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

ORDER MO-1705

Appeal MA-010348-2

York Region 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

BACKGROUND:

In April 2000, the York Region District School Board issued a Request for Proposal (RFP) for the exclusive provision of soft drink and snack vending machines in the Board's schools.

This type of arrangement is common in public educational institutions throughout North America as a means of raising revenue to cover various costs associated with education delivery. These agreements have recently garnered attention, in particular, due to concerns related to their impact on student health. In the United States (U.S.) the agreements that are reached through an RFP or tender process are often referred to as "pouring rights contracts". They have also been referred to as "exclusive sponsorship contracts", "exclusive vending agreements", "vending and pouring agreements" and "branding agreements".

In this situation, eight companies submitted bids in May 2000 and the Board selected the winning bidder (the affected party) during the summer of 2000. The affected party and the Board did not execute a formal contract at that time and, as a result, there is some dispute regarding the nature of the relationship between the Board and the affected party during the time following the selection of the affected party. However, the parties did sign a contract more than two years later, in March of 2003.

NATURE OF THE APPEAL:

This appeal concerns a decision of the Board made pursuant to the provisions of the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to information "…regarding the placement of soft drink vending machines in York Region Schools." In particular, the appellant indicated that he sought access to the following documents:

1. The tender documents which were provided to the prospective bidders on this contract.

2. A list of the prospective bidders who received copies of the tender documents.

3. A list of the companies who submitted bids.

4. The contract between [the Board] and [the affected party].

The Board disclosed records responsive to the first three parts of the request. As to the fourth part, the Board informed the appellant that it does not have responsive documents in its custody or control.

The appellant appealed the Board's decision with respect to part four of the request. This office opened Appeal MA-010348-1. During the mediation stage of this appeal, the parties were able to reach a resolution and the file was closed.

The Board, subsequently, rendered a further decision letter in which it agreed to disclose to the appellant a severed version of a vendor proposal submitted by the affected party. Prior to doing so, the Board sought representations from the affected party. In making its decision to provide the appellant with partial access the Board indicated that it was relying upon the exemptions found in sections 10(1)(a), 10(1)(b) and 10(1)(c) (third party information) and sections 11(c) and 11(d) (economic and other interests of the Board) of the *Act*.

The appellant appealed the Board's denial of access to portions of the proposal. This office opened Appeal MA-010348-2, the present appeal.

The parties were not able to resolve any issues during the mediation stage and the file was referred to inquiry.

I first sought representations from the Board on the application of section 10(1) and sections 11(c) and (d), and from the affected party and two additional parties (two suppliers) on the application of section 10(1). I received representations from the Board and the affected party. I then sought representations from the appellant and shared the non-confidential portions of the Board's and the affected party's representations with the appellant. The appellant submitted representations in response. In its representations the appellant raised, for the first time, the possible application of section 16 (public interest override). I then sought reply representations from the Board on the application of section 16 and from the Board and the affected party on the appellant's submissions on section 10(1). Both the Board and the affected party submitted reply representations.

RECORD:

The information at issue is contained in a package submitted by the affected party to the Board in response to the Board's RFP for the provision of vending services. The package consists of a cover letter and a formal proposal document. The information at issue consists of one paragraph of the cover letter and portions of the formal proposal document.

There are 28 pages of documents at issue consisting of all or portions of pages 2, 13, 20, 30, 31, 35, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 49, 54, 60, 71, 73, 75, 76, 82, 86, 88, 89 and 90. The information includes revenue projections (including revenue generated from programs, incentives and commissions), commercial sales targets (including desired vendor to student and bottle to can ratios), methodologies and programs for generating revenues and information relating to market share, suppliers and customers.

DISCUSSION:

THIRD PARTY INFORMATION

Introduction

The Ministry claims that the severed portions of the record are exempt under section 10(1)(a), (b) and/or (c) of the *Act*. Those sections read:

> 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;

Section 10(1) recognizes that in the course of carrying out public responsibilities, government agencies often receive information about the activities of private businesses. Section 10(1) is designed to protect the "informational assets" of businesses or other organizations that provide information to the government (Order PO-1805).

Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(1) serves to limit disclosure of information which, while held by government, constitutes confidential information of third parties which could be exploited by a competitor in the marketplace.

For a record to qualify for exemption under sections 10(1)(a), (b) or (c) the Board and/or the affected party 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.

(Orders 36, P-373, M-29 and M-37).

Part one: type of information

The Board describes the information at issue as falling into four general categories, as follows:

- Category 1 – information regarding anticipated revenue calculations, including financial calculations of commercial incentives and commission revenue (pages 2, 13, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 49, 60, 73, 86, 88, 89 and 90)
- Category 2 – information regarding anticipated commercial sales targets (pages 30, 31 and 35)
- Category 3 – information, without financial calculations, regarding the programs and/or methods used by the affected party to generate revenue for customers (pages 54, 71 and 75)
- Category 4 – information related to the affected party's suppliers, customers and market (pages 20, 76 and 82)

Both the Board and the affected party submit that the information at issue consists of commercial information and, in some cases, financial information and/or trade secrets. This office has defined the terms commercial information, financial information and trade secret as follows:

Commercial information

Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises (Order P-493).

Financial information

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples include cost accounting method, pricing practices, profit and loss data, overhead and operating costs. (Orders P-47, P-87, P-113, P-228, P-295 and P-394)

Trade Secret

"Trade secret" means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

> (i) is, or may be used in a trade or business,
>
> (ii) is not generally known in that trade or business,
>
> (iii) has economic value from not being generally known, and
>
> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.
>
> (Order M-29)

I adopt these definitions for the purpose of this appeal.

On my review of the record, I am satisfied that the severed information constitutes commercial information, since it pertains to the proposed terms of a commercial relationship between the affected party and the Board involving the sale of merchandise or services by the affected party to the Board (see Order PO-1973).

In addition, I am satisfied that some of the severed information contains financial information, including pricing information and projected calculations of revenues, commissions and bonuses.

Part two: supplied in confidence

Introduction

In order to satisfy part 2 of the test, the affected party and/or the Board must show that the information was "supplied" to the Board "in confidence", either implicitly or explicitly.

"Supplied"

General principles

The requirement that it be shown that the information was supplied to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties. The following passage, from *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report), addresses this purpose:

> . . . [T]he [proposed] exemption is restricted to information "obtained from a person" in accord with the provisions of the U.S. act and the Australian Minority Report Bill, so as to indicate clearly that *the exemption is designed to protect the informational assets of non-governmental parties rather than information relating to commercial matters generated by government itself*. The fact that the commercial information derives from a non-governmental source is a clear and

> objective standard signaling that consideration should be given to the value accorded to the information by the supplier. Information from an outside source may, of course, be recorded in a document prepared by a governmental institution. It is the original source of the information that is the critical consideration: thus, a document entirely written by a public servant would be exempt to the extent that it contained information of the requisite kind.
> (pp. 312-315) [emphasis added]

To meet the "supplied" aspect of part 2 of the test, it must first be established that the information in the record was actually supplied to the Board, or that its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the Board (Orders P-203, P-388 and P-393).

Representations

The affected party states:

> The [p]roposal and all information contained therein, including, the severed portions at issue in this Inquiry, were supplied to the […] Board […] as [our] response to [the Board's] Vending Services [RFP] concerning the supply of beverage products and vending equipment to [the Board].
>
> . . . . .
>
> . . . [W]hile the [p]roposal contained an outline of certain terms of a supply contract which was to be negotiated (and which has now been concluded) between [the Board] and [the affected party], the [p]roposal did not contain all of the terms of the supply arrangement, nor did it contain all of the key terms. The contract entered into by [the Board] and [the affected party] is not a mirror image of the [p]roposal and contains many additional terms which are of key importance to [the affected party].

