Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER M-833

Appeal M_9600145

Toronto Board of Education

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

In 1991, the Toronto Board of Education (the Board) began to investigate the development of a Human Resources Information System and a Financial Information Management System. This integrated project was known as HRIS/FIMS. The development of this project is well documented and information about it is publicly available in the Board's minutes.

The appellant requested copies of all records pertaining to the tendering, acquisition and purchase of these systems under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The appellant subsequently narrowed the request to contracts between the Board and two named companies for records pertaining to the tendering, acquisition and purchase of these systems.

The Board located records responsive to the narrowed request and granted partial access to them. The Board determined that the interests of the two companies referred to above could be affected by disclosure of the remainder of the records (Records 1 - 9). The Board also identified one other company who was a party to the contracts, and one company that was referred to in one of these contracts as having an interest in the disclosure of the records identified as responsive to the request. The Board notified all four companies (the third parties) pursuant to section 21 of the Act, and requested comments on disclosure of the records pertaining to them.

For ease of reference, I will refer to the two companies named in the request as Companies A and B in this order. The other two third parties will be referred to as Companies C and D.

Company A had no objection to the disclosure of most of the information in the records which pertained to it, and this information was disclosed (Records 1 and 3 and portions of Record 2). However, Company A indicated that it objected to disclosure of the remaining information. The other third parties objected to disclosure of any information pertaining to them. The Board subsequently denied access to this information on the basis of section 10(1) of the Act.

The appellant appealed the Board's decision. During mediation, the appellant and the Board agreed to add four records relating to contracts between Company C and the Board to the scope of this appeal as these records are connected to the contract between the Board and Company A. As I noted above, this company was one of the third parties notified by the Board. The Board confirmed that access was also denied to these records on the basis of section 10(1).

This office sent a Notice of Inquiry to the Board, the appellant and the four third parties originally notified by the Board. A review of the records identified that the interests of another company (Company E) might be affected by disclosure of two records (Records 9 and 13). Therefore, this office also sent a Notice of Inquiry to Company E (as a fifth third party in this appeal). Representations were received from the Board, the appellant and four third parties (Companies A, B, C and D).

RECORDS

All of the records at issue relate to the commercial relationship between the Board and the third parties in connection with the implementation of the HRIS/FIMS. In particular, Records 2, 4, 5, 6, 7, 8, 10, 11 and 12 are agreements between the Board and Companies A, B and C. In general, they detail the relationship between the parties and their rights and obligations under the agreements particularly with respect to the intentions of the parties, licenses, and the products/services to be provided by the third parties. Records 9 and 13 are agreements between Company E and Companies B and C and the Board as Licensee. These two records detail the rights and obligations of Companies B, C and E vis a vis each other as well as those of the Board.

Records 4 - 13 have been withheld in their entirety. The majority of Record 2 has been disclosed. The withheld portion consists of the description of items 1.0 to 1.20 in the Table of Contents (on page 3), and pages 4 to 12, which contain details of the items identified as 1.0 to 1.20.

CLARIFICATION OF ISSUES

In its representations, Company D states that there is "no information of any direct import" to the company in the records at issue which were identified as relating to it (Records 4, 9 and 13). Therefore, Company D indicates that it will not make representations with respect to these records. However, Company D also indicates that it objects to the disclosure of any pricing information of software and services offered by Company B as this information is based on and uses Company D's software to a significant extent, and submitted representations on this issue. Company D raises this concern in the absence of any information that this type of information may be contained in the records at issue. In reviewing the records at issue, I note that they do not include pricing information for the provision of software, and it is, therefore, not necessary for me to address Company D's concerns regarding this type of information.

In its representations, Company A indicates that the disclosure of the information contained in section 1.6 of Record 2 is its major concern. Company A's representations are restricted to its concerns regarding this part of the section. However, in its representations to the Board in response to the third party notice, Company A provided some explanation of its reasons for objecting to the disclosure of all parts of section 1. Therefore, I will consider the application of section 10(1) to the entire portion of Record 2 which has been withheld by the Board.

DISCUSSION:

THIRD PARTY INFORMATION

Sections 10(1)(a), (b) or (c) of the Act provide as follows:

> 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.

In order for the exemption to apply, the Board and/or the third parties must provide evidence that each of these elements are present in the records at issue.

TYPE OF INFORMATION

The Board submits that the records contain technical, commercial and financial information. The third parties submit generally that the records contain commercial information. As I indicated above, the records all relate to the commercial relationship between the Board and the third parties in connection with the implementation of the HRIS/FIMS. In this regard, I find that they all contain commercial and/or financial information.

SUPPLIED IN CONFIDENCE

In order to satisfy this element of the exemption, the Board and/or the third parties must show that the information was **supplied** to the Board, either implicitly or explicitly **in confidence**.

The representations of the Board and, particularly, the third parties, focus on their expectations of confidentiality with respect to both the tendering and contracting process and the content of the contracts themselves. I appreciate the concerns raised by the parties, however, before considering these arguments, I must first determine whether the information in the records was "supplied" to the Board.

Supplied

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act (Orders 36, 87, 203, P-219, P-228, P_251, P-263, P-581, P-609 and P-807).

Other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 10(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P_451, P-472 and P_581).

The Board confirms that there was a great deal of "give and take" between the parties to the agreements over the nature and terms of the agreements. The Board indicates that, with the exception of Record 2, the other agreements follow a relatively standard pattern with respect to structure and terms, however, none of the agreements are form contracts, nor were they presented to the Board as non-negotiable. The Board indicates further that although the agreements were drafted by the third parties, it had input into all of the agreements which have been identified as responsive to this request. In this regard, the Board acknowledges that these agreements reflect the extensive negotiation of terms as between the Board and these other parties. In its representations, Company A also refers to the negotiation of the terms of its contract with the Board (Record 2).

Based on the information before me, including the records themselves, it is my view that the information contained in all of the agreements is the product of negotiations between the Board and the third parties. Neither the Board nor the third parties have provided me with evidence which would confirm that the information in any of the agreements is the same as that originally provided to the Board, or that its disclosure would permit the drawing of accurate inferences about information actually supplied to the Board. Accordingly, I find that the information contained in the records was not "supplied" to the Board for the purposes of section 10(1) of the Act. As the second element of section 10(1) of the Act has not been met for these records, the section 10(1) exemption does not apply.

ORDER:

1. I order the Board to disclose the records to the appellant by sending him a copy by **October 16, 1996**, but not earlier than **October 11, 1996**.
2. In order to verify compliance with the provisions of this order, I reserve the right to require the Board to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: September 11, 1996
Laurel Cropley
Inquiry Officer