Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-4325

Appeal MA19-00336

Waterloo Region District School Board

January 30, 2023

Summary: The appellant sought access to aggregated results of the Middle Years Development Instrument survey for each school of the school board. The school board relied on the mandatory third party information exemption at section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* to deny access to the aggregated school survey results.

In this order, the adjudicator does not uphold the board's decision to deny access because the information at issue does not fall within the categories of information protected by section 10(1). She orders the board to disclose the aggregated school survey results.

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

Orders Considered: Orders MO-1476 and MO-2983.

OVERVIEW:

[1] This order considers the right of access to aggregated school survey results and determines that the aggregated survey results, compiled by the third party that conducted the survey, do not qualify for exemption under the third party information exemption at section 10(1) of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*).

[2] The appellant submitted an access request to the Waterloo Region District School Board (the board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the Middle Years Development Instrument survey (the MDI survey) of 27,428 students in grades 4 through 12, conducted in the spring of 2018. In his request, the appellant specified that he sought access to a copy of the survey, and to electronic spreadsheets containing:

- the survey results by grade and by school for each of the five measures of the well-being index (optimism, happiness, self-esteem, absence of stress, and general health) as well as the final scoring (low, medium, thriving)

- the survey results for asset indices by grade and by school for peer relationships, nutrition and sleep, after school activities and adult relationships, including actual responses and scoring

- all student demographics recorded, including gender identity and languages spoken at home.

[3] In response to the appellant's access request, the board issued a decision denying access to the MDI survey. In its decision, the board referenced sections 6.1 and 6.2 of its licensing agreement with a third party (the affected party), which had conducted the MDI survey. The board indicated that section 6.1 states that school-level MDI survey data are not reported to any individual or organization other than the board and/or school under the direct control of the board. The board added that section 6.2 states that MDI survey data from any student on bullying, victimization, school belonging, school climate and adults in school are only ever publicly reported at an aggregate level to protect to the confidentiality of teachers and students.

[4] The appellant was not satisfied with the board's decision and appealed it to the Information and Privacy Commissioner of Ontario (the IPC). The IPC attempted to mediate the appeal. During mediation, the board issued a revised decision after notifying the affected party. In its revised decision, the board relied on the mandatory exemption in section 10(1) (third party information) of the *Act* to deny access. The board then issued a further revised decision claiming that the mandatory exemption in section 14 (personal privacy) of the *Act* also applies to the requested records.

[5] After being referred to the MDI survey information (including the survey questions) available on the affected party's website, the appellant removed the MDI survey from his request and narrowed his access request as follows:

> I am requesting school survey results not by nine individual grades, but with grades aggregated in the same way that board-wide results have already been released. So: aggregate survey results for grades 4-6, aggregate results for grades 7-8, aggregate results for grades 9-12, for each school surveyed.

[6] In response to the appellant's revised request, the board again notified the affected party. It also issued a fee estimate to the appellant of $440, based on $360 to develop a computer program to compile the requested information, $10 for the cost of a USB key, and $10 in courier costs.

[7] The board then issued a final decision indicating that it had extracted the requested information in an aggregate format and was denying access to it under sections 10(1)(a), (b) and (c) of the *Act*, but was no longer relying on the personal privacy exemption in section 14. With its final decision, the board enclosed an index listing six records: Records 1 & 2: Grades 4-6 Survey (parts 1 & 2); Record 3: Grade 7-12 Survey; Record 4: MDI-Demographics; Record 5: MDI-Item Responses; Record 6: Variable Dictionary. The board subsequently advised that Records 1-3 were MDI survey questions and were inadvertently included in the index. The appellant confirmed that he was not interested in Records 1-3 and he agreed with the way that the board had grouped the data.[1]

[8] In response to the board's final decision, the appellant confirmed he wished to pursue access and asserted a public interest in disclosure of the requested information, raising section 16 (public interest override) as an issue in the appeal.

[9] A mediated resolution was not possible and the appeal was moved to the adjudication stage of the appeal process, in which an adjudicator may conduct an inquiry. I decided to conduct an inquiry, and sought and received representations from the board, the affected party and the appellant. I shared the parties' representations in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*.

[10] In this order, I do not uphold the board's decision and I order it to disclose the records at issue.

RECORDS:

[11] The three records at issue are:

- Record 4: MDI Demographics. This record contains eight pages of aggregated student demographic data (including ancestry, birth year, language spoken at home etc.) as reported by the students.

- Record 5: MDI Item Responses. This record is 142 pages long and contains the students' responses to the survey, aggregated by grade level for each school. Each response is listed for each school with a count identifying how many students selected that response. Individual students are not identified.

[1] The board also confirmed the fee would be $471. The appellant challenged the fee during mediation. However, at the adjudication stage, the appellant accepted the fee of $471. Accordingly, I will not address the fee issue further.

- Record 6: Variable Dictionary. This record is eight pages long and contains information on the variables used in the survey (variable name, further details/original question, explanation of variable, proposed descriptive names provided by the affected party and notes, including notes from the board about the variables that should be modified or used for its student population).

DISCUSSION:

[12] The sole issue I determine in this appeal is whether one of the mandatory exemptions at sections 10(1)(a), (b) or (c) of the *Act* applies to the records. The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,[2] where specific harms can reasonably be expected to result from its disclosure.[3]

[13] Sections 10(1)(a), (b) and (c), relied on by the board, 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;
> >
> > (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[.]

[14] For section 10(1) to apply, the party arguing against 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 in confidence, either implicitly or explicitly; and

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[2] *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.*).
[3] 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) and/or (c) of section 10(1) will occur.

