Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER MO-1915

Appeal MA-040155-1

Peel District School Board

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NATURE OF THE APPEAL:

This is an appeal from a decision of the Peel District School Board (the Board), made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) sought access to the vending contract between the Board and a dairy company (the affected party). The Board notified the affected party of the request, inviting it to make representations on why the record or any part of it should not be disclosed. Following receipt of these representations, in which the affected party objected to release of portions of the contract, the Board issued a decision to the appellant granting access to the contract with certain portions severed.

In severing the contract, the Board cited the mandatory exemption from disclosure in section 10(1) of the *Act* (third party information), as well as the discretionary exemption in section 11 (economic interests of an institution).

The appellant appealed the Board's decision. As mediation of this appeal did not resolve the issues, it has been referred to me for adjudication.

A Notice of Inquiry which summarizes the facts and issue in the appeal was sent to the Board and the affected party. Both parties provided representations in response. I then sent a notice to the appellant along with a complete copy of the Board and affected party's representations. The appellant also provided representations. The appellant's representations were then shared with the Board and the affected party. Both the Board and the affected party provided representations in reply. These representations were then shared with the appellant, who also provided representations in response to the reply representations.

RECORD:

At issue are the following severed portions of a contract (the "Supply Agreement") between the Board and the affected party dated February 11, 2004:

- part of section 2.4
- all of sections 2.4(a) – (c)
- part of section 2.4(d)
- part of section 3.1
- all of section 3.1(a)
- part of section 3.1(b)
- all of section 3.4(g)
- all of section 4.1
- all of section 4.2
- all of section 4.4
- all of section 4.5
- part of section 5.1
- all of section 5.4

The Board and the affected party have both agreed to disclose the last paragraph of Section 3.2 of the Supply Agreement. This information will not be further dealt with in this order and should be disclosed to the appellant.

DISCUSSION:

THIRD PARTY INFORMATION

The Board and the affected party submit that sections 10(1)(a), (b) and (c) apply to exempt the identified parts of the contract from disclosure. These portions of section 10(1) read:

> 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;

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. 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 [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 10(1) to apply, the Board and/or the affected party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: Type of information

The types of information listed in section 10(1) have been discussed in prior orders. Significant to this appeal are the definitions of commercial and financial information:

> *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 [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt these definitions for the purposes of this appeal.

The affected party submits:

> …the [severed] Provisions contain a combination of commercial and financial information supplied by the Affected Party to the Board. Particularly, the [severed] Provisions pertain to commercial information in that the information contained in the [severed] Provisions relates to the agreed upon terms of a commercial relationship, i.e., the Supply Agreement between the Affected Party and the Board, which involves the sale of merchandise by the Affected Party from the vending machines installed at the schools falling within the jurisdiction of the Board. Moreover, the [severed] Provisions contain financial information, specifically pricing information and pricing practice.
>
> The Affected Party respectfully submits that all of the information contained in the [severed] Provisions is commercial information. In addition, the information contained in sections 3.4(g), 4.1, 4.2 and 5.4 of the [severed] Provisions is financial information.

I agree with the affected party. The severed information clearly relates to the sale of dairy and dairy-related products by the affected party to the Board. The severed information includes financial information, specifically pricing and remuneration information, as well as commercial information relating to the provision of vending machines, and other terms relating to the

agreement between the affected party and the Board. As such, I find that the information qualifies as commercial and financial information as defined above and the first part of the test has been met.

Part 2: Supplied in confidence

In order to satisfy part two of the test, the affected party must have supplied the information to the Board in confidence, either implicitly or explicitly.

Supplied

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied by the affected party to the Board, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by the affected party [Orders PO-2020, PO-2043].

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 have generally been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation [Orders PO-2018, MO-1706].