The Board supports the affected party's position on this issue and submits:

> [T]he information at issue was supplied to the Board by [the affected party] on or before May 11, 2000, in confidence subject to the terms of a Request for Proposal issued by the Board on April 18, 2000.
>
> The Request for Proposal provided that:
>
> > "If you, or your company are interested in submitting a proposal, kindly complete and return one copy of the appropriate forms, signed and sealed in the special envelope enclosed." …

As in Order MO-1450, the information contained in the Request for Proposal submitted by [the affected party] was not the subject of communications or negotiations between the Board and [the affected party], but rather is [the affected party's] confidential terms of Proposal:

> "the proposed letter agreement between the theatre company *and* the City were 'supplied' to the City by the theatre company. On the face of these letters, they are proposals from the company to the City. There is nothing in these documents to indicate that the information in them was the product of a process of 'give and take'." (MO-1450)

. . . . .

The Board disagrees that the RFP is the "contract" between the parties. […]

. . . . .

The Appellant argues that [the affected party's] proposal submitted in response to the Board's Vending Services RFP formed the contract between the Board and [the affected party] once it was accepted by the Board . . . [T]his is inconsistent not only with the facts in the present case, but also the law with respect to Requests for Proposals.

The Manitoba Court of Appeal in *Mellco Developments v. Portage la Pra[i]rie (City)* [2002], M.J. No. 381 (Man. C.A.) recently addressed the status of a Request for Proposal once accepted. The Court, in examining whether a RFP is a binding tender document quoted the following passage from Paul Sandori and William M. Pigott, Bidding and Tendering: What is the Law?, 2nd ed. (Toronto: Butterworths, 2001) (at p.239)

> "The owner that wants submissions from interested parties but does not wish to create Contract A, may choose to issue a request for proposals (RFP). **Properly drawn, an [sic] RFP asks parties for expressions of interest and sets out the owner's intention to consider those expressions of interest and then to undertake negotiations with one or more parties whose proposal(s) appeal to the owner."** [par. 72]

The Court proceeded to hold:

> "I agree with counsel for the plaintiffs that the question of the duty to negotiate in good faith with respect to bids (be they a tender or proposal), is a form of continuum. At one end are the formal tender cases invoking the principles of [*Ontario v. Ron Engineering & Construction (Eastern) Ltd.*, [1981] 1 S.C.R. 111].

> At the other end are cases where, for example, an owner requests a simple quote. There is obviously a lot of territory between these two extremes. The fact situation before us falls somewhere in between the two extremes. On the one hand, there is a detailed request for proposals mandating that they must contain a security deposit and remain open for a length of time. **Conversely, the RFP does not create Contracts A or B and envisions continuing negotiations with the "lead proponent" that submits the most "attractive proposal".** [par. 80]

The Board submits that its RFP for vending services envisioned continuing negotiations with the "lead proponent" that submitted the most "attractive proposal". The lead proponent was [the affected party] and that proposal was the vending services proposal submitted by [the affected party] and provided to the Appellant in severed form.

The Board submits that acceptance by the Board of [the affected party's] proposal did not establish a "contract" between the parties.

By way of clarification, the Board confirms that [the affected party] and the Board signed an agreement outlining the terms and conditions of the vending services agreement between the parties on or about March 20, 2003, but that at the time of drafting this [submission] public disclosure of the agreement was not known by the writer to have been made.

In the letter of December 13, 2001, to the Appellant, the Board states:

> "No written contract between the [affected party] and the Board exists, as the Board is currently in negotiations with [the affected party] in connection with a draft contract. With approval from [the affected party's] legal counsel, I can now disclose that there is an interim oral agreement between the parties accepting [the affected party's] Bid Proposal until a final written agreement is in place."

This letter clarifies that an interim oral agreement for [the affected party] to provide vending services was put into place pending the finalization of a contract for vending services. It is the Board's position that the Board accepted the proposal, but that further negotiations were to take place regarding the terms of the agreement. Certainly, had the parties been unable to agree to terms, no contract would have been signed.

The appellant counters with the following submissions:

> *Some of the severances from the record are not "information supplied to" the Board*

> The Board states that "the information contained in the […] [p]roposal submitted by [the affected party] was not the subject of communications or negotiations between the Board and [the affected party], . . ." […] But in fact there were formal communications between [the affected party] and the Board. Specifically, the Board issued [an RFP] on April 18, 2000; a Pre-Bid Meeting accessible to all potential bidders was held on April 27, 2000, and only then did [the affected party] submit its [p]roposal on May 12, 2000 . . .
>
> Eight companies responded and three were short-listed, including the [affected party], which submitted a Proposal dated May 12, 2000. The three "short-listed" companies were given the opportunity to formally present their bids at a meeting with representatives of a Board staff committee on June 6, 2000.
>
> Further discussions were held between [the affected party] and Board representatives on June 16, 2000. Following the meeting a decision was made by the Board staff committee to recommend [the affected party] as the vendor.
>
> Apparently in the summer of 2000, the Board and [the affected party] made an oral agreement to proceed with the vending operations based on [the affected party's] Proposal. No formal contract was signed […]. [The affected party's] vending machines appeared in Board schools in the fall of 2000.
>
> . . . . .
>
> In August 2001, a Board student emailed the Board requesting information about the contract. He received a response from a senior Board staff member, stating that a five year contract with [the affected party] had been signed the previous year, and that it was confidential [….].
>
> In September, 2001,[…] [t]he appellant […] filed a request under the [*Act*] for the tender documents which resulted in the […] contract, a list of prospective bidders who received copies of the tender documents, a list of companies who submitted bids, and the contract. The Board disclosed all but the contract. It stated that the contract did not exist.
>
> In mediation, on December 13, 2001, the Board sent a letter to [the appellant's representative] stating that no signed contract existed, and that an oral agreement had been made to proceed based on the [affected party's] [p]roposal.

Analysis

The contents of contracts involving an institution and an affected party will not normally qualify as having been "supplied" for the purposes of section 10(1) of the *Act* since the information in a contract is typically the product of a negotiation process between two parties. A number of past

orders of this office have followed this principle (see, for example, Orders P-36, P-204, P-251, P-1545, PO-2018).

In addition, the fact that a contract is preceded by little negotiation, or that the contract substantially reflects terms proposed by a third party, does not lead to a conclusion that the information in the contract was "supplied" within the meaning of section 10(1). The terms of a contract have been found not to meet the criterion of having been "supplied" by a third party, even where they were proposed by the third party and agreed to with little discussion (see Order P-1545).

The circumstances in this case are somewhat unique. In this case, the status of a contract is in dispute. I acknowledge that a formal written contract does not appear to have come into existence until March 2003, long after the appellant made his request for information. Fortunately, the parties' representations and a comparison of the proposal with the written contract help to provide some clarity to this rather complex situation.

