Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2682

Appeal MA10-105

Hamilton-Wentworth District School Board

December 22, 2011

Summary: The requester sought access to the food services contract between the Hamilton Wentworth District School Board and a named company pursuant to the *Municipal Freedom of Information and Protection of Privacy Act*. The board located one responsive record and notified the company, which objected to the release of portions of the record pursuant to sections 14(1) (personal privacy) and 10(1) (third party information). The board issued an access decision, indicating that it would be granting full access to the record. The company appealed the board's decision. The board provided partial disclosure of the record to the requester, withholding those parts that were the subject of the company's appeal. The requester confirmed that it was not interested in the information that had been severed pursuant to section 14(1) and the application of that section was removed from the appeal. With the company's consent, the board then released additional information from the record to the requester. In this order, section 10(1) is found not to apply to the information at issue, based on the third party's failure to meet the "supplied" part of the test under that section and the appeal is dismissed.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 10(1).

Orders and Investigation Reports Considered: P-1611, MO-1706.

Cases Considered: *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.)

OVERVIEW:

[1] A local journalist sought access to a copy of the food services contract (the contract) between the Hamilton Wentworth District School Board (the board) and a named company (the third party), pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The board located one responsive record, comprised of contract, two addenda and two accompanying letters. However, before releasing the record to the requester, the board notified the third party of the request and sought its views regarding disclosure. The third party objected to the disclosure of certain parts of the record, claiming the application of section 14(1) (personal privacy) and section 10(1) (third party information).

[3] After reviewing the submissions of the third party, the board issued a final access decision in which it indicated that it would be granting full access to the record.

[4] The third party (now the third party appellant) appealed the board's access decision. Following the filing of the appeal, the board provided partial disclosure of the record to the requester, withholding those parts of the record that are the subject of the appeal.

[5] During the mediation stage of the appeal process, the requester advised that it was not interested in the signatures that had been redacted from the record and the third party appellant indicated it no longer objected to the release of the names of the corporate officers or school board employees contained in the record. Under the circumstances, the application of section 14 to the record was removed as an issue in the appeal. The board, in turn, agreed to disclose additional information (the names of the corporate officers and school board employees contained in the record) and, subsequently, issued a supplementary decision letter, pursuant to which it disclosed this additional information to the requester.

[6] The third party continues to rely on the application of the mandatory exemption in section 10 in regard to the information remaining at issue. The requester asserts that there is a public interest in this information, thereby raising the possible application of the section 16 public interest override.

[7] The appeal was not resolved during mediation and was transferred to the adjudication stage for an inquiry, in which the parties are invited to submit written representations on the outstanding issues.

[8] I initiated an inquiry, during which I sought representations from the board, the third party appellant and the requester. The board chose to not submit representations. I received representations from the third party appellant and the

requester, which were shared in accordance with the IPC's *Code of Procedure* and *Practice Direction 7*.

[9] In the discussion that follows, I conclude that the information at issue is not exempt under section 10. Due to my conclusion, it is not necessary for me to consider the application of section 16 in the circumstances of this case.

RECORDS:

[10] There is one record at issue, comprised of the withheld portions of a contract, two attached addenda and two accompanying letters.

DISCUSSION:

Does the mandatory third party information exemption in sections 10(1)(a), (b) and/or (c) apply to the information at issue in the record?

[11] The third party appellant indicates in its representations that it is relying on sections 10(1)(a), (b) and (c) to deny access to the withheld portions of the record. As stated above, the board did not make representations.

[12] Sections 10(1)(a), (b) and (c) 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, where the disclosure could reasonably be expected to,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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;
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> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[13] 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]

[14] For section 10(1) to apply, the board and/or the third party appellant 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 or financial 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 paragraphs (a), (b) and/or (c) of section 10(1) will occur.

Part 1: type of information

[15] The third party appellant submits that the record at issue reveals trade secrets and contains technical, commercial, financial and labour relations information.

[16] These types of information, listed in section 10(1), have been discussed in prior orders:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and

[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.).
[2] Orders PO-1805, PO-2018, PO-2184, MO-1706.

