Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3323

Appeal MA15-586

Exhibition Place

June 21, 2016

Summary: A request was made to Exhibition Place under the *Act* for a copy of a lease agreement between it and a third party. Exhibition Place decided to disclose the lease, in part. The third party appealed Exhibition Place's decision, arguing that certain portions of the lease that Exhibition Place had decided to disclose (the information at issue) are exempt from disclosure pursuant to the exemption for third party information at section 10(1) of the *Act*. In this order, the adjudicator finds that the information at issue was not "supplied" by the third party to Exhibition Place and that, as a result, the section 10(1) exemption does not apply to it. She upholds Exhibition Place's decision with respect to the information at issue and orders it to disclose the information 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).
Orders Considered: Orders MO-3290, MO-1706, MO-2271, PO-2435 and PO-2384.

Cases Considered: *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 and *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII).

BACKGROUND:

[1] Exhibition Place received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> I would like to request a digital copy of [a named company's] latest lease(s) (PDFs), as well as all past copies and versions on file, including any conditions or amendments made to the lease(s).

[2] Exhibition place advised the requester that there is only one lease between Exhibition Place and the named company, dated 2004, and that no other leases or amendments exist. The request was clarified to be a request for a copy of the 2004 lease ("the lease").

[3] Exhibition Place notified the named company who was the other party to the lease (the "third party") to obtain its views regarding disclosure of the lease. The third party objected to the disclosure of certain portions of the lease on the basis that they are exempt from disclosure pursuant to the mandatory exemption for third party information at section 10(1) of the *Act*.

[4] After considering the third party's representations, Exhibition Place issued a decision granting access to the record in part. Exhibition Place decided to withhold portions of the record in reliance on the discretionary exemption for economic and other interests of an institution at section 11 of the *Act*, but decided to disclose the information that was of concern to the third party. The third party (now the appellant) appealed Exhibition Place's decision to this office.

[5] During mediation, the requester confirmed that he continues to seek access to the information that Exhibition Place determined may be disclosed, including the information that the third party holds should be withheld under section 10(1). However, the requester did not state an intention to appeal Exhibition Place's decision to withhold other information under section 11; therefore, that information is not at issue in this appeal.

[6] Also during mediation, Order MO-3290 was released on a different appeal which dealt with the same lease but involved a different requester. In Order MO-3290, I found that section 10(1) did not apply to the information remaining at issue in that appeal and ordered the disclosure of the information. There is significant overlap between the information that was at issue in Order MO-3290 and the information at issue in this appeal.

[7] As mediation did not resolve this appeal, it was transferred to the adjudication stage of the appeal process. I began my inquiry by inviting representations from the appellant. The appellant did not file representations, and I did not find it necessary to invite representations from Exhibition Place or the requester.

[8] In this order, I find that the information at issue is not exempt from disclosure under section 10(1), and I order Exhibition Place to disclose it to the requester.

RECORD:

[9] The record at issue is a lease agreement between the appellant and Exhibition Place. The information at issue consists of the portions of the lease that Exhibition Place decided to disclose, and that the appellant claims are exempt from disclosure under section 10(1). In this Order, I will refer to those portions as the "information at issue" or the "portions of the lease in dispute".

ISSUE:

[10] The issue in this appeal is whether the mandatory exemption for third party information at section 10(1) of the *Act* applies to the information at issue.

DISCUSSION:

[11] Having reviewed the information at issue in this appeal, I conclude that the reasoning in Order MO-3290 applies equally to it. As a result, for the following reasons, I dismiss the appeal and uphold Exhibition Place's decision to disclose the information at issue.

The appellant relies on section 10(1) of the *Act*, which states:

> 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
> >
> > (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.

[12] 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]

For section 10(1) to apply, the appellant, as the party resisting disclosure, 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;

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 paragraphs (a) through (d) of section 10(1) will occur.

Part 1: type of information

[13] "Commercial information" has been discussed in prior orders as relating 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]

[14] I find that the entire lease pertains to a commercial arrangement between the appellant and Exhibition Place to lease certain premises from Exhibition Place. I find, therefore, that the disputed portions of the lease contain commercial information.

Part 2: supplied in confidence

[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.[4]

[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.[5]

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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.) (*Boeing Co.*).
[2] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[3] Order PO-2010.
[4] Order MO-1706.
[5] Orders PO-2020 and PO-2043.

[17] For the following reasons, I find that the information at issue was not "supplied" to Exhibition Place. As noted above, the appellant did not file representations. In reaching my conclusions, I have reviewed the information at issue, section 10(1) of the *Act*, court decisions and previous orders of this office, including Order MO-3290.

[18] The contents of a contract involving an institution and a third party do not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, are 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.[6] In Order MO-1706, Adjudicator Bernard Morrow stated:

> [T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

[19] In Order MO-2271, Adjudicator Laurel Cropley considered the application of section 10(1) to a lease between Exhibition Place and a third party. In rejecting the third party's argument that certain terms of the lease were "supplied" to Exhibition Place, Adjudicator Cropley relied on Order PO-2435, in which Commissioner Brian Beamish stated:

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP released by MBS, the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a VOR agreement with that consultant. The claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation.