On my review of the parties' representations, the proposal and the written contract, I make the following findings:

- the Board accepted the affected party's proposal in or about the summer of 2000
- the Board and the affected party entered into an interim oral agreement in accordance with the terms outlined in the proposal
- the affected party placed its vending machines in the Board's schools in or about the fall of 2000
- for approximately three years the parties carried on a business relationship in accordance with the terms of the proposal
- in March 2003 the Board and the affected party executed a final agreement
- the essential terms of the final agreement are similar or identical to those contained in the proposal, although the final agreement contains additional terms not included in the proposal

I accept that as a practical matter, the affected party physically supplied the proposal to the Board. Had the appellant sought access to the proposal immediately after it was submitted, it may well have met the "supplied" test. However, circumstances changed significantly over the ensuing months. First, the Board announced the affected party as the winning bidder, and accepted the affected party's proposal. Second, the Board and the affected party then entered into an oral agreement to proceed on the basis of the terms set out in the proposal. Third, the parties began to act in accordance with the terms of the proposal, which is most clearly evidenced by the presence of the vending machines in the Board's schools. The appellant made his request after these events had occurred. In my view, at the time of the request, the nature of

the proposal, read as whole, had changed from constituting a mere proposal to a document reflecting the terms of an oral agreement. In other words, the oral agreement incorporated by reference the essential terms of the proposal. Therefore, in my view, many of the withheld portions of the proposal are properly considered to be the terms of a contract, which do not meet the "supplied" test in section 10(1). As indicated above, the fact that contractual terms are proposed by a third party and agreed to with little discussion does not lead to the conclusion that they must have been supplied.

The withheld portions of the record that fall into this category include information relating to

- the number of vending machines to student ratio
- the number of bottles to cans ratio
- the programs proposed to generate revenue, including fixed payment amounts
- the methods proposed to calculate revenue
- the unit pricing figures for beverages and snack foods

The affected party places some weight on the fact that the proposal and the contract are not identical. First, as I stated above, the essential terms of the proposal are either similar to or identical to those in the contract. Second, even if there are some discrepancies, or the contract contains additional information, the fact that a formal written contract was negotiated and entered into after the request does not alter the nature of the original contract which was in effect until the formal contract was executed.

The Board relies on Order MO-1450 in which Adjudicator Sherry Liang found that an offer to lease and a proposed letter agreement met the "supplied" test under section 10(1). That order is clearly distinguishable, since there was no evidence to indicate that these documents reflected an actual agreement:

> Although the matter is not without doubt, I find that without clear evidence otherwise, the terms of an offer, as distinct from the terms of an agreement, can reasonably be regarded as having been "supplied" by the party making the offer. In this case, the evidence is not sufficiently clear that the proposals from the theatre company to the City were the product of negotiation.

Mellco, the Manitoba Court of Appeal case relied on by the Board, also is distinguishable, since the issue in that case was whether or not a binding contractual relationship was created when, in response to an RFP, the successful bidder submitted its proposal. Here, regardless of whether the submission of the proposal created a contract (and I make no finding in this regard), a contract clearly was created when the parties entered into an oral agreement based on the terms of the proposal and subsequently acted in accordance with it. If the Board's acceptance of the proposal and subsequent oral agreement were merely an agreement to "enter into negotiations", one might

ask, why were the machines delivered to the schools? The evidence strongly contradicts the position of the Board and the affected party.

To conclude, I find that, based on the evidence before me, the withheld information in the proposal that comprises the essential terms of the contract between the Board and affected party cannot be considered to meet the "supplied" test in section 10(1) and, therefore, part 2 of the 3 part test has not been met.

On the other hand, the proposal also contains information that cannot be construed as reflecting contractual terms, and I find that this information was "supplied". This category of information includes:

- aggregate revenue projections for the proposed programs
- revenue projections for particular programs, with the exception of fixed payment amounts referred to above
- suppliers
- customers/references
- market share analysis

In the circumstances, given my findings below, I have decided it is not necessary to consider the "in confidence" element of part 2 of the three-part test under section 10(1). I will next consider whether any of the information at issue meets the part 3 "harms" test.

Part three: harms

Introduction

To discharge the burden of proof under part three of the test, the parties opposing disclosure must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the parties must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Representations

The affected party submits:

> The disclosure of the information would be substantially prejudicial to [the affected party's] competitive position in the marketplace if the information came into the hands of [a named competitor] or its bottler, […], or any other

> competitor. The [named competitor's] companies are dominant in the Ontario market and such confidential information in their hands would significantly benefit their business and injure the business of [the affected party] and [a related third party].
>
> If such information were disclosed, [the affected party] would be forced to reconsider its future negotiating approach with public institutions, including minimising or eliminating such information from being supplied to such institutions. In the event of disclosure, [the affected party] would lose valuable business to its competitors and [the affected party] would suffer undue losses as its competitors would know [the affected party's] negotiating and pricing strategies and its rebate and sponsorship structure.
>
> Additionally, [the Board] and other institutions may suffer economically if [the affected party] cannot offer such beneficial economic terms. Other school board customers may object to the favourable terms granted by [the affected party] to [the Board] (if such terms are disclosed) and this could lead to a new round of discussions/negotiations around economic terms for other customers. This could result in less favourable terms being granted to [the Board] and other institutions if [the affected party] cannot afford the terms due to pressure from other customers.

The Board offers extensive representations on this issue. The main thrust of its representations is that disclosure of the information in question would harm the affected party's "negotiation strategy and bottom line". The Board states that this harm is "self-evident". It submits that interested bidders needed to be both "competitive" in their pricing and services and "innovative" in meeting its needs of the Board for a comprehensive, full service cold drink and snack vending program for its schools. The Board goes on to say that a proposal that properly addresses the Board's needs would reveal information that is highly confidential and of great financial value to the party submitting it. It broadly refers to the information at issue as information about the "pricing services" and "innovative solutions" that the affected party proposed in order to meet the Board's needs. The Board places this information into four categories:

- Category 1 – This comprises information regarding anticipated revenue calculations, including financial calculations of commercial incentives and commission revenue. Information regarding the nature of the programs and/or methods used by the affected party to generate revenue is implicit where the information is categorized in detail. The information severed from pages 2, 13, 36, 37, 38, 39, 40, 41, 42, 43, 45, 46, 49, 60, 73, 86, 88, 89, and 90 falls into this category.

- Category 2 – This comprises information regarding the commercial sales targets anticipated in the proposal. The information severed from pages 30, 31, and 36 contain information related to this category.

- Category 3 – This comprises information, without financial calculations, regarding the programs and/or methods used by the affected party to generate

revenue for customers. The information severed from pages 54, 71, and 75 falls into this category.

- Category 4 – This comprises information related to the affected party's suppliers, customers and market. The information severed from pages 20, 76 and 82 relates to this category.

The Board then goes on to make detailed submissions regarding the application of sections 10(1)(a), (b) and (c) of the *Act* to this information.

Under section 10(1)(a), the Board submits that the release of the severed information would significantly prejudice the affected party's competitive position, both with respect to the current negotiations for a vending services contract between the Board and the affected party, and with respect to any future negotiations between the Board and the affected party. In addition, the Board submits that disclosure of this information would allow competitors to know the affected party's negotiating and pricing strategies as well as rebate, sponsorship and special incentive structures. This information could then be used by competitors to gain a competitive advantage in the marketplace. Conversely, the affected party would not have similar knowledge about its competitors, thus giving its competitors an unfair advantage in future bidding for future contracts.

With respect to category 1 information, the Board states:

> … [P]roviding the affected party's competitors with information regarding the anticipated revenue offered by the affected party to the Board […] [would enable] [c]ompetitors […] to anticipate [the affected party's] revenue calculations for other school boards and institutions, and outbid the affected party in any tender or [RFP]. [The affected party] would not have this same information about how revenue will be calculated or how much revenue might be anticipated by its competitors, thereby, placing [the affected party] at a competitive disadvantage. Further, should [the affected party] and the Board be unable to negotiate an agreement in the present circumstances [the affected party's] competitors would have information about, not only what the Board was willing to expect in terms of revenue, but also the most that [the affected party] was able to provide.

