Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3105

Appeal MA13-463

The Corporation of the City of London

September 30, 2014

Summary: The appellant sought access to the management agreement for facility management services at the Budweiser Gardens. The city located an agreement, between two third parties, that was responsive to the request and denied access to it pursuant to section 10(1) (third party information) of the *Act*. This order finds that section 10(1) applies to the agreement and the city’s decision is upheld.

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

Orders and Investigation Reports Considered: Orders PO-1983, PO-2020, PO-2328, PO-2781 and MO-3019.

OVERVIEW:

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

> A copy of the existing Management Agreement (including amendments) with [a named company] pertaining to facility management services for the Budweiser Gardens.

[2] The city located the responsive record and issued a decision letter, denying access to the record in its entirety pursuant to the mandatory exemption for third party information at section 10(1) of the *Act*.

[3] The requester appealed the city's decision.

[4] As a mediated resolution could not be reached, the file was transferred to the adjudication stage of the inquiry process for an adjudicator to conduct an inquiry. I sent a Notice of Inquiry to the parties. The city and the named company (the third party) provided representations that were shared with the appellant in accordance with this office's *Code of Procedure* and *Practice Direction Number 7.* The appellant chose not to submit representations.

[5] In this order, I find that the mandatory exemption at section 10(1) applies to the record at issue and I uphold the city's decision not to disclose it.

RECORD:

[6] The record at issue consists of a one-page covering memo and a 28-page management agreement. In this order, the record will be referred to as "the agreement."

DISCUSSION:

Does the mandatory exemption at section 10 apply to the agreement?

[7] The sole issue to be decided is whether the mandatory exemption at section 10(1) applies to the record at issue. 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,
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> (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

…

[8] 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]

[9] 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

[10] The types of information listed in section 10(1) have been discussed in prior orders. Those that are relevant to the current appeal are described 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.[3] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[4]
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> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this

[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.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.
[4] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[5]

[11] I adopt these definitions for the purpose of this appeal.

[12] The city submits that the agreement contains commercial and/or financial information as it sets out how compensation is to be paid by London Civic Centre Limited Partnership (LCCLP), the lessee of the Budweiser Gardens, to the third party for its services under the agreement. It submits that fees to be paid to the third party for services under the agreement and specific mathematical formulas applied to calculate those fees fall squarely within the definitions of commercial and financial information that, it submits, cannot be released.

[13] The third party also asserts that the agreement consists of its commercial and financial information. It submits that it addresses the essential business terms upon which it will provide management services at the Budweiser Gardens to LCCLP. It submits that the agreement contains information about the required scope of services to be provided, financial reporting and cash handling requirements, as well as pertaining to fees and other compensation payable for the provision of services.

[14] I agree with the city and the third party that the information contained in the agreement reveals both commercial and financial information. The agreement consists of the details of the buying and selling of services which falls within the definition of "commercial information" and, therefore, meets the first part of the test. The agreement also discloses the third party's operating budget, as well as the compensation agreed upon for the provision of its services, the breakdown of which reveals information regarding the third party's cost accounting methods and pricing practices. This information clearly qualifies as financial information under the first part of the section 10(1) test. Accordingly, the first part of the section 10(1) test has been met.

Part 2: supplied in confidence

Supplied

[15] The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.[6]

[16] 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.[7]

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[5] Order PO-2010.
[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.

[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.[8]

In confidence

[18] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[9]

[19] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure[10]

Representations

[20] The city submits that the agreement was supplied to it, in confidence, by the third party within the meaning of the second part of the section 10(1) test. It acknowledges that while the underlying objective of the *Act* is public access to records relating to activities of government, in the circumstances of this appeal, the agreement is between two private parties and the city is not a signatory. As a result, it submits that the underlying objective of open government is not achieved through its disclosure.

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[8]This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*),.

[9] Order PO-2020.

