

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4581

Appeals MA22-00010 and MA22-00041

Simcoe Muskoka Catholic District School Board

October 17, 2024

Summary: A school board received a request for information under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for pricing information contained in contracts with student transportation operators. The board denied access to this pricing 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 pricing 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: Order MO-3258.

OVERVIEW:

[1] This order considers whether pricing information contained in contracts between two school boards and student transportation operators are exempt under the mandatory exemption for third party information.

[2] Two requests were made under *the Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Simcoe County Student Transportation Consortium (the consortium), which is operated jointly by the Simcoe Muskoka Catholic District School Board and the Simcoe County District School Board. The requester sought

access to records regarding two specified Request for Proposals (RFPs) for student transportation services, issued by the consortium.

[3] Request #1 was worded as follows:

All contracts, including all amendments and pricing, awarded to and signed pursuant to RFP [#], for the Provision of Student Transportation Services, issued October 18, 2018.

[4] Request #2 was worded as follows:

All contracts, including all amendments and pricing, awarded to and signed pursuant to RFP [#], for the Provision of Student Transportation Services, issued October 15, 2020.

[5] The consortium responded to the request, stating that it was acting on behalf of its member school boards. It identified records responsive to both requests and notified the student transportation operators (the third parties) under section 21(1) of the *Act* to obtain their views regarding disclosure of the records.

[6] Following third party notification, the consortium issued one decision in response to both requests, granting partial access to responsive records. Access to information in the schedules setting out rates in each contract (Schedule F - Rates) was denied pursuant to section 10(1) (third party information) of the *Act*.

[7] The requester, now the appellant, appealed the consortium's decision to the Information and Privacy Commissioner of Ontario (the IPC). This office opened this appeal, Appeal MA22-00010, in response to the first request and Appeal MA22-00041, in response to the second request.

[8] At the outset of the appeals, the IPC determined that because the consortium is not an institution under the *Act*, the school board members of the consortium (which are institutions under the *Act*) are required to respond to the request.

[9] The Simcoe Muskoka Catholic District School Board (the board) then issued one decision letter in response to both requests, advising that it was a joint decision between it and the Simcoe County District School Board. In its decision, the board granted partial access to the responsive records, denying access to the pricing information in Schedule F - Rates of both contracts pursuant to section 10(1) of the *Act*.

[10] During mediation, the mediator contacted the third parties to determine if they would consent to disclose the records at issue. The mediator was not able to obtain the consent of these parties.

[11] The appellant advised the mediator that it continued to seek access to the records.

[12] As no further mediation was possible, these files moved to adjudication, where an adjudicator may conduct an inquiry. I decided to conduct a joint inquiry into both appeals and I sought the representations of the board and three third parties initially.

[13] Only one third party (from Appeal MA22-00010, the affected party) provided representations, which I sent to the appellant having severed the confidential portions. The appellant provided representations in response, which I shared with the affected party who then provided representations in reply.

[14] During the inquiry, a third party whose records were at issue in both appeals consented to the disclosure of its information to the appellant. The board disclosed this information to the appellant. Therefore, this third party's information is no longer at issue.

[15] The remaining third party (from Appeal MA22-00041, the third party) that was invited to submit representations indicated that it did not consent to the disclosure but did not otherwise respond to the Notice of Inquiry.

[16] In this order, I find that the pricing 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:

[17] The record remaining at issue in Appeal MA22-00010 consists of a schedule, Schedule F – Rates, to a contract between the consortium and the affected party issued pursuant to the first RFP.

[18] The record remaining at issue in Appeal MA22-00041 consists of a schedule, Schedule F - Rates, to a contract between the consortium and the third party that did not provide representations. This contract was issued pursuant to the second RFP.

[19] At issue in both records are the prices charged to the consortium for student transportation services (pricing information).

DISCUSSION:

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

[21] The purpose of section 10(1) is to protect certain confidential information that businesses or other organizations provide to government institutions,¹ where specific

¹ *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.), leave to appeal dismissed, Doc. M32858 (C.A.) (*Boeing Co.*).

harms can reasonably be expected to result from its disclosure.²

[22] 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.

[23] 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.

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

Representations on part 1

[24] The Simcoe Muskoka Catholic District School Board and the Simcoe County District School Board (the boards) provided joint representations. They state that the information at issue is commercial information on the basis that it was supplied in the context of a

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

third party providing commercial services to the government.

