ORDER MO-1706

Appeal MA-020152-2

Peel District School Board

BACKGROUND:

The Peel District School Board (the Board) solicited proposals from two cold beverage companies for a "vending and pouring agreement" for the exclusive provision of soft drink and snack vending machines in the Board's schools. The two companies submitted proposals in June 1999. After eight months of negotiation, the Board issued a press release on February 22, 2000, which stated that an agreement had been reached with one of the companies (the affected party). The Board and the affected party signed a contract (the Contract) on March 20, 2000.

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 a Request for Proposal or tender process are often referred to as "pouring rights contracts". They have also been referred to as "exclusive sponsorship contracts", "exclusive vending agreements" and "branding agreements".

NATURE OF THE APPEAL:

This appeal concerns a decision of the Board made pursuant to the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*). The requester (now the appellant) had sought access to the following information:

1. The Request for Proposal and any other tender documents which were provided to the prospective bidders on this contract.

2. A list of the prospective bidders who received copies of the Request for Proposal or any other tender documents.

3. A list of the companies who submitted bids or proposals in response to the Request for Proposal or other tender document.

4. The successful bids and proposals.

5. The contract between [the Board] and the [affected party] referred to above.

The Board issued an interim decision letter stating that no records exist in response to the first three parts of the request. The Board indicated that it had sought representations from the affected party, and would respond to the final two parts of the request on receipt of these representations.

The Board subsequently issued a second, final decision in which it provided partial access to the records that respond to parts four and five of the request. The Board relied on sections 10(1)(a), (b) and (c) (third party information) and sections 11(a), (c), (d) and (g) (economic and other interests) of the *Act* to withhold the remaining information in these two records.

The appellant appealed the Board's second decision regarding parts four and five of his request.

Mediation did not resolve this appeal and the file was transferred to the adjudication stage of the appeal process.

A Notice of Inquiry was first sent to the Board and the affected party. The Board was asked to submit representations on the application of both section 10(1) and sections 11 (a), (c), (d) and (g). The affected party was asked to submit representations only on the third party information exemption.

Both the Board and the affected party submitted representations in response to the Notice.

A Notice of Inquiry was then sent to the appellant along with the non-confidential portions of the Board's representations and a complete copy of the affected party's representations. The appellant was asked to submit representations on all issues with reference to the representations provided by the Board and the affected party.

The appellant submitted representations in response to the Notice. The appellant also raised the application of the "public interest override" (section 16).

Both the Board and affected party were given an opportunity to reply to the appellant's representations and they submitted reply representations.

RECORDS:

The two records remaining at issue are the affected party's successful "partnership proposal" (the Proposal) and the Contract. The Board has already disclosed portions of these records to the appellant.

DISCUSSION:

STANDARD OF REVIEW OF THE BOARD'S DECISION

The Board submits that this office must show deference to the Board's decision to apply the section 10 and 11 exemptions, and that I should reverse the Board's decision only if it is "unreasonable". Specifically, the Board states:

> . . . [P]ursuant to section 10(1)(a) a head "must" decline to release information if in the opinion of the head it is reasonable to expect that release of the information could significantly prejudice the third party in question. The Board submits that in the present circumstances it was reasonable for the Board's head, after receipt of [the affected party's] response to notice of the request for records to expect that a release of the requested records could significantly prejudice [the affected party's] competitive position or result in the Board no longer being supplied with

> such detailed information, or result in an undue loss by [the affected party] or an undue gain by another party. As such the Board's head was required to deny the release of the record. Further, the Board submits that the decision of the head should be given deference by the IPC.
>
> Similarly, the Board submits that the IPC must show deference to a decision not to release information that could prejudice the economic interests of the Board or be injurious to the financial interests of the Board, as the Board is in the best position to evaluate its interests. In the present circumstances the Board submits it was reasonable for the head to expect that the Board's economic interests could be prejudiced or its financial interests could be injured by the release of the [affected party] proposal and the contract between the parties, and that the Board's decision should be given deference by the IPC.
>
> The Board submits that the decision of the head to deny release of the records pursuant to section 10(1) and section 11, was in both instances reasonable, and that the head's decisions should be accorded deference by the IPC.

I do not accept this submission. The language and purpose of the *Act*, and substantial judicial authority, point to the opposite conclusion.