Representations of the Affected Party

The affected party provides extensive representations on how the circumstances of the record at issue in this appeal are sufficiently distinguishable from the records at issue in Order MO-1706, such that the information at issue in the present appeal should be characterized as "supplied" rather than "negotiated". The affected party submits:

> …as evidence of the "newness" of the [affected party's] business, the Board, which is the second largest public school board in Canada, did not put out a request for proposal as would have been customary in the circumstances. Rather, given that, to the knowledge of both the Affected Party and the Board, the Affected Party is the only commercial enterprise within Canada that has set up a program pursuant to which exclusively milk and milk-based dairy products are sold to the public through vending machines, there was no need for a request for proposal. Instead the Supply Agreement was negotiated and entered into between the Board and the Affected Party much like any other contract that is entered into between parties in the private sector of the Canadian economy, i.e., the Affected Party and the Board negotiated the terms and conditions of the Supply Agreement directly, without the need of a request for proposal;

…given the absence of a request for proposal, necessarily, all information given by the Affected Party to the Board could only have been *"supplied"* in the context of the Supply Agreement, rather than in the context of a request for proposal or other similar manner; and

…substantive explicit efforts were made by the Affected Party to ensure that the [severed] Provisions would be kept confidential and not disclosed to any third party. In particular, as noted by the Confidentiality Provision Drafts, the Confidentiality Provision was the subject of protracted negotiations between the Affected Party and the Board.

…

It is to be noted that the record in Order MO-1706 dealt with both a contract between the Institution and a third party (which contract is referred to in the above cited passage), as well as a proposal that had been submitted by such third party to the Institution in response to such Institution's request for proposal. In respect of such proposal, Order MO-1706 concludes as follows:

> *"… I find that, based on the evidence before me, the withheld information in the Proposal meets the "supplied" test in Section 10(1) and, therefore, part two of the three-part test has been met with respect to this information."* (emphasis added)

Given that the Board in the record under consideration had no need to issue a request for proposal as a result of, to the knowledge of the Affected Party and the Board, the Affected Party being the only commercial enterprise in the Canadian marketplace that offers exclusively milk and milk-based dairy beverages for sale from vending machines, the information contained in the [severed] Provisions could only have been supplied by the Affected Party to the Board in the context of the Supply Agreement, not in the context of a request for proposal or similar document.

…

The Affected Party hereby confirms that the information contained in Sections 4.1, 4.2 and 5.4 of the [severed] Provisions were not the object of any negotiations or any serious negotiations between the Affected Party and the Board. In this regard, the Affected Party respectfully submits that since the Supply Agreement was not preceded by a request for proposal, the information contained in the Supply Agreement could only have been *"supplied"* within the context of the said Supply Agreement. Accordingly, the information contained in the [severed]

> Provisions should be considered by analogy with information *"supplied"* within the context of a request for proposal.

Representations of the Board

The Board stated the following on the issue of whether the information in the contract was "supplied".

> The Board submits that the parties recognized that some of the information incorporated into terms of the agreement was not information resulting from negotiation between the parties, but was information supplied by the Affected Party.

Representations of the Appellant

The appellant submits that Order MO-1706 should apply to the information at issue. The appellant also cites additional orders of this office (Orders PO-2200 and MO-1787) in support of his position that the severed information was not "supplied" for the purposes of section 10(1).

The appellant also responds to the affected party's submission that the severed information was not supplied in response to a Request for Proposal and as such was "supplied". The appellant states:

> The Affected Party in this case relies on the fact that the Agreement was not the product of a request for proposals. In previous appeals, including MO-1706 and MO-1787, the affected parties relied on the fact that there was a request for proposals as evidence that the contractual information was not negotiated but supplied. The absence of a request for proposals makes negotiation more, not less, likely.

And finally the appellant addresses the issue of the confidentiality clause as follows:

> Nor can the confidentiality clause prevent disclosure. The confidentiality clause in the Agreement constitutes a transparent attempt to contract out of the *Act*, which should not be sanctioned. The fact that the clause says the information was supplied does not make it so.
>
> In the British Columbia Order 01-20 Commissioner Loukidelis stated as follows in considering a very similarly worded clause:
>
> > It must be said, however, that the fact the parties intended the entire agreement to remain confidential does not establish the "supply" element necessary under s. 21(1)(b) or a reasonable expectation of harm under s. 21(1)(c) [the B.C. equivalents of the

