Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3905

Appeal MA18-173

Limestone District School Board

February 21, 2020

Summary: A school bus consortium that is not an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) received a request under the *Act* for copies of most recent school bus contracts between a named school bus operator and the consortium for bus services in Kingston, Ontario. The consortium issued a decision denying access to the responsive record on the basis of section 10(1) (third party information) of the *Act*. That decision was appealed and it was determined that the decision was properly that of the Limestone District School Board (the board), which is an institution under the *Act*. At adjudication, the board, and affected parties (including the consortium) argued that sections 10(1) and/or 11(a), (c), and/or (d) (economic interests of the board) apply to the record. In this order, the adjudicator allows the appeal and orders the board to disclose the record.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a), 10(1)(b), 10(1)(c), 11(a), 11(c), and 11(d).

Orders Considered: Orders PO-1763, PO-1998, PO-2435, PO-2676, PO-2758, PO-3572, MO-3058-F, MO-3143, MO-3144, and MO-3145.

OVERVIEW:

[1] A school bus consortium, the Tri-Board Transportation of Eastern Ontario (Tri-

Board, or the consortium),[1] received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> We are seeking copies of school bus contracts (most recent) between the operator [a named company] and the consortium for school bus transportation services in the municipality of Kingston, Ontario.

[2] The consortium identified a responsive record, a contract, and notified affected third parties about the request, seeking their views about disclosure of the record.

[3] After receiving and considering the affected third party representations, Tri-board issued a decision denying access to the record on the basis of the mandatory exemption at section 10(1) (third party information) of the *Act*.

[4] The requester (now the appellant) appealed the consortium's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Before the appeal was assigned to a mediator, the IPC registrar had discussions with the consortium and the Limestone District School Board (the board). Since the consortium is not an institution under the *Act*, the board (which is an institution under the *Act*) issued a decision.[2] The board decided to deny access to the contract, also on the basis of section 10(1) of *Act*.

[6] During the course of mediation, the mediator had discussions with the appellant and the board. The mediator reviewed the withheld record and confirmed that the record at issue affects the interests of a number of third parties. The appellant asked that the mediator notify the affected third parties of the request and determine whether they would consent to the disclosure of their information to him. The board stated that disclosure of the record could only occur if all of the affected third parties consented because the withheld record equally affect the interests of the third parties. The mediator began to notify the affected third parties. Since one of them did not consent to disclose the information at issue to the appellant, no further notification was made. The mediator advised the appellant of the results of notification, and the appellant stated that he wished to pursue the withheld information at the next stage of the process. Accordingly, the appeal moved to adjudication, where a written inquiry may be conducted.

[7] I began an inquiry under the *Act* by issuing a Notice of Inquiry, setting out the facts and issues on appeal, to the board, the consortium (as an affected party), two

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[1] A transportation consortium for the Limestone District School Board, the Algonquin and Lakeshore Catholic District School Board, and the Hastings and Prince Edward District School Board.

[2] See Orders MO-3143, MO-3144, and MO-3145, which found that a school bus consortium is part of the relevant school board for the purposes of the *Act*.

affected party school boards [the Algonquin and Lakeshore Catholic District School Board of Eastern Ontario (ALCDSB) and the Hastings and Prince Edward District School Board (HPEDSB)],[3] and thirty bus operators (affected parties). In response, I received representations from the board (joint with the consortium, and adopted by the ALCDSB and HPEDSB) and from twenty-one bus operators. I also sought and received representations from the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.[4] Twenty bus operators (Affected Parties 1 to 20) provided joint representations, one bus operator provided representations independently (Affected Party 21), and one bus operator advised the IPC that they would not provide representations. The bus operator named in the request did not provide representations. During the inquiry, the board raised the possible application of sections 11(a), (c), and (d) to the record. Therefore, I added the issues of late raising of discretionary exemptions and the possible application of section 11.

[8] For the reasons that follow, I allow the appeal because I find that the record at issue is not exempt under section 10(1) or sections 11(a), (c), or (d). As a result, I order the board to fully disclose the record to the appellant.