[10] Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

[21] The city explains how it came to have a copy of the agreement in its records. It lays out what it describes as a simplified description of the structure of the John Labatt Centre Project (the project) which is now known as Budweiser Gardens:

- The city owns the land upon which the John Labatt Centre was constructed.
- The city, as landlord, entered into a Ground Lease with Royal Trust Corporation of Canada, as Trustee for the City of London Arena Trust, as tenant for the lands upon which the John Labatt Centre was to be constructed. The Trust had been created to hold the leasehold interest and to enter into contracts with the private sector for the construction and development of the John Labatt Centre.
- The trust entered into a Participatory Occupancy Lease with London Civic Centre Limited Partnership (the private sector partner in the project), under which LCCLP had the responsibility for constructing, developing and managing the John Labatt Centre. The city was not a partner in the LCCLP.
- LCCLP then entered into a series of agreements for the construction, development, financing and management of the John Labatt Centre. One of the agreements entered into by LCCLP was the Agreement at issue in this appeal, for the management of the John Labatt Centre. The Participatory Occupancy Lease had clearly provided that the management agreement would be entered into between London Civic Centre Limited Partnership and the third party, as manager.
- A key component of the overall structure of the Project, as reflected in the documents entered into to facilitate the Project was that the city's involvement in the operation and management of the John Labatt Centre was nominal. The city was not a party to the Facility License Agreement entered into by London Civic Centre Limited Partnership and London Knights Hockey Inc., (the owner and operator of the London Knights Ontario Hockey League franchise). The city was also not a party to the Agreement, under which the third party was retained by London Civic Centre Limited Partnership to manage the John Labatt Center.

[22] The city explains that it located a copy of the agreement in its records because a draft of the agreement, and subsequently a signed copy of the agreement, was provided to the solicitor for the city, by the solicitors for LCCLP and the third party, to

satisfy the city that the terms and conditions of the agreement were in compliance with the requirements of the Participatory Occupancy Lease (the lease). It submits that the third party agreed to disclose the agreement for those purposes, relying on a section of the lease which addresses the confidentiality of project documents which, the city submits, provides in part:

> …[T]he Tenant, the Landlord and the City acknowledge and agree that information provided by any one of them to the others pursuant to or in connection with this Lease may comprise trade secrets or technical, commercial or financial information, supplied in confidence, disclosure of which could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of one or all of the Parties or result in undue loss to one or all of the parties or undue gain to others. Accordingly, except as may be required by Applicable Laws, all such information shall be kept confidential by the Parties and shall only be made available to such other parties, employees and consultants as are required to have access to the same in order for the recipient party to adequately use such information for the purposes for which it was furnished.

[23] In a letter written to the city objecting to the disclosure of the agreement, the third party submits that it supplied the agreement to the city in confidence under a proviso that the agreement be kept as strictly confidential and only able to be released with the third party's consent. It submits that this conveys the intention that the agreement was supplied in confidence.

[24] In its representations, the third party submits that the agreement sought by the appellant's request is between itself and LCCLP which are two private, non-governmental entities. It submits that LCCLP is a commercial non-governmental entity. It explains that the city is not a party to the agreement and that although the city has a copy of the agreement, it was not the third party's intention that its terms be made available for the use of entities other than the parties. It submits that as a matter of corporate policy, it does not make the terms of such agreements generally available to the public or other entities that are not party to them.

Analysis and findings

[25] Previous orders have addressed situations where information relating to private contracts entered into by non-governmental entities that find their way into an institution's records, despite the fact that an institution is not party to the agreement. In those cases, the information in such records was found to qualify as having been supplied in confidence as required by part 2 of the section 10(1) test.[11]

[11] Orders PO-2020 and MO-3019.

[26] Other orders have found that information provided to an institution by non-governmental entities pursuant to reporting requirements, established either contractually or by law, have been found to have been "supplied' to the institution for the purposes of this portions of the section 10(1) test.[12] These orders have also considered, in some circumstances, that provisions in the reporting requirements that recognize that there is an intention of confidentiality with respect to those documents, barring the existence of any disclosure obligations that may exist by law, can be seen to provide the third party supplying the information with an express and reasonably held expectation of confidence. Although, the appeal before me can be distinguished on the basis that there is no evidence before me that the agreement was provided to the city pursuant to an explicit reporting requirement outlined in the lease, I find the reasoning expressed in these orders to be relevant to the current appeal.

