Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3629

Appeal MA16-572

City of Greater Sudbury

June 28, 2018

Summary: The appellant, a third party, appealed a decision by the City of Greater Sudbury to disclose information relating to its lease of municipally-owned property. The appellant claims the records are exempt under section 10(1) (third party information) of the *Act*. In this order, the adjudicator finds that the exemption does not apply and orders disclosure of the records.

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: MO-1706, MO-3290 and PO-2384.

OVERVIEW:

[1] The City of Greater Sudbury (the city) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to its lease of municipally-owned property to a private company. The request was for:

> All of the information pertaining to the terms and conditions of the City of Greater Sudbury's leasing of its [named arena, including address] to [named individual], CEO of [named corporation] who occupies this city property and uses it as a commercial film & TV space named [name of studio], a private commercial [enterprise] since 2011. Specifically, we would like to know the amount of rent the city is currently charging him, and has been charging him since 2011.

[2] The city located responsive records, and, in an initial decision, decided to give full access to the lease but only partial access to a summary of invoicing relating to the company identified in the request. Prior to disclosing the records, the city gave notice to two affected parties whose interests might be affected by the release of the records.

[3] One of the affected parties, the named corporation (the appellant in this case), appealed the city's decision to disclose the entire lease and a partial summary of invoicing. The original requester also appealed the city's decision to give only partial access to the summary of invoicing.

[4] During mediation of this appeal, the city issued a revised decision, in which it granted full access to both records. The revised decision ended the requester's appeal.

[5] The appellant, however, advised that, in addition to its appeal of the city's decision to disclose the complete lease agreement, it was also now appealing the city's revised decision to give full access to both records. In objecting to disclosure of the records, the appellant relies on section 10(1) of the *Act*.

RECORDS:

[6] There are two records in dispute: a 19-page lease agreement and a three-page summary of invoicing.

DISCUSSION:

[7] The only question in this appeal is whether the mandatory exemption at section 10(1) of the *Act* applies to the records.

[8] Section 10(1) of the *Act* states that:

> 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.

[9] Section 10(1) is designed to protect the "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

[10] 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

[11] I find that the records contain commercial and financial information.

[12] "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 both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises.[3] "Financial information" has been defined as information relating to money and its use or distribution and must contain or refer to specific data.[4]

[13] The lease is an agreement between the city and the appellant – a business – to lease certain premises from the city for a commercial use. It contains commercial and financial information as it relates to the lease of a property and the conversion of that property for the appellant's business.

[14] By setting out rents, charges for taxes, utilities, as well as repairs for which the city was responsible, and which are reflected in the lease, I find that the summary of invoicing contains financial information that relates to the appellant's use of the

---

[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 PO-2010.

premises.

[15] Because the records contain commercial and financial information, I must consider whether the next two parts of the above-noted three-part test are met: that the information was supplied to the city in confidence, and, if so, that there is a reasonable expectation that the specified harms will result from disclosure.

Part 2: supplied in confidence

[16] 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.[5]

[17] For the reasons that follow, I find that the appellant has not established that it supplied information in the records to the city in confidence and has therefore failed to satisfy part two of the three-part test.

[18] 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.[6]

[19] 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.[7]

[20] In order to satisfy the "in confidence" component of part two, the party resisting disclosure must establish that, as the supplier of the information, it had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[8]

[21] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case must be 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

[5] Order MO-1706.
[6] Orders PO-2020 and PO-2043.
[7] The Divisional Court approved this approach in *Boeing Co.*, supra, and in *Miller Transit Limited* v. *Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII) (*Miller Transit*).
[8] Order PO-2020.

- prepared for a purpose that would not entail disclosure.[9]

Representations

[22] Only the appellant submitted representations. In response to a Notice of Inquiry, the city stated that it intended to give full access to the records, while the requester advised that he continues to seek full access to both the lease and the summary of invoicing.

[23] The appellant submits that the disclosure of the information contained in the records would allow a third party to make pricing conclusions about the appellant's business operations, which the appellant submits is sensitive commercial information. It also submits that the lease contains terms that are unique and pursuant to which the city agreed to lease the premises to the appellant for the refurbishment of the premises in keeping with the appellant's particular business needs.

The lease agreement

[24] The appellant submits that the lease agreement contains commercial and financial information that was supplied to the city in confidence, the disclosure of which would prejudice the appellant's competitive position within its industry, would provide the requester with an undue gain and the benefit of understanding the negotiated terms contained within the agreement, as well as insight into its business operations.

[25] The appellant states that the requester is a direct competitor who has requested the information in bad faith in an attempt to interfere with the agreement between the city and with the appellant's business.

The summary of invoicing

[26] The appellant submits that the summary of invoicing contains financial information in the form of a summary of rent and utility invoicing, other related invoicing such as charges for repair of a frozen meter, and financial credits issued by the city to the appellant.

[27] The appellant submits that the information contained within the summary of invoicing was supplied to the city in confidence and is not available from sources to which the public has access. It submits that its disclosure would permit the drawing of accurate inferences regarding the amounts paid by the appellant to the city in operating the leased premises.