RECORD:

[9] The record at issue is a commercial contract and its attached schedules.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the record?

B. Is the board entitled to the late raising of the discretionary exemption at section 11 during the inquiry?

C. Do one or more of the discretionary exemptions at sections 11(a), (c), and/or (d) apply to the record?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10(1) apply to the record?

[10] For the reasons that follow, I find that the record is not exempt under section

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[3] As stated above, Tri-board is the transportation consortium for Limestone District School board, ALCDSB, and HPEDDSB.
[4] *Practice Direction 7*.

10(1) of the *Act*.

[11] The board and twenty-four affected parties participated in the inquiry process, as follows:

- Tri-Board made joint submissions with the board, which were adopted by the ALCDSB and HPEDSB (together, "the board" for ease of reference),[5] relying on section 10(1)(a) to resist disclosure of the record;

- twenty bus operators (Affected Parties 1 to 20) jointly rely on sections 10(1)(a) and 10(1)(b) to resist disclosure of the record; and

- one bus operator (Affected Party 21) objected to disclosure in full, or, in the alternative, to specified pricing and rate information in the record, on the basis of sections 10(1)(a) and/or 10(1)(c).

[12] In this appeal, the relevant parts of section 10(1) say:

> 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,
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> > a. prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
> >
> > b. result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
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> > c. result in undue loss or gain to any person, group, committee or financial institution or agency[.]

[13] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[6] 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.[7]

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[5] CDSBEO also provided brief, additional representations, which I have also considered.
[6] *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.*).
[7] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

[14] For section 10(1) to apply, a party resisting disclosure 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 inconfidence, 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 one: type of information

[15] In this appeal, the board and the affected parties submit that the record contains two of the types of information listed under section 10(1), specifically, commercial and financial information.

[16] The appellant did not take a position on part one.

[17] Based on my review of the record, I find that it is a commercial contract. Accordingly, it contains both commercial and financial information, as defined by the IPC:

> *Commercial information* is "information that relates solely to the buying, selling or exchange of merchandise or services."[8]
>
> *Financial information* refers to information relating to money and its use or distribution (for example, pricing practices).[9]

[18] Since the record contains commercial and financial information, it meets part one of the test. In light of this finding, it is not necessary for me to determine whether the record contains labour relations information (as also argued by the board), or technical information (as also argued by Affected Party 21).

[19] Affected Party 21 describes the record as "a private contract between two parties" carrying with it a "reasonable expectation of confidentiality." However, as discussed, based on my review of the record, I have found that the record is a contract involving an institution under the *Act*,[10] and a third party. The contract is said by

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[8] Order P-493.
[9] Order PO-2010.
[10] See note 2.

counsel for the board to be identical to the ones of the twenty-nine other third party bus operators, including Affected Party 21. Since the record is in the custody and control of the board, it is potentially accessible under section 4(1) of the *Act*, as a contract between a third party and the board.

Part two: supplied in confidence

[20] Part two of the section 10(1) test itself has two parts: the information at issue must have been "supplied" to the institution by the third party, and this must have been done "in confidence" implicitly or explicitly. If either of these requirements has not been met, the section 10(1) exemption does not apply, and there is no need to decide part three of the test.

"Supplied"

[21] 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.[11] 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.[12]

[22] The fact that the record at issue is a contract is significant because 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.[13]

[23] There are two exceptions to this general rule that contracts are not "supplied" within the meaning of section 10(1), 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.[14]

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[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] 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*),.
[14] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.

> 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.[15]

[24] Affected Party 21 argues that the payment-related information meets the "inferred disclosure" exception because it "may lead other bidders to infer" its "underlying bidding practice and strategies," and vulnerabilities. However, based on my review of the record, it is not clear to me that its disclosure would reveal the bidding practices and vulnerabilities of Affected Party 21.

[25] The board submits that the information at issue was "supplied" to the board[16] by the third party bus operators, but for the reasons that follow, I find that there is insufficient evidence to support that position, except with regard to some pricing and rate information (under parts of section 12 of the record, and all of Schedule "H.") As a result, with the exception of that information in the contract, the record does not meet part two of the test.

