

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-3578

Appeal MA16-391

Exhibition Place

March 27, 2018

**Summary:** The appellant submitted a request to Exhibition Place under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of a lease between it and a third party. At issue in this appeal are provisions in the lease relating to gross revenue and rents, which Exhibition Place withheld from the appellant on the basis that the exemption for economic interests of an institution at section 11 of the *Act* applies. In this order, the adjudicator finds that section 11 does not apply and that the third party exemption at section 10(1), raised by the third party, also does not apply. She orders Exhibition Place to disclose the information at issue 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) and 11.

**Orders and Investigation Reports Considered:** Orders PO-2758, MO-2490, MO-2509, MO-1706, MO-2271, PO-2435 and PO-2384.

### 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, 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 under the mandatory exemption for third party information at section 10(1) of the *Act*.

[4] After considering the representations from the third party, Exhibition Place issued a decision granting partial access to the lease. Exhibition Place decided to withhold gross revenue and rent information in the lease in accordance with the discretionary exemption for economic interests of an institution at section 11 of the *Act*, but decided to disclose other information that was of concern to the third party.

[5] Before releasing the record, Exhibition Place advised the third party of its right to appeal the decision to this office. The third party appealed, which resulted in Order MO-3323, where I found that the information that was of concern to the third party was not exempt from disclosure under section 10(1) of the *Act*. I ordered Exhibition Place to disclose those portions of the lease to the requester.

[6] Upon receiving a copy of the portions of the lease ordered to be disclosed in Order MO-3323, the original requester (now the appellant in this appeal) appealed Exhibition Place's decision to withhold the gross revenue and rent portions of the lease under section 11 of the *Act*.

[7] This office assigned a mediator to the appeal. During mediation, Exhibition Place confirmed its position that the gross revenue and rent portions of the lease are exempt from disclosure in accordance with section 11 of the *Act*. The third party advised that it supports Exhibition Place's position and added that it also takes the position that the gross revenue and rent information in the lease should be withheld under the mandatory third party information exemption at section 10(1).

[8] As mediation did not resolve the appeal, the appeal proceeded to adjudication, where an adjudicator conducts an inquiry under the *Act*. I began my inquiry by seeking representations from Exhibition Place and the third party. The appellant then made representations and supplementary representations, and raised the public interest override provision found at section 16 of the *Act*. Exhibition Place and the third party provided reply representations. I invited the appellant to make surreply representations on the public interest override but he did not do so.

[9] The parties' representations were shared with one another in accordance with this office's *Code of Procedure* and *Practice Direction 7*.

[10] In this Order, I find that neither section 10(1) nor section 11 applies to the information at issue, and I order Exhibition Place to disclose it to the appellant.

## **RECORD:**

[11] The record at issue is a lease agreement between the third party and Exhibition Place dated 2004. The information at issue relates to gross revenue and rent.

## **ISSUES:**

- A. Does the discretionary exemption at section 11 apply to the information at issue?
- B. Does the mandatory exemption at section 10(1) apply to the information at issue?

## **DISCUSSION:**

### **A. Does the discretionary exemption at section 11 apply to the information at issue?**

[12] Exhibition Place relies on sections 11(c) and (d) of the *Act*, which state as follows:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[13] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.<sup>1</sup>

[14] For sections 11 (c) or (d) to apply, the institution must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove

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<sup>1</sup> *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

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 the seriousness of the consequences.<sup>2</sup>

[15] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.<sup>3</sup>

[16] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.<sup>4</sup>

[17] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.<sup>5</sup>

### ***Representations***

[18] Exhibition Place and the appellant made representations on the application of section 11.

[19] Exhibition Place submits that it is a unique property in Toronto, perhaps even in Canada, located centrally in the city and on the lakefront, which includes a number of unique heritage buildings, including the building which is the subject of the lease at issue. The use of Exhibition Place is prescribed by legislation and includes being used for parks, exhibitions, trade centres and trade and agricultural fairs. Thus, in Exhibition Place's submission, it presents unique business development possibilities in the city.

