

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2817-I

Appeal MA11-465

Toronto District School Board

December 10, 2012

Summary: The appellant made a request to the board for records relating to a particular RFP. The board withheld some of the records on the basis of the discretionary exemptions in sections 6(1)(b)(closed meeting), 11 (economic and other interests) and 15 (publicly available). Other responsive records were withheld on the basis of the mandatory third party information exemption in section 10(1). The board's decision is partially upheld. However, the board is ordered to exercise its discretion with respect to three records.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b), 10(1)(a), 11(c) and 15(a). *Education Act*, R.S.O. 1990, c. E. 2, s. 207(2)(a), and (c).

Orders Considered: MO-1558-I, PO-2384, PO-2618.

OVERVIEW:

[1] The appellant made a multi-part request¹ to the Toronto District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to records relating to the board's Request for Proposal (RFP) DW10-153, which is the rooftop solar photo-voltaic energy project.

¹ The index set out in the "Records" section contains a detailed description of the portions of the request remaining at issue.

[2] The board issued a decision letter to the appellant, advising of the following:

- Records responsive to items 1, 6, 8, 10(f), 10(h) and 10(i) of the request are publicly available. The board listed four responsive records and provided copies of them to the appellant. It also provided website information for accessing three of the four records;
- There are no responsive records regarding item 7 of the request; and
- Access to any other responsive records, to the extent that they exist, was denied with respect to items 2, 3, 4, 5, 9(a) to (l) and 10(a) to (e) of the request. The board claims sections 6(1)(b)[closed meeting], 10 [third party information] and 11 [economic and other interest] of the *Act* in denying access to records, if they exist.

[3] During mediation of the appeal, the appellant advised that he is not pursuing access records responsive to items 1, 6, 7 and 8 of his request; however, the remaining items, including the information claimed to be publicly available by the board, remain at issue.

[4] The appellant made a similar request to the board which is the subject of appeal MA11-281. There are two responsive records that are the same in both appeals: the winning bid proposal and the bid evaluation sheet. I have determined that I will consider the application of the section 10(1) exemption to the bid evaluation sheet in appeal MA11-281. The order disposing of that appeal is being released concurrently with this order. Regarding the winning bid proposal document, I have determined that I will consider the application of the section 10(1) exemption to that record in this appeal instead of appeal MA11-281.

[5] During the inquiry into this appeal, the adjudicator sought and received representations from the board, the appellant and an affected party. Representations were shared in accordance with section 7 of the IPC's *Code of Procedure and Practice Direction 7*.

[6] The appeal was then transferred to me to issue the order. In this order, I partially uphold the board's decision and order the board to exercise its discretion relating to the discretionary exemptions.

RECORDS:

Item No.	Request	Responsive Record	Exemption Claimed
2	Bid response from the RFP's successful bidder	Bid Response Document	10(1)(a)
3	All bid evaluation documents respecting the successful bidder(s)	Bid Evaluation Sheet ²	10(1)(a)
4	Notification from the board to the successful bidder(s) that they were the successful bidder(s)	Letter to successful bidder	Institution withdrew its decision on this record
5	Contract(s) entered into between the board and the successful bidder(s)	Project agreement between successful bidder and the board	10(1)(a), 11(c)
9(a)	The number of elementary schools that are to receive roof replacements	Project Tracking Sheet	10(1)(a)
9(b)	The square footage of the elementary school roofs that are to be replaced	Project Tracking Sheet	10(1)(a)
9(c)	The number of elementary schools that are to receive rooftop photo-voltaic solar installations	Project Tracking Sheet; List of Sites and Locations	10(1)(a)
9(d)	The capacity, expressed in watts, of the rooftop photo-voltaic solar installations that are to be installed on elementary schools	Project Tracking Sheet; List of Sites and Locations	10(1)(a)
9(e)	The anticipated electricity to be generated, in kilowatt hours annually, from the rooftop photo-voltaic solar installations that are to be installed on elementary schools	Presentation Power Point Slides	6(1)(b)
9(f)	The area, in square feet, of the rooftop photo-voltaic solar installations that are to be installed on elementary schools	Project Tracking Sheet	10(1)(a)

² I have determined that I will consider the appeal of access to this responsive record in the order for Appeal MA11-281.