[28] For the reasons that follow, I find that the second part of the three-part test has not been satisfied. As a result, the records do not qualify for exemption under section 10(1) of the *Act* and should be disclosed to the appellant.

---

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

Analysis and findings

[29] 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 has been preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[10] In Order MO-1706, Adjudicator Bernard Morrow wrote:

> [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.

[30] While the appellant submits that the records contain information that was supplied to the city in confidence, by its own representations the appellant states that the lease is the product of prolonged negotiations between the parties which took place between October 2011 and March 2012.

[31] 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 claim that certain terms of the lease were "supplied" to Exhibition Place, Adjudicator Cropley wrote:

> 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 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).

[32] I find this reasoning equally applicable to this case. Based on the appellant's representations and on my review of the lease, I find that it is the product of negotiations between the parties and was not "supplied" to the city by the appellant

[10] Order MO-3290.

within the meaning of that term as it is used in section 10(1) but negotiated between the parties over a protracted period of time.

[33] Although not explicitly argued by the appellant, I have also considered the two exceptions to the general rule that 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 "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be drawn with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[11] The immutability exception arises where the contract contains information supplied by the third party, but the information is not susceptible to negotiation.

[34] I adopt the reasoning of Senior Adjudicator Gillian Shaw in Order MO-3290 who, in considering whether information was "supplied" to an institution and finding that the "inferred disclosure" exception did not apply, wrote that:

> 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. Similarly, the appellant submits that while provisions setting out permitted and prohibited uses are often the subject of heavy negotiations in the entertainment and venue context, these provisions are based on non-negotiated commercial realities and business plans. However, I observe that all parties to contracts would be expected to have their own interests in mind when negotiating contractual terms. I do not accept that any commercial realities and business plans that could be inferred from the disputed provisions constitute information that was "supplied" to Exhibition Place.

[35] I also find that the "immutability" exception does not apply in this case. The appellant argues that the lease contains unique terms that reveal its plans and business activities, and that disclosure would provide the requester with "private information" that discloses its business activities. The appellant does not provide particulars in this regard. In my view, the fact that inferences can be drawn about the appellant's interests does not mean that this is information that was "supplied" to the city for the purposes of the section 10(1) exemption.

[36] Adjudicator Steve Faughnan wrote, in Order PO-2384, that the intention of section 10(1) [section 17(1) of the provincial *Act* in that case], is to protect information of a third party that is not susceptible to change in the negotiation process, not information that was susceptible to change but was not, in fact, changed. I find that the lease agreement in this case consists of various clauses that were subject to what the

[11] Order MO-1706, cited with approval in *Miller Transit*, supra, at paragraph 33.

appellant described as prolonged negotiation by the parties and that the immutability exception therefore does not apply.

[37] Similarly, I find that the summary of invoicing reflects the terms of the lease. Where invoices merely reflect the terms of an agreement between an institution and a third party, it has been found that such invoices are not "supplied" to the institution.[12] In this case, however, the record at issue is a summary of invoicing, and not invoices themselves. The summary sets out a list of charges arising from the lease, such as rent and taxes paid, credits given to the appellant by the city, or the cost of repairs. Absent evidence to the contrary, it appears that the summary of invoicing was created by the city to record a summary of charges flowing from, or in accordance with, the terms negotiated in the lease. I therefore find that it cannot be said that the information contained in the summary was "supplied" to the city by the appellant in confidence, and so part two of the test has not been satisfied.

[38] Finally, I note that the appellant, in its representations, discusses harms that it submits can reasonably be expected to occur if the records are disclosed, submitting that the requester is a competitor who the appellant says seeks access to the information in bad faith and in order to cause harm to the appellant's business operations. Beyond speculating that possible harm will come from disclosure based on past critical commentary by the requester to local media, for example[13], the appellant gives little evidence to support that disclosure of the records would result in any of the harms contemplated by section 10(1), which require evidence about the potential for harm that is beyond the merely possible or speculative.[14]

[39] However, section 10 does not exempt from disclosure all information that will cause harm if disclosed. To be exempt from disclosure under section 10(1), information must have been "supplied" to the institution. Because I have found that the appellant has not satisfied part two of the test, it is not necessary to review whether any of the harms in section 10(1) are established.

[40] Accordingly, I find that the second part of the three-part test has not been satisfied and the records do not qualify for exemption under section 10(1) of the *Act* and should be disclosed.

ORDER:

1. I uphold the city's decision and dismiss the appeal. I order the city to disclose the records at issue to the requester by **August 3, 2018** and not before **July 30, 2018**.

---

[12] See, for example, Orders MO-3462, PO-2020 and PO-2043.
[13] The appellant and requester are known to each other and consented, during mediation, to disclosure of each other's identities to one another.
[14] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paragraphs 52-54.

2. In order to verify compliance with provision 1 of this order, I reserve the right to require the city to provide me with a copy of the record which is disclosed to the requester.

Original Signed By: June 28, 2018

Jessica Kowalski
Adjudicator