[20] Exhibition Place submits that private sector participation in its development is of great importance and achieves numerous public objectives, including preserving and maintaining its capital assets and heritage structures. It submits that if the private sector is not comfortable that it will be dealt with fairly and in confidence, it may not be

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<sup>2</sup> *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

<sup>3</sup> Order MO-2363.

<sup>4</sup> Orders P-1190 and MO-2233.

<sup>5</sup> Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

attracted to invest in Exhibition Place's assets. In Exhibition Place's submission, this would have a significant economic impact on finances and lost development and business opportunities at Exhibition Place, as well as loss of revenue. It submits that its ability to maintain the confidentiality of the financial terms is crucial to its competitive position in the real estate market and its ability to maximize the financial return on its investment.

[21] Exhibition Place submits that given that it is home to a number of unique properties which are leased to third parties, it can be anticipated that it will engage in competitive public processes for the lease and use of its assets in the future, including potentially the building at issue once the lease term expires. It submits that the information at issue could be used by future proponents in their bids to the financial disadvantage of Exhibition Place and by extension to the public at large:

Without any knowledge as to Exhibition Place's acceptable price as evidenced by the information at issue, potential proponents would have an incentive to put forward their best and highest offer, without regard to what price is actually acceptable to Exhibition Place, in a public competitive process. However, if the information at issue is disclosed, the comparative advantage of Exhibition Place in the information decreases, and the maximum value that the proponents would be willing to offer will decrease. Since the disclosure of the information at issue would provide potential partners with information effectively establishing the minimum Exhibition Place will accept ... their maximum values will then fall to that level, or close to that value minimizing the potential for profit by Exhibition Place, and negatively affecting the purpose of engaging in a public competitive process.

Accordingly, Exhibition Place submits that it would be reasonable to assume that experienced potential bidders would use the information at issue to their advantage and in fact it would [be] unreasonable to assume that they would ignore it. The information establishes, among other things, the rent amount that Exhibition Place is prepared to accept, which from a commercial and business perspective, would be tremendously valuable to potentially [sic] bidders. In addition, the information at issue reveals the progressive rent increase trajectory with which Exhibition Place is comfortable over the course of a multi-year lease term as well as the types of revenue on which Exhibition Place will expect to receive as a percentage. It is reasonable to assume that as a matter of sound business practice, if potential bidders are aware of the minimum acceptable price, bidders would submit bids at or very close to the reserve price, adding the smallest premium the bidder believes would best their competitors, rather than at some other, higher amount, thus precluding Exhibition Place from realizing the maximum value from its assets. Disclosing the information at issue would permit bidders to have as much information as possible to

afford them the best chance of figuring out what the smallest increase to the current value of the lease they could offer in future opportunities to best their competitors, which is not in Exhibition Place's best interest.

[22] Exhibition Place also stresses that it is only required to provide evidence sufficient to prove that there is a reasonable basis for expecting more than a possibility of harm, and that context is relevant when considering whether a potential harm is to be reasonably expected.

[23] The appellant submits that section 11 does not apply because a lease is negotiated between two parties and is therefore not proprietary information. He also notes that Exhibition Place has in the past released older versions of the lease at issue, and that in Order MO-2271, this office ordered Exhibition Place to release copies of its lease agreements in full.