The Board also raises Orders M-511 and M-1471 to support the non-disclosure of bid information in the context of this appeal. The adjudicators in these cases found that the disclosure of unit prices would prejudice significantly the competitive position of the affected parties involved pursuant to sections 10(1)(a) and (c).

Regarding category 2 information, the Board states:

> [Disclosure of this information would provide [c]ompetitors with information regarding the commercial sales targets anticipated by [the affected party]. [The affected party's] competitors would then have information regarding how much [the affected party] anticipates selling in school board markets, which would

> permit [the affected party's] competitors to design any future proposals to address the sales targets anticipated by [the affected party]. Similar information regarding the amount of sales that are anticipated by [the affected party's] competitors would not be available to [the affected party].

Pertaining to category 3 information, the Board states:

> [Release of this information would provide] [the affected party's] competitors with information regarding the way [the affected party] generates revenue for its customers. Each of [the affected party's] competitors utilizes different programs and methods based on their own research and past practice to maximize revenue for their customers. [The affected party's] competitors would have information about [its] programs and methods and would be able to copy its programs and methods or design any future proposals to address [the affected party's] programs and methods. However, without similar information about its competitors, [the affected party] would not be able to act accordingly.

With respect to category 4 information the Board states:

> [Its release] would provid[e] [the affected party's] competitors with information regarding [the affected party's] suppliers, its current customers and its perceived market share. It forms the basis of the way [the affected party] manages its operation in Ontario. This information could be used by [the affected party's] competitors to out bid [the affected party] in a Request for Proposal. Again, similar information about [the affected party's] competitors would not be available to [the affected party], and [the affected party] would be unable to act accordingly.

Under section 10(1)(b), the Board submits that if the information at issue is disclosed to the appellant the affected party has indicated that it would have to reconsider its future negotiating approach with public institutions, including minimizing or eliminating this type of information from being supplied to institutions. The Board states that if pricing information and other information relating to revenue generation is not disclosed to the Board, the Board would be unable to evaluate the merit of a proposal. In addition, competitors also concerned about their proprietary information being released, may choose to refrain from providing such information to public institutions. The Board feels strongly that this type of information is essential to the integrity of the tender and RFP system. Without it public bodies would be severely disadvantaged from achieving the best possible deals leading to higher costs, which would be borne by the taxpayer.

The Board also presents submissions under section 10(1)(c). These submissions are similar in substance to those made under section 10(1)(a).

The appellant counters with extensive representations regarding the application of section 10(1).

The appellant has drawn upon a broad range of evidence in his attempt to demonstrate that the Board and affected party have failed to provide "detailed and convincing evidence" of harm under sections 10(1)(a), (b) or (c), should the information at issue be disclosed to the appellant.

With respect to section 10(1)(a), the appellant states:

> Disclosure of the Proposal will not affect the commissions that [the affected party] and its competitors are able to offer other school boards and similar institutions. School boards have an obligation to the public to negotiate the best deal. The primary factor that determines the winning bidder must be the value of the compensation package offered. The commission that each bidder can offer is determined by that bidder's costs, and the additional promotional benefit that each bidder expects to derive from the contract. The release of the Proposal does not affect the bidder's costs, nor does it affect the promotional benefit.

In critiquing the Board's representations regarding the application of section 10(1)(a), the appellant focuses on two aspects of the Board's representations:

1. the Board's assertion that the harm to the affected party, which would result from disclosure of the information in question, is "self-evident" as it represents the affected party's negotiation strategy and bottom line

2. the Board's assertion that the affected party's proposal contains "unique pricing information" and "innovative solutions"

With respect to the Board's "self-evident" argument, he refers to two orders of this office (Order MO-1368 and PO-1745) and an order of the Office of the Information and Privacy Commissioner for British Columbia (Order 01-20). He also attempts to distinguish the circumstances in Order M-511 from those in this case.

Order MO-1368 concerns a request for access to information relating to tenders for school bus services in Manitoulin Island including all bottom line bids by name for each route and the price awarded for each route. Assistant Commissioner Tom Mitchinson found that the school board and one bidder had not provided detailed and convincing evidence of harm to the third parties involved and ordered disclosure of the information at issue. In his interpretation of this order, the appellant states:

> Clearly, in this situation the [Assistant Commissioner] did not consider it "self-evident" that disclosure of the bottom line bids and contract prices would cause harm. He required, but had not been given, "detailed and convincing" evidence applicable to the specific circumstances of the record at issue.

It is the appellant's view that the Board does not describe the connection between disclosure of the information at issue and the alleged harm. He submits that the Board has failed to establish

the harm considering that the information in the proposal is more than three years old and marketing conditions and strategies have changed over that time.

The appellant refers to Order 01-20 as an example of a case involving similar facts to this appeal in another province. In that case, David Loukidelis, Information and Privacy Commissioner for British Columbia, ordered the release of a contract regarding an exclusive sponsorship agreement between the University of British Columbia (UBC), its student society and a named third party for the supply of cold beverage products to UBC. In analyzing this decision, the appellant states that Commissioner Loukidelis used criteria similar to those that apply in this case and found that the institution and third party had not provided "convincing" evidence of harm to the third party in the event that the contract was released to the applicant.

With respect to the Board's assertion that its proposal contains "unique pricing information" and "innovative solutions" the appellant states:

> [T]he specific "needs" of the Board which required "innovative solutions" are not mentioned in the RFP. The Board does [not] offer any examples of such "needs", or the "innovative solutions" to them, in the severed version [of] its Representation. In the absence of any evidence, or even any specific examples, the vague claim of "innovative solutions" has no basis, and the term "pricing services" is bafflegab.
>
> The Board is arguing that the "innovative solutions" proposed by [the affected party] are qualitatively different from terms offered by other potential suppliers. They implicitly claim these "innovative solutions" do not amount to something as simple as a higher commission rate. Instead, they are unique, qualitatively different from terms offered by other suppliers, and so valuable to the Board and others who contract with [the affected party] that they are the factor which results in [the affected party] winning against its competitors.
>
> The reality is, many pouring rights contracts have been obtained by interested organizations who have analyzed them and published the results.

The appellant then goes on to examine the U.S. experience with these types of arrangements, frequently referred to as pouring rights agreements. He provides details from at least two U.S. based organizations that have obtained and analyzed these kinds of agreements and have identified the financial incentives and promotional techniques used in them. In particular, he refers to the "Salem-Keizer Contract", a ten year agreement between a named third party and the Salem-Keizer School District 24-J in the state of Oregon. With respect to it, the appellant states:

> [This contract] contains a copy of a Proposal which discusses many of the types of financial incentives which apparently are part of the record at issue here. The proposal recommends a vendor/student ratio on page 5; it offers a signing bonus amount on page 6; specific annual payments on page 7 and 8; funding for sports scoreboards on page 22; states prices and commission rates on vending machine

> sales on pages 24 and 25; projected sales and commissions on page 26; offers free product on page 27; a scholarship fund on page 28; and various other promotions on pages 29 to 34. On pages 36 and 37 of the Salem-Keizer proposal there is a complete summary of the anticipated revenue and benefits of each type of incentive.

The appellant states that in many U.S. states pouring rights agreements between private sector organizations and public institutions are freely available by law.

