

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-4588

Appeal MA22-00507

Peel District School Board

October 30, 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 a contract 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: Orders MO-3258 and MO-3905.

OVERVIEW:

[1] This order concerns whether the prices of a student transportation operator contained in a contract between two school boards and this operator are exempt under the mandatory third-party information exemption.

[2] The Student Transportation of Peel Region consortium, which is operated by the Peel District School Board (the board) and the Dufferin-Peel Catholic District School Board (DPCDSB) 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 RFP [#], for the Provision of Student Transportation Services, issued February 2, 2018.

[3] As the consortium is not an institution under the *Act*, the board, on behalf of both school board members of the consortium, responded to the request. It identified records responsive to the request and notified affected third parties under section 21(1) of the *Act* to obtain their views regarding disclosure of the records.

[4] Following third party notification, the board issued a joint decision between it and the DPCDSB granting partial access to responsive records. Some information in the records was denied pursuant to the mandatory third party information exemption in section 10(1) of the *Act*.

[5] The board subsequently issued a revised decision granting full access to the responsive records.

[6] One of the affected third parties, the student transport operator (the appellant), filed an appeal of the board's revised decision to the Information and Privacy Commissioner (the IPC) and a mediator was assigned to attempt a resolution of this appeal.

[7] As mediation did not resolve this appeal, it was transferred to the adjudication stage where an adjudicator may conduct an inquiry. I decided to conduct an inquiry and I sought the appellant's and the requester's representations, which were exchanged between them in accordance with the IPC's *Practice Direction 7* on the sharing of representations.

[8] 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.

RECORD:

[9] At issue are the prices charged to the consortium for student transportation services contained in Schedule F – Rates to a contract dated May 1, 2018 that was issued pursuant to the RFP identified in the request. This pricing information includes the rates charged for transportation services for the school terms of 2018-2019, 2019- 2020, 2020-2021, and 2021-2022.

DISCUSSION:

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

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

[12] 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.

[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.

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.*).

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

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

Representations on part 1

[14] The appellant submits that the record is comprised of financial and commercial information.³

[15] Based on the lack of detail in the non-confidential portions of the appellant's representations, the requester disputes that the records contain these types of information

Findings on part 1

[16] 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.⁴ The fact that a record might have monetary value now or in future does not necessarily mean that the record itself contains commercial information.⁵

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.⁶

[17] From my review, I accept that the information at issue is financial information as it is pricing information found in a contract. I also accept that the contract contains commercial information because it relates to the buying and selling of student transportation services.

[18] As I have found that the record contains both financial and commercial information, I find that part 1 of the test has been met.

Part 2: supplied in confidence

Supplied

[19] 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

³ The appellant provided both confidential and non-confidential representations. In this order, I will be only referring to the non-confidential information.

⁴ Order PO-2010.

⁵ Order P-1621.

⁶ Order PO-2010.

parties.⁷

[20] 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

[21] 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

[22] 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

Representations on supplied

[23] The appellant submits that the information at issue in its current form was supplied to the boards pursuant to the RFP. In the alternative, it submits that even if it was not considered to have been supplied, the pricing information at issue falls under the inferred disclosure and immutability exceptions to the supplied requirement.

[24] The appellant relies on Order MO-3905 where the adjudicator found that the immutability exception applied to information relating to the third parties’ underlying fixed costs, including wages, building and property expenses, office and administrative expenses, operations expenses and fixed vehicle costs.¹²

[25] In response, the requester submits that the information at issue was not supplied.

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.

¹² The appellant also discusses Order MO-3508, however that order involved a request for access to information regarding a submission made in response to an RFP and did not concern information in a contract, as is the case in this appeal.

It states that the immutability exception does not apply because it is not seeking any non-negotiable information supplied by the appellant. For instance, it states, financial statements and product designs are not at issue.

Findings on supplied

[26] As indicated above, the appellant's position is that that pricing information at issue in the contract is information that was contained in its RFP response and therefore, was supplied.

[27] Although the pricing information in the contract was part of a submission made in response to an RFP, this submission is attached to and forms part of the contract entered into between the boards (through the consortium) and the appellant. Therefore, the successful proponent's submission was accepted by the boards and its terms, including the pricing information, were then incorporated into the contract.

[28] 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.

[29] As noted above, 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.

[30] The appellant also relies on the inferred disclosure and immutability exceptions to support its position that the pricing information at issue in the record, which is a contract, was not supplied.

[31] The appellant provided extensive confidential representations on these exceptions. Essentially, its position is that its underlying costs and methodology would be ascertainable from disclosure of the pricing information at issue in the records.

[32] I disagree with this claim of the appellant, as outlined in the appellant's representations, as a number of components, both fixed and variable, are combined together to comprise the appellant's costs. Based on my review of the appellant's representations, it appears to me that the underlying non-negotiable costs are not discernable from the pricing information at issue because these costs are made up of a number of different items.

[33] As well, I find that even with taking into consideration the other available information in the contract, as well the student transportation industry publicly available standard information, I cannot ascertain how disclosure of the specific pricing information agreed upon in 2018 could reasonably be expected to reveal the appellant's underlying non-negotiated confidential information.

[34] Order MO-3905, the order relied upon by the appellant, the adjudicator found that the immutability exception applied to information relating to the third parties' underlying fixed costs, including wages, building and property expenses, office and administrative expenses, operations expenses and fixed vehicle costs. In this appeal, these types of information are not at issue. Instead, it is only pricing information.

[35] Based on my review of the appellant's representations and the contract and the information at issue therein, I cannot ascertain how disclosure of the pricing information at issue, which are the rates charged for various transportation services for the school terms of 2018-2019, 2019-2020, 2020-2021, and 2021-2022, would reveal the specific underlying costs referred to by the appellant in its representations. The appellant has also not demonstrated how disclosure of a specific rates at issue in the record could reveal the amount of a specific underlying cost.

[36] Therefore, I do not accept that the pricing information is either information that was not negotiated between the parties nor do I accept that it is information which, were it disclosed, would permit someone to infer accurate information about non-negotiated information. Therefore, I find that the pricing information at issue in the record was not supplied to the boards.

[37] As the information at issue was not supplied to the boards, I find that part 2 of the test has not been met.

[38] 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, I find that the pricing information at issue in the record is not exempt from disclosure under section 10(1). It is not necessary for me to consider part 3.

[39] Accordingly, I order the board to disclose the pricing information to the requester. I dismiss the appeal.

ORDER:

1. I order the board to disclose to the requester all of the information at issue in the record **by December 5, 2024, but not before December 2, 2024.**
2. 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 disclosed to the requester.

Original Signed by: _____
Diane Smith
Adjudicator

October 30, 2024 _____