9(g)	The number of secondary schools that are to receive roof replacements	Project Tracking Sheet	10(1)(a)
9(h)	The square footage of the secondary school roofs that are to be replaced	Project Tracking Sheet	10(1)(a)
9(i)	The number of secondary schools that are to receive rooftop photo-voltaic solar installations	Project Tracking Sheet; List of Sites and Locations	10(1)(a)
9(j)	The capacity, expressed in watts, of the rooftop photo-voltaic solar installations that are to be installed on secondary schools	Project Tracking Sheet; List of Sites and Locations	10(1)(a)
9(k)	The anticipated electricity to be generated, in kilowatt hours annually, from the rooftop photo-voltaic solar installations that are to be installed on secondary schools	Presentation Power Point Slides	6(1)(b)
9(l)	The area, in square feet, of the rooftop photo-voltaic solar installations that are to be installed on secondary schools	Project Tracking Sheet	10(1)(a)
10(a)	The amount to be paid to the board by the successful bidder, as roof leasing payments, expressed on both a yearly basis and the total amount	Project Agreement between board and successful bidder; Presentation Power Point Slides	6(1)(b), 10(1)(a), 11(c)
10(b)	Any amounts other than roof leasing payments to be paid by the successful bidder to the board, expressed on both a yearly basis and the total amount	Project Agreement between board and successful bidder; Presentation Power Point Slides	6(1)(b), 10(1)(a), 11(c)
10(c)	Whether the successful bidder or the board, or both, will be receiving the revenue generated by the rooftop photo-voltaic solar installations pursuant to a "feed in tariff" contract with the Ontario Power Authority (FIT contract)	Project Agreement between board and successful bidder; Presentation Power Point Slides	6(1)(b), 10(1)(a), 11(c)

10(d)	If both the board and the successful bidder will be receiving a percentage of the income generated by rooftop photo-voltaic solar installations under a FIT contract, the percentage to be received by each	Project Agreement between board and successful bidder; Presentation Power Point Slides	6(1)(b), 10(1)(a), 11(c)
10(e)	The revenue to be received by the successful bidder and the board generated by the rooftop photo-voltaic solar installations under a FIT contract	Project Agreement between board and successful bidder; Presentation Power Point Slides	6(1)(b), 10(1)(a), 11(c)
10(f)	The amount to be paid by the board to the successful bidder		15(a)
10(g)	Over what time period the amount to be paid by the board to the successful will be paid		15(a)
10(h)	The amount to be paid by the board to the successful bidder in respect of rooftop replacement or remediation		15(a)
10(i)	Over what time period the amount to be paid by the board to the successful bidder in respect of rooftop replacement or remediation will be paid		15(a)

ISSUES:

- A. Are the responsive records publicly available and thus exempt under section 15(a) of the *Act*?
- B. Does the discretionary exemption at section 6(1)(b) apply to the records?
- C. Does the mandatory exemption at section 10(1) apply to the records?
- D. Was the board's exercise of discretion in regard to section 6(1)(b), 11(c) and 15(a) proper in the circumstances?

DISCUSSION:

A. Are the responsive records publicly available and thus exempt under section 15(a) of the *Act*?

[7] Section 15(a) states:

A head may refuse to disclose a record if,

the record or the information contained in the record has been published or is currently available to the public;

[8] For this section to apply, the institution must establish that the record is available to the public generally, through a regularized system of access, such as a public library or a government publications centre.³

[9] To show that a "regularized system of access" exists, the institution must demonstrate that:

- a system exists;
- the record is available to everyone; and
- there is a pricing structure that is applied to all who wish to obtain the information.⁴

[10] Section 15(a) is intended to provide an institution with the option of referring a requester to a publicly available source of information where the balance of convenience favours this method of alternative access. It is not intended to be used in order to avoid an institution's obligations under the *Act*.⁵

[11] In order to rely on the section 15(a) exemption, the institution must take adequate steps to ensure that the record that they allege is publicly available is the record that is responsive to the request.⁶

[12] Section 15(a) does not permit an institution to sever a small amount of information from a larger record, particularly where the entire record is otherwise subject to disclosure under the *Act*. A requester should not be required to compile small

³ Orders P-327, P-1387 and MO-1881.

⁴ Order MO-1881.

⁵ Orders P-327, P-1114 and MO-2280.

⁶ Order MO-2263.

pieces of information from a variety of sources in order to obtain a complete version of a record that could be disclosed.⁷

[13] Examples of the types of records and circumstances that have been found to qualify as a “regularized system of access” include:

- unreported court decisions;⁸
- statutes and regulations;⁹
- property assessment rolls;¹⁰
- septic records;¹¹
- property sale data;¹²
- police accident reconstruction records;¹³ and
- orders to comply with property standards.¹⁴

[14] The exemption may apply despite the fact that the alternative source includes a fee system that is different from the fees structure under the *Act*.¹⁵ However, the cost of accessing a record outside the *Act* may be so prohibitive that it amounts to an effective denial of access, in which case the exemption would not apply.¹⁶

[15] The board submits that the responsive information for items 10(f) through (i) of the appellant’s request are publicly available on the board’s website. The board further notes that it provided the appellant with copies of the records from its website containing the responsive information. The board sets out items 10(f) through (i) of the appellant’s request and states:

These 4 requests for information in essence request information about the amount of monies to be paid by [the board] to the successful bidder (including timing of payments, amounts of payments and categories of payments).