One of the express purposes of the *Act*, as set out at section 1(a), is:

> to provide a right of access to information under the control of institutions in accordance with the principles that,
>
> (i) information should be available to the public,
>
> (ii) necessary exemptions from the right of access should be limited and specific, and
>
> (iii) *decisions on the disclosure of information should be reviewed independently of the institution controlling the information*; [emphasis added]

Commenting on the purpose clause in *Ontario (Workers' Compensation Board) v. Ontario (Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464, the Court of Appeal for Ontario said:

> The Commissioner, an officer of the legislature, is required to administer the *Act* and to provide independent review of government decisions on access to information. He is also required to determine if any of the statutory exemptions apply.

. . . . .

> The legislature intended that fact-finding and the weighing of the content of submissions be dealt with by the Commissioner.

On an appeal from an institution's decision, the Commissioner may conduct a full, *de novo* inquiry into all of the issues of fact and law that were originally before the institution, and the Commissioner may substitute her decision for that of the institution. Section 39(1) provides that a requester "may appeal *any decision* of a head under this Act to the Commissioner…" [emphasis added]. Section 41(1) says that "[t]he Commissioner may conduct an inquiry to review the head's decision." Section 41 also sets out a wide array of inquisitorial powers, including the power to summon and examine witnesses [section 41(8)] and compel the production of documents [section 41(4)]. At the conclusion of an inquiry, the Commissioner "shall make an order disposing of the issues raised by the appeal" [section 43(1)], and the order "may contain any conditions the Commissioner considers appropriate [section 43(3)].

By contrast, the institution is not empowered to hold a hearing or compel witnesses and documents. Further, since the institution is making a decision regarding its own record-holdings, it is not a disinterested adjudicator at first instance. As stated recently by the Federal Court of Appeal in *3430901 Canada Inc. v. Canada (Minister of Industry)*, [2002] 1 F.C. 421 regarding the federal *Access to Information Act*:

> . . . Heads of government institutions are not disinterested in the interpretation and application of the *Access to Information Act* and are likely to have an institutional predisposition towards restricting the public right of access and construing exemptions broadly.
>
> . . . . .
>
> . . . [I]f the Court were to confine its duty under section 41 to review ministerial refusals of access requests by deferring to ministerial interpretations and applications of the [*Access to Information Act*], it would, in effect, be putting the fox in charge of guarding the henhouse.

The Supreme Court of Canada adopted these statements in *Macdonell v. Quebec (Commission d'access a l'information)*, [2002] S.C.J. No. 71 at paragraphs 6-9, and affirmed a "correctness" standard of review for the court reviewing the decisions of institutions in *Canada (Information Commissioner v. Canada (Commissioner of the Royal Canadian Mounted Police)*, [2003] S.C.J. No. 7 at paragraphs 17-19.

In my view, the Legislature could not have intended that this office show deference to an institution's decision. Accordingly, in this case, the appropriate standard of review regarding the Board's interpretation and application of both sections 10 and 11 of the *Act* is "correctness".

THIRD PARTY INFORMATION

The Board 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

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.

The Board makes detailed submissions regarding part one of the test under section 10(1). As part of its submission, the Board includes two appendices. Appendix A identifies the severed information in the Proposal. Appendix B identifies the severed information in the Contract and

cross-references it to information contained in the Proposal. In both appendices the Board has outlined the categories under which it believes the information falls (i.e. commercial information, financial information and/or trade secrets).

As stated above, the Board submits that all of the information at issue in the Proposal and Contract is commercial information and that some of the information is also financial information and/or trade secrets.

With regard to the commercial information category, the Board states:

> The information contained in the Proposal represents the submissions of [the affected party] in response to an invitation by the Board for proposals for exclusive vending services to the schools of the Board. The Contract represents the final agreement entered into by the Board and [the affected party] resulting from the Proposal submitted by [the affected party]. The Proposal and Contract both relate to the selling of services by [the affected party], a large for-profit corporation, to the Board, a large non-profit organization.

With respect to the financial information category, the Board states:

> The information provided includes the pricing for vending packages, financial information regarding the revenue to be generated through the implementation of the methodology, approach and/or processes recommended by [the affected party], the financial supports available to the Board, calculations of anticipated revenue and services which will be provided.

