is typically the product of a negotiation process between the parties and that the content of a negotiated contract involving a governmental institution and another party will not normally qualify as having been "supplied". Even where the contract is preceded by limited negotiation, or where the final agreement substantially reflects information that originated from a single party, the

[3] 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.).
[4] 2013 ONSC 7139 (Div. Ct.).

> Commissioner has concluded that the information was not supplied….
>
> The Commissioner took the view that the records before him did not contain information which was supplied to the ministry because the information was found in complex contracts which were the subject of agreement by a number of parties….His conclusion that complex and detailed agreements like the ones before him were the result of negotiations was a reasonable one. While the Ministry has suggested that its role was passive with respect to the Asset Purchase Agreement, it was reasonable for the Commissioner to conclude that the agreement was, nevertheless, negotiated and that it reflected all the parties' interests.

[20] I adopt the reasoning of the Divisional Court for the purposes of the present appeal and conclude that the information in section 3.01 of the Services Agreement was the subject of negotiation between the parties, despite the fact that this provision originated with the appellant. For this reason, I find that it cannot be said that the appellant "supplied" this information to the city for the purposes of the second part of the test under section 10(1).

[21] In its representations, the appellant argues that the services agreement incorporates terms and conditions taken from the Letter of Intent and that this wording originated with one of its affiliated service providers. For this reason, it appears to suggest that the disclosure of this service agreement would "permit the drawing of accurate inferences of that third party information and prejudice the confidentiality of those agreements" which involve the affiliated service providers, as well as the appellant.

[22] There are two exceptions to the general rule around the treatment of "mutually-generated" terms, 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[5].

[23] In *Miller Transit,* (cited above), the court addressed the standard of proof required when a party is relying on the "inferred disclosure" exception. It states:

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

> The third party information exemption will only apply if it can be shown, on a balance of probabilities, how the information in the contract meets the exceptions *based on its content*, not merely the fact that it originated with the third party. In this case, neither Miller Transit nor York Region highlighted specific information supplied to the Region that would permit the drawing of an accurate inference with respect to information supplied, what that inference would be, or what information in the contract was not susceptible to change in the negotiation process and why.

[24] In the present appeal, I find that the appellant has also failed to provide me with evidence as to what information in section 3.01 was not susceptible to change and why this position is reasonable. A simple statement that the disclosure of the information in this particular services agreement could lead to the disclosure of the contents of other such agreements involving its affiliated companies is not, in my view, sufficient to establish the "inferred disclosure" exception to the general rule regarding the disclosure of information contained in contracts. For this reason, I find that this exception does not apply to the information in section 3.01 of the Services Agreement.

[25] As I have found that the information in issue was not "supplied" by the appellant to the city, the second part of the test under section 10(1) has not been established. As all three parts of the test must be met in order for the information to qualify for exemption under section 10(1), I find that the exemption has no application and I will order that it be disclosed.

[26] For the sake of completeness, I will also briefly address the appellant's representations concerning the "in confidence" aspect of the second part of the section 10(1) test, as well as the harms component in part three of the test. The submissions relating to whether the information was provided to the city "in confidence" relate to the information contained in the Letter of Intent executed between the appellant and the city, as opposed to the information at issue in this appeal, which consists only of section 3.01 of the actual Agreement between them. The argument that the confidentiality that was explicitly outlined in the Letter of Intent by the parties was implicitly understood by them to apply to the Agreement is not borne out by the language of the Agreement itself.

[27] Similarly, the appellant has provided me with representations respecting the anticipated harms that will flow from the disclosure of the information. I find that the appellant's representations do not describe in sufficiently specific detail how the disclosure of the information in section 3.01 of the Agreement could reasonably be expect to result in the harms contemplated by section 10(1).

[28] As the only exemption claimed for the information does not apply, I will uphold the city's decision to disclose the information and order it to disclose section 3.01 of the Agreement to the requester.

ORDER:

1. I uphold the city's decision to disclose section 3.01 of the Service Agreement to the requester and order it to do so by providing him with a copy by **May 22, 2014** but not before **May 16, 2014.**

2. I reserve the right to require the city to provide me with a copy of the record that is disclosed to the requester pursuant to Order Provision 1.

Original Signed By: April 14, 2014
Donald Hale
Adjudicator