Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3885

Appeal MA18-208

Ottawa-Carleton District School Board

December 24, 2019

Summary: The records at issue in this appeal are a contract and an addendum to the contract between the Ottawa-Carleton District School Board (the board) and an online school payment service provider. The appellant made an access request to the board under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of these records. The board denied access to the records, claiming the application of the mandatory exemption in section 10(1) (third party information). In this order, the adjudicator finds that the exemption in section 10(1) does not apply, because the contract and amending agreement do not meet the second part of the three-part test in section 10(1), that is, they were not "supplied" to the board by the service provider because they were negotiated. The adjudicator orders the board 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, section 10(1).

Orders and Investigation Reports Considered: Orders PO-2384 and PO-2632.

Cases Considered: *HKSC Developments L.P. v. Infrastructure Ontario*, 2013 ONSC 6776 (Ont. Div. Ct.).

OVERVIEW:

[1] The Ottawa-Carleton District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to a copy of a contract between the board and an online school payment service provider, as well as all communications between the board and the company's executives, including emails, phone calls and texts during a specified time period.

[2] The board identified five records, and notified the company as an affected party under section 21(1)(a) of the *Act,* and sought its views regarding the disclosure of five records. Following consideration of the company's representations, the board granted the requester full access to Record 1. It refused access to Records 4 and 5 (a contract and an amending agreement), claiming the application of the mandatory exemption in section 10(1) of the *Act* (third party information). The board also claimed that Records 2 and 3 were not responsive to the request.

[3] The requester (now the appellant) appealed the board's decision to this office.

[4] During the mediation of the appeal, the appellant advised that she is only interested in pursuing access to Records 4 and 5. She also asserted that there is a public interest in the disclosure of those records, thereby raising the public interest override in section 16 of the *Act*. The company confirmed that it objects to the disclosure of Records 4 and 5.

[5] The appeal was then moved to the adjudication stage of the appeals process, where an adjudicator may conduct an inquiry. The adjudicator assigned to the appeal sought, and received representations from the board, the affected party and the appellant. Representations were shared, although portions of the affected party's representations were withheld, as they met this office's confidentiality criteria set out in *Practice Direction 7*. The appeal was then transferred to me to continue the inquiry.

[6] I note that in both its original and reply representations, the board states that its decision to deny access to the records was made upon review of the affected party's submission to it during the processing of the access request.

[7] For the reasons that follow, I find that the records are not exempt from disclosure under section 10(1) and I order the board to disclose them to the appellant.

RECORDS:

[8] There are two records at issue. Record 4 is an 11 page contract (referred to as a statement of work), and Record 5 is a five page amending agreement to the contract (referred to as an addendum).

DISCUSSION:

[9] The sole issue in this appeal is whether the mandatory exemption in section 10(1) applies to the records. The affected party has raised the application of sections 10(1)(a) and (c) to exempt the records from disclosure. The board did not specify which subsections of section 10(1) apply. Sections 10(1)(a) and (c) state:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, 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;

[10] 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]

[11] 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.

Part 1: type of information

[12] Both the board and the affected party argue that the records contain the commercial information of the affected party. The board also submits that the records contain financial information. The types of information listed in section 10(1) have been discussed in prior orders.

[13] Commercial information refers to information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-

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[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.

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]

[14] 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.[5]

Representations

[15] The board submits that the records contain the commercial and financial information of the affected party. In particular, the board submits, the records contain pricing information, a proprietary implementation schedule, service provisions, details regarding support, intellectual property, client responsibilities and restrictions, dispute resolution and warranties.

[16] The affected party submits that it provides school cash management solutions and online payment software for students within the board's schools, and that the records contain commercial information, as it relates solely to the buying, selling or exchange of merchandise or services. In particular, the affected party argues that the records contain the following information:

- Unit pricing for training services;
- Unit rates for calculating fees;
- Milestone fees for various phases of work;
- Annual licensing fees and one-time costs;
- Business processes;
- Commercial arrangements such as the proprietary implementation schedule/process, service levels for provision of service, and commercial terms relating to support, intellectual property and warranties.

[17] The appellant's representations do not explicitly address this issue, although she does so implicitly, as she refers to the records as a "contract.'