Finally, with respect to the trade secret category, the Board states:

> [Information] which is contained in the Proposal and Contract, represents the methodology, approach and/or process utilized by [the affected party] to generate revenues for its vending customers, and is, therefore, a trade secret.
>
> The methodologies, approaches and/or processes utilized by [the affected party] are not generally known in the trade or business, as each vending supplier implements its own process and/or methodology to maximize customer revenue and satisfaction. [the affected party's] methodology, approach and/or process have economic value from not generally being known because they provide [the affected party] with a competitive advantage in that [the affected party] may offer to its customers innovative revenue-generating option not generally offered by other vending suppliers. [The affected party] does not disclose publicly the methodology, approach and/or process used to generate revenues for its customers, and it is reasonable to request that such information not be disclosed through the release of the severed information.

The affected party offers the following general submissions regarding part one of the test:

> [T]he Severed Information meets the definition of a "trade secret[,] commercial and financial information" in the *Act*, in that:
>
> a) it is used, or may be used, by competitors of [the affected party] for commercial advantage;
>
> b) is, or may be used in a trade or business;
>
> c) is not generally known in that trade or business;
>
> d) it derives independent economic value, actual or potential, from not being generally known to the public or to other persons, including competitors of [the affected party], who can obtain economic value from its disclosure or use;
>
> e) it is the subject of reasonable efforts to prevent it from becoming generally known; and
>
> f) the disclosure of it would result in harm or improper benefit.

On my review of the records, I am satisfied that the severed information constitutes commercial information, since it pertains to the proposed and agreed upon 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.

I acknowledge the Board's position that some of the information in the records contains trade secrets. In this category, the Board includes information relating to "methodologies, approaches and/or processes" utilized by the affected party to generate revenue for the Board. However, in my view, it is the affected party that is in the best position to address this issue and I am not persuaded by the affected party's submissions. In regard to the trade secret category, the affected party has merely restated portions of the test under Order M-29; it has failed to provide evidence to demonstrate how certain information meets this test. However, I do find that information relating to the affected party's methodologies, approaches and/or processes meets the part one test under section 10(1) as commercial information.

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"

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 two 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).

In my view, it is clear that the information contained in the Proposal was supplied by the affected party to the Board in response to the Board's solicitation of proposals from the affected party and a competitor for the delivery of vending services. This information was not the product of any negotiation and remains in the form originally provided by the affected party to the Board. This finding is consistent with previous decisions of this office involving information delivered in a proposal by a third party to an institution (see Orders MO-1368 and MO-1504).

However, I view the Contract differently.

A number of previous orders of this office have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was "supplied" within the meaning of section 10(1). Because the information in a contract is typically the product of a negotiation process between two parties, the contents of contracts involving an institution and an affected party will not normally qualify as having been supplied (see, for example, Orders P-36, P-204, P-251, P-1545 and 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 affected party offers the following representations on the "supplied" issue in regard to the Contract:

> [A]lthough the agreement may have been negotiated for a lengthy period of time, it is my understanding that the financial terms of our arrangements with the Board, are similar if not identical to the actual terms set out in our proposal. Therefore the terms of such financial and commercial information were not negotiated when discussions around the other terms of the agreement were being made.

The Board provides the following submissions on this issue:

> This information was first presented to the Board through [the affected party's] Proposal. And on acceptance of the Proposal by the Board this information was incorporated into the Contract and in some cases explained or set out in further detail, and while it is included in different terms of the Contract, it was not the result of negotiation between the parties. […T]his is evidenced by the terms of the Confidentiality Clause, 8.12 in the Contract, quoted above in whole, which states in part:
>
> > *"Without limiting the foregoing, the parties acknowledge and agree that [the affected party] has advised Peel that the provisions of this Agreement constitute commercial and financial information of [the affected party] which has been supplied to Peel - in confidence."*
>
> The Board submits that as in Order MO-1450, […], the confidential information severed from the Contract was supplied by [the affected party] and incorporated into the clauses of the Contract for the purpose of describing in detail and guaranteeing the approach, methodology and/or process to be used by [the

> affected party] to maximize the Board's revenues. This information was originally outlined in the Proposal and later incorporated into the Contract, in some cases in greater detail and was not the result of negotiations between the Board and [the affected party]. Please refer to Appendix B for an outline of the information severed from the Contract and its genesis in the Proposal.
>
> . . . . .
>
> The information contained in a negotiated agreement, is not necessarily the product of negotiations, but may be information that has been supplied by the third party, as it was in the present case, a circumstance recognized in Order 01-20 BC Information & Privacy Commissioner, par. 89. In the present case the Board has released those clauses that resulted from negotiation, and has denied release of those clauses containing information submitted to the Board.