> provisions considered on this Appeal]. This is a point I also made in Order 00-09, [2000] B.C.I.P., C.D. No. 9. I also agree with the applicant the CCB's wish to keep information confidential does not establish risk of harm to UBC under s. 17(1). A third party that contracts with a public body may prefer that the terms of the contract not be publicly disclosed. Yet even if the third party obtains a contractual commitment of confidentiality, as CCB did here, that commitment cannot dictate whether the contract, or part of it, is accessible under the Act. Nor is the application of s.17 dictated by a third party contractor maintaining that it prefers or insists on confidentiality as a condition of its doing business with a public body. As I found in Order 00-47, [2000] B.C.I.P.C.D. No 51, any attempt to contract out of the Act is void as against public policy.

Analysis and Finding

In Order MO-1706, Adjudicator Bernard Morrow found that, except in unusual circumstances, agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be supplied. I adopt the approach taken in Orders MO-1706.

The affected party submits that the Supply Agreement was negotiated and entered into between the Board and the affected party like any other contract. The affected party further submits that the information contained in sections 4.1, 4.2 and 5.4 of the severed provisions were not the object of any negotiations or any serious negotiations. The Board submits that some of the information incorporated into the terms of the agreement was not negotiated, but does not specify the supplied information. I find that, in the circumstances of this appeal, I have not been provided with sufficient evidence to support a finding that the severed information was "supplied" for the purposes of section 10(1). In my view, the evidence suggests a finding that the severed information is part of a contract which has normally been found not to qualify as "supplied" (see Orders PO-2018 and MO-1706).

I find the affected party and the Board's representations on what portions of the Agreement were or were not "supplied" to be both contradictory and unhelpful. Based on my reading of the severed provisions and the representations of the parties, I remain unable to discern the severed provisions which the parties argue were "supplied" from those they argue were "negotiated". Accordingly, I do not accept the affected party and the Board's submissions that the severed information was supplied and not negotiated.

In any event, I do not accept the affected party's argument that because the Board did not issue a request for proposals like in Order MO-1706, the information in the severed portions of the agreement was supplied. The fact that there was not a request for proposals and the affected party did not submit a proposal, does not lead to the conclusion that the terms of the agreement were supplied and not negotiated. The presence or absence of a request for proposal is not determinative of the "supplied" issue for the purposes of section 10(1).

The affected party also takes the position that the information in the Supply Agreement was supplied and not negotiated because the supply of dairy products is a fairly new business, unlike the sale of soft drinks which were the subject of the beverage agreement at issue in Order MO-1706. From this, the affected party asks me to conclude that, therefore, the terms of the agreement would have had to have been created for this new venture, and in fact were created by the affected party and supplied to the Board. While I accept that the affected party's sale of dairy products in the vending machine format may be a new venture, the affected party has not provided me with sufficient evidence as to the information that was supplied to the Board nor sufficient evidence as to the confidential information that would be disclosed if the severed provisions are released.

And finally, the affected party argues that the confidentiality provision in the Supply Agreement is evidence of the fact that the information was supplied. I disagree with the affected party. The confidentiality provision, in and of itself, is not sufficient evidence that the affected party supplied the information in the agreement. As such, I agree with Commissioner Loukidelis' approach in Order 01-20, quoted above by the appellant, that the fact that the parties intended the contract to remain confidential does not establish the "supplied" element necessary for section 10(1).

In summary, I am unable to find that the severed information was "supplied" for the purposes of section 10(1). As all three parts of the test under section 10(1) must be met, I find that section 10(1) does not exempt the severed provisions of the Supply Agreement from disclosure.

ECONOMIC AND OTHER INTERESTS

In the alternative to section 10(1), the Board originally claimed that sections 11(a), (c), (d) and/or (g) applied to exempt the information in the severed provisions from disclosure. In its representations, the Board states that it no longer relies on sections 11(a) and (g). I will now analyze whether section 11(c) and (d) apply to the information at issue. These sections read:

> A head may refuse to disclose a record that contains,
>
> (c) information where the 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;

The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For sections 11(c) and (d) to apply, the Board must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the Board must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(c): prejudice to economic interests

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 [Order P-1190].