[15] For the reasons that follow, I find that section 10(1) does not apply because part 1 of the three-part test is not satisfied – the records at issue do not reveal a trade secret or scientific, technical, commercial, financial or labour relations information.

[16] The board and the affected party assert that the records at issue fall within the type of information protected by section 10(1) because they reveal scientific information. The appellant agrees that the records reveal scientific information. However, for the following reasons, I do not. The representations of the board and the affected party also contend that the records are commercially valuable to the affected party. This argument alludes to commercial information. However, I do not accept that the records reveal commercial information within the meaning of section 10(1) of the *Act*, for the reasons set out below.

[17] Previous IPC orders have described scientific and commercial information, protected under section 10(1), as follows:

> *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as "scientific," it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field.[4]
>
> *Commercial information* is information that relates only to the buying, selling or exchange of merchandise or services. This term can apply to commercial or non-profit organizations, large and small.[5] The fact that a record might have monetary value now or in the future does not necessarily mean that the record itself contains commercial information.[6]

These descriptions have been adopted and applied in countless IPC orders. I agree with these descriptions, and find them useful in determining whether the information at issue in this appeal is the kind of information that is protected by section 10(1) of the *Act*.

[18] The affected party and the board do not directly address the IPC's definitions of scientific and commercial information, nor do they address records 4, 5 and 6, individually; they simply assert that the records contain scientific information and have commercial value to the affected party. In asserting that the records reveal scientific information, the affected party submits:

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

> MDI records constitute scientific information which is embedded in evidence-based papers and public reports that are shared broadly through academic journals, community reports and presentations, media, HELP's website, and directly with schools and communities in BC and across the country.

[19] Having reviewed the records, I observe that they contain aggregated demographic data (Record 4) about the students who completed the MDI survey, the students' survey responses in an aggregate form (Record 5) and explanations of the variables used for the survey questions prepared for the board with input from the board (Record 6). Most of the information in the records comes from the students' survey responses (records 4 and 5), while some information comes from the affected party and the board (record 6). The information in the records does not relate to "the observation and testing of a specific hypothesis or conclusion," nor is it information "belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics" as required to be considered scientific information. It is information obtained by the affected party through the board and its students; while this information may reflect the application of scientific methods used by the affected party in conducting survey research, it does not reflect the actual observation and testing of specific hypotheses or conclusions.

[20] Previous IPC orders have found that aggregated survey responses, like the information at issue in this appeal, that do not deal with the observation and testing of specific hypotheses or conclusions, do not constitute scientific information under section 10(1). Order MO-1476, which considered reports containing the results of polling done by the City of Toronto on certain topics, found that the results of the application of the scientific methods in a survey, contained in the reports at issue in that appeal, did not qualify as scientific information under section 10(1). The adjudicator in Order MO-1476 acknowledged that the third party appellant in that appeal, a company involved in survey research, was engaged in a social science and applied its scientific knowledge and expertise when undertaking survey work; however, he determined that the results of this work, as reflected in the reports, did not reveal any scientific information as that term has been defined by the IPC, because he was not persuaded that the reports dealt with "the observation and testing of specific hypotheses or conclusions." Order MO-1476 was followed in Order MO-2983, which also addressed survey results for a student survey conducted at three secondary schools and compiled in five reports. I agree with and adopt Order MO-1476. Like the records at issue in that order, the records before me in this appeal do not relate to the observation and testing of specific hypotheses and conclusions, and, therefore, do not reveal scientific information within the meaning of section 10(1).

[21] Furthermore, the affected party's general assertion, that "MDI records" contain scientific information that is or may be used and relied on in papers, reports, presentations, media and communications, does not convince me that the three records at issue contain or reveal scientific information; although the affected party may use

the student survey results and information in the records to compile papers and reports that may qualify as scientific information, this possible future use does not make the student survey results and related information in the records inherently scientific. Accordingly, I find that the records, which are mainly composed of the students' responses to the survey questions aggregated (grades 4-6, 7-8 and 9-12) for each school, do not reveal scientific information as required for the application of section 10(1) of the *Act*.

[22] The information in the records at issue is also not commercial information because it does not relate only to the "buying, selling or exchange of merchandise or services" as required to be protected under section 10(1). The information in the records is mostly information that was collected by the board, using the MDI survey, from students – the students provided responses about themselves that the affected party then aggregated. The demographic data about the students who completed the MDI survey, the students' survey responses, and the explanations of the variables used for the survey questions prepared for the board, are not commercial information within the meaning of section 10(1), despite the fact that the records at issue may be commercially valuable to the affected party. The records do not contain the confidential informational assets of the affected party that section 10(1) is meant to protect; they contain information obtained from the students and aggregated so that it does not identify any specific student. I find that records do not reveal commercial information as required for the application of section 10(1) of the *Act*.

[23] Since section 10(1) of the *Act* is a mandatory exemption, I have reviewed the records to determine whether they reveal any of the other types of information protected by section 10(1). They do not. As a result, I find that the records are not exempt from disclosure under section 10(1) of the *Act*.

[24] I have also reviewed the records to determine whether the mandatory personal privacy exemption at section 14(1) of the *Act* applies to the records and I confirm that it does not. The board has not claimed any other exemption to withhold the records at issue. Having found that the records are not exempt from disclosure under section 10(1), I will order the board to disclose them to the appellant.

ORDER:

I do not uphold the decision of the board. I order the board to disclose Records 4, 5 and 6 to the appellant by **March 7, 2023**, but not before **March 2, 2023**.

Original Signed By: January 30, 2023
Stella Ball
Adjudicator