[27] The commercial and financial information contained in the agreement is derived entirely from a private agreement entered into between the third party and another private entity. The city is not a party to the agreement and did not, in any way, participate in the negotiations of the terms of service outlined therein; nor does it have any ability to enforce them. Given that the city is not a signatory to the agreement and was provided with a copy for ancillary purposes to ensure that it complied with the lease, I accept that the information was "supplied" to the city within the meaning of part 2 of the section 10(1) test.

[28] Moreover, I do not have any evidence before me to suggest that this information is publicly available and I accept the third party's submission that as a matter of corporate policy, it does not generally disclose the terms of such agreements to entities that are not party to them. Additionally, the confidentiality section of the lease suggests that all parties were under the assumption that the agreement was communicated to the city on the basis that it was confidential and that it was to be kept in confidence. Accordingly, I am satisfied that the third party had an implicit (if not explicit) expectation of confidentiality with respect to the disclosure of the agreement and that the expectation was reasonable and based on objective grounds. Therefore, I find that "in confidence" requirement of part 2 of the section 10(1) test has been established.

[29] In sum, in keeping with the findings of Order PO-2020 and MO-3019, as well as the reasoning expressed in Orders PO-2043, PO-2371 and PO-2497, I find that the agreement, which was entered into by two private companies, was supplied in confidence to the city for the purposes of ensuring compliance with the lease. Therefore, I find that the second part of the section 10(1) test has been met.

[12] Orders PO-1983, PO-2328, and PO-2781.

Part 3: harms

[30] To meet this part of the test, the party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative, although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[13]

[31] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.[14]

[32] In applying section 10(1) to government contracts, 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 10(1).[15]

Representations

[33] The city submits that disclosure of the agreement will significantly prejudice the competitive position or interfere significantly with the contractual or other negotiations of the third party within the meaning of section 10(1)(a). It submits that the third party has expressly stated that the agreement contains financial and operational information, the disclosure of which could be used by its competitors or suppliers in such a way that it would be put at a competitive disadvantage in carrying out its business.

[34] The city submits that contracts that municipalities or other owners of sports and entertainment centres enter into with a manager for the management of a facility like the current Budweiser Gardens are entered into after a competitive procurement process and reveal fees offered by the proponents for their services. It submits that the third party would be at a significant competitive disadvantage when bidding on future contracts if the information was disclosed and one of the third party's competitors knew the third party's fee structure used in the Project. It submits that the third party would use the same fee structure outlined in the agreement in any future negotiations or bids. The city further submits that fees charged by companies for services under agreements like the one at issue are not matters of public information and are kept confidential.

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[13] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[14] Order PO-2435.
[15] Order PO-2435.

[35] The city also submits that disclosure of the agreement could reasonably be expected to give rise to the harm outlined in section 10(1)(b) because it would result in similar information no longer being supplied to the institution and it is in the public interest that similar information continue to be so supplied. The city reiterates that it was their external solicitors who wanted the opportunity to review the agreement in order to obtain instructions from the city with respect to its terms and conditions. The city submits that it wished to satisfy itself that the agreement complied with the requirements of the lease, that it could be enforced against the third party if the city had to act on the collateral assignment of the agreement that it took from LCCLP. The city also wished to ensure that the agreement satisfied the requirements of the Municipal Capital Facilities Agreement, which characterized it as a Material Agreement.

[36] The city submits that if it were to disclose the agreement, in future similar transactions where a municipality requested that a private sector company provide it with a draft and/or signed copy of an agreement such as the one at issue here, the private sector company could reasonably be expected to refuse to provide it because the municipality could subsequently be compelled to disclose it subject to an access request under the *Act*. It explains:

> It is important that, in transactions like the Project, municipality and its solicitors be able to obtain copies of agreements like the Agreement, which the municipality is not a party to, in order to protect, as best as possible, the public interest. In the Project, the public interest clearly was served by [the city's solicitors] being able to obtain a draft of the agreement and the signed Agreement and obtain instructions from the city about the terms and conditions in the Agreement. If the Agreement had been disclosed by the City, particularly where the third party objected to such disclosure, municipalities in the future might not be given drafts and signed copies of such agreements. This would not be in the public interest.