Board's Representations

In support of the application of section 11(c), the Board submits the following:

> The Board is funded by the provincial government using a predetermined funding formula. The funding received for many school boards is inadequate to address the various needs of its student populations. In addition to the funding received by the provincial government, the Board, as a corporate entity, may engage in revenue generating endeavours. To meet the growing demands of the Board's student population in a time of reduced public spending in education, school boards in Ontario, including the Board, have attempted to generate revenue in diverse and imaginative ways.
>
> One such method has been to seek unique, innovative exclusive arrangements with suppliers, "branding agreements." These branding agreements have provided the Board with and have assisted it in providing services to students that might not otherwise be provided for under the 'funding formula'.
>
> The Board submits that it will be prejudiced in the future if it is required to disclose confidential proprietary commercial and trade secret information supplied by third party contractors. The Board submits that either this type of

> information will no longer be shared with the Board in writing or, innovative solutions to the Board's needs will not be accessible to the Board.
>
> In the present case, the Affected Party is the only commercial enterprise within Canada that has, to the knowledge of the Board, established a program pursuant to which milk and milk-based dairy products are sold to the public through exclusively designated vending machines. As such, the Board, through its relationship with the Affected Party was supplied with confidential proprietary commercial and trade secret information.
>
> …
>
> The Board submits that innovative agreements, including methods, approaches and/or procedures, which are unique and represent valuable confidential proprietary commercial and trade secret information that address the Board's needs will not [be] accessible to the Board should private corporations determine that they cannot risk such valuable confidential proprietary commercial and trade secret information being disclosed. This, the Board submits, will greatly prejudice its economic interests.
>
> In summary, if third party contractors know that valuable confidential proprietary commercial and trade secret information will not be confidential if supplied to the Board, then they will cease to provide it. If they cease to provide it to the Board, then the Board will either not benefit from the innovative solutions available to private corporations, or the Board will not have the information before it in order to make informed choices. In either case, the Board's economic interests will prejudiced, as it will not be able to maximize its resources.

The Affected Party states in its representations that it defers to the representations of the Board with respect to section 11 of the *Act*.

Appellant's representations

The appellant submitted the following in support of its position that section 11 does not apply.

> The Affected Party does not claim that it would not provide similar information to the Board if the Requested Information were public. Such a position would be tenuous as, following Orders MO-1705 and MO-1706, the Affected Party would have known that disclosure of the Requested Information was a distinct possibility.
>
> The fact that the Affected Party has stopped short of claiming that it would not have entered the Agreement if the Requested Information were public, makes the Board's arguments – that third parties will refuse to deal with institutions or deal

> with institutions on less favourable terms – speculative in the extreme. Moreover, the factual findings in Orders MO-1705, MO-1706 and British Columbia Order 01-20, disclose that there is a highly competitive market for vending machine contracts with school boards and other educational institutions, and that this competition has not been diminished by public disclosure of contractual agreements.
>
> …
>
> There is no evidence disclosure of the Requested Information would prejudice the competitive position of the Board in any way. In fact, to the extent that disclosure of the Requested Information would cause the Affected Party's potential competitors to attempt to offer more favourable contractual terms, the disclosure of the Requested Information would actually improve the Board's competitive position.

The appellant then quotes from Order MO-1706 where Adjudicator Morrow, faced with a similar submission from the Board, found that sections 11(c) and (d) of the *Act* did not apply.

Analysis and Findings

The Board alleges that if the information in the severed provisions is disclosed then third parties would refuse to do business with the Board and the Board will lose out on opportunities to raise funds for schooling which would in turn prejudice the economic interests of the Board. In addition, the Board argues that third parties in the future may refuse to disclose information to the Board which would put the Board at a disadvantage in its ability to bargain with third parties. This would affect the Board's competitive position.