[The board] provided records which address all four requests and confirm that [the board] is not making any payments to the successful bidder arising out of the project awarded under the RFP. This was confirmed in items (i), (ii) and (v) of the publicly available records provided to the requester.

⁷ PO-2641.

⁸ Order P-159.

⁹ Orders P-170, P-1387.

¹⁰ Order P-1316.

¹¹ Order MO-1411.

¹² Order PO-1655.

¹³ Order MO-1573.

¹⁴ Order MO-2280.

¹⁵ Orders P-159, PO-1655, MO-1411 and MO-1573.

¹⁶ Order MO-1573.

[16] The board provided excerpts of records (i), (ii) and (v) as evidence that the board is not making payments to the affected party for the photo-voltaic solar installation project.

[17] The appellant submits that he has not seen the records provided by the board that are responsive to items 10(f) through (i) of his request and argues that the balance of convenience does not favour the board withholding a responsive record containing the responsive information and instead providing multiple records from various sources.

[18] The board provided me with excerpts of the documents provided to the appellant responsive to items 10(f) through (i) of the appellant's request. These documents consist of the following:

- Supplementary questions and answers regarding Agenda Item 7 of the May 11, 2011 Administration, Finance and Accountability Committee Public Agenda;
- Toronto District School Board Renewable Energy Project, Solar Rooftops Agreement Report to Administration, Finance and Accountability Committee; and
- Toronto District School Board News Release "Historic Green Energy Deal Funds Long-Term School Roof Renewal".

[19] The board notes in its decision letter to the appellant where this information can be found on its website. Based on my review of the documents provided to the appellant, as well as the availability of these documents on the board's website, I find that the information responsive to the items 10(f) through (i) of the appellant's request is contained in records that are currently available to the public. I note that the board has not withheld the records which it claims are covered under the exemption. However, I find that section 15(a) would apply to these records if they were the subject of the appellant's request.

B. Does the discretionary section 6(1)(b) exemption apply to the records?

[20] As set out above, the board has claimed section 6(1)(b) to exempt a Power Point presentation slide. Section 6(1)(b) reads:

A head may refuse to disclose a record,

that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of

one of them if a statute authorizes holding that meeting in the absence of the public.

[21] For this exemption to apply, the institution must establish that:

1. a council, board, commission or other body, or a committee of one of them, held a meeting
2. a statute authorizes the holding of the meeting in the absence of the public, and
3. disclosure of the record would reveal the actual substance of the deliberations of the meeting

[Orders M-64, M-102, MO-1248]

[22] Previous orders have found that:

- “deliberations” refer to discussions conducted with a view towards making a decision;¹⁷ and
- “substance” generally means more than just the subject of the meeting.¹⁸

[23] Section 6(1)(b) is not intended to protect records merely because they refer to matters discussed at a closed meeting. For example, it has been found not to apply to the names of individuals attending meetings, and the dates, times and locations of meetings.¹⁹

[24] The first and second parts of the test for exemption under section 6(1)(b) require the institution to establish that a meeting was held by the institution and that it was properly held *in camera*.²⁰

[25] In determining whether there was statutory authority to hold a meeting *in camera* under part two of the test, was the purpose of the meeting to deal with the specific subject matter described in the statute authorizing the holding of a closed meeting?²¹

¹⁷ Order M-184.

¹⁸ Orders M-703, MO-1344.

¹⁹ Order MO-1344.

²⁰ Order M-102.

²¹ *St. Catharines (City) v. IPCO*, 2011 ONSC 346 (Div. Ct.).

[26] With respect to the third requirement set out above, the wording of the provision and previous decisions of this office make it clear that in order to qualify for exemption under section 6(1)(b), there must be more than merely the authority to hold a meeting in the absence of the public. Section 6(1)(b) of the *Act* specifically requires that disclosure of the record would reveal the actual substance of deliberations which took place at the institution's *in camera* meeting, not merely the subject of the deliberations.²²

Part 1 – a council, board, commission or other body, or a committee of one of them, held a meeting

[27] The board submits that the power point presentation which is the subject of the section 6(1)(b) claim was presented by board staff to the board's Administration, Finance and Accountability Committee at an *in camera* meeting held on May 11, 2011.

[28] As evidence of the meeting, the board provided an affidavit of the Senior Manager of Board Services and the Freedom of Information Coordinator for the board. She affirms that she attended the meeting held on May 11, 2011 and attaches a copy of a document that was distributed to the trustees at the meeting.

