

Information and Privacy Commissioner,  
Ontario, Canada



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

---

## ORDER MO-4571

Appeal MA22-00104

Hamilton-Wentworth District School Board

September 26, 2024

**Summary:** A school board received a request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the fees charged by student transportation operators contained in contracts. The board denied access to this information, stating that it is third party information subject to the mandatory exemption in section 10(1) of the *Act*.

In this order, the adjudicator finds the fee information at issue is not third-party information exempt under section 10(1) and orders the board to disclose it.

**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-3258, and MO-3508.

### OVERVIEW:

[1] This order concerns whether the fees of student transportation operators contained in contracts between a school board and those operators are exempt under the mandatory third-party information exemption.

[2] The Hamilton-Wentworth District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the following:

All contracts, including all amendments and pricing, awarded to and signed pursuant to [Request for Proposals] RFP [#], for the Provision of Student Transportation Services, issued February 9, 2021.

[3] The board located several contracts related to the provision of student transportation services. These contracts were entered into between three transportation service operators and an unincorporated transportation consortium, the Hamilton-Wentworth Student Transportation Services, which is operated by the board and Hamilton-Wentworth Catholic District School Board (the HWCDSB).

[4] The board notified the three transportation service operators and the HWCDSB, under section 21(1) of the *Act* to obtain their views regarding disclosure of the contracts.

[5] Subsequently, the board issued a decision granting partial access to the responsive contracts. Access to some information was denied pursuant to the mandatory third-party information exemption in section 10(1) of the *Act*.

[6] The requester, now the appellant, appealed the board's decision to the Information and Privacy Commissioner (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[7] During mediation, the mediator contacted the three transportation service operators to determine if they would consent to disclose the records at issue. The mediator was not able to obtain the consent of these parties.

[8] As no further mediation was possible, this file was moved to adjudication where an adjudicator may conduct an inquiry.

[9] I sought representations from the board, the three transportation service operators, and the HWCDSB, initially. One transportation service operator (the affected party) provided representations. None of the other parties provided representations, however, one transportation service operator advised that it did not consent to disclosure of its information in the records.

[10] I then sought representations from the appellant and provided it with a copy of the affected party's representations. The appellant provided representations in response.

[11] In this order, I find that the fee information at issue is not exempt from disclosure under the mandatory third-party information at section 10(1) and I order the board to disclose it to the appellant.

## **RECORDS:**

[12] The information remaining at issue consists of an appendix entitled, "Appendix B – Fees" for three contracts entered into between the board and each of three

transportation service operators, as well as the fees in two agreements amending the fees in Appendix B for two of these three contracts.<sup>1</sup>

## **DISCUSSION:**

[13] The sole issue to be determined in this appeal is whether the mandatory exemption at section 10(1) for third party information apply to the information at issue in the records.

[14] 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>

[15] Section 10(1) states:

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; or

(d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[16] 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;

---

<sup>1</sup> The affected party that provided representations only had one Appendix B to its contract at issue and did not have an amendment to this appendix at issue in this appeal.

<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.

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 of the section 10(1) test: type of information**

#### ***Representations re part 1***

[17] The affected party submits that its record contains commercial and financial information, including but not limited to pricing information, being the fees charged to the consortium for the provision of student transportation services. It states that the IPC has held that pricing information regarding the selling of and pricing of school bus services to a school board is commercial and financial information and falls under section 10(1) of the *Act*.<sup>4</sup>

[18] The appellant states that the information at issue consists of fees set out in contracts and amendments to those contracts. It submits that the affected party has not demonstrated that the records contain financial information within the meaning of section 10(1) and required by part 1 of the three-part test. It submits that the portion of the records remaining at issue neither contains information, such as cost accounting methods, pricing practices, profit and loss data, nor is that the type of information sought by the appellant.

[19] In the alternative, the appellant submits that many previous orders issued by the IPC, including Order MO-3508 referenced by the affected party, have ordered similar commercial or financial information, including contract fees, disclosed to the requesting party. It states that these prior orders have determined that the three-part test has not been met on one or more grounds and have ordered disclosure of information that is financial and/or commercial in nature.

#### ***Findings re part 1***

[20] The IPC has defined the types of information referred to by the affected party under section 10(1) as follows:

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 or small.<sup>5</sup> The fact that a

---

<sup>4</sup> The affected party relies on Order MO-3508.

<sup>5</sup> Order PO-2010.

record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.<sup>6</sup>

Financial information is information relating to money and its use or distribution. The record must contain or refer to specific data. Some examples include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.<sup>7</sup>

[21] From my review, I accept that the fee information at issue is financial information as it is pricing information found in appendices to three contracts or agreements amending two of these contracts. I also accept that the contracts and relating amending agreements contain commercial information because they relate to the buying and selling of student transportation services.

