

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-4390

Appeal MA22-00196

Toronto District School Board

June 7, 2023

**Summary:** The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the board's interactions with a certain charity. This order relates to the charity's objection to the board's decision to release a memorandum of understanding between the board and the charity, and portions of a record of payments by the board to the charity, relying on the mandatory exemption at section 10(1) (third party information) of the *Act*. The adjudicator orders the board to disclose the records in accordance with its decision, and dismisses the appeal.

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

**Orders Considered:** Orders PO-2806 and PO-4391.

**Cases Considered:** *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.*); *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.*, 2013 ONSC 7139 (CanLII).

### OVERVIEW:

[1] This order resolves an appeal over a decision to disclose a memorandum of understanding (MOU) between a school board and a charity, and part of a record setting out donation (or fee) information for services rendered by the charity.

[2] The Toronto District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*), as follows:

... Please provide records of any official interaction between the board and [specified charity], [specified charity], or other [specified] entities.

Specifically, I seek records showing instances where the board enlisted the services of, made donations to, or held fundraisers for [specified charity] (or its related entities)...

[3] The board identified responsive records, and notified a third party (the charity named in the request) to obtain its views about disclosure of the records. The board later issued a decision that granted partial access to the records, and withheld some information under the mandatory exemption at section 14(1) (personal privacy) of the *Act*.

[4] The board advised the charity that it could appeal the decision to the Information and Privacy Commissioner of Ontario (IPC). The charity did so, relying on the mandatory exemption at section 10(1) (third party information).

[5] The IPC appointed a mediator to explore resolution. During mediation, two records were partially released to the requester, in accordance with the board's decision and the charity's consent. Since the requester continued to seek access to the information that the board's decision was to disclose (record 1 in full, and parts of record 4) and the charity would not consent to this, no further mediation was possible. As a result, the appeal moved to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry.

[6] I began a written inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the charity. I sought and received written representations in response. On my review of these representations, I determined that I did not need to hear from the board or the requester.

[7] For the reasons that follow, I uphold the board's decision and dismiss the appeal. As a result, I order the board to release the records to the requester in accordance with its decision.

## **RECORDS:**

[8] The two records remaining at issue are a nine-page memorandum of understanding (record 1) withheld in full, and portions of nine "pages of donation information"<sup>1</sup> (record 4). The charity also describes record 4 as "being fees relating to specific services rendered" and containing, "[f]or example...a breakdown of payments made for specific activities."

## **DISCUSSION:**

[9] The only issue to be determined in this appeal is whether the mandatory exemption at section 10(1) for third party information applies to record 1 in full, and

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<sup>1</sup> As described in the Mediator's Report, which summarizes the agreed upon facts.

the portions of record 4 that are at issue (which I will simply refer to as “record 4”). As I explain below, I find that these records are not exempt under section 10(1) of the *Act*.

[10] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,<sup>2</sup> where specific harms can reasonably be expected to result from its disclosure.<sup>3</sup>

[11] Section 10(1) 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[.]

[12] The charity relies on the above sections to argue against disclosure of the records.

[13] 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;
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.

[14] All three parts of the above test must be met to establish the exemption. Given my findings, below, that the charity has not established that the records were “supplied” (as required by part two of the test), it is not necessary for me to consider parts one and three of the test.

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<sup>2</sup> *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.*).

<sup>3</sup> Orders PO-1805, PO-2018, PO-2184 and MO-1706.

## Part 2: supplied in confidence

### *Supplied*

[15] The requirement that the information have been “supplied” to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.<sup>4</sup>

[16] 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.<sup>5</sup>

[17] The contents of a contract between an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 10(1). Contractual provisions are generally treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where it reflects information that originated from one of the parties. This approach to the “supplied” test and government contracts has been consistently upheld by the court as consistent with the intent of the *Act*.<sup>6</sup> That is, this approach recognizes that public access to information contained in government contracts is essential to government accountability for expenditures of public funds.

[18] There are two exceptions to this general rule:

1. **the “inferred disclosure” exception.** This exception applies where disclosure of the information in a contract would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the institution by a third party.<sup>7</sup>
2. **the “immutability” exception.** This exception applies where the contract contains non-negotiable information supplied by the third party. Examples are financial statements, underlying fixed costs and product samples or designs.<sup>8</sup>

[19] The charity notes the above well-established principles in its representations, and then provides brief representations about each of the records at issue.

### *Record 1*

[20] It is undisputed that record 1 is a memorandum of understanding (MOU) between the board and the charity.<sup>9</sup> The charity describes the program that is the

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<sup>4</sup> Order MO-1706.

<sup>5</sup> Orders PO-2020 and PO-2043.

<sup>6</sup> 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*).

<sup>7</sup> Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

<sup>8</sup> *Miller Transit*, cited above at para. 34.

<sup>9</sup> The appellant describes record 1 this way in its representations about part one of the test (regarding the type of information at issue).

subject of the MOU as being jointly delivered between the board and the charity.<sup>10</sup> On my review of the MOU, I agree with this characterization.