[26] The board and all the participating affected parties object to disclosure of the record in full. The board and Affected Party 21 also take a position in the alternative: that specific portions of the record detailing pricing and rate information should be withheld. I will discuss both of these positions, below.

Objection to disclosure, in full

[27] On the basis of the following, I find that there is insufficient evidence to conclude that the whole record was "supplied" to the board.

[28] Although the board and Affected Party 21 object to disclosure of the record in full, their representations are largely silent on the portions of the record that do not relate to pricing and rate information.

[29] The board's submissions under part two of the test, before delving into pricing and rate information, contain:

- an assertion that "[t]he information was supplied by the third parties to the [c]onsortium in confidence;"

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[15] *Miller Transit*, above at para. 34.

[16] The board asserts that "[t]he information was supplied by the third parties to the [c]onsortium in confidence," but this must be taken to mean that it was supplied to the board in confidence. The representations of the board acknowledge that the IPC has determined that the *Act* applies to records held by consortia such as the one involved in this case (Tri-Board), and that such records are deemed to be in the custody and/or control of the member school board subject to the access request. See footnote 2 and the orders referenced there.

- an assertion that "the presumption that a contract is 'mutually generated,' and rather than "supplied" does not apply in these circumstances," but instead, the "inferred disclosure" and/or "immutability" exception(s) is/are applicable; and

- a quote from Order MO-3258, which reiterated the definitions of the "immutability" and "inferred disclosure" exceptions.

[30] Similarly, the representations of Affected Party 21 did not specify how portions of the contract unrelated to payment were "supplied" to the board.

[31] Affected Parties 1 to 20 make a general statement that "information that formed the basis of and was incorporated into the contract…was supplied to [the consortium]17 as part of a private and confidential legal arbitration procedure." However, these parties did not cite either of the exceptions (immutability or inferred disclosure) as applying, so I am unprepared to find that they have discharged their burden of proof under part two of the test.

[32] The record is a commercial agreement between the board (through Tri-Board) and a named bus operator. It contains agreed-upon terms and conditions regarding the provision of school transportation services, apart from pricing/rate information, such as the parties' obligations and the applicable laws. I find that the board and the participating affected parties have not established that the portions of the record that do not relate to pricing and rate information were "supplied" by the third parties to the board. From my review of the record, it is not evident that those portions of it (that is, those unrelated to pricing and rate information) were "supplied." As a result, these portions of the record do not meet part two of the test, and are not exempt under section 10(1) of the *Act*.

Alternative position: objection to certain pricing- and rate-related information

[33] As mentioned, all the parties argued that pricing- and rate-related information was "supplied;" the board and Affected Party 21 took the position that this information should be withheld even if the rest of the record is disclosed. For the reasons that follow, I am prepared to accept that a limited portion of the pricing- and rate-related information in the record was "supplied," but I find that the remaining portions were not.

[34] The board submits that the record contains "an outline of the underlying fixed costs of the third parties [the bus operators];" in particular, it submits that sections 12.1-12.5 and Schedule "H" contain:

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[17] See note 16.

> detailed information related to the third parties' underlying fix costs, including wages, building and property expenses, office and admin expenses, operations expenses and fixed vehicle costs."

[35] The board argues that one or both of the "immutability" or the "inferred disclosure" exceptions apply to that information.

[36] Affected Party 21 argues that portions of section 12.2 ("Base Costs") and section 12.5 ("Payment Terms") were "supplied" to the board. I note that section 12.2 relates to section 12.5, which in turn references Schedule "H."

[37] Affected Parties 1 to 20 did not specify portions of the record that were "supplied" but did state that "[i]nformation that formed the basis of and was incorporated into the contract, including individual companies' payroll records, costs breakdowns, financial statements, etc" was supplied to the board (through the consortium).