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[3] Order PO-2010.
[4] Order P-1621.
[5] Order PO-2010.

Analysis and findings

[18] Having reviewed the parties' representations and the records themselves, I find that the records contain both commercial and financial information. The records relate to the selling and buying of the affected party's online payment system service with the board, thus qualifying as "commercial information" for the purposes of the first part of the three-part test in section 10(1). In addition, the records contain pricing practices, which qualify as "financial information" for the purposes of part 1 of the three-part test in section 10(1).

[19] Having found that the first part of the three-part test in section 10(1) was met, I will now determine whether the commercial and financial information in the records was "supplied in confidence" by the affected party to the board.

Part 2: supplied in confidence

Supplied

[20] In order to satisfy part 2 of the test, the affected party must have supplied the information to the board in confidence, either implicitly or explicitly. 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.[6]

[21] 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.[7]

[22] 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.[8]

[23] 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

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[6] Order MO-1706.
[7] Orders PO-2020 and PO-2043.
[8] This approach was approved by the Divisional Court in Boeing Co., cited above, and in Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al., 2013 ONSC 7139 (CanLII) (Miller Transit).

information supplied by the third party to the institution.[9] 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.[10]

Representations

[24] The board submits that the records were supplied in confidence to it.

[25] The affected party submits that the information contained in the records was supplied in confidence to the board by it in connection with the provision of a school cash management system. Further, the affected party argues that the information in the records was supplied in circumstances that fall within the "immutability" and "inferred disclosure" exceptions. In particular, the affected party submits that the "inferred disclosure" exception applies, stating:

> If disclosed, the unit pricing information contained in the Records would be highly valuable to [its] competitors and current or potential customers other than [the board]. The information would reveal the specific services provided by [the affected party] to [the board], the specifications and functionality for those products and services, and the fees or rates charged for each such product or service. What software and services [the affected party] will supply to customers and at what prices are essential elements of [its] overall product/pricing strategy. From the unit pricing contained in the Records, a competitor could infer information about this strategy and therefore the "inferred disclosure" exception applies.

[26] The requester submits that the information she seeks to obtain was not supplied in confidence and that it is arguable that the information does not even pertain to the affected party, but rather to public spending.

[27] In reply, the board reiterated the affected party's position that the information was supplied in confidence, quoting from the affected party's submissions made during the processing of the access request.

[28] In reply, the affected party submits that it does not agree that pricing and fee information pertains only to public spending, as the requester suggests.

Analysis and findings

[29] As previously stated, past orders of this office have generally found that, absent

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[9] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[10] *Miller Transit*, above at para. 34.

evidence to the contrary, the content of a negotiated contract involving a government institution and a third party is presumed to have been generated in the give and take of negotiations and therefore not "supplied" for the purposes of the exemption in section 10(1).

[30] Based on my review of the contract and the addendum between the board and the affected party, and having considered the representations of the board, the affected party and the appellant, I find that none of the information contained in the records qualifies as having been "supplied" as required by part two of the three-part test in section 10(1).

[31] In Order PO-2632, Adjudicator Daphne Loukidelis set out this office's approach with respect to the determination of whether information has been supplied for the purposes of section 17(1) in the context of an agreement. She stated:

> Many previous orders have reached the conclusion that contracts between government and private businesses do not reveal or contain information "supplied" by the private business since a contract is thought to represent the expression of an agreement between two parties. Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by section 17(1) [Order PO-2018].
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> In Order PO-2226, former Assistant Commissioner Tom Mitchinson considered the appeal of a decision regarding a request for access to various sale agreements entered into by the Ontario government and Bombardier Aerospace relating to de Havilland Inc. As in the present appeal, the records at issue in Order PO-2226, consisted of a complex, multi-party agreement with other smaller agreements that flowed from the main one, all of which were multi-faceted with customized terms and conditions. In that appeal, the former Assistant Commissioner was not persuaded by the evidence that the records were "supplied" to the Ministry or would reveal information actually supplied to the Ministry, and had the following to say about the complex multi-party agreement at issue:
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> > [I]t is simply not reasonable to conclude that contracts of this nature were arrived at without the typical back-and- forth, give-and-take process of negotiation. I find that the records at issue in this appeal are not accurately described as as "the informational assets of non-government parties", but, but instead are negotiated agreements that reflect the various interests of the parties engaged in the purchase and sale of "the de Havilland business".