The appellant submits that the Contract was the product of a negotiation process. He bases this conclusion on the Board's press release of February 22, 2000, which states that a contract had been under negotiation over an eight-month period. In light of this negotiation process he believes that at least some parts of the Contract were not supplied by the affected party to the Board.

As stated above, past decisions of this office have established that the terms of a contract between an institution and affected party will not normally be considered to have been "supplied" within the meaning of section 10(1). This is the case even where the contract substantially reflects terms proposed by a third party.

In this case, there would appear to be consensus between the parties that the terms of the Contract were negotiated over a fairly lengthy period of time. However, both the affected party and the Board take the position that the severed information in the Contract was not the result of a negotiation process since the severed information is identical to the information contained in the Proposal. I disagree. In general, agreed upon terms of a contract are not qualitatively different, whether they are the product of a lengthy exchange of offers and counter-offers, or the result of an immediate acceptance of the terms offered in a proposal. Except in unusual circumstances (for example, where a contractual term incorporates a company's "secret formula" for manufacturing a product, amounting to a trade secret), agreed upon terms of a contract are considered to be the product of a negotiation process and therefore are not considered to have been "supplied".

The Board also raises the existence of a confidentiality clause to demonstrate the mutual commitment of the Board and the affected party to acknowledge that the provisions of the Contract contain information that has been supplied to the Board in confidence. The intent of the parties with respect to the "supplied" element cannot alter the fact that the information was agreed upon and not supplied as that term is interpreted in section 10.

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.

The Board also makes reference to British Columbia Order 01-20 to support its position that information contained in a negotiated agreement is not necessarily the product of negotiations but may be information that has been supplied by a third party. The facts in Order 01-20 are very similar to those in this case. 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 his analysis, Commissioner Loukidelis spoke of an "exception to a general rule" in which negotiated information is not "supplied". He called this exception "inferred disclosure". In explaining the concept he stated at paragraph 86:

> If the disclosure of information in a contract with a public body would permit an accurate inference to be made of underlying confidential information supplied by the contractor to the public body – such as the contractor's non-negotiated costs for materials, labour or administration – that inferred disclosure of information can be protected […].

Of note, in the circumstances of the B.C. case, Commissioner Loukidelis did not find the evidence supported the application of the inferred disclosure exception. In my view, in regard to this appeal, the same is true. Neither the affected party nor the Board have provided convincing evidence that disclosure of the information in the Contract would permit an accurate inference to be made of underlying *non-negotiated* confidential information supplied by the affected party to the Board. In fact, on my review of the Contract the severed information clearly falls into the category of contractual terms and not non-negotiated contractual terms of the sort contemplated by Commissioner Loukidelis.

To conclude, I find that, based on the evidence before me, the withheld information in the Proposal meets the "supplied" test in section 10(1) and, therefore, part two of the three-part test has been met with respect to this information.

On the other hand, I find that the withheld information in the Contract that comprises the essential terms of an agreement between the Board and affected party cannot be considered to

meet the "supplied" test in section 10(1) and, therefore, part two of the three-part test has not been met in regard to this information.

In the circumstances, given my findings below, I have decided it is not necessary to consider the "in confidence" element of part two of the three-part test under section 10(1). I will next consider whether any of the information at issue in both the Proposal and the Contract meets the part three "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 affected party] places great value on [its] trade-marks and the marketing advantages they provide. [The affected party's] success in promoting its products is due in large measure to the efficacy of its marketing strategies and tactics. A unique component of [the affected party's] business success is its operating style and identity. For these reasons, [the affected party] does not want to give its competitors access to financial information to allow them to determine the value that [the affected party] places on such advantages.
>
> Confidentiality is extremely important to [the affected party] because of the harm that disclosure would cause to [the affected party's] financial and economic interests and the benefits that disclosure would confer on [the affected party's] competitors.
>
> [The affected party's] concerns about harm to its competitive position may be grouped under the following categories:
>
> **Harm to [Our] Relationship with Existing Customers**
>
> Harm could reasonably be expected to arise from disclosure to existing clients in a number of ways. First, some existing clients might be upset if they perceive that their deal is inferior in dollar amounts or some other respect. Those clients could

seek to re-open their agreements, creating ill-will in the relationship and prejudicing the possibility of a suitable renewal transaction. Other clients might not voice any discontent to [the affected party], but goodwill in that business relationship might still be at risk (particularly during renewal period). Theoretically, [the affected party] could justify the dollar and other differences between the transactions, pointing to differences in the context and scope of the agreement. In reality, such explanations would not make those difficulties disappear.