Sections 12.1, 12.3, and 12.4 of the record

[38] Based on my review of these portions of the record and the board's general submission about sections 12.1-12.5 (noted above), I am not satisfied that sections 12.1, 12.3, and 12.4 were "supplied" to the board. Section 12.1 (entitled "Basis for Payments") contains information which I find is general in nature, and which clearly, on its face, represents terms of the contract that were negotiated between the board and the bus operator, not "supplied." I also find that sections 12.3 (entitled "Other Adjustments") and 12.4 (entitled "Payment Calculation") contain general terms of the commercial contract at issue. Without more detailed evidence about why sections 12.1, 12.3, and 12.4 were "supplied," I do not accept the position that they were. Therefore, these portions of the record do not meet part two of the test and are not exempt under section 10(1) of the *Act*.

Sections 12.2 and 12.5, and Schedule "H"

[39] As mentioned, section 12.2 (entitled "Base Costs") references section 12.5 (entitled "Payment Terms"), and section 12.5 is related to Schedule "H."

[40] The board submits that the "immutability" and/or "inferred disclosure" exceptions apply to Schedule "H" of the record because Schedule "H" contains information "related to be the third parties' underlying fixed costs and/or would allow accurate inferences to be made with respect to such information." The board cites Order MO-3058-F in support of this position, but that case is not of assistance to the board because it did not involve a contract, which is the type of record at issue in this appeal. The board also provided a definition of the immutability exception from the case law, and cited Order PO-2383 in support of its submission that the IPC has held that overhead and labour costs would qualify for the immutability exception. In addition to these citations, the board offered the brief submission reproduced above, that sections 12.1-12.5 and

Schedule "H" contain "detailed information related to the third parties' underlying fixed costs, including wages, building and property expenses, office and admin expenses, operations expenses and fixed vehicle costs." In the alternative, the board argues that the "inferred disclosure" exception applies because accurate inferences could still be made about the third parties' underlying fixed costs using the information about vehicle rates in the record, and reveal the third parties' underlying cost structures.

[41] Based on my review of the record and the representations of the parties, I am prepared to accept that at least some of the detailed costs set out in these portions of the record were not negotiated with the board, but are immutable in nature, and qualify for the "immutability" exception. Given my findings below about part three of the test, it is unnecessary to make definitive findings about the various costs listed in these portions of sections 12.2 and 12.5, and Schedule "H."

Part three: harms

[42] The third part of the test deals with reasonably expected harms as a result of disclosure of the record at issue. For the reasons that follow, I find that there is insufficient evidence to accept that the information that I have accepted as "supplied" (portions of sections 12.2 and 12.5 and Schedule "H" of the contract) meets the third part of the test.

[43] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[18] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the record itself and/or 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*.[19]

[44] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[20] The Notice of Inquiry sent to the parties specifically stated that, in applying section 10(1) to government contracts, the need for public accountability in the expenditure of public funds is an important reason behind the need for detailed

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[18] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.
[19] Order PO-2435.
[20] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.

evidence to support the harms outlined in section 10(1).[21]

[45] Here, the bus operator named in the request did not provide representations in the inquiry. Therefore, I am in a position of deciding the question of reasonably expected harms without recent evidence from the party in the best position to provide it. The operator did provide representations at the notification stage, which I will discuss below. Based on my review of the information that I have accepted was "supplied," and the circumstances in this appeal, I cannot infer harms under section 10(1) of the *Act* from the information in question.

Evidence of the participating parties

[46] For the sake of completeness, I will go on to consider the arguments of the board and the bus operators that did participate in the inquiry on the question of reasonably expected harms. The board submits that disclosure of the information at issue could reasonably be expected to lead to the harms set out in section 10(1)(a) of the *Act*. Affected Parties 1 to 20 do not cite the *Act* but appear to argue that disclosure could reasonably be expected to lead to the harms set out in sections 10(1)(a) and (b). Similarly, without specifically citing them, Affected Party 21 appears to argue sections 10(1)(a) and/or (c) apply.

[47] For ease of reference, sections 10(1)(a), (b), and (c) say:

> 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;
> >
> > 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[.]

[48] The board relies on the representations of the third party bus operators (including the one named in the appeal) who objected to disclosure at the notification stage (when the consortium notified the affected party companies about the request).

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[21] Order PO-2435.