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[3]

Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing.[4]

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

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.[7]

Labour relations information has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute[8]

- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,[9]

but not to include:

- names, duties and qualifications of individual employees[10]

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[3] Order PO-2010.
[4] Order PO-2010.
[5] Order PO-2010.
[6] Order P-1621.
[7] Order PO-2010.
[8] Order P-1540.
[9] Order P-653.
[10] Order MO-2164.

- an analysis of the performance of two employees on a project[11]
- an account of an alleged incident at a child care centre[12]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation[13]

[17] The third party appellant states that it uses "specialized techniques to fulfill its obligations to the board" developed after many years in the food preparation and distribution business, and that disclosing the severed portions of the record would reveal its trade secrets and confidential information.

[18] It also submits that the record contains technical information, which it describes as its "technical methods of operation and equipment utilization."

[19] In addition, the third party appellant states that the record contains commercial information, including information on "pricing, products, equipment, description of services provided, rights and obligations [in relation to its relationship with the board] and commercial insurance information."

[20] With regard to pricing information, the third party appellant submits that the record contains "pricing and costing information, commission information, payment terms and arrangements and capital investment information." It adds that it has made and may make in the future a "capital investment at the board."

[21] With respect to labour relations information, the third party appellant acknowledges that "while it is not a union employer at the board, this may change in the future." It suggests that any information that is disclosed will "most likely be obtained by a potential union which may be used for collective bargaining purposes with [it]."

[22] The requester does not make representations on part 1 of the test under section 10(1).

[23] Having reviewed the third party appellant's representations and the information at issue, I am satisfied that the record contains commercial and financial information within the meaning of those terms in section 10(1). The commercial and financial information includes the contractual terms of a commercial relationship for the delivery

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[11] Order MO-1215.
[12] Order P-121.
[13] Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

of cafeteria services by the third party appellant to the board, as well as the financial terms relating to that relationship, including pricing and commission rates. I do not find that the record contains any trade secrets, technical information or labour relations information within the meaning given to those terms under section 10(1). However, having found that the record contains commercial and financial information, I am satisfied that part 1 of the test under section 10(1) has been met.

Part 2: supplied in confidence

Supplied

[24] 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.[14]

[25] 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.[15]

[26] 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, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[16]

[27] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution. The "immutability" exception applies to information that is immutable or is not susceptible of change, such as the operating philosophy of a business, or a sample of its products.[17]

[28] The third party appellant submits that in making its proposal to the board it disclosed a business strategy, as well as costing and other information that it supplied

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[14] Order MO-1706.
[15] Orders PO-2020, PO-2043.
[16] Cited above. See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe,* [2008] O.J. No. 3475 (Div. Ct.).
[17] Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, cited above.

to the board in confidence. The third party appellant states that the information it supplied during the bidding process is the same information that was incorporated into the record at issue and should be viewed as having been supplied. The third party appellant cites Order P-1611 in support of its position.

[29] The requester's representations indicate that the record at issue is a contract between the third party appellant and the board that governs the delivery of cafeteria services for most of the board's high schools.

[30] I have carefully reviewed the record at issue and considered the representations of the third party appellant and the requester. In my view, the information in the record was not "supplied" to the board by the third party appellant, for the reasons that follow.

[31] As noted above, there is one record at issue, comprised of a contract between the board and the third party appellant for the provision of cafeteria services by the third party appellant to the board, two addenda and two accompanying letters. The contract is dated July 18, 2000 and was signed by the parties on September 5, 2000. It contains the terms of an agreement between the board and the third party appellant. Appended to the contract are two addenda, made on October 17, 2000. The addenda set out new financial terms of the contract and provide that all other terms and conditions of the contract are to remain in effect. Attached to the contract are two letters. One letter, dated July 16, 2002, is from the third party appellant to the board and it confirms new financial terms of the contract effective fiscal year commencing August 31, 2002. The second letter is dated February 29, 2008 and it confirms the extension of the contract for the 2008-2009 school term.