With respect to the application of section 10(1)(b), the appellant states:

> [The affected party] was declared the winner of the contract with the Board more than two years ago, and the resulting contract has been in operation ever since. Disclosure of the Proposal cannot affect the outcome of that competition. Even if the Board and [affected party] agree to renegotiate, disclosure of the Proposal cannot affect renegotiation since the Board has already seen the Proposal.
>
> Similarly, disclosure of the Proposal cannot reasonably be expected to affect negotiations between [the affected party] and other parties. School boards who would be willing to sell access to their students have an obligation to the taxpayers to negotiate the best possible deal. This may be done by a formal bidding process, or it may be done by approaching the two major soft drink suppliers […] and requesting proposals.
>
> The bidders, for their part, must determine the amount that they are willing to pay for the market access that the school board is offering. Each must arrive at an estimate of the value to that bidder of that market access. If the value of the market access were based purely on the anticipated direct profits from sales in that market, then the value to one competitor would not differ much from the value to another competitor. But in the case of the two major soft drink suppliers […] profits from sales are not the only consideration. These bidders derive additional value from the market access. Specifically, it gives them an opportunity to promote their products to a young and impressionable audience, to obtain the implicit approval of the school for their product, and so to develop brand loyalty which will generate increased sales outside the school and possibly, long after the students graduate.
>
> The promotional benefit of market access may differ for two different bidders. For example, if [the affected party's] market share were below average in the school district, it might be willing to pay substantially more to promote its products tha[n] would otherwise be the case. If [a named competitor] were already saturating the school district with advertising, access to the school markets might be worth considerably less to it. The specifics of a proposal made years earlier in another school district would be of little value to a bidder. Furthermore, the major suppliers bid against each other in many districts. Each

> knows the specifics of each of its own bids, and whether that bid succeeded or failed. That allows each bidder to infer the typical "bottom line" that is being offered by the other.

The appellant also makes submissions pertaining to section 10(1)(c). Many of his submissions repeat points made in his discussion of section 10(1)(a). However, the appellant also submits that the Board has not provided evidence that disclosure of the severed information will result in undue loss or gain. The appellant states:

> *The alleged loss cannot be quantified; there is no evidence that the contract is profitable.*
>
> The Board's arguments are all based on an assumption which is not stated and for which no evidence is offered: that the contracts between [the affected party] and school boards are profitable for [the affected party]. If there is no profit, then failure to win a competition for a contract does not result in a financial loss.
>
> In most business situations, it can be assumed that a contract has been priced so that it will most likely generate a profit. But "pouring rights contracts" are a special case. As discussed above, [the affected party] may well see the contract as a means of promotion, and may be willing to enter the contract anticipating that it will just break even. The fact that [the affected party] and [a named competitor] win the vast majority of these contracts, to the exclusion of competitors who cannot treat them as promotions, gives credibility to this scenario. The burden of proof is on the Board and on [the affected party] to show that this contract, and similar actual or potential contracts which figure in its "undue loss" arguments, will actually produce profits. Apparently, no such evidence is offered, and therefore all such arguments must fail.
>
> *Even if losses or gains occur they cannot be said to be "undue".*
>
> Even if, as claimed by the Board, disclosure to other educational institutions requires [the affected party] to justify differences, and in some cases match the Board's proposal or risk losing future business, can such losses be said to be "undue"? Surely it is a feature of a free market system that participants find out the "going price" for various deals and negotiate accordingly. Competitive bidding procedures offer one way in which boards can get information about the "going price". [The affected party] cannot reasonably expect school boards to negotiate from a position of complete ignorance.
>
> *The potential for loss, even if it was once real, was time limited.*
>
> Any information contained in the contracts would be of little significance to a competitor because it is outdated. The Proposal is now [two and one-half] years

old; even on the date of the original request for access, it was more than one year old.

. . . . .

A more general insight into the soft drink business is provided by Roger Enrico in his 1986 book, *The Other Guy Blinked - How Coke Won the Cola Wars*. Mr. Enrico is an authority in this field. At the time of writing he was President and CEO of Pepsi-Cola USA. He is now President of PepsiCo.

> In July of 1985, before all these figures and sales trends were mine to quote, I was often asked to take the long view and assess the historical impact of New Coke on our business.
>
> Fast-paced marketing businesses like soft drinks don't encourage you to look several years down the line. A year is about the most anyone can reasonably discuss - and in an industry where one decision or one commercial can change an entire nation's attitude toward a soft drink, you can't be too confident even about a year. Still, I decided to answer the question.
>
> In a year, I said, whether the Coca-Cola Company kills New Coke or spends tens of millions trying to prop it up, we'll find ourselves in pretty much the same place we are now.
>
> Coke, which has been losing ground in the regular cola business since 1980, will continue to confront the reality of a shrinking market share.
>
> Pepsi, which has been growing steadily, will gain another share point or so in the regular cola segment. And that's pretty much the way it's worked out.
>
> [Roger Enrico and Jesse Kornbluth, 1986, *The Other Guy Blinked - How Coke Won the Cola Wars*, Bantam Books, Toronto, p. 236. Emphasis added.]

These comments show that the marketing of soft drinks is a volatile business; but they also show that, in spite of the great seriousness with which the major soft drink companies compete, the short term effect on market share is not very great.

The book quoted above is a unique source of information about the methods used by Pepsi in 1986. Is the volatility described in the excerpt still present today? There are indications that it is. For example, one year after the date of the Contract, the [affected party] made an announcement […] which substantially

> changes the way in which pouring rights contracts will be negotiated in the future. Specifically, it supports the adoption of non-exclusive agreements. Previously, both [the affected party] and [a named competitor] have routinely demanded exclusive access to student bodies, and the Proposal and Contract apparently have a strong incentive for exclusivity. Any subsequent contract entered into by the Board will be negotiated in the knowledge that [the affected party] has accepted the concept of non-exclusive agreements.
>
> Based on the above evidence, we submit that information on pricing, commission arrangements, and marketing programs that is contained in the Proposal was of greatly diminished value one year after the date of the proposal, and its value to a competitor toady would be insignificant.

Both the affected party and the Board were given an opportunity to respond to the appellant's representations regarding the "harms" test under section 10(1). The affected party chose not to respond; the Board made the following representations:

> [T]he Board disputes that the proposal in question submitted by [the affected party] is now [a] "pouring rights agreement" nevertheless, the release of "pouring rights agreements" in different jurisdictions is not relevant to a determination of whether [the affected party's] proposal should be released in the present circumstances.
>
> Firstly, if legislation or case law requires that pouring rights agreements be released in a particular jurisdiction parties to such agreements would anticipate such a release and ensure that sensitive proprietary information was not included in the body of the contract. In the present circumstances, the Act creates an expectation that sensitive proprietary information supplied by third parties on a confidential basis to institutions will be protected by the Act. [The affected party] had such an expectation.
>
> Secondly, even if the [the affected party's] proposal has become the "contract" between the parties, which is not conceded by the Board, it was presented to the Board as a proposal in response to a RFP, and not as a "contract". The proposal is not drafted as a contract would be drafted, and certainly, it is not drafted as a contract that is being released in a jurisdiction requiring release would be drafted.
>
> The Appellant further suggests that release of the information contained in the proposal would not cause harm to [the affected party] because the information is old and factors in the market place change so rapidly that the information is now outdated. While the Board disputes that the information is now outdated, more important is the fact that even if [the affected party] no longer conducts business as it did when the proposal was presented, which the Board cannot deny or confirm as this is [the affected party's] confidential proprietary commercial information, the information would provide a historical reference point for [the

> affected party's] competitors from which assumptions could be made regarding [the affected party's] present and future conduct. One such basic assumption is that [the affected party] will not do in the future what was not successful in the past, thus if [the affected party's] market share has dropped, it can be assumed that its past practices will not be repeated.

Analysis

The parties to this appeal have clearly given considerable thought to this issue; this is reflected in the quality of representations that I have received.