[49] I have considered the notification-stage representations that the board attached to its representations. In particular, I considered the representations of the bus operator named in the request, since the record before me relates to that affected party. Having reviewed their representations, I find that the affected party named in the request did not establish the harm identified through sufficient evidence.

[50] I have also considered the age of the information itself. It is several years old. Given the nature of this information and its age, I am not satisfied that its release could reasonably be expected to result in the harms contemplated under section 10(1)(a), even if the bus operator named in the request is currently in negotiations (and I have insufficient evidence to accept that that is the case). It is also worth noting, on the issue of competitive position (raised by the board and Affected Parties 1-21), that this office has long held that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its competitive position.[22]

[51] In addition, the board relies on Order MO-3058-F to argue that pricing information, such as a breakdown of rates into detailed financial components has been found to meet part three of the test. However, Order MO-3058-F is not helpful to the board because it involved a different kind of record (the winning bid, which had not been incorporated into a contract), so different considerations could apply.

[52] Furthermore, it is clear from Order MO-3058-F that the adjudicator had been provided with detailed evidence that demonstrated that the information at issue could be used to the advantage of competitors and the disadvantage of the third party. I do not have that here, with any specificity, from the bus operator named in the request.

[53] Instead, Affected Parties 1 to 20 simply assert that disclosure could reasonably be expected to result in the following harms:

- significantly affect their competitive position with respect to other operators in a competitive bid procurement process going forward;
- have a significant negative impact on their negotiations with their other customers if their contract became public; and
- make it unlikely that companies would be willing to share similar information with the board in the future, depriving the board of accessing the services through "the most reasonable and cost- efficient contract with its operators," and, in turn, decrease the quality of school bus service and increase its cost to taxpayers.

[54] I find these submissions to be vague, speculative, and insufficiently supported by

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[22] *Ibid*.

the evidence before me. The first two relate to section 10(1)(a), and as discussed, the IPC has long held that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its competitive position. The third submission relates to section 10(1)(b), and is similarly speculative and unpersuasive. The quality-related argument is unsupported by the evidence. I also do not accept that disclosure of the pricing information that I have considered "supplied" could reasonably be expected to lead to potential bidders to be reluctant to share pricing information with the board, and result in higher costs. In my view, this argument is unpersuasive because it does not reflect the commercial reality of doing business with a government entity. As reasoned in Order PO- 2758, such an argument:

> ignore[s] an absolutely fundamental fact of the marketplace. That is to say, if a competitor . . . truly wishes to secure a contract with [an institution], it will do so by charging lower fees to [the institution] than its competitor, resulting in a net saving to [the institution] . . . . To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality.

[55] For its part, Affected Party 21 submits that the harm associated with disclosure of the record "is obvious" in that disclosure of the contract will allow the affected party's competitors to know its "'winning' pricing structure," giving them a significant competitive advantage over Affected Party 21 in upcoming bids. In a similar vein, Affected Party 21 also argues that disclosure would amount to "an unfair, preferential and/or discriminatory result, in violation of the [Canadian Free Trade Agreement], the [Broader Public Sector Procurement] Directive, and . . . the general duty to treat all bidders in a tendering process fairly."

[56] I find these submissions to be speculative and unpersuasive for the reasons I did not accept similar arguments about competitive positions, above. It is worth emphasizing that this office resolves disputes over access to information requests made pursuant to *MFIPPA*, not the Canadian Free Trade Agreement or the Broader Public Sector Procurement Directive. Furthermore, disclosure under *MFIPPA* is to be distinguished from disclosure in a tendering process, and here, the information at issue is not being sought during a tendering process. As an institution under *MFIPPA*, the board is obligated by law to disclose records unless they are exempt under the *Act*. It is also well-established that access to general records under the *Act* "is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put."[23]

[57] In addition, I do not accept the submission by Affected Party 21 that the harms

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[23] Order PO-1998.

claimed are "obvious." As noted in the Notice of Inquiry sent to all parties, parties should not assume that the harms under section 10(1) are self-evident, and the need for accountability in the expenditure of public funds regarding government contracts is an important reason behind the need for *detailed* evidence to support the harms outlined in section 10(1).