[37] The third party submits that disclosure of the agreement would provide its competitors with knowledge of the compensation payable for its services at the Budweiser Gardens, which is information that would be great value to other firms in its line of business. It submits that companies in the same business compete against each other for management contracts related to other venues and having knowledge of the information contained in the agreement would allow its competitors to fashion their compensation proposal to undercut the third party thus giving them an unfair advantage in securing the business opportunity. The third party further submits that disclosure of the fees in the agreement could be utilized to its detriment by its clients at other venues in negotiating the fee arrangement for management services at such venues. It submits that clearly this would prejudice its position in the highly competitive venue management marketplace in which it operates. The third party concludes its representations by reiterating that the disclosure of the agreement would

interfere with its competitive position in the industry in which it operates and could potentially result in undue loss and the curtailment of future business opportunities or prospects.

[38] The third party reiterates that the city is not a party to the agreement but, on request, was provided a copy in confidence on the condition that it be kept as strictly confidential and only released with the third party's consent. It states that it was not its intent that the terms set out in the agreement would be made available for the use of entities other than those who are party to the agreement and that, as a matter of corporate policy, it does not make such agreements generally available to others.

Analysis and findings

[39] I have considered the the fact that the informational assets of the third party that are at issue in this appeal relate to a private agreement that it has entered into with another third party and not the city. On that basis, I am satisfied that the disclosure of the agreement could reasonably be expected to (1) prejudice significantly the competitive position of the third party or interfere significantly with its contractual negotiations (section 10(1)(a)), (2) result in similar information no longer being supplied to the city where it is in the public interest that similar information continue to be so supplied (section 10(1)(b)), or (3) result in undue loss to the third party and correlative undue gain to its competitors (section 10(1)(c)).

[40] The agreement contains information about the third party's fees and compensation structure, as well as detailed operational information about how it provides its services. Given that I accept the competitive nature of the third party's business, I find that the information contained in the agreement is valuable information that could reasonably be expected to be used by its competitors, thereby placing it in a position of significant competitive prejudice when bidding on future contracts. I also find that disclosure would interfere significantly with any ongoing or future negotiations that the third party may enter into with respect of its services. Both of these harms are contemplated by section 10(1)(a).

[41] Similarly, I also accept that its disclosure could reasonably be expected to be used by the third party's competitors to undercut it in future bids and that the third party, not having access to comparable information about its competitors, would suffer an undue loss, while the competitor would experience a correlative undue gain. This harm is contemplated by section 10(1)(c).

[42] Additionally, I have considered the fact that on the evidence before me, the city, who is not a party to the agreement, requested the opportunity to review the agreement and how that request was granted by the third party on the condition that it be kept as strictly confidential and could only be released with the consent of the third party. I accept that it is in the public interest that, in future similar transactions,

municipalities be provided with agreements between public sector companies, if such public entities choose to disclose them, where it deems that it might be beneficial for ancillary purposes. I also accept that if such agreements between private entities were routinely subject to disclosure simply as a result of falling into the hands of municipalities that are not parties to such agreements, it could be reasonably expected that similar information no longer be supplied by the public sector companies. As a result, I find that disclosure could reasonably be expected to give rise to the harm outlined in section 10(1)(b).

[43] In sum, I find that all three parts of the section 10(1) test have been met. I find that disclosure of the third party's commercial and financial information contained in the agreement that was supplied in confidence to the city, could reasonably be expected to prejudice significantly the third party's competitive position and interfere significantly with its contractual negotiations and could reasonably be expected to result in it experiencing an undue loss. I also find that its disclosure could reasonably be expected to result in similar information no longer being supplied to the city and that it is in the public interest to do so. Accordingly, I find that the exemptions at sections 10(1)(a), (b) and (c) apply and the agreement is exempt from disclosure.

ORDER:

I uphold the city's decision and dismiss the appeal.

Original Signed By: September 30, 2014
Catherine Corban
Adjudicator