### ***Analysis and findings***

[24] Previous orders of this office have found that the fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not necessarily prejudice the institution's economic interests, competitive position or financial interests.<sup>6</sup> For example, in Order PO-2758, Senior Adjudicator John Higgins addressed McMaster University's argument that disclosing contracts between it and food companies could reasonably be expected to prejudice its economic interest or competitive position. McMaster argued that by revealing certain detailed negotiated financial payments such as rent and royalty payments, its negotiating position would be severely compromised when negotiating new agreements or negotiating renewal terms of existing agreements. It argued that the competitor would have knowledge of the actual financial terms negotiated between McMaster and the original service provider, and that a precedent of a floor or ceiling would be established for any prospective supplier in advance of negotiations. Senior Adjudicator Higgins dismissed McMaster's argument:

McMaster's arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with McMaster, it will do so by charging lower fees to McMaster than its competitor, resulting in a net saving to McMaster. Similarly, in circumstances where McMaster is receiving payment, a competitor or renewing party would attempt to secure a contract by paying more than its rivals, resulting in financial gain for McMaster. To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. In my view, this is a totally different situation than in Order PO-1745, where

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<sup>6</sup> Orders MO-2363 and PO-2758.

there was an obvious danger that customers would move to a casino where the slot machines had a lower "hold percentage".

[25] The application of section 11 to leases between Exhibition Place and third parties has been addressed previously. In Order MO-2490, the records at issue were an interim lease, a lease and a lease assignment. Exhibition Place relied on section 11, making arguments similar to those reproduced above. In rejecting those arguments, Adjudicator Daphne Loukidelis stated as follows:

While I accept that it is in the public interest of institutions to negotiate favourable contractual and commercial arrangements, I am not satisfied by the evidence before me that disclosure of the information at issue could reasonably be expected to lead to the harms identified by Exhibition Place under section 11(c) and (d).

The information Exhibition Place seeks to withhold from the leasing records consists of the term of the lease, the amount of the annual rent expressed in two forms ("basic" and "participation"), with minimum and maximum figures for the latter, and the amount of money to be allocated to leasehold improvements.

In my view, the evidence provided is not sufficiently detailed or convincing to establish the harms claimed to Exhibition Place's economic, financial or competitive interests. For example, the withheld information at issue in this appeal relates specially to the agreed upon terms of the lease agreements that are nearly 10 years old, and not to Exhibition Place's current financial information generally. In the circumstances, I find the argument that "disclosure of the severed information would provide potential partners with information effectively establishing the minimum Exhibition Place will accept" to be unpersuasive. Accordingly, I am not persuaded that this information could be used by other parties in future unspecified transactions or negotiations to the economic or financial disadvantage of Exhibition Place... Further, in my view, the submissions provided do not support a finding that such unspecified transactions could fall through or that new negotiations could be affected by disclosure.

[26] Adjudicator Loukidelis added that

I would like to address Exhibition Place's argument that protecting its development prospects required it to withhold the information related to this commercial arrangement because the private sector must be "dealt with fairly, in confidence and in a business like manner." As an institution under the *Act*, Exhibition Place has certain rights and responsibilities which, in this context, means providing access to information under its 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). It is worth noting that in this appeal, the third party with whom the leasing arrangements were made took the position that section 10(1) did not apply to exempt the records. In my view, this suggests that there is awareness on the part of individuals or corporations doing business with government institutions that sometimes their business objectives must be balanced with the concurrent objective of transparency in public matters. It also recognizes that taxpayers have an important interest in knowing the terms of the agreements entered into by institutions [see PO-2435 and PO-2758]. Moreover, this office's decisions acknowledge that public review of, and commentary on, the financial arrangements entered into by government institutions is consistent with open and accountable government and does not represent the type of financial injury contemplated by section 11 of the Act [Orders MO-2363 and MO-2468-F)].

[27] Similarly, in Order MO-2509, Adjudicator Stephanie Haly dismissed Exhibition Place's claim that section 11 applied to its lease agreements with a third party:

The information that Exhibition Place seeks to withhold is set out above. From my review, I note that the lease and sub-lease were signed in 2005 and thus any information does not represent Exhibition Place's current financial or commercial terms. Further, while I agree that disclosure of this information will reveal to the appellant and competitors of the affected parties how much Exhibition Place is willing to accept for such terms as: rent, parking costs, insurance, I am unable to find that disclosure of this information will reveal to potential tenants "the minimum value Exhibition Place has accepted for the Ricoh Coliseum". As stated above by the affected party appellant, the lease was a result of confidential negotiations because of the "complex revenue sharing provisions." I have been provided with little evidence that suggests that the affected party appellant or the affected party offered Exhibition Place the minimum value for each of the terms. Rather, it is more likely that Exhibition Place and the parties negotiated the terms and I find that Exhibition Place has the power to agree or disagree to any new terms in any future lease agreements. I am not persuaded that disclosure will result in prejudice to Exhibition Place's economic interests or competitive position, or that it would suffer injury to its financial interests.