[58] For these reasons, I am not satisfied that the information that I have accepted as having been "supplied" meets part three of the test. Since all three parts of the test must be met to be exempt under section 10(1), and the information that was "supplied" does not meet part three, that information is not exempt under section 10(1).

Issue B: Is the board entitled to the late raising of the discretionary exemption at section 11 during the inquiry?

[59] In their joint representations, the board, the consortium, and other school boards involved as affected parties (ALCDSB and HPEDSB) raised the application of section 11 during the inquiry.

[60] As a preliminary matter, I note that unless there are exceptional circumstances, only the Limestone District School Board, as the institution responsible for the access decision, is entitled to claim a discretionary exemption, not the consortium, ALCDSB, or HPEDSB, as affected parties. I find that no such exceptional circumstances have been identified in this case. Accordingly, I am considering the representations in relation to late raising and section 11 as only coming from the board, not the consortium, ALCDSB, or HPEDSB.

[61] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[62] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice

was found in excluding a discretionary exemption claimed outside the 35-day period.[24]

[63] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[25] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[26]

[64] The appellant objects to the board's ability to raise section 11 during the inquiry, citing prejudice to its interests, and the public interest, through delay of the inquiry and disclosure of the record.

[65] I appreciate that the consideration of section 11 has contributed to some delay in the adjudication of this appeal. I accept that delay is inherently prejudicial to the appellant.

[66] However, I agree with the board that late reliance on a discretionary exemption does not significantly prejudice the appellant because raising section 11 has not impacted the initial disclosure decision to withhold all the information at issue, and the appellant was given an opportunity to provide representations on the possible application of section 11 during the inquiry. Moreover, the delay resulting from the addition of the section 11 claim was not significant. These are circumstances that weigh towards allowing the board to claim section 11 during the inquiry, and I will do so.

Issue C: Do the discretionary exemption at sections 11(a), (c), and/or (d) apply to the record?

[67] The board claims that sections 11(a), (c), and/or (d) apply in this case, but for the reasons that follow, I am unpersuaded that any of these exemptions apply to the record at issue.

[68] Sections 11(a), (c), and (d) state:

> A head may refuse to disclose a record that contains,
>
> > a. trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

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[24] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[25] Order PO-1832.
[26] Orders PO-2113 and PO-2331.

> c. information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> d. information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution[.]

[69] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.[27]

Section 11(a): information that belongs to government

[70] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

Part one

[71] The types of information listed in section 11(a) have been discussed in prior orders, and have the same definitions as those under section 10(1).

[72] Here, the board submits that the record contains commercial and financial information.

[73] I accept this submission for the same reasons discussed under part one of the section 10(1) test, as the record contains information relating to money and its use or distribution (financial information), and relates solely to the buying, selling or exchange of merchandise or services (commercial information). Therefore, the record meets part one of the test for section 11(a).

Parts two and three

[74] The board submits that the information belongs to it (as well as to the consortium and other member school boards, ALCDSB and HPEDSB). The appellant submits that this is "plainly incorrect in the context of a negotiated contract." Without clear evidence regarding which information in the contract, if any, specifically belongs

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[27] *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

to the board, I am unwilling to accept that there is any such information.

[75] The board submits that the information in the contract has potential monetary value. It argues that disclosure would reveal the commercial terms, pricing, and rates of the third parties, and the details of the board's financial and human resources related to school bus services, which have been consistently treated as confidential.

[76] The board also submits that the vehicle rates and pricing information "has intrinsic monetary value" because it would reveal the amounts that the board is willing to pay for school bus services. It is argued that this information would then allow future bidders to bid at higher prices than the board would otherwise pay, thereby depriving the board of the monetary value of "its" confidential commercial and financial information.

[77] I am unpersuaded that these submissions establish that the record has monetary value to the board, or that the information in the record "belongs to" the board under part two the test. In Order PO-1763, this office held that *"there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information."* [Emphasis added.][28] Without evidence regarding how the information in the contract resulted from the board's expenditure of money or the application of skill and effort to develop that contractual information, I am unwilling to accept that the information found in the record is of the nature addressed in Order PO-1763 and "belongs to" the board under part two of the test.

