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

# FINAL ORDER MO-1199-F

## Appeal MA-980178-1

## Kawartha Pine Ridge District School Board

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:

The appellant made a request to the English-Language Public District School Board No. 14 (now the Kawartha Pine Ridge District School Board) (the Board) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for a copy of the complete report dealing with consulting services regarding Employee Benefit Programs which was submitted to the Board at a meeting on April 16, 1998, as well as any supporting reports. The appellant was the unsuccessful bidder for a contract for consulting services.

The Board initially denied access to the requested records on the basis that the records fell outside the scope of the Act by virtue of section 52(3). The Board claimed, in the alternative, that the records were exempt under the following sections of the Act:

- closed meeting - section 6(1)(b);
- third party information - section 10(1); and
- economic and other interests - sections 11 (c), (d), (e) and (f).

The appellant appealed this decision. Upon receipt of the Confirmation of Appeal, the Board notified this office that the head was of the opinion that the request was frivolous or vexatious. I addressed the question of whether the appellant's request was frivolous or vexatious pursuant to section 4(1)(b) of the Act as a preliminary matter in Interim Order MO-1168-I. In that order, I found that the appellant's request was not frivolous or vexatious. I will not revisit this issue in this order.

This final order will dispose of the issues arising from the Board's decision to deny access to the records.

This office provided a Notice of Inquiry to the Board, the appellant and the successful bidder for the contract. Representations were received from all three parties. In its representations, the Board clarifies that it is relying on paragraphs 52(3)2 and 3 of the Act.

## RECORDS:

The records at issue consist of the following reports:

Record 1 Report entitled "Benefit Consulting Proposals Analysis and Recommendations" to the Superintendent of Business Services and Treasurer from the Manager of Employee Relations and Supervisor of Personnel Administration, dated February 12, 1998;

Record 2 Draft Report (memorandum) to the Superintendent of Business Services and Treasurer from the Manager of Employee Relations which contains a review of Record 1, dated March 10, 1998; and

Record 3 Report entitled "Personnel Matter - Selection of Benefits Consultant" from Superintendent of Business Services and Treasurer to the Board, dated April 16, 1998.

## DISCUSSION:

### JURISDICTION

The first issue in this appeal is whether the records fall within the scope of sections 52(3)2 and/or 3 and 52(4) of the Act. These provisions read:

> (3) Subject to subsection (4), this Act does not apply to records collected, prepared, maintained or used by or on behalf of an institution in relation to any of the following:
>
> ...
>
> 2. Negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the institution between the institution and a person, bargaining agent or party to a proceeding or an anticipated proceeding.
>
> 3. Meetings, consultations, discussions or communications about labour relations or employment-related matters in which the institution has an interest.
>
> (4) This Act applies to the following records:
>
> 1. An agreement between an institution and a trade union.
>
> 2. An agreement between an institution and one or more employees which ends a proceeding before a court, tribunal or other entity relating to labour relations or to employment-related matters.
>
> 3. An agreement between an institution and one or more employees resulting from negotiations about employment- related matters between the institution and the employee or employees.
>
> 4. An expense account submitted by an employee of an institution to that institution for the purpose of seeking reimbursement for expenses incurred by the employee in his or her employment.

Section 52(3) is record-specific and fact-specific. If this section applies to a specific record, in the circumstances of a particular appeal, and none of the exceptions listed in 52(4 ) are present, then the record is excluded from the scope of the Act and not subject to the Commissioner's jurisdiction.

**Section 52(3)2**

In order for the records to fall within the scope of paragraph 2 of section 52(3) of the Act, the Board must establish that:

1. The record was collected, prepared, maintained or used by the Board or on its behalf; **and**

2. This collection, preparation, maintenance or usage was in relation to negotiations or anticipated negotiations relating to labour relations or to the employment of a person by the Board; **and**

3. These negotiations or anticipated negotiations took place or will take place between the Board and a person, bargaining agent or party to a proceeding or anticipated proceeding.