Competitors might take the Documents to other [affected party] clients and seek to provoke unhappiness or discontent. It is not far-fetched, given the intense competition in the industry, to foresee that competitors will attempt to create dissatisfaction and attempt to steal [affected party] clients.

Harm to [Our] Dealings with Future Potential Customers

Prospective clients can be expected to demand business terms at least as favourable as those given by [the affected party] to the Board. Disclosure of the Documents can reasonably be expected to prejudice [the affected party's] position in future dealings with other parties. Further, although [the affected party] can seek to justify different terms by pointing to factual distinctions between the Board and the potential client, human nature being what it is, such distinctions will weigh less heavily with the potential client than the actual terms of the deal.

Delivery of Financial Proposal Information to [Our] Competitors

Disclosure of the Documents to [the affected party's] competitors will give their experts a document that, once deciphered, will allow them to determine [the affected party's] financial consideration and determine the key financial factors that underlie [the affected party's] offer. The competitor can then fine-tune the figures to offer competitive bids to other educational institutions. [The affected party] has spent a considerable amount of time to develop key strategic methodologies and different and unique approaches to meet the need of its clients, especially in the public institution arena. These methodologies and approaches are quite unique and perhaps may give [the affected party] a competitive advantage over its competitors. The disclosure of such methodologies and approaches is information which is protected under the Act.

. . . . .

[O]ur company wants to ensure that the disclosure takes a balanced approach so that the interests of local stakeholders are addressed while still meeting our objectives of not causing harm to our business through disclosure to our competitors, or individuals linked to our competitors.

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 "business strategy with respect to exclusive vending agreements with school boards and its bottom line for the provision of exclusive vending services to the Board." The Board states that this harm is "self-evident". The Board submits that the broad latitude to sell the Board on the particular product and services being offered required the affected party and its competitor to not only be competitive in their pricing and services, but also "innovative" in meeting the needs of the Board. The Board submits that these factors contribute to a successful proposal and are considered highly confidential and of great financial value to a potential service provider.

As mentioned above, the information at issue in the Proposal and Contract is contained in Appendices A and B respectively. With regard to both the Proposal and Contract, the Board states that the information at issue addresses the affected party's general business philosophy, methodology, approach and/or process, revenue generating plan, pricing strategy, services and innovative solutions to meet the Board's needs.

The Board follows with 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 in the market place, particularly with respect to its negotiations with other public entities, including school boards. In addition, the Board submits that disclosure of this information would allow competitors to know the affected party's methodology, approach and/or process to servicing school boards, including pricing and the innovative strategies used to address school board needs.

The Board states that the affected party's concerns regarding disclosure were brought to its attention in a letter from the affected party to the Board dated May 10, 2002. An excerpt from that letter reads:

> Our primary concern […] is to protect the business terms and other proprietary, financial and commercial information from falling into the hands of our competitors and which, by law, is rightfully safeguarded thereunder. We support the release of certain information with the exception of those section[s], which would be of the greatest value to our competitor and the greatest harm to our business...
>
> > i) ... It also contains tactical information of [the affected party] with respect to the manner in which the parties execute their respective rights and specifically reflects the expertise involved in the arrangement and distribution of soft drink beverages at the premises; . . . .
> >
> > b) [The affected party] derives independent economic value, actual or potential, from not being generally known to the public or to other persons including

> competitors of [the affected party] who can obtain economic value from its disclosure or use; . . .

The Board references the following passage from Order MO-1450 to establish the purpose of the section 10(1) exemption:

> Although, as stated in other orders, 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 in the possession of government, constitutes confidential information of a third party which could be exploited by a competitor in the marketplace. (Order MO-1450) [emphasis added].

Then, relying on the wording of Order PO-1745, the Board argues that the severed information could be exploited by its competitors to gain a competitive advantage in the market place by providing competitors with information that is "not already known" to them and "which could be useful" to them in developing their own pricing strategies, revenue generating plan, services and innovative solutions. Conversely, the affected party would not have similar knowledge about its competitors, thus giving its competitors a competitive advantage in bidding for future contracts.

