Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3178

Appeal MA13-600

York Catholic District School Board

March 31, 2015

Summary: The school board received a request for all negotiated leases relating to land that it leases to a third party. Access was denied to the responsive records, in their entirety, pursuant to the mandatory personal privacy exemption at section 14(1) and the mandatory third party commercial information exemption at section 10(1). This order finds that neither of the exemptions apply. The school board is ordered to disclose the records to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) and 10(1).

Orders and Investigation Reports Considered: Order PO-1706.

Cases Considered: *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario,* 2015 ONSC 1392 (CanLII); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII); *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] The York Catholic District School Board (the school board) received a request under the *Municipal Freedom of Information Act* (the *Act*) for the following:

> … leasing information for the land located at the North / East corner of Islington and Rutherford, specifically: (a) when the lease started; (b) the term of the lease; (c) when the contract opens up for renewal; (d) penalty for the YCDSB [York Catholic District School Board] for terminating the lease early; (e) renewal options clauses and amounts; and (f) the current lease payment schedule amount.

[2] The school board identified the records responsive to the request and issued a decision advising:

> The information you are seeking was approved by Board through in-camera sessions. Therefore your request is denied. This denial is based on section 6(b) (sic) [6(1)(b)] of the *Municipal Freedom of Information and Protection of Privacy Act.*
>
> …
>
> The authorizing statute is the *Education Act*, section 207(2): 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, (c) the acquisition or disposal of a school site.

[3] The requester (now the appellant) appealed the school board's decision to deny access to the records, indicating that he was not looking for information on the acquisition or disposal of the land, but rather, information regarding its current use.

[4] During mediation, the appellant clarified that he was not looking for information that was discussed at a closed session meeting, and that he wanted access to the actual negotiated lease between the school board and its tenant. Accordingly, the records relating to the closed session meetings are not at issue.

[5] The school board conducted another search for records and sent the appellant a letter that provided him with the answers to the questions outlined in his request. The appellant advised the mediator that he wanted to pursue access to the original records that the information provided in the letter was derived from.

[6] The school board then notified the tenant of the leased land (the affected party) of the request and provided them with an opportunity to make submissions regarding disclosure of the records. The affected party informed the school board that they objected to disclosure of the records.

[7] The school board then issued a final decision denying access to the records, in their entirety, pursuant to the mandatory exemptions at sections 10(1) (third party commercial information) and 14(1) (personal privacy) of the *Act*.

[8] As a mediated resolution could not be reached, the appeal was transferred to the adjudication stage of the appeal process for an adjudicator to conduct an inquiry. I began my inquiry into this appeal by sending a Notice of Inquiry setting out the facts and issues on appeal to the school board and the affected party.

[9] The school board provided brief representations stating that it wished to rely on the information that it had previously provided to the mediator and that it continued to deny access pursuant to section 6(1)(b) of the *Act*. I wrote to the school board to remind it that the application of section 6(1)(b) had been withdrawn during mediation. I advised that this appeal related only to the possible application of the exemptions at sections 10(1) and 14(1) to the records which it had claimed in its final access decision and which were set out in both the Mediator's Report and the Notice of Inquiry. As both these exemptions are mandatory, I provided the school board with another opportunity to respond with representations on their potential application. It chose not to do so.

[10] The affected party also did not provide representations. In the circumstances, I deemed that it was not necessary to seek representations from the appellant.

[11] In this order, I find that the mandatory exemptions at sections 14(1) and 10(1) of the *Act* do not apply to the records at issue. Accordingly, I order the school board to disclose the records to the appellant.

RECORDS:

[12] The records at issue in this appeal are the following:

- a 16-page lease agreement;
- a 2-page lease agreement;
- a 3-page lease renewal agreement;
- a 3-page lease amending agreement; and
- a 1-page letter.

ISSUES:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

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

DISCUSSION:

A. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[13] For the mandatory personal privacy exemption at section 14(1) of the *Act* to apply, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
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> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,
>
> (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,
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> (c) any identifying number, symbol or other particular assigned to the individual,
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> (d) the address, telephone number, fingerprints or blood type of the individual,
>
> (e) the personal opinions or views of the individual except if they relate to another individual,
>
> (f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,
>
> (g) the views or opinions of another individual about the individual, and
>
> (h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[14] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[1]

[15] Sections (2.1) and (2.2) also relate to the definition of personal information. These sections state:

> (2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.
>
> (2.2) For greater certainty, subsection (2.1) applies even if an individual carries out business, professional or official responsibilities from their dwelling and the contact information for the individual relates to that dwelling.

[16] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.[2] Even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[3]

[17] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[4]

Analysis and finding

[18] From my review, I find that all of the records identified as responsive are documents that were created in the course of business transactions. In my view, none of them contain any information that can be described as "personal" within the meaning of the definition outlined in section 2(1) of the *Act*. Any references to individuals by name that appear in the records appear solely in a business context and do not reveal anything personal about them. Accordingly, I find that the records do not contain any "personal information" as that term is defined in section 2(1) of the *Act.*

[19] As the mandatory personal privacy exemption at section 14(1) only applies to information that qualifies as "personal information", section 14(1) cannot apply in the circumstances of this appeal and it is not necessary for me to address it in this order.