[29] I accept that a committee of the board held a meeting on May 11, 2011 and as such the board has met the first requirement for the application of section 6(1)(b).

Part 2 – a statute authorizes the holding of the meeting in the absence of the public

[30] The board submits that section 207(2) of the *Education Act* authorizes meetings of the board to be held in the absence of the public. Section 207(2) states in part:

A meeting of a committee of a board, including a committee of the whole board, may be closed to the public when the subject-matter under consideration involves

(a) the security of the property of the board;

...

(c) the acquisition or disposal of a school site;

²² Orders MO-1344, MO-2389 and MO-2499-I.

[31] The board submits that it exercised its discretion under these two subsections to hold in-camera meetings and provided this background information:

The purpose of the entire tender process was to enter into a contract with the successful bidder [and] have a solar panel system built on the rooftops of various Board owned schools. The successful bidder would derive income from selling power to the provincial electrical power grid under the Ontario Power Authority's "Feed In Tariff"²³ program. The Board derived benefits in several manners including through the repair of roofs older than 10 years on its schools.

[32] The board submits that the *Education Act* does not limit or qualify the definition of "security" and submits that the Supreme Court of Canada in another context has adopted broad definitions of terms which are not qualified in their home statute. Accordingly, the board suggests that the solar panel project deals with securing the physical assets of the board.

[33] Regarding paragraph (c) of section 207(2), the board submits that the record also relates to the disposal of the board's school sites. The board states:

As noted at p.1 of Exhibit A to the Affidavit of [named individual] under part 2 the "Purpose" section, the board's proposed model for the project was to lease out a portion of the affected school sites, on the roof tops, to the successful bidder who would place solar panel arrays, to be owned by the bidder, on the roof.

The board notes that the *Education Act* equates the term "disposal" with the leasing of part of a school site in s. 194(3) of the *Act* which reads in part:

(3) Subject to subsections (3.3) and (4), a **board has power to sell, lease or otherwise dispose of** any school site or part of a school site of the board or any property of the board, [emphasis in original]

[34] The board submits that the subject matter of the in camera sessions dealt with the proposal and thus was related to both the security of board property and the disposal of a school site; thereby falling within the ambit of section 207(2).

[35] The appellant submits that the board was not permitted to go *in camera* for the purposes of dealing with the issues around the RFP as neither section 207(2)(a) or (c) can be interpreted as relating to the installation of solar panels on the rooftops of board schools.

²³ Feed in Tariff hereafter "FIT".

[36] Having reviewed the record and the board's representations, I am satisfied that the meeting was properly held *in camera* pursuant to section 207(2) of the *Education Act*. Prior decisions of this office have found that the term "disposal" is also used in Ontario Regulation 444/98 where the term "disposition" is used in the context of sale, lease or "other disposition", such as the granting of an easement.²⁴ In Order MO-1558-I, Adjudicator Laurel Cropley found the following in regard to the term "disposition":

In essence, this term is used to denote some form of transfer of ownership or use of the property. In my view, both terms should be similarly characterized to relate to the purchase, sale, lease or other similar transfer of rights of use of the property (land and/or premises).

[37] I adopt this approach in the current appeal and find that the subject matter of the records relates to the leasing of a portion of the school sites. Thus, in keeping with the findings in these earlier decisions, the meeting was in relation to the disposal of school sites and thus the board was within the ambit of section 207(2) of the Education Act when it went *in camera* for the meeting. Accordingly, I find the board has met part two of the test for the application of section 6(1)(b).

Part 3 – the disclosure of the record would reveal the actual substance of the deliberations of this meeting

[38] In Order M-184, former Assistant Commissioner Irwin Glasberg made the following comments on the term "deliberations":

In my view, deliberations, in the context of section 6(1)(b), refer to discussions which were conducted with a view towards making a decision. Having carefully reviewed the contents of the Minutes of Settlement, I am satisfied that the disclosure of this document would reveal the actual substance of the discussions conducted by the Board, hence its deliberations, or would permit the drawing of accurate inferences about the substance of those discussions. On this basis, I find that the institution has established that the third part of the section 6(1)(b) test applies in this case.

[39] The former Assistant Commissioner expanded on his analysis of the interpretation of section 6(1)(b) in Order M-196 as follows:

The Concise Oxford Dictionary, 8th edition, defines "substance" as the "theme or subject" of a thing. Having reviewed the contents of the agreement and the representations provided to me, it is my view that the "theme or subject" of the in-camera meeting was whether the terms of

²⁴ Orders MO-1558-I and MO-1590-F.

the retirement agreement were appropriate and whether they should be endorsed.