The Board also states that the information at issue includes information about the affected party's perceived market share and its human capital. This information forms the basis of the way in which the affected party manages its operation in Ontario, and could be used by its competitors to gain insight into the affected party's success. Conversely, the affected party would not have similar information about its competitors, thus giving its competitors an unfair advantage in bidding for future contracts.

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).

In summary, the Board fears that release of the information at issue could be used by the affected party's competitors to "out manoeuvre or outbid" the affected party in any future tender or request for proposal with another school board.

Under section 10(1)(b), the Board submits that confidentiality is essential to ensure the integrity of the tender and request for proposal system. The Board points out that consistent with this view, the Proposal includes a "non-disclosure" clause and the Contract contains a confidentiality clause. The Board states that had it not agreed to abide by these terms the affected party would not have supplied the information contained in its Proposal to the Board or agreed to enter an agreement with the Board.

In assessing the value of this information, the Board states that it relies upon the breadth of information supplied in a proposal (including information regarding pricing, revenue generation

and the methodology for addressing the Board's needs) to evaluate the merit of a proposal. If this information were not included in a proposal the Board would be unable to make this evaluation and would have no assurances after the consummation of a contract of how the project was going to be addressed by the third party. The Board suggests that if third parties risked the release of proprietary information they would no longer supply it.

The Board also presents submissions under section 10(1)(c). These submissions are similar in substance to those it 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 and Contract 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 and Contract 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, is "self-evident" as it represents the affected party's "business strategy" with respect to exclusive vending agreements and "bottom line" for the provision of exclusive vending services

2. the Board's assertion that the severed information contains the affected party's "unique solutions" and "innovative strategies" to achieve the Board's revenue goals and other needs

With respect to the Board's "self-evident" argument, he refers to two orders of this office (Orders MO-1368 and PO-1745) and British Columbia Order 01-20. He also submits that the circumstances in Order M-511 are distinguishable 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 and Contract 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. The facts of that case have been set out above. 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.

In distinguishing Orders M-511 and M-1471 from the facts of this case, the appellant states:

> In [Order M-511], access had been sought to successful bids by two separate companies for contracts with the Toronto Transit Commission (TTC). The TTC granted access to severed copies of the records, but withheld access to the unit prices contained in the proposals. It is useful to compare the circumstances of that case with this one. The adjudicator wrote,
>
> > The affected parties argue that this has always been a very competitive tender. One party advises that it is generally tendered annually and that each tender is basically for the same services with only the quantities changing. The unit prices represent the amount the affected parties will charge the TTC to perform various quality assessment tests on masonry, asphalt, concrete, etc. Should the unit prices be disclosed, the affected parties maintain that this will allow the competition to undercut their prices to secure the contracts when competing for future quality assurance business. The TTC itself notes that the current recessionary climate "places an unparalleled requirement on business to ensure their product and pricing is competitive for their corporate survival". [Order M-511.]

In M-511, the institution was buying. Here, the Board is selling. Other factors, which persuaded the adjudicator to withhold access in M-511, are not present in this case.

- In [Order] M-511, contracts were tendered year after year with only the unit price changing. Here, the contract recorded in the Proposal and Contract is the first district-wide pouring rights contract ever entered into by the Board. There is no reason to believe that the next contract will not have qualitatively different terms.

- In [Order] M-511, the term is one year; here it is ten years. The volatility of the soft drink business is such that the market will be substantially changed after ten years.

- In [Order] M-511, the contract price was based simply on the number of tests of each type. In this contract, the pricing and other compensation is apparently complex, and apparently provides for price adjustments during the term of the contract.

- In [Order] M-511, the identical services could be performed by a number of contractors. Here, the student body to which access is provided is unique. The products and promotions used to market to the student body are also different for each bidder.

- In [Order] M-511, it was necessary for the successful bidder to make a direct profit on the services performed under the contract. Here, there is an additional component. Access to the student body has a promotional benefit which is assessed by each bidder based on its particular situation.

The M-511 situation is one in which prices, costs, and profitability can be precisely determined. It can be seen that a small change in unit prices could win or lose the bid, and that knowing the pricing of the previous successful bid (which was just one year old) could be a significant advantage to the unsuccessful bidders. That type of advantage would not occur in the circumstances of […] Order [01-20], nor would it occur here.