[32] In my view, it is clear that the record contains contractual terms that were the subject of negotiations between the board and the third party appellant and, accordingly, mutually generated by the parties. As a result, this information cannot be considered "supplied" for the purposes of section 10(1) of the *Act*, subject to the two exceptions set out above.

[33] I acknowledge that the third party appellant has cited Order P-1611 in support of its position that the information in the record was supplied since the information provided during the bidding process is the same information incorporated into the record. At the time that Order P-1611 was issued, this office took the view that information contained in a third party's proposal that was provided to an institution in the context of a commercial bidding process, and which was one and the same as that incorporated into an agreement, would qualify as having been supplied under section 10(1). However, the approach taken in Order P-1611 has long been departed from and does not reflect the current approach of this office to the supplied issue.

[34] As stated above, 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, will be 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. This approach has been followed in numerous decisions issued by this office and has been approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*.[18] There are two exceptions to this general rule, the inferred disclosure and immutability exceptions.

[35] With respect to the possible application of the first exception ("inferred disclosure"), while I acknowledge the third party appellant's view that it provided strategic as well as costing information to the board during the bidding process, there is no evidence before me that would suggest that disclosure of any of this information would permit a person to make an accurate inference with respect to underlying non-negotiated confidential information supplied by the third party appellant to the board. I find, therefore, that the "inferred disclosure" exception does not apply to the information in the record at issue.

[36] With respect to the possible application of the second exception ("immutability"), I have no evidence before me that any of the information at issue is not susceptible of change and, therefore, not negotiated. I find that the contractual terms contained in the contract, addenda and accompanying letters contain terms that were negotiated between the board and the third party appellant. In fact, the presence of the addenda and the accompanying letters confirm, in my view, that the terms of the relationship between the board and the third party appellant were the subject of ongoing negotiations and clearly susceptible of change. I find, therefore, that the "immutability" exception does not apply to the information in the record at issue.

[37] To summarize, I find that the information in the record was the product of a mutual negotiation process between the board and the third party appellant. It cannot, therefore, be said that the third party appellant "supplied" the information in the record to the board. Consequently, I find that the third party appellant has failed to satisfy part 2 of the three-part section 10(1) test. Although the third party appellant submits that the information in the record was provided in confidence, it is not necessary to consider the "in confidence" element of part 2 of the three-part test, having already found that it has failed to satisfy the preliminary "supplied" requirement.

[38] In its representations, the third party appellant also submits that the harms contemplated in part 3 of the three-part section 10(1) test could reasonably be expected to occur if the information at issue in the record is disclosed to the requester. I have carefully reviewed the third party appellant's submissions on harms and find that they suggest vague and speculative forecasts of harm rather than the type of detailed

[18] See footnote 5, above.

and convincing evidence of harms that is required to successfully meet the harms test under section 10(1). I note that this office has, in the past, rejected similar speculative assertions of harm in cases involving food or beverage service contracts between suppliers and educational institutions[19] and, in the circumstances of this case, I see no basis for departing from this approach.

[39] In any event, the third party appellant must satisfy all three parts of the section 10(1) test to establish that the record at issue is exempt from disclosure. If it fails to meet any part of this test, the section 10(1) exemption does not apply. Given that I have found that the third party appellant has failed to satisfy part 2 of the three-part test, the record at issue does not qualify for exemption under section 10(1) of the *Act*. It is, therefore, not necessary to consider, in detail, whether it has satisfied part 3 of the section 10(1) test.

[40] To conclude, I find that the record at issue does not qualify for exemption under section 10(1) of the *Act*, and it must be disclosed to the requester.

ORDER:

1. I uphold the board's decision to disclose the record at issue to the requester and I dismiss the third party appellant's appeal.

2. I order the City to disclose the record at issue to the requester by **January 26, 2012** but not before **January 20, 2012**.

Original signed by: December 22, 2011
Bernard Morrow
Adjudicator

[19] See Orders MO-1705, MO-1706 and PO-2758.