

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3304

Appeals MA15-23, MA15-25 and MA15-41

Simcoe County District School Board

April 20, 2016

Summary: The sole issue in these appeals is the possible application of the mandatory exemption in section 10(1) (third party information) to both portions of the record at issue, which is a report and an appendix relating to a response to an RFP issued by the Simcoe County District School Board. During the inquiry, both third party appellants provided their consent to disclose the report to the appellant, but the adjudicator finds that part of the report is not responsive to the appellant's request. The adjudicator also finds that the appendix portion of the record is exempt under section 10(1). The board is ordered to disclose the responsive portions of the report to the appellant.

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

OVERVIEW:

[1] This order disposes of the issues raised as a result of three appeals to this office relating to the same request made by the appellant to the Simcoe County District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The request was for all records regarding a particular secondary school in relation to a request for proposal (RFP). After notifying four third parties whose interests might be affected by the request, the board identified responsive records and granted partial access to them, claiming the application of the discretionary exemptions in sections 6(1)(b) (closed meeting) and 7(1) (advice or recommendations) of the *Act*.

[3] The requester (now the appellant) filed an appeal of the board's decision to this office. As a result, appeal file MA15-41 was opened. In addition, two of the third parties (now the third party appellants) also appealed the board's decision to this office. As a result, appeal files MA15-23 and MA15-25 were opened.

[4] During the mediation of the appeals, the appellant narrowed the scope of her request to one record, for which only section 6 had been claimed. The record consists of two parts. The first part is a report and the second part is an appendix to the report. The third party appellants raised the possible application of the mandatory exemption in section 10(1) (third party information) to both parts of this record. Consequently, section 10(1) was added as an issue in the appeals.

[5] The appeals then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry. The board, one of the third party appellants (third party appellant A) and the appellant provided representations to this office. The board advised that it was no longer claiming the application of the exemption in section 6(1)(b) to the report portion of the record, and that it was willing to disclose it to the appellant, with non-responsive information withheld.

[6] The second third party appellant (third party appellant B) advised that it could not provide representations with respect to the report portion of the record, as it did not have a copy of it, and that it would not be providing representations regarding the appendix portion of the record, notwithstanding that it authored the appendix. Later in the inquiry, the board provided the report portion of the record to third party appellants A and B, with the non-responsive portions withheld.

[7] In sum, the sole issue remaining in these appeals is the possible application of the mandatory exemption in section 10(1) to the appendix portion of the record at issue. For the reasons that follow, I find that the appendix portion of the record is exempt from disclosure under section 10(1).

RECORD:

[8] The record consists of a two-page report from the board's Superintendent of Education to the board's Business and Facilities Standing Committee, with a three-page appendix attached to the report which is authored by third party appellant B on behalf of third party appellant A and others. I agree with the board that the first two paragraphs on the second page of the report portion of the record are not responsive to the request, as they relate to a secondary school that is not the subject matter of this request. Consequently, this portion of the record is not to be disclosed to the appellant.

DISCUSSION:

[9] As previously stated, during the inquiry the board provided the report to the third party appellants, with the non-responsive portions withheld. Both third party appellant

A and B subsequently advised staff of this office in writing that they had no objection to the disclosure of the report portion of the record. Consequently, as the third party appellants no longer object to its disclosure, and as the board is no longer claiming the exemption in section 6(1)(b), I will order the board to disclose the responsive part of the report to the appellant.

[10] The sole issue in these appeals is whether the appendix portion of the record at issue is exempt from disclosure under section 10(1) of the *Act*, which 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, 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;

...

[11] 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

[12] For section 10(1) to apply, the third party must satisfy each part of the following three-part test:

- the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information;
- the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
- 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.

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No, 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

Part 1: type of information

[13] The board acknowledges that the appendix portion of the record may contain *commercial information* as contemplated by section 10(1). Third party appellant A submits that the records contain commercial, financial and technical information. The appellant advises that she is seeking financial information.

[14] On my review of the record, I find that the appendix contains commercial information as interpreted by past orders of this office. 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.³ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁴ I find that the appendix contains commercial information because it relates to the buying and selling of services between the board and the third party appellants. I also find that the record does not contain financial information.

Part 2: supplied in confidence

[15] The requirement that the information was *supplied* to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.⁵ Information may qualify as supplied if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.⁶

[16] In order to satisfy the *in confidence* component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[17] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, including whether the information was:

- Communicated to the institution on the basis that it was confidential and that it was to be kept confidential;
- Treated consistently by the third party in a manner that indicates a concern for confidentiality;

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

⁶ Order MO-1706.

⁷ Order PO-2020.

- Not otherwise disclosed or available from sources to which the public has access; and
- Prepared for a purpose that would not entail disclosure.

[18] The board submits that certain information in the appendix was supplied to it in confidence. Third party appellant A submits that the information at issue was supplied by it to the board in confidence, as part of its response to the RFP.

[19] The appellant states that she is concerned that the board's requirement of confidentiality regarding the third party appellants' response to the board's RFP undermines the purpose of freedom of information legislation.

[20] Upon my review of the representations and the record itself, I am satisfied that the appendix was supplied in confidence by third party appellant B to the board on behalf of third party appellant A.

Part 3: harms

[21] The party resisting disclosure must provide detailed and convincing evidence about the potential for 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.⁸

[22] 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 the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.⁹

[23] The board states that it is not in a position to determine whether harm would result from disclosure of the appendix portion of the record. The appellant's representations do not directly address this issue. Third party appellant A states that the appendix provides a detailed summary of the response to the RFP, including its high-level strategy and alternate proposals. It submits that other parties could unfairly benefit from having detailed information about the kind of approach it takes when responding to an RFP. Accordingly, it argues, the disclosure of the technical, financial and commercial information in the record may have a material impact on its business strategy going forward and could severely prejudice its competitive position. In particular, third party appellant A submits that the disclosure of the information at issue could restrict its ability to participate fairly in future negotiations and bidding processes.

[24] Based on third party appellant A's representations and my review of the

⁸ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

⁹ Order PO-2435.

appendix, I find that it qualifies for exemption under section 10(1)(a) of the *Act*. The appendix contains detailed commercial information that was supplied in confidence by the third party appellants to the board. The appendix contains a detailed summary of the third party appellants' response to the board's RFP. I find that disclosure of this information could reasonably be expected to prejudice the third party appellants' competitive position, as it could be used by a competitor in response to future RFP's involving similar issues and properties. Consequently, I find that the third part of the test has been met with respect to the appendix. As all three parts of the test in section 10(1)(a) apply to the appendix, I find that it is exempt from disclosure.

ORDER:

1. I order the board to disclose the report portion of the record to the appellant by **May 4, 2016**. The non-responsive information which is contained in the first two paragraphs of page two of the report is not to be disclosed to the appellant.
2. I reserve the right to require the board to provide this office with a copy of the record it discloses to the appellant.
3. I uphold the board's decision to deny access to the appendix under section 10(1)(a) of the *Act*.

Original Signed By: _____
Cathy Hamilton
Adjudicator

_____ April 20, 2016