Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3263

Appeal MA15-120

City of Greater Sudbury

November 12, 2015

Summary: A media requester sought records related to contractual arrangements between the City of Greater Sudbury and various service providers for a specific municipal arena. After notifying several third parties respecting the possible disclosure of agreements relating to them, the city issued a decision denying access to one agreement under section 10(1) (third party information) and section 11 (economic or other interests) of the *Act,* while granting partial access to the second agreement, relying only on section 11. The requester did not appeal the city's access decision, but the third party whose operating agreement was to be disclosed nearly in its entirety did, taking the position that section 10(1) applied to the second agreement. Although the third party appellant was offered an opportunity to explain its position that its operating agreement with the city should not be disclosed, it did not make submissions. In this order, the adjudicator finds that section 10(1) does not apply based on her review of the agreement, and she dismisses the appeal.

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: *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII); *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario,* 2015 ONSC 1392 (CanLII).

OVERVIEW:

[1] This order addresses the issues raised by an access request submitted to the City

of Greater Sudbury (the city) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* by a member of the media for:

> …all documents, including financial records, related to [a named municipal arena] …, dating back to 2009. The documentation I'm requesting could include correspondence (email, scans, faxes, letters, etc.) between former employees [two named individuals], as well as revenue and expense reports for the arena and auditor's reports. I would like access to forensic audits, if such reports exist.[1]

[2] The city located two responsive agreements and notified two third parties whose interested could be affected by disclosure, pursuant to section 21(1) of the *Act*.[2] Both of the third parties opposed disclosure. The city then issued a decision on March 9, 2015, denying access to the first agreement, in its entirety, pursuant to sections 10(1) (third party information) and 11 (economic and other interests). The city granted partial access to the second agreement, withholding only the amounts to be paid by the service provider to the city under section 11 of the *Act*.

[3] The requester did not appeal the city's decision to completely withhold the first agreement under sections 10(1) and 11 or portions of the second agreement under section 11 of the *Act.* However, the service provider appealed the city's decision to disclose the rest of the second agreement on the basis that the entire agreement should be withheld under the mandatory third party information exemption in section 10(1) of the *Act*.

[4] This office appointed a mediator to explore resolution of the appeal. When a mediated resolution of the issues proved not to be possible, the file was moved to adjudication for an inquiry. The adjudicator formerly responsible for the appeal decided to seek representations from the third party appellant first and did so by sending a Notice of Inquiry outlining the facts and issues. The appellant did not respond to the Notice of Inquiry provided to him, despite being granted additional time for the submission of his representations. The appeal was transferred to me for disposition.

[5] In this decision, I uphold the city's decision to disclose the full agreement, with the exception of those portions of Schedule A withheld by the city pursuant to section 11.

[6] To be clear, because the original requester did not appeal the city's access decision, this order does not address or determine the issue of whether the monthly fees payable to the city by the appellant are exempt under the discretionary exemption

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[1] The request also identified certain employment-related information respecting the two named individuals, but that part of the request is not the subject of this appeal.

[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*.

in section 11 of the *Act,* as claimed by the city.

RECORDS:

[7] At issue in this appeal is a record titled Arena Concession Operating Agreement, dated October 1, 2013, except for the withheld portions of Schedule A.

DISCUSSION:

Does the mandatory exemption for confidential third party information in section 10(1) of the *Act* apply to the operating agreement?

[8] The appellant has appealed the decision to partially disclose the operating agreement it signed with the city, claiming that the entire contract should be exempt from disclosure under section 10(1), which states, in part:

> 10(1) 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

[9] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[3] 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.[4]

[10] Under section 42 of the *Act*, the burden of proof that a record, or a part of it, falls within one of the specified exemptions in the *Act* lies with the head of the

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[3] *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.*).
[4] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

institution. Where a third party relies on the exemption provided by section 10(1), it shares the onus of proving that the exemption applies with the institution.[5] In this appeal, the city does not rely on section 10(1) to deny access to the operating agreement. Further, as noted in the introduction to this order, the appellant did not respond to the Notice of Inquiry provided to him. However, since the section 10(1) exemption is a mandatory one, I am required to consider whether the content of the record itself provides sufficiently compelling evidence to persuade me that the exemption might apply.

[11] 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) and/or (d) of section 10(1) will occur.

Part 1: type of information

[12] Based on my review of the agreement, I am satisfied that it contains commercial and financial information for the purpose of part one of the test for exemption under section 10(1) of the *Act*.

[13] Definitions of these two types of information have been provided by past orders of this office:

> *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.[6] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[7]
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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

[5] Order P-203.
[6] Order PO-2010.
[7] Order P-1621.