[See Order M-861]

The Board submits that the records were prepared by staff to be maintained and used by the Board, as well as by the Trustees on behalf of the Board. The Board points out that Record 3 in particular refers to the negotiation of new collective agreements for all unionized groups and the proposed involvement of the benefits plan administrator in such negotiations and in developing an overall plan for the Board. Therefore, the Board submits that the records refer to labour relations issues.

The Board continues that the reports refer to benefits to be provided for various employees and employee groups. The Board states that it is currently in the process of negotiating with its teaching groups and that the information contained in the records is relevant to these negotiations. The Board argues that disclosure of the information in these records would be detrimental to these negotiations.

The appellant submits that section 52(3)2 does not apply in the circumstances.

**Requirement 1**

The records were prepared by Board staff. I am satisfied that they were prepared, maintained and used by the Board, thereby satisfying the first requirement of section 52(3)2.

**Requirement 2**

In Order P-1223, Assistant Commissioner Tom Mitchinson found that the preparation, collection, maintenance, or use of a record must be "for the purpose of, as a result of, or substantially connected to" an

activity listed in section 65(6) of the provincial Act [which is the equivalent of section 52(3) of the municipal Act] in order to be "in relation to" that activity.

The purpose of the records was to assess the various components of the two proposals submitted to the Board for consulting services. Although the selected consultant may be involved in negotiations with the Board's unionized employee groups and/or non-unionized employees, the records at issue in this appeal relate primarily to the selection of a business entity to provide the consulting services. In my view, the fact that the consultant will be involved in labour relations negotiations or negotiations relating to the employment of a person with the Board, at some future time, is not sufficient to satisfy me that the preparation, maintenance and use of these records by the Board are "for the purpose of, as a result of, or substantially connected to" labour relations negotiations

Therefore, I find that the Board has not established that the preparation, maintenance or use of these records is "in relation to" any negotiations or anticipated negotiations relating to an employee or to labour relations. Therefore, I find that the second requirement has not been met and section 52(3)2 does not apply.

**Section 52(3)3**

In order to fall within the scope of paragraph 3 of section 52(3), the Board must establish that:

1. The record was collected, prepared, maintained or used by the Board or on its behalf; **and**

2. This collection, preparation, maintenance or usage was in relation to meetings, consultations, discussions or communications; **and**

3. These meetings, consultations, discussions or communications are about labour relations or employment-related matters in which the Board has an interest.

The Board states that the records were collected, prepared, maintained and used by the Board for a meeting of the Board of Trustees and for discussions by the Trustees. In particular, the Board points to certain notations on the records which indicate that they were prepared for use at a particular Board meeting of the committee of the whole Board. The Board states that Records 1 and 2 form the basis for the Board Report (Record 3) and were also available to the Trustees of the Board as part of the "package" for deliberation at this meeting. The Board indicates that benefit plans apply to individual employees as well as bargaining units throughout the jurisdiction of the Board and submits that the purpose of the reports was to make a decision with respect to benefits administration which would impact on all employees. Therefore, the Board submits that the meeting with the Trustees was about labour relations as well as employee-related matters.

**Requirements 1 and 2**

As I indicated above, the records were prepared by Board staff. Based on the Board's submissions, I am satisfied that the records were prepared, maintained and used by the Board. I also accept that the records were prepared for and used in relation to discussion, consultations and communications between various staff of the Board as well as with the Trustees of the Board, and that they were used by the Trustees at a Board meeting. Therefore, I find that the first two parts of the section 52(3)3 test have been met.

**Requirement 3**

In my view, a finding that the third part of the test has been met turns on whether these consultations, discussions and communications are "about labour relations or employment-related matters". In Order P-1618, Assistant Commissioner Mitchinson noted that section 65(6) [the provincial Act equivalent to section 52(3)] must be understood in context, taking into consideration both the stated intent and goal of the Labour Relations and Employment Statute Law Amendment Act (Bill 7), which is to restore balance and stability to labour relations and to promote economic prosperity. In my view, this means that an analysis of the application of section 52(3) must consider whether the disclosure of the records could lead to an imbalance in labour relations between the Board and its employees.