As stated above, the Board must provide detailed and convincing evidence that disclosure of the information in the severed provisions could reasonably be expected to prejudice the economic interests or competitive position of the Board. The Board has not provided me with such evidence. The Board's arguments are speculative at best and I can find no basis for its position that third parties in the future would be unwilling to either do business with the Board, or provide necessary information to the Board during negotiations. Moreover, I agree with the appellant's position that disclosure of the information at issue may result in potential competitors attempting to offer more favourable contract terms to the Board, and that this could in fact improve the Board's competitive position. As a result, I find that section 11(c) of the *Act* does not apply to the information at issue.

Section 11(d): injury to financial interests

The Board submits the following in support of its position that section 11(d) of the *Act* applies.

> Release of the information at issue in this appeal can reasonably be expected to be injurious to the financial interests of the Board by discouraging other potential parties from entering into branding agreements with the Board. As outlined in the submissions of the Affected Party, it is the opinion of the affected party that confidential proprietary commercial and trade secret information was supplied to [the] Board, despite such information later being included in the Record. The Board submits that arguably the Affected Party would not have entered into an agreement with the Board had the Board been unwilling or unable to accept the terms of the Confidentiality clause.
>
> The Board does not make the confidential proprietary commercial or trade secret information supplied to it and contained in a contract available on request. These are confidential as between the Board and the third party and must be known to be confidential to ensure that information will be provided to the Board. If such information was commonly disclosed the risk to third parties that their information would be available on request would be too great for their participation in contractual agreements with the Board. As evidence the Board points to the Confidentiality provisions outlined in the Record.
>
> The inability to engage in negotiations with single vendors offering unique, new or innovated solutions to the Board's needs would cause significant prejudice to the Board's financial position.

Analysis and Findings

In Order MO-1706, Adjudicator Morrow addressed a similar argument, and stated the following in finding that section 11(d) did not apply to exempt the proposal and contract for cold beverage vending between the Board and an affected party:

> The Board suggests that disclosure of the information at issue will cause prospective venders to not participate in tender, request for proposal or invitation to propose processes and a subsequent contracting process. In making this argument the Board asserts that the tender, request for proposal or invitation to propose process is understood to be a confidential process. The Board only discloses the final cost, price or revenue-generating amount submitted by the successful bidder to the public. The Board suggests that if the information at issue is disclosed potential vendors will not participate in the process, in turn, reducing the number of potential partners and driving up its cost of entering into purchase agreements.
>
> The Board presents a conclusion that is laden with speculation. I have no evidence that prospective vendors will not provide this information to the Board in the future or that they will not submit proposals in the future. In fact, based upon the evidence of U.S. practice, as discussed above under section 10(1), there

> is compelling evidence that prospective vendors do, in fact, provide this sort of information with the knowledge that it is non-confidential. In addition, the suggestion that the pool of potential vendors would be reduced, thus increasing the Board's costs of entering into similar arrangements, is self-serving at best. In this type of vending and pouring agreement it is the vendors that are competing for the Board's business and absorbing the costs, not the Board. The Board does not incur any costs; on the contrary, it only reaps the financial benefits of the relationship.

As Adjudicator Morrow found in Order MO-1706, I find the Board's arguments in this appeal are speculative. The Board suggests that third parties would refuse to negotiate or enter into "branding agreements" with the Board if information like that at issue is disclosed. I do not accept this argument. As stated in Order MO-1706, vendors are competing for the Board's business, and not the other way around. I am not satisfied that disclosure of the information could reasonably be expect to result in these same vendors refusing to do business with the Board, and thus result in injury to the Board's financial interests.

As the Board has not provided detailed and convincing evidence that the disclosure of the severed information could reasonably be expected to be injurious to the Board's financial interests, I find that section 11(d) does not apply to exempt the information in the severed portions of the Supply Agreement.

As I have found that sections 11(c) and (d) do not apply to the information at issue, I will order that the severed information be provided to the appellant.

ORDER:

1. I order the Board to provide the appellant with a complete copy of the Supply Agreement by **May 11, 2005** but not before **May 6, 2005**.

2. In order to verify compliance with this order, I reserve the right to require the Board to provide me with a copy of the record disclosed to the appellant pursuant to Provision1.

Original signed by: April 6, 2005
Stephanie Haly
Adjudicator