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[1] Order 11.
[2] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[3] Orders P-1409, R-980015, PO-2225 and MO-2344.
[4] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

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

[20] The school board claims that all of the records are exempt from disclosure under the mandatory exemption at section 10(1) of the *Act*. Although the affected party did not communicate with this office, it advised the school board that it objected to the disclosure of the information contained in the records.

[21] The portions of section 10(1) that might be relevant in this appeal state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

[22] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[23] For section 10(1) to apply, the institution 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
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[5] *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.).
[6] Orders PO-1805, PO-2018, PO-2184, and MO-1706.

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

[24] Based on my review of the information contained in all of the records it appears that they contain information that is appropriately categorized as "commercial" in nature. This type of information has been discussed in prior orders:

> *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.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]

[25] All of the records relate to the lease of school board land to the affected party. With the exception of the letter, the records are signed agreements between the two parties that clearly outline the commercial arrangement between them. The letter, while not an agreement, also consists of information that addresses the terms of that commercial arrangement. In my view, the information in all of the records clearly falls within the definition of "commercial information" as it relates to the use of the school board's land in exchange for monetary compensation provided by the affected party.

[26] I find that all of the records contain information that can be described as "commercial information" as that term has been defined. Accordingly, part 1 of the test for exemption under section 10(1) of the *Act* has been met.

Part 2: supplied in confidence

[27] In order to meet part 2 of the test under section 10(1), the party resisting disclosure must provide sufficient evidence to establish that the information at issue was "supplied" to the school board by the affected party "in confidence," either implicitly or explicitly. I will address each of these components separately.

Supplied

[28] 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.[9] Information may qualify as "supplied" if it was directly supplied to an

[7] Order PO-2010.
[8] Order P-1621.
[9] Order MO-1706.

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.[10]

[29] 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. In other words, except in unusual circumstances, agreed-upon essential terms of a contract are considered to be the product of a negotiation process and are not, therefore, considered to have been "supplied." This approach has been upheld by the Divisional Court in *Boeing Co. V. Ontario (Ministry of Economic Development and Trade),* and a number of other decisions.[11] Most recently, it was once again upheld by the Divisional Court in *Aecon Construction Group Inc. v. Information and Privacy Commissioner of Ontario*.[12]

[30] There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[13] The "immutability" exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[14]

[31] With the exception of the letter, the records at issue are executed agreements between the affected party and the school board relating to the lease of the land. As stated above, it is well established that the agreed-upon essential terms of a contract or agreement are considered to be the product of a negotiation process and not "supplied" even when "negotiation" amounts to acceptance of the terms proposed by the third party.[15] In Order MO-1706, Adjudicator Bernard Morrow stated:

> …[T]he fact that a contract is preceded by little negotiation, or that the contract substantially reflects the terms proposed by a third party, does

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[10] Orders PO-2020 and PO-2043.

[11] *Supra,* note 1. See also, Orders PO-2018, and PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan,* [2008] O.J. No. 2243 (Div. Ct.) and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis,* [2008] O.J. No. 3475 (Div. Ct) (*CMPA*). See also *HKSC Developments L.P. v. Infrastructure Ontario and Information and Privacy Commissioner of Ontario,* 2013 ONSC 6776 (Can LII) and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*).

[12] 2015 ONSC 1392 (CanLII), upholding PO-3311.

[13] Order MO-1706, cited with approval in *Miller Transit*, *supra,* note 9 at para. 33.

[14] *Miller Transit*, *supra,* note 9 at para. 34.

[15] See Orders PO-2384, PO-2497 (upheld in *CMPA, supra,* note 9) and PO-3157.

> not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been supplied by a third party, even where they were proposed by the third party and agreed to with little discussion.

[32] Also as stated above, the Divisional Court has affirmed this office's approach with respect to the application of section 10(1) to negotiated agreements[16] and specifically confirmed in *Miller Transit* and *Aecon Construction* that the approach is consistent with the intent of the legislation which recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.[17]

[33] As previously stated, with the exception of the letter, the records consist of executed agreements between the school board and the affected party. In keeping with this office's approach with respect to the application of section 10(1) to agreements and contracts, which has repeatedly been upheld by the Divisional Court, I am satisfied that the information contained in these records was negotiated. I accept that the contents of these records represent the final agreements regarding the lease of land outlining the agreed-upon essential terms that were the product of a negotiation process between the two parties.

[34] Additionally, I do not accept that any of the information in these agreements meets either of the two exceptions to the general rule that contracts are not "supplied": the "inferred disclosure" and "immutability" exceptions. In my view, none of the information would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution; nor do these records contain information supplied by the affected party that is immutable or not susceptible of change.

[35] I find that none of the agreements can be said to have been "supplied" for the purposes of the "supplied in confidence" requirement of part 2 of the section 10(1) test. Accordingly, part 2 of the section 10(1) test has not been established for these records. As all three parts of the test must be established for the exemption to apply, I find that none of the agreements are exempt from disclosure under section 10(1) of the *Act*.