[20] There are two exceptions to the general rule that the provisions of a contract are not "supplied" for the purposes of section 10(1), which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies

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[6]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*).

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 third party to the institution.[7] The immutability exception applies where the contract contains information supplied by the third party that is not susceptible to negotiation. Examples of such information include financial statements, underlying fixed costs and product samples or designs.[8] Although the appellant did not file representations, I consider below whether the "immutability" or "inferred disclosure" exceptions apply, since the appellant raised these exceptions in the appeal leading to Order MO-3290.

[21] In Order MO-2271, discussed above, Adjudicator Cropley concluded that neither the immutability nor the inferred disclosure exceptions applied to a lease with Exhibition Place, commenting as follows:

> Looking at the disputed information on its own, and in conjunction with the Agreement as a whole, I find that it simply sets out the agreed upon terms under which the lease was given. The appellant acknowledges that the Agreement was negotiated and its representations suggest that the information contained in it about the appellant's business use of the property was required in order for the Agreement to be completed. Moreover, based on my review of this record, it is apparent that its contents reflect the meeting of the minds that generally takes place during the negotiation process…
>
> I find that the Agreement sets out the terms and conditions under which the lease has been entered into and is signed by representatives of both Exhibition Place and the appellant. I conclude that the body and nature of this document signifies that the terms were subject to negotiation and, therefore, were not "supplied" within the meaning of section 10(1) of the *Act*.

[22] Based on my review of the portions of the lease at issue in this appeal, I also conclude that they are the product of negotiations between the parties and were not "supplied" to Exhibition Place by the appellant within the meaning of that term as it is used in section 10(1). While the disclosure of the terms of the lease might permit general inferences to be made about the appellant's business plans, it does not follow that those business plans were "supplied" to Exhibition Place. In my view, it is not enough that certain terms of a contract may, by inference, reveal the parties' general plans, since this would be true of most if not all contracts. All parties to contracts would be expected to have their own interests in mind when negotiating contractual terms. I do not accept that any such interests that could be inferred from the disputed provisions constitute information that was "supplied" to Exhibition Place. I find,

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[7] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[8] *Miller Transit*, above at para. 34.

therefore, that the "inferred disclosure" exception does not apply.

[23] I also find that the "immutability" exception does not apply. The appellant argued in Order MO-3290 that the disputed information reveals its intentions and plans, and that these plans are intimately and inextricably linked to its overarching business model and operating philosophy. However, the information in dispute is not the operating philosophy of the appellant's business, nor am I persuaded that it would reveal the operating philosophy of the appellant's business. Even if it would, I find again that the fact that general inferences can be drawn about the appellant's interests does not mean that this is information that was "supplied" to Exhibition Place for the purposes of the section 10(1) exemption. In my view, the disputed portions of the lease reflect information that was susceptible to negotiation and terms that were in fact negotiated by the parties. As stated by Adjudicator Steven Faughnan in Order PO-2384:

> [O]ne of the factors to consider in deciding whether information is supplied is whether the information can be considered relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of section 17(1) [section 10(1) of the municipal *Act*]. Another example may be a third party producing its financial statements to the institution. It is also important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it. The intention of section 17(1) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but was not, in fact, changed.

[24] Based on my review of the disputed information, it is evident that it simply reflects the agreed-upon terms that were the result of negotiation between the parties. In Order PO-2435, Commissioner Brian Beamish made the following comments regarding Service Level Agreements (SLAs) between the Ontario Family Health Network and various consultants:

> Further, upon close examination of each of these SLAs, I find that in fact the proposal of terms by each third party and then the transfer of those terms into a full contract which adds a number of significant further terms and which was then read and signed by both parties, indicates that the contents of this contract were subject to negotiation. For this reason, I find that its constituent terms do not fall into the "inferred disclosure" or "immutability" exceptions.

> In summary, I find that the SLAs are contracts between the Government of Ontario and the affected parties that were subject to negotiation, and that no information in the agreements, including the withheld portions, were "supplied" as that term is used in section 17(1).

[25] Similarly, having reviewed the information at issue, I find that it consists of various clauses that were subject to negotiation by the parties. I find, therefore, that the immutability exception does not apply.

[26] I conclude that the information at issue was not "supplied" to Exhibition Place and that the appellant has failed to meet the requirements of Part 2 of the section 10(1) test.

[27] As I have found that the information at issue was not supplied to Exhibition Place, I do not need to consider Part 3 of the test, that is, whether its disclosure could reasonably be expected to result in any of the harms set out in section 10(1).

[28] I conclude that the information at issue is not exempt from disclosure pursuant to section 10(1) of the *Act*. Since no other exemptions were claimed for this information, I will order it to be disclosed.

ORDER:

1. I uphold Exhibition Place's decision to disclose the disputed portions of the lease.

2. I order Exhibition Place to disclose the disputed portions of the lease to the requester by sending him a copy by **July 27, 2016** but not before **July 21, 2016**.

3. In order to verify compliance with provision 2, I reserve the right to require Exhibition Place to provide me with a copy of the record which is disclosed to the requester.

Original Signed by: June 21, 2016

Gillian Shaw
Adjudicator