"Labour relations" is defined as "the collective relationship between an employer and its employees" (Order P-1223). "Employment-related" has not been defined *per se* in previous orders. Rather, the factual circumstances of each case have been examined to determine whether the discussions, etc. concern matters which relate to the employment of an individual by an institution (see, for example: Orders P-1242, P-1260, P-1302, and M-922). In my view, in order to fall within the parameters of this section, the discussions, etc. must be about matters which directly relate to, or have as their focus, "labour relations" or "employment" matters.

In this case, any discussion, consultations or communications regarding the records was "about" the retention of a consultant to provide services in the area of benefits administration. Although the development and operation of a benefits administration plan may ultimately impact on the employment of individuals by the Board and/or labour relations issues relating to the collective agreements the Board may have with unionized staff, this was not the purpose of, nor the issue in, these discussions, consultations or communications. As I noted in the discussion under section 52(3)2, the purpose of the creation of the records and the subsequent discussions, consultations and communications was to assess the various components of the two proposals submitted to the Board for consulting services. I find that discussions about the proposals for services to be provided by a consultant, with a view to selecting a business entity for this purpose, are peripheral to labour relations or employment-related matters. Consequently, I am not persuaded that the discussions, consultations and communications were "about" labour relations or employment-related matters.

Even if I were to find that the records were prepared, maintained or used by the Board in relation to meetings, consultations, discussions or communications about "labour relations" or "employment-related matters", I must determine whether these are matters in which the Board has an interest.

Previous orders have held that an interest is more than mere curiosity or concern. An "interest" for the purposes of section 52(3)3 must be a legal interest in the sense that the matter in which the Board has an interest must have the capacity to affect the legal rights or obligations of the Board (Orders P-1242 and M-1147).

However, several recent orders of this office have considered the application of section 52(3)3 (and its provincial equivalent, section 65(6)3) in circumstances where there is no reasonable prospect of the institution's "legal interest" in the matter being engaged (Orders P-1575, P-1586, P-1618, M-1128, M-1161 and MO-1193). The conclusion of this line of orders has essentially been that an institution must establish an interest that has the capacity to affect its legal rights or obligations, and that there must be a reasonable prospect that this interest will be engaged. The passage of time, inactivity by the parties, loss of forum, absence of a right or basis for redress or conclusion of a matter have all been considered in arriving at a determination of whether an institution has a "legal interest" in the labour relations or employment-related matter.

I can accept that the Board will, once its benefits plan is in place and operational, have an interest in applying the plan to its labour and employee negotiations. However, the Board does not specifically address what its "legal" interest is or how it will be engaged. Moreover, in my view, the records reflect, not a completed or operational plan, but rather, proposals for developing a plan which will then be used by the Board in the area of benefits administration and are more directly concerned with the level of expertise and services which will be provided by each of the two consultants. In my view, the Board's interest with respect to these records does not yet exist, as any potential interest the Board may have in developing its benefits administration plan, whether legal or otherwise, is not reasonably foreseeable.

Consequently, I find that the Board has not demonstrated that it has sufficient legal interest in the records to bring them within the ambit of section 52(3)3. The records are, accordingly, subject to the Act.

**CLOSED MEETING**

Section 6(1)(b) of the Act states:

> A head may refuse to disclose a record,
>
> > that reveals the substance of deliberations of a meeting of a council, board, commission or other body or a committee of one of them if a statute authorizes holding that meeting in the absence of the public.

In order to rely on section 6(1)(b), the Board must establish that:

1. a meeting of a council, board, commission or other body or a committee of one of them took place; **and**

2. a statute authorizes the holding of such a meeting in the absence of the public; **and**

3. the disclosure of the record at issue would reveal the actual substance of the deliberations of this meeting.

[Orders M-64, M-98, M-102 and M-219]

Each part of the section 6(1)(b) test must be established.

The Board submits that the reports were prepared for the purpose of a meeting of the committee of the whole Board, which was held *in camera* pursuant to section 207(2) of the Education Act, and in particular, sections 207(2)(b) and (d). The Board also refers to the records themselves, which indicate that they were reviewed *in camera*.

The appellant acknowledges that the Board may have considered the reports "*in camera*", but submits that in order for section 6(1)(b) to apply, the Board must establish that section 207(2) of the Education Act allows the Board to do so.