Further, Adjudicator Steve Faughnan provided the following summary with respect to the interpretation of "supplied" in Order PO-2384:

> 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) … **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** [see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, [2002] B.C.J. No. 848 (S.C.), Orders PO-2433 and PO-2435] [emphasis added].

[32] I agree with the reasoning articulated in the orders excerpted above, and will apply it in my analysis of the records before me.

[33] In terms of the burden of proof as to whether a third party "supplied" a record to an institution, the Divisional Court of Ontario has held that the third party bears the onus of rebutting the presumption that information forming part of a contractual agreement was negotiated between the third party and an institution.[11]

[34] As previously stated, I have reviewed the parties' representations and the records themselves. I am satisfied, and I find that the terms of these agreements were mutually generated and, therefore, do not qualify as having been "supplied" for the purposes of part two of the three-part test in section 10(1).

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[11] See *HKSC Developments L.P. v. Infrastructure Ontario*, 2013 ONSC 6776.

[35] I find that the records are signed agreements setting out the terms by which the affected party is to provide online school cash payment services to the board. I further find that the records at issue clearly fall within the general rule that has been well established by this office and upheld by the courts that the provisions of a contract are treated as having been mutually generated, rather than supplied. As a result, I find that these agreements were negotiated between the affected party and the board and therefore, subject to the possible application of either of the two exceptions to this general rule, cannot be considered to have been "supplied" to the board by the affected party for the purposes of the second part of the three-part test in section 10(1).

[36] The affected party argues that the information contained in the records falls within the "inferred disclosure" exception, where disclosure of the information in a contact would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by a third party to an institution. For ease of reference, I reproduce the affected party's argument on this issue as follows:

> If disclosed, the unit pricing information contained in the Records would be highly valuable to [its] competitors and current or potential customers other than [the board]. The information would reveal the specific services provided by [the affected party] to [the board], the specifications and functionality for those products and services, and the fees or rates charged for each such product or service. What software and services [the affected party] will supply to customers and at what prices are essential elements of [its] overall product/pricing strategy. From the unit pricing contained in the Records, a competitor could infer information about this strategy and therefore the "inferred disclosure" exception applies.

[37] I do not accept that the disclosure of the information contained in the records would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the board, thereby meeting the "inferred disclosure" exception. The affected party submits that disclosure of the unit pricing would permit a competitor to infer information about its product and pricing strategy. Based on my review of the agreements themselves, as well as the affected party's representations on this issue, I find that there is insufficient evidence to support such a conclusion, and I further find that the contract and the addendum contain negotiated information that was agreed upon by the parties and does not qualify as underlying, non-negotiated confidential information supplied by the appellant to the university. Further, I note that there is much more information in the records than unit pricing, and the affected party has not provided sufficient evidence as to how that information was "supplied" as opposed to negotiated.

[38] In addition, I note that the other exception, known as the "immutability" exception applies to information that is immutable or is not susceptible to change, such as the overhead costs of a business or a sample of its products. While the affected party did not raise this exception, I find on my review of the records that they do not

contain any information that can be said to be "immutable."

[39] Consequently, I find that the information in both records was not "supplied" to the board by the affected party. As a result, it is not necessary for me to consider the "in confidence" prong of the second part of the test as the "supplied" portion of the test has not been met. Therefore, I find that the second part of the three-part test has not been met, and that it is not necessary for me to consider the third part of the test. Accordingly, I find that the records are not exempt from disclosure under section 10(1) of the *Act*. As a result, it is not necessary for me to consider the public interest override in section 16, which was raised by the appellant.

ORDER:

1. I do not uphold the board's decision to deny access to the records under section 10(1) of the *Act*.

2. I order the board to disclose the records in their entirety to the appellant by **February 3, 2020**, but not before **January 27, 2020**.

3. I reserve the right to require the board to provide to this office copies of the records it discloses to the appellant.

Original Signed by: December 24, 2019
Cathy Hamilton
Adjudicator