The Board has cited Order M-1471 to support its case. […] The facts in Order M-1471 are similar to those in Order M-511, and are substantially different from the facts in this case. Order M-1471 concerned unit prices for garbage collection services. The appellant's and adjudicator's remarks suggest that the unit price for the services is determined primarily by the cost of fuel, the cost of labour, and the anticipated productivity (e.g. the number of houses that can be serviced per hour);

> and that the primary variable between bidders is the anticipated productivity. As in M-511, the Town was the purchaser, while in the present case, the Board is the seller. Order M-1471 says nothing about the term of the contract, but the other points relating to M-511 listed above apply to M-1471.
>
> The specific circumstances which caused the adjudicator to find an expectation of harm in [Orders] M-511 and M-1471 are not present in this case.

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 "Kent-[named third party] Proposal" (the Kent Proposal), a proposal submitted by a named third party in response to a Request for Proposals issued by the Kent Independent School District, 2930 Knapp N.E., Grand Rapids, Michigan, and 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 the Kent Proposal, the appellant states that it discusses many of the types of financial incentives that are at issue in this case. The appellant provides the following details:

> A signing bonus related to vendor-student ratios (i.e. students per vending machine) is discussed on pages 30-31; minimum "per-student" commissions on page 32; actual commission rates, with several pricing options, on pages 35-41; incentives to students for good marks, an essay contest with "lunch with a sports role model" as a prize, scholarships, internships for students . . . on pages 47-56, and so on. On page 61 and 62 there is a complete summary of the financial benefits of the contract, broken down by type of incentive.

With respect to the Salem-Kaizer Contract, 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.

The appellant suggests that the Board's argument that disclosure of the information at issue will reveal the affected party's "unique solutions" and "innovative strategies" is "self-contradictory". On this point, the appellant states:

> If [the affected party] does not know the secret solutions and strategies of its competitors, then [the affected party] has no objective knowledge that its secrets and strategies are qualitatively different from those of its competitors. On the other hand, if [the affected party] has such knowledge, then its statement that it "would not have similar information" is false.
>
> I submit that the whole concept of "secret solutions and strategies" is one of the "honestly held but perhaps subjective opinions" referred to by the Federal Court, [quoted in PO-1745]. Apparently, a study of [experiences from other jurisdictions] will show that many, if not all, of the sales techniques and information contained in the severed portions of the Proposal and Contract have been made public, and some are used by competing […] companies. In the absence of any objective evidence that [the affected party's] "secret solutions and strategies" are unique or qualitatively different from those devised by its competitors, there is no reasonable expectation of harm.
>
> Are [the affected party's] incentives so original that experienced and creative minds at [its competitor] might not also have arrived at them independently? Are the incentives offered in the severed parts of the Proposal and Contract so different from the many kinds of arrangements identified in [other jurisdictions] that they support the Board's and [the affected party's] argument? I submit that they are not.

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

> [I]nformation similar to that contained in the Proposal and Contract is also contained in various publicly available proposals and contracts in [other jurisdictions].
>
> . . . . .
>
> The Board claims that in the absence of confidentiality, [the affected party] would have refused to do business with it.
>
> . . . . .
>
> Are the Board's staff and legal counsel making this assertion in good faith? A diligent investigation would have shown them that [the affected party] and [a named competitor] enter into similar contracts in jurisdictions in which those contracts are freely accessible by law.

> Alternatively, the Board claims that if the Proposal were not confidential, [the affected party] would omit important information from it.
>
> . . . . .
>
> This argument continues the theme of "secret solutions and strategies" discussed above, and fails due to the same lack of evidence.

The appellant also makes submissions regarding the application of 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 Proposal and Contract would be of little significance to a competitor because it is outdated. The Contract is now three years old; even on the date of the original request for access, it was more than one year old.

Similar contracts contain a provision for price adjustments during the life of the Contract. Is that the case here?

A 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 and Contract would be of no significant value to a competitor today.

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) and, in particular, to comment on the relevance and impact of Order 01-20 to this case.

The affected party provided reply representations. However, its representations deal more with the appellant's arguments regarding parts one and two of the test under section 10(1). The only comment that deals specifically with harms concerns the appellant's reference to other jurisdictions where disclosure and access to this type of information is more readily available. In addressing this point the affected party states:

> …the supplier[s] in those jurisdictions may have taken those matters into consideration when preparing and proposing certain contracts with those institutions and tailored those agreements accordingly.

The Board made the following representations regarding the relevance of practices in other jurisdictions:

> . . . [The] requirements in U.S. jurisdiction for the release of agreements between [the affected party] and school authorities is not relevant in the present circumstances. The parties in such jurisdictions are required to comply with differently worded legislation, which they would be cognizant of prior to drafting their agreement. Thus, the agreement between the parties would recognize the requirement of disclosure and sensitive information would not be included.