[21] Past IPC orders have recognized that an MOU is a type of negotiated agreement or contract.<sup>11</sup>

[22] As mentioned, the charity notes the above-noted principle, that the contents of a contract would not normally qualify as having been "supplied" for the purpose of section 10(1). I agree that this principle is relevant here. Based on my review of the MOU, I find that it is a negotiated agreement that reflects the parties' agreed upon terms regarding the overall nature of the program and the parties' roles and responsibilities. Even if the MOU was preceded by little negotiation (or, even if it substantially reflects terms proposed by the charity), that does not lead to the conclusion that the information was "supplied" within the meaning of section 10(1).<sup>12</sup> As an MOU, it is treated like a contract, so it would not normally qualify as being "supplied" for the purpose of section 10(1) unless one of the two exceptions apply (the inferred disclosure exception or the immutability exception, defined above).

[23] The charity appears to argue that the "inferred disclosure" exception applies, saying:

Using this information, a reviewer of the document could make inferences about the operation of the [named] Program delivered by [the charity], including non-negotiated confidential information, such as the contents of curriculum resources offered by [the charity]; information related to how the program is typically delivered to schools, including the core components of the program, and the methods for evaluating such curriculum resources and the program overall.

[24] In my view, the above representations amount to an assertion that the "inferred disclosure" exception to the rule applies, but this is insufficient evidence to establish that it does.

[25] Having reviewed the MOU, I find that the information about the program's contents, delivery, and evaluation is general in nature. I found, above, that the information in the MOU reflects the parties' agreed upon terms regarding the overall nature of the program and the parties' roles and responsibilities. I do not accept that disclosure of this information about the operation of the program would reveal the appellant's "non-negotiated confidential information" such that the "inferred disclosure" exception would apply to it. The board, for example, was free to not enter into the MOU at all if it did not agree to the method of delivery, "contents of

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<sup>10</sup> In its representations regarding under part one of the test (type of information) and part two, in the discussion about whether it was "supplied."

<sup>11</sup> See, for example, Orders PO-2914, PO-3375, and MO-3708.

<sup>12</sup> Order MO-1706.

curriculum resources," or "core components of the program."<sup>13</sup>

[26] Furthermore, as discussed, 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.<sup>14</sup> Here, there is insufficient evidence before me that information in the MOU relating to the operation of the program could reasonably be considered an "informational asset" of the charity. As a result, I do not accept that this information is "supplied," or "non-negotiated."

[27] Therefore, I find that the charity has not sufficiently established that the MOU was "supplied" to satisfy an element of part two of the test for section 10(1). As a result, it is not necessary to consider the other element of part two of the test ("in confidence"), or parts one and three of the test for section 10(1), since all parts of the test must be satisfied for the exemption to apply.

[28] Since no other exemptions have been claimed over the MOU, I will order it disclosed to the requester, in full.

#### *Record 4*

[29] Although the charity opposes disclosure of the records (in full or in part), since the original requester did not appeal the board's decision to withhold parts of record 4 under section 14(1), those parts of record 4 are not at issue in this appeal.<sup>15</sup>

[30] In the Mediator's Report, record 4 is described as nine "pages of donation information." The charity explains that the information in this record is "fees relating to specific services rendered," and makes clear that they were paid by the board:

Record 4 consists of records of payments made by the [board] to [the charity] in exchange for services rendered, such as providing workshops and presentations.<sup>16</sup>

[31] The charity submits that disclosure of record 4 would "allow the public, and [the charity's] competitors, to draw accurate inferences regarding this financial and commercial information relating to [the charity]," arguing that "[g]iven these circumstances," the record was "supplied."

[32] To the extent that the charity's submission may be raising the "inferred disclosure" exception for record 4, that exception cannot apply because record 4 is not a contract.

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<sup>13</sup> The fact that "contents of the curriculum resources" or "core components of the program" would be presented to students further undermines the charity's submission that this is "non-negotiated confidential information" (emphasis mine), under the "in confidence" element of part two of the test.

<sup>14</sup> Order MO-1706.

<sup>15</sup> Since those portions of record 4 are outside the scope of this appeal, nothing in this order should be read as agreeing or disagreeing that those parts of record 4 are exempt under section 10(1) or 14(1) of the *Act*.

<sup>16</sup> In the appellant's representations about part one of the test (type of information).

[33] From my review of the contents of record 4 itself and the charity's representations, I accept that record 4 consists of recorded payments made by the board to the charity in exchange for services rendered. However, I am not persuaded that this breakdown of the board's payments to the charity can reasonably be considered an "informational asset" of the charity, such that it can qualify as being "supplied" for the purpose of section 10(1) of the *Act*. There is insufficient evidence before me to conclude otherwise.

[34] Given my finding that there is insufficient evidence that record 4 was "supplied," it cannot meet part two of the three-part test for section 10(1). As a result, I will order the board to release the portions of this record that it intended to release through its access decision (that is, all portions of record 4 except those over which the board claimed section 14(1)).

[35] For these reasons, I uphold the board's decision, and dismiss the appeal.

**ORDER:**

1. I uphold the board's decision, and dismiss the appeal.
2. I order the board to disclose to the requester records 1 and 4, in accordance with the board's access decision, by **July 13, 2023** but not before **July 10, 2023**.
3. In order to verify compliance with provision 2 of this order, I reserve the right to require the board to provide me with a copy of the records disclosed to the requester.

Original Signed by: \_\_\_\_\_  
Marian Sami  
Adjudicator

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June 7, 2023