[25] The boards also submit that the information at issue is financial information as it is primarily composed of granular pricing information.

[26] The affected party states that in its bid for student transportation services, it outlined not only its pricing breakdowns but also provided non-pricing information, which it submits can be characterized as trade secrets.

[27] In its representations, the affected party states that its trade secrets do not include its pricing information but include its programs, recruitment strategies, training methods, marketing strategies, and staffing levels.

Findings on part 1

[28] The IPC has defined the types of information referred to by the boards 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.³ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁴

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.⁵

[29] From my review, I accept that the information at issue is financial information as it is pricing information found in schedules to two contracts. I also accept that the contracts contain commercial information because they relate to the buying and selling of student transportation services.

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

[31] As I am only considering the pricing information in the records, there is no need for me to decide whether the non-pricing information in the records, which has been disclosed to the appellant, qualifies as trade secret information, as submitted by the

³ Order PO-2010.

⁴ Order P-1621.

⁵ Order PO-2010.

affected party.⁶

Part 2: supplied in confidence

Supplied

[32] 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.⁷

[33] 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.⁸

[34] 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.⁹

[35] 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.¹⁰
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.¹¹

⁶ The IPC has described a trade secret to include information such as a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which:

- a. is, or may be used in a trade or business;
- b. is not generally known in that trade or business;
- c. has economic value from not being generally known; and
- d. is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

⁷ Order MO-1706.

⁸ Orders PO-2020 and PO-2043.

⁹ 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*).

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

¹¹ *Miller Transit*, cited above at para. 34.

Representations on supplied

[36] The boards submits that the “inferred disclosure” exemption should apply to the pricing information contained within withheld information, as the pricing information would allow a competitor to infer pricing methodologies that are not found in the contract.

[37] The affected party submits that the “immutability exception” should apply in this case to the non-pricing information. It accepts that the pricing aspects of its record do not meet the board’s threshold for ‘supplied’.

Findings on supplied

[38] The schedules, which set out the prices agreed to be charged by two transportation service operators, are part of contracts entered into between the consortium and these transportation service operators.

[39] 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.

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

[41] My reasoning in Order MO-3258 is relevant to the circumstances before me in these appeals and I adopt it for the purposes of this appeal.

[42] I find that the pricing information at issue here forms part of the contracts 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 information at issue in the records contains non-negotiable information supplied by the transportation service operators.

[43] As well, I find that the inferred disclosure exception does not apply to the pricing information at issue. Although the boards submit that the pricing information would allow a competitor to infer pricing methodologies that are not found in the contract, they have not explained how this information could be ascertained nor is it apparent to me from my review of the records.

[44] I find that I have not been provided with sufficient evidence to demonstrate that disclosure of the pricing information would permit someone to make accurate inferences

about underlying non-negotiated confidential information supplied to the boards via the consortium. Additionally, such information is not evident from my review of the records themselves.

[45] I have also considered that in its reply representations the affected party submits that the immutability exception applies to its pricing models, which it describes as non-negotiated trade secrets.

[46] The affected party has not indicated how the information at issue reveals its pricing model. The information that remains are the prices it agreed to charge the boards per route by size of vehicle. The affected party did not directly address how these rates amount to immutable information which is considered to have been supplied. Additionally, from my review of the contracts, the details as to how it breaks down its pricing in its record has already been disclosed.

[47] Based on my review of the records, I find that the pricing information at issue in both contracts is not immutable but negotiated information. Therefore, this information is not supplied.

[48] In summary, the pricing information at issue is found in contracts and I have found that neither the inferred disclosure nor immutability exceptions apply. Therefore, I find that, in accordance with the reasoning of previous IPC orders, this pricing information is information that was negotiated between the parties rather than information that was supplied.¹² As the pricing information was not supplied to the boards, I find that part 2 of the test under section 10(1) has not been met.

[49] All three parts of the test must be established for section 10(1) to apply. As 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) and it is not necessary for me to consider part 3.

ORDER:

1. I order the board to disclose the information at issue in the records to the appellant **by November 21, 2024**, but not before **November 18, 2024**.
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

_____ October 17, 2024

¹² See for example Orders PO-3499, PO-3972, PO-3892, and MO-4571.