[40] The board submits that the contents of the responsive record provided the subject matter of deliberations of the AFA Committee. Further, the board submits that several pages of the presentations also reflected the deliberations of an earlier in camera board meeting held on September 7, 2010. The board notes that the matters set out in the record have not been considered in a public meeting of the board. The board submits:

While the AFA Committee did adopt a resolution recommending the execution of the agreement with [the affected party] the board notes that the IPC has previously determined that an adoption of a recommendation does not reveal the substance of deliberations for the purposes of section 6(2)(b).²⁵

[41] I have reviewed the record at issue, as well as the evidence provided by the board and I find that disclosure of the slide presentation would disclose the substance of the deliberations of the May 11, 2011 meeting. The record contains detailed information about the subject to be deliberated upon by the committee. I further accept the board's submission that the fact that the committee later adopted a resolution to complete the agreement between the board and the affected party does not bring about the exception in section 6(2)(b).

[42] Accordingly, I find that this record is exempt under section 6(1)(b) of the *Act*, subject to my finding on the board's exercise of discretion.

C. Does the mandatory exemption at section 10(1) apply to the records?

[43] The board and the affected party submit that section 10(1) applies to exempt the following records:

- Bid proposal;
- Project Agreement;
- Project tracking sheet; and
- List of sites.

[44] Section 10(1) states in part:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information,

²⁵ Order M-385.

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

[45] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.²⁶ 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.²⁷

[46] For section 10(1) to apply, the institution and/or the third 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.

²⁶ *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.).

²⁷ Orders PO-1805, PO-2018, PO-2184, MO-1706.

Part 1: type of information

[47] The board submits that the records contain financial, commercial and technical information. These terms have been defined in past orders as follows:

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 [Order PO-2010].

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].

[48] Based on my review of the records, I find that the bid proposal document and the project agreement contain financial and commercial information. These records contain information relating to the provision of the photo-voltaic solar power installation by the affected party at board schools. I find the project status sheets contain information about the capacity of power to be generated, size of the array and the work to be done and as such, also contain commercial information. I also find that the list of sites also contains the amount of power to be generated and therefore constitutes commercial and technical information.

[49] Accordingly, the board has satisfied part one test for the application of section 10(1).

Part 2: supplied in confidence

Supplied

[50] 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.²⁸

[51] 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.²⁹

[52] 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)*, cited above.³⁰

[53] 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.³¹

In confidence

[54] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.³²

²⁸ Order MO-1706.

²⁹ Orders PO-2020, PO-2043.

³⁰ 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.).

³¹ Orders MO-1706, PO-2384, PO-2435, PO-2497 upheld in *Canadian Medical Protective Association v. John Doe*, (cited above).

³² Order PO-2020.

[55] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, 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 in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization;
- not otherwise disclosed or available from sources to which the public has access; and
- prepared for a purpose that would not entail disclosure.³³

[56] The board submits that the information in the bid proposal and the evaluation sheet were supplied in confidence by the affected party. The board did not directly address whether the agreement, the project status sheets or the list of sites contains supplied information.

[57] The affected party submits the following in support of its position that the information in the records were supplied in confidence for the purposes of section 10(1):

- The information in the project agreement was not “mutually generated” but instead it was supplied by the affected party and it relates to the approach taken by the affected party to fulfill the project for the board.
- The information in the bid proposal was supplied by the affected party to the board.
- The identified information on the bid evaluation sheet relates to the affected party’s confidential bid price provided to the board.
- A portion of the information on the list of sites and project status sheets were supplied by the affected party as the affected party used its technical expertise to calculate the power to be generated at each site.

[58] Having reviewed the records and the parties’ representations, I make the following findings regarding the “supplied in confidence” portion of the test for section 10(1):

³³ Orders PO-2043, PO-2371, PO-2497.

Project Agreement

[59] The affected party's submissions regarding the portions of the agreement which it argues was supplied in confidence is set out in a confidential affidavit. Paragraphs 6 through 11 of that affidavit identifies information that the affiant submits was not "mutually generated" with the board, but instead was provided to the board with little or no negotiation.

[60] The board did not address whether information in the project agreement was supplied for the purposes of section 10(1), but in its confidential section 11(c) submissions the board discusses this issue. The board's submissions respecting the section 11(c) exemption relate to the harm it would suffer should disclosure of the terms of the project agreement occur.

[61] Based on my review of this information and the parties' representations, I find that neither the board nor the affected party has established that the information was supplied and not mutually generated. I make this finding despite the affected party's arguments on the nature of the information that was provided to the board with no negotiation.

[62] I am not satisfied by the affected party's submissions that the identified information fit within either of the exceptions to the general rule that the contents of a contract are to be treated as mutually generated. The affected party did not make representations on the inferred disclosure exception, but does suggest that certain portions of the agreement contain information that was provided to the board with little or no negotiation. However, given the nature of this information, I am not satisfied that the board was not in a position to reject or change these terms if it did not prove suitable to the board's interests.