[28] I agree with the reasoning in the above orders. In the present appeal, Exhibition Place has not provided sufficient evidence to enable me to conclude that the harms set out in section 11 can reasonably be expected to occur as a result of disclosure of the information at issue. Exhibition Place argues that disclosure would allow others to



ascertain what price is acceptable to Exhibition Place. However, the lease dates back to 2004. It is reasonable to expect that the financial terms that Exhibition Place found to be acceptable at the time are not indicative of what it will find acceptable when it enters into negotiations for a new lease agreement for the property. Market conditions and other factors influencing an acceptable price can vary significantly over time.

[29] I am also not persuaded, in any event, that the financial terms reflected in the lease represent the minimum price that Exhibition Place would accept at the time. In this regard, I agree with the reasoning of Adjudicator Haly in Order MO-2509. I have been provided with little evidence to suggest that the financial provisions in the lease represent the minimum amount that Exhibition Place was willing to accept. The lease represents the result of negotiations between the parties, based on their interests at the time.

[30] Exhibition Place's submission that the information at issue could reasonably be expected to be used to its detriment in negotiations for the lease of buildings other than the one at issue is even less convincing, given the uniqueness of each of the buildings.

[31] Although I agree with Exhibition Place that context is important in determining whether the section 11 exemption applies, I am not satisfied from the information before me that Exhibition Place has demonstrated a risk of harm that goes beyond the merely possible or speculative. For these reasons, I am not persuaded that disclosure of the information at issue could reasonably be expected to result in prejudice to Exhibition Place's economic interests or competitive position, or that disclosure could reasonably be expected to be injurious to its financial interests.

[32] I conclude, therefore, that the exemption at section 11 does not apply to the information at issue.

**B. Does the mandatory exemption at section 10(1) apply to the information at issue?**

[33] The third party relies on sections 10(1)(a) and (c) of the *Act*, which 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, 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;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[34] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.<sup>7</sup> 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.<sup>8</sup>

[35] For section 10(1)(a) or (c) to apply, the third party, 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) and/or (c) of section 10(1) will occur.

[36] The third party provided representations to which I refer below. The appellant submitted that section 10(1) does not apply because a lease is negotiated between two parties and is therefore not proprietary information. He submits that leases, like contracts, are negotiated and that this office has found that contracts should be made public.

[37] I will now consider each part of the test in turn.

***Part 1: type of information***

[38] The third party submits that the information at issue is the type of information contemplated by section 10(1) of the *Act*.

[39] “Commercial information” has been interpreted in prior orders as information 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.<sup>9</sup>

[40] I find that the entire lease pertains to a commercial arrangement between the third party and Exhibition Place to lease certain premises from Exhibition Place. I find, therefore, that the information at issue constitutes commercial information.

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<sup>7</sup> *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.*).

<sup>8</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

<sup>9</sup> Order PO-2010.

## ***Part 2: supplied in confidence***

### *Supplied*

[41] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>10</sup>

[42] 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.<sup>11</sup>

[43] 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 are generally 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.<sup>12</sup>

[44] 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 third party to the institution.<sup>13</sup> 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.<sup>14</sup>

### *Representations*

[45] In support of its argument that the information at issue was “supplied” to Exhibition Place, the third party submits that both the “inferred disclosure” and “immutability” exceptions apply.