However, I am not convinced that the affected party or the Board have provided sufficient evidence that disclosure of the severed portions of the records in categories 1, 2, 3 and 4 could reasonably be expected to result in the harms outlined in section 10(1) of the *Act*.

Following the reasoning in Order MO-1368, the harms the Board suggests under section 10(1)(a) are not "self-evident".

The affected party has suggested that release of this information would be substantially prejudicial to its competitive position in the marketplace. The affected party also suggests that it would lose business to its competitors and suffer undue losses as its competitors would know its negotiating and pricing strategies and its rebate and sponsorship structure. The affected party indicates that upon release of this information it would be forced to reconsider its negotiating approach with public institutions, including minimizing or eliminating the supply of this information to institutions.

I am not convinced that there is any inherent value in this information. As of the date of this order, the information in the proposal is more than three years old and there is evidence to suggest that it would be of little value to competitors as the landscape changes with respect to the creation of cold beverage vending arrangements between public institutions and prospective vendors.

In short, I find both the affected party's and the Board's evidence speculative. The affected party and the Board have not provided detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of harm. I address my findings with respect to the information at issue in greater detail below.

In addition, I have carefully reviewed Order 01-20 and I find strong parallels between the circumstances of that case and this appeal, especially given my finding above that certain portions of the proposal constitute the terms of a contract.

The appellant in this case has focused on Commissioner Loukidelis' finding that the institution and the affected party had not provided "convincing" evidence of harm to the affected party in the event that the severed portions of the contract were released to the applicant. Commissioner

Loukidelis used the words "sweeping assertions" to describe the evidence of harms tendered by UBC and the affected party. In establishing an evidentiary benchmark, he states:

> Evidence relating to the whole of the agreement, as a product, is irrelevant, as most of the agreement has been disclosed. The evidence needs to address the specific items of information which have been withheld. Evidence that vaguely connects speculative harm to unspecified parts of the agreement is not meaningful.

In this appeal, the Board has made an attempt to address concerns pertaining to portions of the information through the introduction of four categories of information. However, the evidence of harm provided in its representations is not persuasive. It does not address the specific items of information that have been withheld. I note also that the affected party, being in the best position to describe in detail the potential for competitive harm or undue loss under sections 10(1)(a) and (c), has provided only generalized assertions, without specific, detailed reference to the information at issue and explanations as to how these harms could reasonably be expected to occur from disclosure.

I will now address each category.

Category 1

This comprises the largest category of information at issue in this appeal. The Board indicates that it includes information pertaining to anticipated revenues, including incentives and commissions, and that implicit in this information are the programs and/or methods used to generate the revenue.

In my view, it is not enough for the Board to say, in arguing for non-disclosure of the category 1 information, that providing the affected party's competitors with it would enable competitors to anticipate the affected party's revenues on other RFPs. Aside from stating that the affected party would not have the same information about its competitors, the Board fails to provide a reasonable explanation as to how competitors would be able to anticipate the affected party's revenues through disclosure of the information at issue.

As well, the affected party, the party that theoretically would appear to have the most to lose from disclosure of this information, has provided even less in terms of specifics regarding anticipated harms. This does not assist the position of the Board and affected party.

I am also persuaded by the evidence of U.S. practice in this area, where university institutions and cold beverage companies enter into exclusive sponsorship contracts on a non-confidential basis. The appellant has tendered evidence confirming this practice and I note that the applicant in Order 01-20 also did so.

I acknowledge that in many U.S. states this practice is required by law. The Board would like me to accept that this distinction diminishes the strength of this evidence. However, in my view,

this distinction is a red herring. The appellant has tendered evidence of American studies that have found that the non-confidentiality of these agreements has not caused cold beverage companies to stop entering into exclusive sponsorship agreements. The applicant in Order 01-20 also made this point and Commissioner Loukidelis accepted it. I see no reason to view the evidence differently here.

It would appear that the publication of the details of "pouring rights agreements" between university institutions and cold beverage companies has been commonplace in the U.S. for some time. During the course of considering this appeal I located an article that appeared in the April 30, 1998 edition of the *Daily Illini*, a newspaper publication associated with the University of Illinois. The article provides the financial details of a new "Campus Sponsorship Agreement" between the University and a named cold beverage company. The article also alludes to the fact that this new agreement only slightly alters the previous arrangement with a competitor, clearly suggesting that the details of that agreement had also been in the public domain (see http://www.dailyillini.com/archives/1998/April/30/p01_coke.txt.html).

I also find Commissioner Loukidelis's analysis with respect to "pricing" in Order 01-20 instructive in this case. The Board has argued that disclosure of "pricing strategies" as well as "rebate, sponsorship and special incentive structures" could be used by competitors to gain a competitive advantage in the marketplace.

In Order 01-20 the UBC and the affected party argued that disclosure of information variously described as "pricing structure", "specific pricing information" and the "price paid for exclusive supply, advertising and promotional rights…" would result in harm to the contractual relationship between UBC and the affected party. In this appeal, the Board has similarly argued that disclosure of the information at issue would significantly prejudice the affected party's competitive position with respect to current negotiations of a contract and future negotiations.

In Order 01-20, Commissioner Loukidelis found these arguments to be "essentially based on speculation" and "insufficient" to discharge the onus of proving a reasonable expectation of any harms. He also found the possibility of "competing agreements" being formulated by other cold beverage companies would offer the potential for an enhanced deal for UBC.

With respect to this appeal, current negotiations are not an issue; the parties have a written agreement in place. With regard to future negotiations, I also find the Board's position highly speculative and I, too, see the possibility of competition as offering an enhanced deal to the Board without compromising the affected party's goal of maximum exposure to and promotion of its products.

In the circumstances, I find that neither the Board nor the affected party have provided convincing evidence that disclosure of the Category 1 information could reasonably be expected to result in the harms set out in section 10(1)(a).

Category 2

The information in this category comprises the commercial sales targets anticipated in the proposal. The Board also makes a "competitive disadvantage" argument to support its position. The Board states that its disclosure would provide competitors with information regarding how much the affected party anticipates selling in school board markets, enabling competitors to design future proposals tailored to defeat the affected party's numbers.

I note that much of the information contained in these documents has already been released to the appellant with the exception of desired vendor to student and bottle to can ratios in various schools. I find the evidence presented, with regards to the U.S. practice of commonly making this information public, compelling. While publication may be required by law there is no evidence to suggest that the absence of confidentiality has prevented educational institutions and cold beverage companies from entering into exclusive sponsorship agreements. It is also noteworthy that Commissioner Loukidelis in Order 01-20 was persuaded by this evidence and found that it had not been established that disclosing the disputed information could reasonably be expected to harm the financial or economic interests of UBC or the affected party.

In the circumstances of this appeal, I find that neither the Board nor the affected party have provided convincing evidence that disclosure of this category of information could reasonably be expected to result in the harms set out in section 10(1)(a).

Category 3

This category of information comprises the methods and/or programs used by the affected party to generate revenue for customers. The Board has also labelled this category as "innovative solutions". Three portions of information are at issue under this category. As with Categories 1 and 2, the Board makes a "competitive disadvantage" argument to deny disclosure to it. The Board states that disclosure would provide the affected party's competitors with information regarding the way it generates revenue for its customers, including different programs and methods based upon its own research and past practice. Conversely, the affected party would not have access to its competitors' methods and programs, thus creating a competitive disadvantage.

Based on my review of the parties' representations and the actual documents at issue, I see no evidence of "methods", "programs" and/or "innovative solutions" that are unique to the affected party or qualitatively different from those that might be offered by the competition. Without such evidence I am not in a position to conclude that revealing this information could reasonably be expected to prejudice significantly the affected party's competitive position within the meaning of section 10(1)(a).