> type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.[8]

[14] The agreement contains provisions outlining the terms, obligations and conditions of the buying, selling or exchange of services by the city with respect to the appellant. This record represents the formalized commercial relationship between the city and the appellant. Accordingly, I find that the record contains commercial information for the purpose of part one of section 10(1).

[15] I am also satisfied that the record contains financial information for the purposes of the first part of the test under section 10(1), as it relates to financing or money matters, including specific details about interest rates and fee structuring.

[16] Since the agreement contains commercial information and some information that also qualifies as financial, I find that the requirements of part one of the section 10(1) test are met.

Part 2: supplied in confidence

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

[18] Requiring evidence that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the confidential informational assets of third parties.[9] 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.[10]

[19] 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 the terms of it 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."[11] This approach has been approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above, and many other decisions.[12] Most recently, the approach was

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[8] Order PO-2010.
[9] Order MO-1706.
[10] Orders PO-2020 and PO-2043.
[11] Orders MO-1706, PO-2371, PO-2384.
[12] See Orders PO-2018, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No.

upheld in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[13]

[20] 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.[14]

[21] As stated, the appellant provided no submissions in response to the Notice of Inquiry to support its position that the record should not be disclosed on the basis of section 10(1). Earlier on, at the time the appeal was filed with this office, the appellant stated simply that it did not want to release its "company information … to our competition and public."

[22] As far as section 10(1) of the *Act* is concerned, however, the appellant's desire to maintain the confidentiality of the agreement and avoid its release to the public or to potential competitors is not determinative. Indeed, the agreement contains a provision expressly acknowledging that the city is bound by the provisions of the *Act.* As an institution under the *Act,* therefore, the city is required to provide access to information in its 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."[15] 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 inherent in the determination of whether a record is protected under section 10(1) is the balancing of third party business interests with the concurrent objective of transparency in public matters. This affirms the important interest taxpayers have in knowing the terms of the agreements entered into by institutions on their behalf.[16] Records that are determined not to fit within section 10(1) of the *Act* will be ordered disclosed. Further, and as stated above, the Divisional Court has affirmed this office's approach to the application of section 10(1) to negotiated agreements,[17] specifically confirming in *Miller Transit* and

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3475 (Div. Ct). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

[13] 2015 ONSC 1392 (CanLII) (*Aecon Construction*), upholding PO-3311.

[14] Orders MO-1706, PO-2384, PO-2435 and PO-2497 upheld in *Canadian Medical Protective Association v. Loukidelis*, cited above.

[15] See section 1 of the *Act*, where the purposes of the statute are set out.

[16] Orders PO-2435, PO-2758 and MO-2490.

[17] *Supra,* note 9.

Aecon Construction that the approach is consistent with the intent of the legislation, which recognizes that public access to information contained in government contracts is essential to government accountability for the expenditure of public funds.[18]

[23] Having read through the entire agreement under review in this appeal, I note that it is an executed contract between the city and the appellant. Consistent with this office's approach to the application of section 10(1) to agreements and contracts, which has been repeatedly affirmed by the courts, I am satisfied that the content of the record represents a final agreement between the two parties outlining agreed-upon essential terms that resulted from a negotiation process. Accordingly, I find that the information in the operating agreement was not "supplied" by the appellant to the city.

[24] I have also considered whether any information in the record fits within either of the two exceptions to the general rule that the content of a negotiated agreement between an institution and a third party is not "supplied." On my review of its terms, there is no information in this operating agreement that would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the appellant to the city; nor does the record contain information supplied by the appellant that is immutable or not susceptible of change. Therefore, I find that the "inferred disclosure" and "immutability" exceptions do not apply.

[25] In view of my finding that the operating agreement between the city and the appellant was not "supplied" for the purposes of part two of the section 10(1) test and because all three parts of the test must be established for the exemption to apply, I find that the record is not exempt from disclosure under section 10(1) of the *Act*.

ORDER:

1. I uphold the city's access decision of March 9, 2015 and dismiss this appeal.
2. I order the city to disclose the operating agreement to the original requester pursuant to its access decision by sending a copy to the requester by **December 17, 2015**, but not earlier than **December 10, 2015**.
3. In order to verify compliance with this order, I reserve the right to require the city to provide me with a copy of the records disclosed to the requester in accordance with paragraph 2 above.

Original Signed by: November 12, 2015
Daphne Loukidelis

[18] *Miller Transit, supra* note 9 at para. 44 and *Aecon Construction, supra* note 9 at paragraph 13. See also Order MO-3175.

Adjudicator