[22] As I have found the records contain both financial and commercial information, I find that part 1 of the test has been met.

## **Part 2: supplied in confidence**

### ***Supplied***

[23] 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>8</sup>

[24] 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>9</sup>

[25] 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.<sup>10</sup>

[26] 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

---

<sup>6</sup> Order P-1621.

<sup>7</sup> Order PO-2010.

<sup>8</sup> Order MO-1706.

<sup>9</sup> Orders PO-2020 and PO-2043.

<sup>10</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*).

underlying non-negotiated confidential information supplied to the institution by a third party.<sup>11</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>12</sup>

### ***Representations re supplied***

[27] The affected party submits that this information was supplied to the board in response to a request for proposal (RFP) process and disclosure of the requested information would reveal or permit the drawing of an accurate inference with respect to the information supplied by it.

[28] The appellant points out that the requested fees amount to the contents of a contract between an institution and third party. It submits that the two exceptions to the general rule that the contents of a contract are not considered to be supplied for the purposes of the part 2 test, specifically, the “inferred disclosure” and “immutability” exceptions, are not applicable. It submits that there are no inferences that may be made about underlying non-negotiated confidential information and it is not seeking any non-negotiable information supplied by the affected party.

[29] The appellant also points out that the RFP provides that proposals and accompanying documents submitted by proponents may be released in accordance with the *Act*.

### ***Findings re supplied***

[30] The records, which set out the fees agreed to be charged by the three transportation service operators, are part of contracts or agreements entered into between the consortium and these transportation service operators.

[31] As set out above, the contents of a contract between an institution and a third party will not normally qualify as having been supplied unless the inferred disclosure or the immutability exception applies.

[32] In Order MO-3258, I found that unit pricing information contained in addenda to contracts between a third party and an institution formed part of the contract and was not supplied. I rejected the argument that because the contract was awarded in response to an RFP, where generally the lowest overall bid is accepted, the information was supplied by the third party and not mutually generated. I found that the unit pricing information was “part of a competitive process”, “was susceptible to negotiation”, and that the immutability exception did not apply to the pricing information. As a result, I

---

<sup>11</sup> Order MO-1706, cited with approval in *Miller Transit*, cited above at para. 33.

<sup>12</sup> *Miller Transit*, cited above at para. 34.

ordered the pricing information at issue in Order MO-3258 disclosed.

[33] My findings in Order MO-3258 are relevant to the circumstances before me in this appeal and I adopt them. I find that the fee information at issue here forms part of the contracts and agreements before me; they are part of a competitive process and were susceptible to negotiation. From my review of the contracts, I find that the immutability exception does not apply, as I have no evidence before me that the records contain non-negotiable information supplied by the transportation service operators.

[34] As well, I find that the inferred disclosure exception does not apply as I have not been provided with sufficient evidence to demonstrate that disclosure of the fee information would permit someone to make accurate inferences about underlying non-negotiated confidential information supplied to the board via the consortium. Additionally, such harm is not borne out by my review of the information itself.

[35] In making these findings, I have considered that neither the board nor the HWCDSM, the other board member of the consortium, choose to provide representations. Neither did two of the three transportation service operators provide representations in this appeal.

[36] I have also considered the order relied upon by the affected party: Order MO-3508. However, in finding that the information at issue was supplied, the adjudicator in this order considered the application of section 10(1) to information provided in a proposal supplied to an institution in response to an RFP, not information that forms part of a contract, as is the case here.

[37] As previously mentioned, the fee information at issue in this appeal is found in contracts or agreements amending these contracts. Therefore, in accordance with the reasoning of previous IPC orders I find that this information is information that was negotiated between the parties rather than information that was supplied.<sup>13</sup> As I have found that neither the inferred disclosure nor the immutability exceptions apply to the fee information, I find that it was not supplied to the board and part 2 of the test under section 10(1) has not been met.

[38] As all three parts of the test must be met for section 10(1) to apply and I have found that part 2 of the test has not been met, the information at issue in the records is not exempt under section 10(1).

## **ORDER:**

1. I order the board to disclose the information at issue in the records to the appellant **by November 1, 2024**, but not before **October 28, 2024**.

---

<sup>13</sup> See for example Orders PO-3499, PO-3972, and PO-3892.

2. In order to verify compliance with order provision 1, I reserve the right to require the board to provide me with a copy of the records disclosed to the appellant.

Original Signed by: \_\_\_\_\_

Diane Smith  
Adjudicator

September 26, 2024 \_\_\_\_\_