Category 4

According to the Board, this category of information comprises the affected party's suppliers, customers and market. Information on three pages falls into this category and most of the information has been disclosed to the appellant. As with the previous three categories of

information, the Board argues that disclosure would result in a competitive disadvantage to the affected party.

In my view, the Board's evidence is again unpersuasive.

The first page concerns information pertaining to the affected party's "market" in a document titled "Market Share Analysis". Much of the information contained in this document has already been disclosed to the appellant; for example, the Board disclosed portions of a cold beverage product-ranking list drawn from a market study. The top ten beverages are listed; however, the names of the first, fourth, seventh, eighth and tenth ranking beverages are severed. Directly above this list is a statement identifying one of the affected party's products as the top selling beverage; directly below this statement, in the product-ranking list, the name of an affected party's beverage is severed. Clearly, this is incongruent. In addition, in my view, the other four products on the product-ranking list that have been severed would appear to be fairly obvious to anyone with even moderate knowledge of the cold beverage industry. On the right side of the page there is a statement to the effect that consumers choose one of the affected party's beverages and a competitor's beverage equally. Yet below this statement, the affected party's percentage market share is severed and the competitor's is revealed. In light of what has been disclosed, this severed portion seems rather obvious to the reader.

The second page is a listing of seven references. The referees are listed by name and affiliation and their business telephone numbers are provided. In some cases an implementation date is also provided, ostensibly in regard to the provision of vending services. Neither the Board nor the affected party have provided evidence as to why disclosure of this information could reasonably be expected to prejudice significantly the affected party's competitive position within the meaning of section 10(1)(a).

The third page is a list of suppliers, including "supplier name", "business type", "contact person" and "telephone number". As with the first and second pages the Board suggests that this information could be used by competitors to outbid the affected party in an RFP process. However, the Board fails to identify how disclosing this information could cause this to happen. In my view, the business types could be easily obtained by simply visiting one of the affected party's vending machines located in one of the Board's schools. The balance of the severed information could be obtained once the business types have been established.

In conclusion, I find that the harm component under section 10(1)(a) has not been established for any of the information at issue in categories 1, 2, 3 and 4.

Turning briefly to an examination of the section 10(1)(b) harm provision, both the Board and affected party submit that if the severed information is disclosed to the appellant the affected party would have to reconsider its future negotiating strategy, including not supplying certain information to the Board. Looking at U.S. practice, there is no evidence to suggest that the non-confidentiality of this information has caused beverage companies to withhold it from institutions when competing for contracts. Again, this argument is highly speculative and I find that the harm component under section 10(1)(b) has not been established. As well, there is

reason to believe that two years after the Board and the affected party reached an agreement the information contained in the proposal is now stale dated. The Board also provides that this information could be valuable to establish an historical benchmark for future negotiations. Without additional evidence of its demonstrated value, I view this strictly as speculation.

With respect to the section 10(1)(c) harm provision, I find that my analysis under section 10(1)(a) applies, given that the arguments of the Board and the affected party under paragraph (a) are very similar, if not identical, to those underpinning paragraph (c). I find that the harm aspect of the section 10(1)(c) test has not been established for the information at issue.

To summarize, I find that the information at issue does not qualify for exemption under section 10(1) of the *Act*, on the basis that some of the information in question was not "supplied" within the meaning of section 10(1), and that, in any event, the Board and the affected party have failed to provide convincing evidence that disclosure of this information could reasonably be expected to cause one of more of the harms under paragraphs (a), (b) or (c) of section 10(1).

ECONOMIC AND OTHER INTERESTS

Introduction

As stated above, the Board claims the application of sections 11(c) and (d) to the information at issue.

Sections 11(c) and (d) of the *Act* read:

> 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;

For this exemption to apply, the Board must demonstrate that disclosure of the information "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

Section 11(c)

Representations

With respect to section 11(c), the Board submits:

> The Board is funded by the provincial government using a predetermined funding formula.
>
> In addition to the funding received by the provincial government, the Board, as a corporate entity, may engage in revenue generating endeavours. Schools boards across Ontario have in recent years, in an attempt to generate much needed revenue, entered into exclusive arrangements with suppliers. In such cases, vendors provide their brand of product to the schools of the Board exclusively, and for such exclusivity provide the Board with a revenue stream as determined by the parties. These "branding agreements" have assisted school boards to address funding shortages, as well as to provide services to students, which might not otherwise be provided for under the "funding formula".
>
> Branding agreements are negotiated through the Request for Proposal process to ensure that the Board is receiving the best possible deal. Release of the information at issue in this appeal could reasonably be expected to prejudice the economic interests, or the competitive position of the Board by providing the Board's bottom line to potential bidders, and thereby, eliminating the incentive for them to provide the best deal possible. […]
>
> . . . . .
>
> Branding agreements have become important sources of revenue for school boards, and the Board and others must be able to enter into the "best possible deals". This is not possible if valuable confidential commercial information and financial information is disclosed. A [r]elease of the information at issue would constitute a release of the Board's "bottom line". Other parties interested in branding agreements will be less likely to offer greater benefits to the Board than those accepted by the Board already.
>
> . . . . .
>
> The Board argues that the potential harm accepted by the adjudicator in M-712 is similar to that at issue in this appeal:
>
> > It is the Board's position that, if the terms of the agreement as noted in Record 2 are disclosed, any future negotiations in similar cases could be jeopardized. That is **developers will be aware of the conditions which the Board has accepted in the past and will not be prepared to offer any additional concessions.** The Board has submitted that, in a similar case, a Board trustee leaked information regarding its negotiating position to the developer and the Board's financial benefit was greatly compromised.

> Based on the submissions provided by the Board, and its references to another situation in which disclosure of such information negatively affected its bargaining power, I am satisfied that disclosure of the balance of Record 2 could reasonably be expected to prejudice its economic interests. Therefore, it qualifies for exemption under section 11(c) of the Act. (M-712) [emphasis added]

It is submitted that the Board considers the information at issue to be confidential and guards against its disclosure in order to avoid such consequence as indicated above. It is because the Board recognizes the potential for harm to its interests that the Board guards such information zealously and has not, as yet, suffered harm from the inappropriate disclosure of confidential information.

Further, the same prejudice identified in Order PO-1973, is applicable in the instant case:

> "The Ministry is correct in pointing out that Orders P-1026, P-1022 and M-712 found that the economic interests and competitive position of the institution would be prejudiced if the institution could not negotiate the "best possible deal for the province". Further, these orders found that disclosure of the information at issue would inhibit the institution's ability to negotiate the "best possible deal" and applied section 18(1)(c) (prejudice to the economic interest or the competitive position of an institution) of the Act to this information." (PO-1973)

The appellant submits in response:

> The primary factor which determines the amount that a buyer will offer, is the value to the buyer of access. As discussed above, that value has two components: the direct profit potential of sales to the students, and the promotional benefit derived by advertising and promoting products to the students, leading them to make purchases outside the school or in the future. Neither component will be affected by the release of the record.
>
> . . . . .
>
> We note that the Proposal was, and presumably and future contracts will be, the result of a competitive bidding process initiated by the Board. The bidding process which resulted in the selection of [the affected party] attracted eight proposals, of which three were considered good enough to be short-listed. […] Bidders in such a process have a strong incentive to offer the "best deal possible". If they do not, they will most likely lose out to another bidder. The Board is claiming that somehow, by knowing the details of the winning bid in the last competition, no bidder will offer a better deal. There is no rational basis for this

> claim. If anything, the opposite is true: a bidder would expect to have to better the existing deal to have a chance of winning. But most likely, the Proposal will have little effect on subsequent bids because changes in circumstances over the more than two years since the last competition make the "bottom line" irrelevant today.
>
> . . . . .
>
> The market within which the Board is competing can be given definitions ranging from narrow to broad. Using a narrow definition, the Board has a monopoly. No one else can provide access to the public school students of York Region as a distinct body. By this narrow definition, there is no competition, and so the competitive position cannot be prejudiced.
>
> Using a broader definition, the Board could be considered to be competing with other school boards who can provide access to demographically similar groups within the same geographical area (e.g. the Greater Toronto Area, or Ontario). Release of the Proposal and Contract will not affect the value of access to the student bodies of other school boards, any more than it will affect the value of access to the Board's student body. Therefore release will not affect the Board's competitive position.