Section 207(2) of the Education Act provides:

> A meeting of a committee of a board including a committee of the whole board, may be closed to the public when the subject under consideration involves,
>
> (a) the security of the property of the board;
>
> (b) the disclosure of intimate, personal or financial information in respect of a member of the board or committee, an employee or prospective employee of the board, pupil of the board or his or her parent or guardian;
>
> (c) the acquisition or disposal of a school site;
>
> (d) decisions in respect of negotiations with employees of the board; or

(e) litigation affecting the board.

The appellant submits that none of the paragraphs of section 207(2) apply. In particular, the appellant asserts that the reports do not contain information regarding "an employee".

I have reviewed the three reports at issue. I am satisfied that they were presented to the Board as a package and that the Board met *in camera* to consider them. I am also satisfied that disclosure of the records would reveal the substance of the deliberations of that meeting. Therefore, I find that parts one and three of the test have been met.

However, I am not persuaded that the Board was authorized to hold this meeting in the absence of the public. The circumstances in which the Board is entitled to hold *in camera* meetings are quite explicit in section 207(2) of the Education Act. In particular, sections 207(2)(b) and (d) concern matters in respect of specifically identified individuals. Section 207(2)(b) refers to "intimate, personal or financial information of a Board or Committee member, an employee or prospective employee, a pupil or his or her parent". Section 207(2)(d) concerns decisions relating to negotiations with employees of the Board.

In my view, none of these records contain any of the types of information referred to in section 207(2). Rather, they contain an analysis and recommendations of Board staff regarding the proposals submitted by the two bidders for a contract for consulting services. Although the records may touch on issues which will eventually have some relevance to employees, they do not pertain to any identifiable individual or to negotiations with any employees.

Therefore, I find that section 6(1)(b) does not apply.

**ECONOMIC AND OTHER INTERESTS**

Sections 11(c), (d), (e) and (f) of the Act state:

A head may refuse to disclose a record that contains,

(c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

(d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

> (e) positions, plans, procedures, criteria or instructions to be applied to any negotiations carried on or to be carried on by or on behalf of an institution.
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

**Section 11(c)**

In Order P-1190 (upheld on judicial review in Ontario Hydro v. Ontario (Information and Privacy Commissioner), [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694 (C.A.)), Assistant Commissioner Mitchinson stated:

> In my view, the purpose of section 11(c) is to protect the ability of institutions to earn money in the market-place. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.

I agree with this interpretation of section 11(c).

Further, "could reasonably be expected to" has been interpreted to mean that the expectation of prejudice to the economic interests or competitive position of the Board, should a record be disclosed, must not be fanciful, imaginary or contrived, but rather one which is based on reason (Order 188). I agree with this interpretation and adopt it for the purposes of this appeal. It is not necessary to prove that actual harm will result from disclosure.

The Board submits that it has an economic interest in receiving complete and candid proposals, which may include sensitive confidential information, in order to properly evaluate them. The Board argues that the ability of the public and competitors to access this kind of information jeopardizes the openness of the proposal and tender process. The Board submits that this would have a detrimental impact on its ability to negotiate the best possible economic advantage both during the initial tendering stage, as well as during the administration of the benefit plan.

In my view, the Board alleges possible consequences but does not provide evidence or sufficient explanation to support the conclusion that these consequences **could reasonably be expected** to result from the disclosure of these records. In particular, the Board simply alleges that disclosure of the records would have a detrimental impact on its ability to negotiate the best deal. It does not, however,

indicate why or how it expects that this would occur. In my view, the Board's concerns are purely speculative.

Further, I find that the Board has not made a reasonable connection between disclosure of the records and its ability to be competitive or earn money in the market-place. I am not satisfied that this record, which relates to the evaluation of consulting services proposals, is related to the Board's economic interests or competitive position as contemplated by section 11(c). I find that the Board has not provided sufficient evidence to establish a reasonable expectation that disclosure of the records would prejudice the Board's interests in these areas, and section 11(c) does not apply.

**Section 11(d)**

To establish a valid exemption claim under section 11(d), the Board must demonstrate a reasonable expectation of injury to its financial interests.