[36] While the subject matter of the letter addresses the commercial arrangement between the school board and the affected party regarding the lease of land, it is not an executed agreement or contract. It was prepared by the affected party, on its letterhead, and is addressed to the school board. This information clearly originates with the affected party and I accept that it was "supplied" to the school board within the meaning of that term in part 2 of the section 10(1) test. Therefore, I must go on to

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[16] *Supra,* note 9.
[17] *Miller Transit, supra,* note 9 at para. 44 and *Aecon Construction, supra,* note 9 at paragraph 13.

determine whether the letter can be said to have been supplied to the school board "in confidence."

In confidence

[37] In order to satisfy the "in confidence" component of part 2, 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.[18]

[38] 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
- prepared for a purpose that would not entail disclosure[19]

[39] The letter does not make any reference to the affected party's expectation of confidentiality with respect to the information it contains. Without evidence from either of the parties, it is difficult to ascertain what those expectations might have been. However, based on the nature and content of the information contained in the letter which addresses the affected party's lease of land from the school board, I accept that the affected party had a reasonably held, implicit expectation that the information that it supplied to the school board in this letter would be treated in a confidential manner by the school board. In the circumstances, I find that the information at issue was supplied "in confidence" for the purposes of part 2 of the section 10(1) test.

[40] Accordingly, I find that the letter was "supplied in confidence" to the school board by the affected party and part 2 of the test for the application of section 10(1) has been met for that record.

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[18] Order PO-2020.
[19] Orders PO-2043, PO-2371 and PO-2497.

Summary conclusion

[41] I find that the "supplied in confidence" component in part 2 of the section 10(1) test has not been established with respect to the disclosure of all four of the agreements at issue. As all three parts of the test must be met for the exemption to apply, I find that section 10(1) does not apply to the agreements at issue.

[42] With respect to the letter, however, I find that it was "supplied in confidence" within the meaning of part 2 of the section 10(1) test. Accordingly, I must now determine whether the disclosure of the information in that letter could reasonably be expected to give rise to the harms outlined in section 10(1)(a) and/or (c).

Part 3: harms

[43] To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[20]

[44] 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, 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*.[21]

[45] Although neither the school board nor the affected party has submitted any representations on the reasonable expectation of the occurrence of the harms identified in section 10(1), as that section is a mandatory exemption, I will address all those sections that, in my view, are applicable. In the circumstances of this appeal, I will examine the possible application of sections 10(1)(a) and (c) to the letter, which is the only record which remains at issue.

Sections 10(1)(a) and (c): prejudice to competitive position and undue loss or gain

[46] Frequently, when section 10(1) is claimed for a record that involves a business transaction between two parties, the party or parties resisting disclosure claim that disclosure could reasonably be expected to prejudice its competitive position (section 10(1)(a) or result in it suffering an undue loss while providing a correlative undue gain

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[20] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII) at paras 52-54.
[21] Order PO-2435.

to its competitors (section 10(1)(c). While these types of harms are the only harms listed in section 10(1) that might be relevant in the circumstances of this appeal, I find that they have not been established with respect to the disclosure of the letter that remains at issue.

[47] In the absence of representations, I find that I have not been provided with the requisite clear and convincing evidence to establish that the disclosure of the information contained in the letter could result in either prejudice to the affected party's competitive position as contemplated by section 10(1)(a) or cause it to experience an undue loss or result in an undue gain to its competitors as contemplated by section 10(1)(c).

[48] Moreover, from my review of the letter itself, in my view, it is not evident how its content could be used by the affected party's competitors in future situations in ways that could reasonably be expected to give rise to these harms. The letter is very brief and is general in nature, addressing the most recent lease agreement between the school board and the affected party. In the absence of evidence describing how the disclosure of the specific information contained in the record or even the type of information contained in the record could be of assistance to the affected party's competitors, I do not accept that it could reasonably be expected to give rise to the harms contemplated in sections 10(1)(a) and/or (c).

[49] I am not satisfied that I have been provided with the requisite evidence to establish that disclosure of the information in the letter could reasonably be expected to give rise to the harm contemplated by either section 10(1)(a) or section 10(1)(c). Therefore, I find that the harm component in part 3 of the section 10(1) test has not been established for the letter that remains at issue in this appeal.

[50] As none of the other harms identified in section 10(1) appear to be relevant in the circumstances of this appeal, the third component of the test for the application of that exemption has not been established.

Conclusion

[51] I have found that none of the four lease agreements were "supplied in confidence" as required by part 2 of the section 10(1) test. Additionally, I have found that the harm component in part 3 of the section 10(1) test has not been established with respect to the disclosure of the letter. As all three parts of the test must be established for the exemption to apply, I find that section 10(1) of the *Act* does not apply to exempt any of the information at issue in this appeal from disclosure.

ORDER:

1. I order the school board to disclose all of the records to the appellant by **May 6, 2015** but not before **April 30, 2015**.

2. In order to verify compliance with order provision 1, I reserve the right to require the school board to provide me with copies of the records which are disclosed to the requester.

Original signed by: March 31, 2015
Catherine Corban
Adjudicator