The appellant then goes on to address the Board's representations regarding Order M-712:

> The Board cites M-712 in support of its "bottom line" argument. In M-712, a school board withdrew its objections to a proposed development in exchange for a payment of a sum of money, and other non-monetary conditions. We note that the payment in M-712 is analogous to the "bottom line" in this case. **The adjudicator ordered the release of the amount of the payment.** The adjudicator did not order the release of the records containing details of the non-monetary conditions. He noted the fact that the power of the school board over the developer was minimal, and was the result of legal costs and time-lost costs which were incurred by the developer if the school board withheld its approval for a development. This made negotiations delicate and justified the withholding of the details of non-monetary conditions.
>
> This is quite a different situation from the one in which the Board finds itself. The Board has absolute power to grant or deny access to the student body. There is nothing delicate about its position with respect to sale of access to the student body. Furthermore, there is really nothing in the Board's relationship with [the affected party] which is analogous to the "non-monetary conditions" negotiated with the Developer in M-712. Apparently, [the affected party] offers certain incentives such as scholarships and anti-drug presentations, but these are either essentially monetary in nature (just another form of payment), or a small part of the overall contract.

The appellant then comments on the Board's discussion of Order PO-1973:

> The Board cites PO-1973 to support its claim that the competitive position of the Board will be prejudiced by the release of the Proposal. That case involved the sale by the Ministry of Transportation of Highway 407 to a private owner. The Board does not identify any similarities between the facts of that case and this case. Furthermore, in PO-1973, the adjudicator rejected all the Ministry's claims for exemptions under Section 18 of the provincial act (which corresponds to section 11 of the [*Act*]), and in fact ordered the release of all the records at issue except for some deletions of personal information from three of the records based on Section 21(1). PO-1973 does not support the Board's position.

Analysis

Orders M-712 and PO-1973 are important decisions with respect to the interpretation of the words "prejudice to the economic interests or competitive position of an institution". However, in my view, the appellant is correct in his analysis of those decisions. The circumstances in those cases are distinguishable from the circumstances in this appeal. Therefore, they are not relevant to a consideration of the application of section 11(c) to the facts of this case.

More significantly, I find that the Board has not provided me with detailed and convincing evidence that disclosure of the information at issue could reasonably be expected to prejudice the economic interests or the competitive position of the Board. I see no evidence to suggest that a competitor armed with this information would undercut the affected party's terms in the future. I agree with the appellant that there is no rational basis for this claim and that the opposite is more likely to occur since the Board is out to maximize revenue. Therefore, a bidder would expect to have to better the Board's current deal to have a chance of winning in a future bidding process.

I also agree with the appellant that the terms of the current deal between the Board and the affected party would likely have little effect on a future bidding process due to changes over time in the economic climate and the Board's "bottom line" needs.

Accordingly, I find that the information at issue does not qualify for exemption under section 11(c) of the *Act*.

Section 11(d)

Representations

The Board submits:

> Release of the information at issue in this appeal can reasonably be expected to be injurious to the financial interests of the Board by discouraging other potential parties from entering into branding agreements with the Board. As indicated by [the affected party] in its letter to [a named representative of the Board] dated

> January 18, 2002, should the information at issue in this appeal be released, [the affected party] would reconsider supplying such information in the future:
>
> > "If such information were disclosed, [the affected party] would be forced to reconsider its future negotiating approach with public institutions including minimizing or eliminating such information from being supplied to such institutions." […]
>
> As evidenced by the comment above, vendors will not be willing to participate in a Request for Proposal process or tender process if there is a potential that the confidential commercial information submitted will be released. Without participation from vendors in the Request for Proposal process and tender process, the Board would not be able to enter into branding agreements and would not receive the revenue now being realized.

The appellant responds with the following:

> The release of the Proposal, and its use as a precedent in subsequent [access to information] requests, could conceivably make Ontario de facto a jurisdiction in which educational institutions are required to release pouring rights contracts. [T]his will make it no different from several jurisdictions in the U.S.A., and possibly British Columbia. Soft drink companies have negotiated pouring rights contracts with educational institutions in those jurisdictions. They will continue to do so in Ontario.
>
> The Board claims that vendors will not be willing to submit bids for future pouring rights contracts if there is a potential that confidential information will be released. The Board quotes as "evidence" a letter from [the affected party].
>
> [The affected party's] letter is a vague statement about a hypothetical situation. It is patently self-serving and impossible to either support or refute using objective facts. It is therefore of no probative value whatsoever.
>
> Furthermore, [the affected party's] letter does not actually support the Board's statement. It does not say that [the affected party] would refuse to bid. It states only that [the affected party] would consider minimizing or eliminating commercial information supplied in future negotiations. The idea that soft drink vendors would refuse to bid because their successful proposals might be released is far fetched. [The affected party] and [a named competitor] have been competing strenuously for a decade in various jurisdictions in the U.S.A. where the law requires the publication of their contracts. […]. Objective evidence refutes the Board's claim.

Analysis

In my view, the Board has failed to provide detailed and convincing evidence that release of the information at issue could reasonably be expected to be injurious to the financial interests of the Board.

The Board suggests that disclosure of the information at issue will cause prospective venders to not participate in the RFP process. In making this argument the Board relies on the contents of a letter from a representative of the affected party to the Board. It states that the affected party would be forced to reconsider its future negotiating approach should the information at issue in this appeal be disclosed. The Board concludes that in the event of disclosure it will be prevented from entering into branding agreements and it will lose revenue that it now derives from this kind of arrangement.

The Board presents a conclusion that is laden with speculation. I have no evidence that prospective vendors will not provide this information to the Board in the future or that they will not submit RFPs in the future. In fact, based upon the evidence of U.S. practice, as discussed above under section 10(1), there is compelling evidence that prospective vendors do, in fact, provide this sort of information with the knowledge that it is non-confidential.

In addition, I note that both the Board and appellant raise some of the same arguments that they made under section 10(1)(b) and so I find that my analysis under section 10(1)(b) also applies here.

Accordingly, I find that the information at issue does not qualify for exemption under section 11(d) of the *Act*.

PUBLIC INTEREST OVERRIDE

The appellant has raised the application of the section 16 "public interest override" as a basis for requiring the disclosure of the records at issue in this appeal.

Both the appellant and the Board make submissions on this issue.

However, as I have found the information at issue to not be exempt I am not required to consider the public interest override in the circumstances of this appeal.

ORDER:

1. I order the Board to provide the appellant with a complete copy of the record at issue in this appeal by **December 1, 2003** but not before **November 24, 2003**.

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 appellant pursuant to Provision 1.

Original signed by: October 31, 2003
Bernard Morrow
Adjudicator