The Board argues that disclosure of the information contained in the records will impact on the willingness of suppliers to provide information which they might consider to be confidential and competitive. The Board submits that this would result in an inability on the part of the Board to negotiate the best possible arrangements and would thus be injurious to its financial interests.

I am not persuaded that companies bidding for contracts with the Board would not provide sufficient details of their proposals and any other information the Board may ask for in order to obtain the contract simply because this information may be subject to disclosure under the Act. Moreover, the Act contemplates that third parties may indeed have commercial or other interests in records. An analysis of these concerns is more appropriately considered in the discussion under section 10(1) of the Act. In my view, the Board's arguments are not sufficient to establish how or why disclosure of the records would be injurious to its financial interests, and I am not convinced that such a harm could reasonably be expected to occur. Accordingly, I find that section 11(d) does not apply to exempt the records from disclosure.

**Section 11(e)**

For a record to qualify for exemption under section 11(e), each part of the following test must be established:

1. the record must contain positions, plans, procedures, criteria or instructions; **and**

2. the positions, plans, procedures, criteria or instructions must be intended to be applied to any negotiations; **and**

3. the negotiations must be carried on currently, or will be carried on in the future; **and**

4. the negotiations must be conducted by or on behalf of an institution.

[Order M-92]

Broadly speaking, section 11 is designed to protect certain economic interests of institutions covered by the Act. Sections 11(c), (d) and (g) all take into consideration the **consequences** which would result to an institution if a record was released. They may be contrasted with sections 11(a) and (e) which are concerned with the **type** of the record, rather than the consequences of disclosure.

As stated above, the first part of the section 11(e) test requires that the record contain positions, plans, procedures, criteria or instructions. As such, the first part of the test relates to the form of the record and not to its intended use.

The Board submits that the records contain the positions of the proponents as well as the plans, procedures and criteria of the Board for the awarding of the benefit administration. The Board submits further that this information is relevant to negotiations currently being conducted between the Board and the suppliers.

The Board may very well intend to use the results of the analysis contained in the records in its negotiations with the successful bidder. However, in my view, this has no bearing on whether the record itself contains information which can be characterized as a position, plan, procedure, criteria or instruction.

Previous orders of the Commissioner's office have defined "plan" as "... a formulated and especially detailed method by which a thing is to be done; a design or scheme" (Order P-229).

In my view, the other terms in section 11(e), that is, "positions", "procedures", "criteria" and "instructions", are similarly referable to pre-determined courses of action or ways of proceeding. In my opinion, the record at issue does not disclose any "pre-determined" course of action on the part of the Board. It is not sufficient for the Board to merely state that because the records are relevant to negotiations, they represent the "positions, plans, procedures, criteria or instructions" of the Board. It is evident from a review of the records, that they do not represent a plan, position, criteria or instruction to be applied by the Board in its negotiations, but rather contain an analysis of the merits of the two proposals which would be used by the Board in arriving at a decision regarding the contract and may be used in any subsequent negotiations in relation to the contract.

The Board has not provided me with sufficient evidence to conclude that this record contains a position, plan, procedure, criteria or instruction. Accordingly, the first part of the section 11(e) test has not been

satisfied. Therefore, I find that the record does not qualify for exemption pursuant to section 11(e) of the Act.

**Section 11(f)**

In order to qualify for exemption under section 11(f) of the Act, the Board must establish that the record satisfies each element of the following:

1. the record must contain a plan or plans, **and**

2. the plan or plans must relate to:

    (i) the management of personnel or

    (ii) the administration of an institution, **and**

3. the plan or plans must not yet have been put into operation or made public.

The Board submits that the records contain the plans for the benefit administration and that these plans relate to the management of benefits administration on behalf of the personnel of the Board and thus constitute part of the administration of the institution. The Board indicates that the plans would not be put into operation until the decision of the Board on this issue. The Board states that these plans would not be made public.

In Order P-348, former Commissioner Tom Wright made the following finding under section 18(f) of the provincial Act, which is equivalent to section 11(f) of the Act:

> The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan. Therefore, in my view, the record does not qualify for exemption under either section 18(1)(f) ...