[63] Adjudicator Steve Faughnan provided the following rationale for the "supplied" component of section 17(1) (provincial equivalent of section 10(1) in Order PO-2384:

If the terms of a contract are developed through a process of negotiation, a long line of orders from this office has held that this generally means that those terms have not been "supplied" for the purposes of this part of the test. As explained by Adjudicator DeVries in Order MO-1735, Adjudicator Morrow in Order MO-1706 identified that, except in unusual circumstances, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers or preceded by little or no negotiation. In either case, except in unusual circumstances, they are considered to be the product of a negotiation process and therefore not "supplied".

As discussed in Order PO-2371, one 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) 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.

[64] I adopt this rationale for the purposes of this appeal. Neither the affected party nor the board has established that this is one of those "unusual circumstances" where the agreement cannot be considered the product of a negotiation process. The affected party submits that the unique nature of the business arrangement in the agreement is such that the terms and conditions that set out this arrangement cannot be characterized as mutually generated. However, given that many of the terms concern the actions and operations of the board, I am not convinced that the board could not have rejected or changed these terms should it have decided to do so. I find that the information identified by the affected party as having been supplied has the quality of information that was "susceptible to change but was not, in fact, changed" rather than information that was not susceptible to change.

[65] I acknowledge that section 14 of the agreement relates to confidentiality and that both the board and the affected party agreed to keep the provisions and the existence and the transactions relating to the agreement confidential. The confidentiality provision also makes reference to the fact that the affected party acknowledges that the board is subject to the provisions of the *Act*. However, despite the confidentiality provision in the agreement, as I have found that the information was not supplied by the affected party to the board, I am unable to find that part two of the test has been met.

[66] Accordingly, as I have found that the information in the project agreement was not supplied by the affected party, and as such does not apply for exemption under section 10(1) as all three parts of the test under that section must be satisfied. I will consider the application of section 11 to the Project Agreement below.

Bid proposal

[67] The board and the affected party submit that the bid proposal document was supplied in confidence to the board. The board submits that within the RFP documents, the board expressly identifies that the bid documents would be held in confidence. The appellant's submissions focus on the fact that the RFP alerts the potential bidders to the fact that any information submitted in response to the RFP would be subject to the *Act*.

[68] Based on my review of the parties' representations and the bid proposal, I find that the proposal was supplied in confidence by the affected party to the board. I make this finding notwithstanding the affected party's knowledge that its proposal would be subject to the access provisions of the *Act*. Adjudicator Frank DeVries in Order PO-2618 held that a confidentiality provision did not nullify an expectation of confidentiality, when he considered the application of section 17(1) and stated the following:

Although I agree with the appellant's general statement that parties who seek to do business with the government must be prepared to submit to a higher and more transparent level of disclosure, in my view this does not mean that parties ought to have on expectations of confidentiality for any of their proposals. Section 17(1) of the *Act* clearly provides that certain third party information may be denied to requesters if the requirements of section 17(1) are met, and that is the issue that is being reviewed in this appeal.

[69] I adopt Adjudicator DeVries' approach for the current appeal. The affected party had both an implicit and explicit expectation of confidentiality when it supplied its bid proposal to the board. Accordingly, I find that part two test for the application of section 10(1) has been met for this record.

Project Tracking Sheet

[70] The affected party's submissions regarding the supplied in confidence element were provided in the confidential affidavit. The affected party provided a copy of the record highlighting the information it argues was supplied in confidence on these pages. The affected party submits that this information was developed through its engineering and technical analysis and was supplied in confidence to the board.

[71] Based on my review of this information and the arguments of the affected party I find that the information identified by the affected party was supplied in confidence to the board. It is evident that the technical and commercial information in the pages of this record were supplied by the affected party to the board in the context of completing the project requirements for the board. Further, I find that the affected party had an implicit expectation of confidentiality in supplying this information to the

board. Accordingly, I find that these portions of the record meet the part 2 requirement for the application of section 10(1).

[72] On the other hand, I am unable to find that the following information was supplied in confidence by the affected party:

- The key;
- A list of the board's school and addresses; and
- FIT reference number.

[73] As this information was not supplied in confidence it does not qualify for exemption under section 10(1). As no other mandatory exemption applies to this information and no other discretionary exemptions have been claimed, this information should be disclosed to the appellant.

List of Sites

[74] The affected party submissions on this record were also provided in the confidential affidavit. The affected party submits that the information under one of the headings in the chart was supplied in confidence to the board, as it was developed through its engineering work and technical analysis. The information identified by the affected party appears to be the energy output breakdown per school site and I accept that this information was supplied in confidence to the board and thus meets part 2 of the test for the application of section 10(1).