[78] In addition, the fact that the board would have expended some effort to enter into the contract is not sufficient evidence that the record has monetary value to the board resulting from any such expenditure of money or the application of skill and effort. Therefore, I find that the record does not have monetary value to the board, it does not meet part three of the test.

[79] For these reasons, the record does not meet the three-part test above, and is, therefore, not exempt under section 11(a) of the *Act*.

Sections 11(c) (prejudice to economic interests) and 11(d) (injury to economic interests)

[80] As set out below, there is insufficient evidence to accept the board's position that the exemptions at sections 11(c) and/or (d) apply.

[81] The section 11(c) exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or

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[28] Order PO-1763.

competitive position.[29] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. 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 section 11(c) 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.[30]

[82] The section 11(d) exemption requires an institution to show that disclosure of the information in the record could reasonably be expected to be injurious to the financial interests of the institution.

[83] Here, the board argues that disclosure of the record would prejudice its economic or financial interests, specifically, its interests in not paying more than they otherwise would for school bus transportation. It argues that disclosure would benefit prospective bus operators in future competitive processes by revealing rates and terms that were agreeable to the board in the past (but that were not established through a competitive process, and at a time when the board did not have significant power in determining which companies it would do business with). The board argues disclosure would allow prospective bus operators to bid at higher rates than they would otherwise bid. It argues that that would injure the board's economic or financial interests (under section(s) 11(c) and/or (d)) by depriving the board of the chance to obtain the best value for money, especially in times of fiscal constraint.

[84] The appellant submits that these arguments "ignore the commercial reality" regarding the board's position vis-à-vis new or renewing bus operators, as reasoned in Order PO-2758 where similar arguments were considered and not accepted. I agree. As discussed under section 10(1)(b), in Order PO-2758, the adjudicator recognized certain facts relevant to contracts involving government bodies:

> . . . [the institution] has significant power in determining which companies to do business with. [The institution] offers an environment in which a large body of individuals require access to [the specified services related to the contract].
>
> Even more importantly, [the institution's] arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with [an institution], it

[29] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[30] Orders P-1190 and MO-2233.

> will do so by charging lower fees to [the institution] than its competitor, resulting in a net saving to [the institution]. . . .To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. In my view, this is a totally different situation than in Order PO-1745, where there was an obvious danger that customers would move to a casino where the slot machines had a lower 'hold percentage.' For all these reasons, I find that [the provincial equivalent of section 11(c)] does not apply.

[85] The appellant submits, and I find, that the above reasoning in PO-2758 applies to this appeal. I find the board's submission that disclosure of the commercial and financial information in the record could harm its economic/financial interests and competitive position to be speculation. I am satisfied that if a new or renewing bus operator wishes to secure a contract with the board, it will do so by charging lower fees, resulting in net savings to the board. There is insufficient evidence to accept that this commercial reality is altered by the ongoing legal proceedings mentioned in the board's representations and/or the circumstances under which the prices and terms were established (including limitations on the companies the board could contract with). Given this commercial reality, I am unpersuaded that Orders PO-2676 and PO-3572 are of assistance to the board, as submitted. Neither of those cases involved responsive records that were contracts and the board did not sufficiently explain why the reasoning related to very different types of records in those cases should be applied to negotiated agreements.

[86] For these reasons, I find that the board has not established that the record qualifies for an exemption under sections 11(c) and/or (d).

[87] Since I have found that the record is not exempt under sections 10(1), 11(a), 11(c), or 11(d), I will order the record disclosed to the appellant.

ORDER:

1. I allow the appeal and do not uphold the board's decision.

2. I order the board to fully disclose the record to the appellant by **March 27, 2020**, but not before **March 20, 2020**.

3. In order to verify compliance with this order, I reserve the right to require the board to provide me with a copy of the record sent to the appellant, pursuant to paragraph 2 of this order.

Original Signed By: February 21, 2020

Marian Sami
Adjudicator