In my view, the records do not contain the sort of detailed methods, schemes or designs which are characteristic of a plan. It is evident from my review of the records that the Board did not intend them to be used as a plan but rather as a basis for discussion regarding the awarding of a contract for consulting services. Although the services to be provided by the successful bidder may involve the development of a plan, and the details of its proposal may be instrumental in the development of plans

relating to the management of benefits administration, these records are not, in an of themselves, a plan or proposed plan. Accordingly, I find that the first requirement of section 11(f) has not been met and the exemption does not apply to the records.

**THIRD PARTY INFORMATION**

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the Board and/or the successful bidder 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; **and**

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 (a), (b) or (c) of section 10(1) will occur.

**Part One**

The Board submits that the information provided is commercial and financial. The successful bidder states that the written materials it provided to the Board identify the focus of its business plan. It submits that disclosure of the records would reveal commercial information.

Previous orders of the Commissioner's office have defined the term "commercial information" generally, to mean information which relates to the buying, selling or exchange of merchandise or services (Orders 47, 179 and P-318). The records contain assessments of the proposals, including references to specific parts of the proposals, submitted to the Board in response to a Request for Proposal (the RFP) and relate to the provision of services by two consulting firms. I am satisfied that the records either contain or would reveal commercial information and the first part of the test has been met.

**Part Two**

In order to satisfy Part 2 of the test, the information must have been **supplied** to the Board **in confidence** either implicitly or explicitly. It is clear that the records at issue in this appeal were prepared by Board staff. Therefore, they were not supplied to the Board. However, the information will also be considered to have been supplied if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution.

In reviewing the records, I note that large portions of the records contain information pertaining to the Board itself, such as general administrative requirements, its rationale for retaining the services of a consultant, the Board's requirements as a basis for making a decision regarding selection, information about Board staffing, background information on various categories of information the Board was seeking in the RFP and discussion of the plans currently in place in the two previous school boards. In addition, portions of the records contain information pertaining to the appellant, including particulars of its proposal and the assessment of its proposal by Board staff. In my view, none of this information would reveal or permit the drawing of accurate inferences with respect to information supplied to the Board by the company. Accordingly, this information is not exempt under section 10(1). As I have found that no other exemptions apply to this information, it should be disclosed to the appellant.

With respect to information pertaining to the company, I find that portions of the record contain particulars of its proposal and disclosure of this information would reveal information supplied to the Board by the company. The records also contain assessments of the company's proposal by Board staff. Much of this information is very general in nature, however, I am prepared to accept that disclosure of this information would permit the drawing of accurate inferences with respect to the information supplied to the Board by the company.

Having found that portions of the records reveal or would permit the drawing of accurate inferences with respect to information supplied to the Board by the company, I must now determine whether the information which was originally supplied to the Board was done so in confidence.

With respect to this issue, the Board simply states that the information which was provided to it by the company was "supplied and received in confidence and would not be made available to any third party". The company states that its response to the Board "and indeed all responses received in that type of process, are normally held in strict confidence". The appellant claims that the information in the records was not supplied in confidence. In support of this argument, it points out that the RFP contained the following provisions:

1. It is anticipated that oral submissions, in the format of a formal presentation to the Board, will be scheduled as soon as administratively possible following the Board's review of the proposal submissions.

2. To aid in your response, please contact [a named individual from the appellant] or [a named individual from the company] who will provide to you the following information on the present school board they represent:

    - Employee Benefit Booklets

    - Current premium rates by benefit line, net or any administration charges, services fees, consulting fees and/or commissions

- Total annual premium by benefit line for most recent 12 month period.

In my view, the first provision is not helpful in determining whether the information was supplied in confidence as it is not clear that both companies would attend together at these formal presentations.

However, the second provision clearly indicates that the parties are to make available to each other specific details relating to their contracts with the previous boards. In my view, therefore, it is not reasonable for any party to have an expectation that the portions of their proposals which refer to these details was supplied in confidence. This does not mean, however, that similar considerations apply to any "proposed" details in response to the RFP. In my view, the details of its proposal relate to future work to be done by the company which may or may not be the same as previously provided.