[75] I find that the remaining information in the chart including the FIT number, school name and address and date is information was not supplied in confidence by the affected party to the board and does not qualify for exemption under section 10(1). As no other mandatory exemptions apply to this information and the board has not claimed any further discretionary exemptions for this information it should be disclosed to the appellant.

Part 3: harms

[76] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³⁴

[77] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a

³⁴ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.³⁵

[78] The need for public accountability in the expenditure of public funds is an important reason behind the need for “detailed and convincing” evidence to support the harms outlined in section 10(1).³⁶

[79] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act*.³⁷

Section 10(1)(a): prejudice to competitive position

[80] The board submits that the solar project which was the subject of the RFP sought to take advantage of the government of Ontario’s FIT program. The board explains that the FIT program was a province wide initiative to subsidize the construction of electrical generation projects. The board submits that, given the nature of the program, it is evident that there will be many future business opportunities to be bid upon by the affected party and its competitors. The board also notes that given the number of proposals it received in response to the RFP, it is evident that there is a considerable degree of competition in the business. Finally, the board submits that in the purpose section of its RFP, the board invited bidders to formulate alternative business models and provide the associated business cases to achieve the goals of the project.

[81] On the specific records, the board states the following:

- The bid proposal provides descriptions of the specialized methods the affected party proposed to maximize the goals of the project. Disclosure of this information would provide an unfair advantage to the affected party’s competitors.
- The list of sites and the project tracking sheets contain financial and technical information that would permit the requester to unfairly reap the benefit of the affected party’s work and to profit from it.

[82] The affected party submits that the solar power industry is new and developing and by necessity it has become an innovator in the market. The affected party’s submissions on the possible harm in disclosure of the records at issue are contained within the confidential affidavit.

[83] The appellant submits that the board and affected party have not provided detailed and convincing evidence of the harm set out in section 10(1)(a).

³⁵ Order PO-2020.

³⁶ Order PO-2435.

³⁷ Order PO-2435.

[84] Based on my review of the records and the parties' representations, I find that the nature of portions of the commercial and technical information in the bid proposal is such that disclosure of this information could reasonably be expected to prejudice significantly the affected party's competitive position. I base my findings on the representations of the board and the affected party on the competitive nature of the solar energy marketplace and the detailed information in the records. The board's submission that the bidders were asked to provide alternative business models in their proposals to achieve the goals of the project is borne out by the content of the records.

[85] In particular, I find that the portions of the bid proposal which includes the affected parties' business structure, client project information, methodology, schedules and reports to qualify for exemption under section 10(1)(a). I am satisfied that disclosure of this information could reasonably be expected to prejudice the competitive position of the affected party as this information relates to its business organization and or methodology for the RFP project. I will provide a copy of the bid proposal to the board identifying the information I have found exempt under section 10(1)(a).

[86] Similarly, I find that the disclosure of the technical and commercial information in the Project Tracking Sheets and List of Sites could reasonably be expected to prejudice significantly the competitive position of the affected party and thus is exempt under section 10(1)(a). I am satisfied that the information on these pages supplied by the affected party are a result of its technical analysis and engineering work.

D. Does the discretionary section 11 exemption apply to the Project Agreement?

[87] The board relies on sections 11(c), (e) and (g) in denying access to the Project Agreement. Due to my finding below, I only considered the application of section 11(c) which states:

A head may refuse to disclose a record that contains,

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

[88] 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.

[89] For sections 11(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.³⁸

[90] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11.³⁹

[91] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.⁴⁰

[92] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.⁴¹

Section 11(c): prejudice to economic interests

[93] 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.⁴²

[94] 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

³⁸ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

³⁹ Orders MO-1947 and MO-2363.

⁴⁰ Order MO-2363.

⁴¹ See Orders MO-2363 and PO-2758.

⁴² Orders P-1190 and MO-2233.

reasonably be expected to prejudice the institution's economic interests or competitive position.⁴³

[95] The board submits that disclosure of the terms of the agreement could reasonably be expected to prejudice the economic interests of the board and impact on future negotiations with respect to the solar project. The board states:

...there remains a very real possibility that the successful bidder, ..., may renege from the agreement prior to its execution if it determines that the terms of the project do not remain financially viable. The possibility was envisioned by the board in the RFP itself which makes it explicit that if negotiations do not lead to a binding agreement, the board may enter into negotiations with another bidder.