[46] In support of its argument that the “inferred disclosure” exception applies, the third party submits that disclosure of the information at issue would permit others and, in particular, persons familiar with the industry in which it operates, to make accurate inferences with respect to its finances, business strategy and plans, and other similar

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<sup>10</sup> Order MO-1706.

<sup>11</sup> Orders PO-2020 and PO-2043.

<sup>12</sup>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*).

<sup>13</sup> Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

<sup>14</sup> *Miller Transit*, above at para. 34.

confidential information.

[47] The third party submits that the information that can be inferred from the information at issue is commercially sensitive and is not the product of negotiations between the third party and Exhibition Place. It submits that this information is proprietary and sensitive, and that it has been "supplied" to Exhibition Place in the sense that the contractual provisions contained in the lease allow one to make accurate inferences with respect to it.

[48] With respect to the "immutability" exception, the third party submits that the information at issue fits within the scope of this exception as it contains, *inter alia*, information about its operations and revenue sources, and is therefore considered to be "supplied" within the meaning of section 10(1).

#### *Analysis and findings*

[49] As noted above, the provisions of a contract are generally treated as mutually generated, rather than "supplied" by a 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.<sup>15</sup>

[50] 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.

[51] Adjudicator Cropley also concluded that neither the immutability nor the inferred disclosure exceptions applied to the lease with Exhibition Place, commenting as follows:

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<sup>15</sup> See, for example, Order MO-1706.

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*.

[52] Based on my review of the information at issue -- that is, the information about gross revenue and rents -- I conclude that this information is the product of negotiations between the parties and that the third party did not "supply" it to Exhibition Place within the meaning of that term as it is used in section 10(1). While disclosure of the information at issue might permit very general inferences to be made about the third party's finances, business strategy and plans, it does not follow that its finances, business strategy and 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' finances and plans in a broad sense, since this would be true of most if not all contracts. I do not accept that any such general information that could be inferred from the disputed provisions constitutes information that was "supplied" to Exhibition Place. I find, therefore, that the "inferred disclosure" exception does not apply.

[53] I also find that the "immutability" exception does not apply. The third party argues that the information at issue reveals its operations and revenue sources. It relies on previous orders of this office that have found that the "immutability" exception applies to information that is immutable or not susceptible to change. However, in my view, the information at issue was susceptible to negotiation.

[54] The third party makes specific reference to information about its revenue sources. The lease contains a definition of "gross revenue", the details of which have been withheld. In my view, the types of revenue sources available to the third party are subject to negotiation since Exhibition Place, as the landlord, has a legitimate interest in the activities taking place on its premises. In fact, the portion of the lease disclosed to the appellant contains a section entitled "Use of Leased Property", setting out the activities for which the leased property is to be used. This is all information that was subject to negotiation. 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). 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) [section 10(1) of the municipal *Act*] 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.

[55] Based on my review of the information at issue, it is evident that as a whole it simply reflects the agreed-upon terms that were susceptible to negotiation between the parties.

[56] I conclude that the information at issue was not "supplied" to Exhibition Place and that the third party has not met the requirements of Part 2 of the section 10(1) test.

[57] 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 either of the harms set out in sections 10(1)(a) or (c).

[58] I conclude that the information at issue is not exempt from disclosure pursuant to section 10(1) of the *Act*.

[59] Given my conclusions that sections 10(1) and 11 do not apply, it is not necessary for me to consider the public interest arguments raised by the appellant.

## **ORDER:**

1. I do not uphold the decision of Exhibition Place to withhold the information at issue under section 11 of the *Act*. I find that section 10(1) also does not apply to the information at issue.
2. I order Exhibition Place to disclose the information at issue to the appellant by **April 26, 2018**, but not before **April 19, 2018**.

3. In order to verify compliance with provision 2 of this Order, I reserve the right to require Exhibition Place to provide me with a copy of the information disclosed to the appellant.

Original Signed by: \_\_\_\_\_

Gillian Shaw  
Adjudicator

\_\_\_\_\_ March 27, 2018