I have not been provided with the actual proposals or the complete RFP. Therefore, I have no evidence before me which might demonstrate that the company's proposal was supplied explicitly in confidence. However, I am satisfied that the company had an implicit expectation that its proposal would be treated confidentially by the Board and, based on the submissions of the Board, that the company's expectations were reasonable.

**Harms**

In order to meet this part of the test, the Board and/or the company must show how disclosure of the

information in the record could reasonably be expected to result in the harms described in sections 10(1)(a) through (c) of the Act. Both the Board and the company argue that disclosure of the information in the records would prejudice significantly the company's competitive position (section 10(1)(a)). The Board also suggests that disclosure of this type of information places the entire proposal or tender process in jeopardy since "it will be difficult for institutions to receive the type of confidential information necessary to properly evaluate a proposal or tender". In my view, the Board has implicitly raised the application of section 10(1)(b) as well.

**Section 10(1)(b)**

In my discussion above under section 11(d), I indicated that I am not persuaded that companies bidding for contracts with the Board would not provide sufficient details of their proposals and any other information the Board may ask for in order to obtain the contract simply because this information may be subject to disclosure under the Act. I find that the Board has not demonstrated that the proposal or tender process would be compromised in any way by disclosure of the information at issue in this appeal or that similar information will no longer be supplied to the Board.

**Section 10(1)(a)**

With respect to this issue, the Board states that disclosure of the records will result in an unfair competitive advantage to the appellant, however, it does not expand on this statement further. The company states that the materials it supplied to the Board "clearly identify the focus of our business plan, a focus developed over many years and a focus which contains proprietary and sensitive materials".

In another vein, both the Board and the company refer to the Board's concerns relating to the motivation of the appellant in seeking and using this information. In this regard, the Board states:

> While our submissions with respect to frivolous or vexatious were denied, the utilization of the information by the requester, and the obvious intent to use the information further to discredit both the Board and [the company] should be taken into consideration in reviewing the application of section 10(1).

The company expresses concern that the information "may be misused through the press medium, to further exacerbate a sensitive situation". The company asserts that disclosure of the information contained in the records "may lead to further misstatements and half-truths being disseminated indiscriminately in the public domain".

The appellant takes issue with the statements made by the Board which were reflected in Interim Order MO-1168-I that it obtained confidential information from an employee and attempted to discredit the Board through the media. The appellant denies both allegations.

In Interim Order MO-1168-I, I found that the Board had not established that the request was frivolous or vexatious. It is clear from the representations that there is a dispute regarding the awarding of the contract for benefits consulting services, and as a result, there is considerable acrimony among the parties. In my view, the comments made by the Board and the company reflect this. However, the expressed concerns are either vague or unsubstantiated, and are, in fact, disputed by the appellant. I am not prepared, without direct evidence of the harm to its competitive position resulting from such a dispute, to give these concerns much weight.

I have reviewed the information which remains at issue following my decision under part one of the test, and I find that, although parts of the records refer to the proposal submitted by the company, these references are very general and do not reveal the details of the proposals submitted. Moreover, they are made in the context of determining whether the company has met the standards for the Board's decision-making regarding the various components of the RFP. In my view, disclosure of this information could not reasonably be expected to result in the harm envisioned by section 10(1)(a). However, there are distinct portions of the records which contain the details of the company's proposal. This information is severable from the assessments of its proposal. I am satisfied that this information contains sufficient details of the company's unique business plan, the disclosure of which could reasonably be expected to result in competitive harm to the company. I have highlighted this information in yellow on the copy of these records which I am providing to the Board's Freedom of Information and Privacy Co-ordinator with this final order.

## ORDER:

1. I uphold the Board's decision to withhold the information which I have highlighted in yellow on the copy of the records which I am providing to the Board's Freedom of Information and Privacy Co-ordinator with this final order.

2. I order the Board to provide the appellant with the remaining portions of the records by sending it a copy of them by **April 29, 1999** but not before **April 24, 1999**.

3. 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 disclosed to the appellant pursuant to Provision 2.

Original signed by: March 23, 1999
Laurel Cropley

Adjudicator