[96] The board, in its representations, provides a short summary of the project agreement and states that the following factors could impact on the financial viability of the project as formulated by the affected party:

- The price provided by the OPA under the FIT program. The board submits that the Drummond Report recommended that the initial prices offered in the FIT contract be reduced to discourage reliance on public subsidies.
- The ability of the local distribution company, Toronto Hydro, to construct any necessary infrastructure for the purposes of facilitating attachments of the solar panel arrays to the electrical distribution and transmission grid. The board submits that the utilities' budget for capital construction has been cut recently by Ontario Energy Board.
- The number of approvals granted by the OPA for the FIT program. The board submits that none of the applications under the project agreement have yet been determined.

[97] The board states:

If as a result of the negative impact of one or more of these external variables, [the affected party] opts not to perform the project, it may be necessary for the board to enter into fresh negotiations with another bidder or to re-tender the project and start negotiations fresh with another bidder. The Board notes that at the time of the submissions the terms of the agreement have not been finalized.

⁴³ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

Release of this information [the project agreement] would permit potential future bidders to have an unfair insight...thus undermining the board's ability to maximize the benefits it is able to achieve for itself under the bargaining process.

[98] The appellant submits that the board has not provided "detailed and convincing" evidence of harm and any harm suggested by the board is mere speculation. The appellant states:

The [board] offers instead only mere speculation that [the affected party] might, possibly, resile, that the project will therefore, possibly, not be completed, and that the RFP will, possibly, have to be re-opened...

There is a risk inherent in any contractual arrangement that the counterparty might choose to resile from the agreement either before or after signing the written agreement.

[99] In the present appeal, I find there is detailed and convincing evidence of the harm should disclosure of the project agreement occur. The circumstances in this appeal vary from the usual circumstances where the institution has claimed the exemption in section 11(c) and argued that disclosure of the terms of an agreement will make it more difficult for the institution to compete in the marketplace. The reasoning of this office on these cases is that the agreement is not exempt under section 11(c) [and the provincial equivalent in section 18(1)(c)] on the basis of that the institution will face a more competitive marketplace.⁴⁴

[100] In the circumstances of this appeal, I find that the board has presented cogent evidence in support of its position that there are several factors which weigh against the success of the project as set out in its agreement with the affected party. Further, the nature of the agreement itself, a complicated negotiated contract containing a unique business structure that achieves the multiple goals of revenue creation under the FIT program and the re-roofing of board properties, is such that disclosure of the terms could reasonably be expected to prejudice the board's economic interests. I am satisfied that disclosure of the terms of the agreement before the project has been completed could reasonably be expected to prejudice the board's economic interests. Accordingly, subject to my finding on the board's exercise of discretion, I uphold the exemption of the project agreement under section 11(c).

⁴⁴ See Orders PO-3055, PO-2843 and PO-2758.

E. Did the board properly exercise its discretion under section 6(1)(b), and 11(c)?

[101] The sections 6(1)(b), 11 and 15 exemptions are discretionary, and permit an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[102] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[103] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations.⁴⁵ This office may not, however, substitute its own discretion for that of the institution.⁴⁶

Relevant considerations

[104] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant:⁴⁷

- the purposes of the *Act*, including the principles that
 - information should be available to the public
 - individuals should have a right of access to their own personal information
 - exemptions from the right of access should be limited and specific
 - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

⁴⁵ Order MO-1573.

⁴⁶ Section 43(2).

⁴⁷ Orders P-344, MO-1573.

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information.

[105] The board did not submit representations on its exercise of discretion and when given a chance to respond to the appellant's representations, also declined to make representations regarding its exercise of discretion. Further, I am unable to discern what factors, if any, the board considered in applying the section 6(1)(b), 11(c) and 15 exemptions. Accordingly, I will order the board to exercise its discretion in applying the exemptions to the power point slide presentation, the project agreement and the publicly available information, taking into consideration the factors listed above.

ORDER:

1. I order the board to disclose portions of the bid proposal, the project tracking sheets and the list of sites by providing the appellant with a copy of the records by **January 18, 2013** but not before **January 11, 2013**. I have enclosed a highlighted copy of the records with the board's copy of the order identifying the portions that should not be disclosed. To be clear, the information that is highlighted should NOT be disclosed.
2. I uphold the board's decision to withhold the portions of the bid proposal, the project tracking sheets and the list of sites which I have found to be exempt under the mandatory section 10(1) exemption.
3. I order the board to exercise its discretion with respect to the project agreement, the power point slide presentation and the publicly available information taking into account the factors set out above in paragraph 104 and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the board

continues to withhold all or part of these records, I also order them to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The board is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy of this office, by no later than **January 4, 2013**. If the appellant wishes to respond to the board's exercise of discretion and/or its explanation for exercising its discretion to withhold the information, it must do so within 21 days of the date of the board's correspondence by providing me with written representations.

4. I remain seized of this matter pending the resolution of the outstanding issues in this appeal.

Original signed by: _____
Stephanie Haly
Adjudicator

December 10, 2012 _____