> The Appellant has requested that the decision of the Information and Privacy Commission in Order 01-20 involving the UBC and [a named third party] be applied in the present circumstances.
>
> . . . [The] test applied by the Information and Privacy Commissioner of British Columbia to determine the "harm" should the information be released is not appropriate and should not be applied in the present circumstances.
>
> . . . [P]ursuant to section 10(1)(a) a head "must" decline to release information if in the opinion of the head it is reasonable to expect that release of the information could significantly prejudice the third party in question. The Board submits that in the present circumstances it was reasonable for the Board's head, after receipt of [the affected party's] response to notice of the request for records to expect that a release of the requested records could significantly prejudice [the affected party's] competitive position or result in the Board no longer being supplied with such detailed information, or result in an undue loss by [the affected party] or an undue gain by another party. As such the Board's head was required to deny the release of the record. Further, the Board submits that the decision of the head should be given deference by the IPC.
>
> Similarly, the Board submits that the IPC must show deference to a decision not to release information that could prejudice the economic interests of the Board or be injurious to the financial interests of the Board, as the Board is in the best position to evaluate its interests. In the present circumstances the Board submits it was reasonable for the head to expect that the Board's economic interests could be prejudiced or its financial interests could be injured by the release of the [affected party] proposal and the contract between the parties, and that the Board's decision should be given deference by the IPC.
>
> The Board submits that the decision of the head to deny release of the records pursuant to section 10(1) and section 11, was in both instances reasonable, and that the head's decisions should be accorded deference by the IPC.

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 two records 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".

I agree with the appellant that release of this information is not likely to affect the affected party's costs or the promotional benefit it would derive from securing business. I agree with the appellant that it is the affected party and its competitors that determine the promotional value of a market. I also agree with the appellant that the commission that a bidder can offer is determined by that bidder's costs and the additional benefit that it expects to gain from its presence in an existing market or infiltration into a new market.

The affected party's arguments focus on harms relating to disclosure of financial terms. The affected party has suggested that release of this information could jeopardize relationships with existing clients and future potential clients as well as providing competitors with a competitive advantage in future bids. I am not convinced that there is any inherent value in this information. The information is now 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 this financial information 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, both of which involve similar records.

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, both the affected party and the Board have made an attempt to address concerns pertaining to the information at issue. However, the evidence of harm provided in their representations does not address the specific items of information that have been withheld. Therefore, I do not find their evidence persuasive. 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 regarding the potential impact of the disclosure of financial information on its relationship with existing and potential customers and on its competitive advantage. It has failed to provide me with specific and detailed reference to

the information at issue and explanations as to how these harms could reasonably be expected to occur from disclosure of this information.

In my view, the information at issue in this appeal falls into the following four general categories

- Financial Information – This comprises information regarding pricing and anticipated revenue calculations, including financial calculations of commercial incentives and commission revenue. Implicit in this information are the programs and/or methods used by the affected party to generate revenue.

- Commercial Sales Targets – This includes information relating to desired vendor to student ratios for the placement of vending machines in Board schools.

- Methodologies and Programs – This comprises information, without financial calculations, regarding the business philosophies, methodologies, programs and/or incentives used by the affected party to generate revenue for the affected party.

- Market Advantage – This comprises information related to the affected party's implementation team and positioning in the cold beverage market.

I will now address each category.

Financial Information

This comprises the largest category of information at issue in the Contract.

The affected party should be in the best position to address this category of information.

As referred to above, the affected party's concerns regarding harm to its competitive position can be grouped into the following three categories

- harm to the affected party's relationships with existing customers

- harm to the affected party's dealings with future potential customers

- delivery of financial proposal information to the affected party's competitors

With respect to its existing client relationships, the affected party argues that an existing client might be upset if they perceive that its deal is inferior to the deal struck between the Board and the affected party. The existing client may seek to re-open its agreement, in turn creating ill will in the relationship and prejudicing the possibility of a renewal for the affected party with that client. The affected party also suggests that competitors could use the information to attempt to solicit business from the affected party's clients.

In my view, the affected party's arguments are highly speculative. The affected party has not provided detailed and convincing evidence that disclosure of this information could lead to a reasonable expectation of harm. On the contrary, I am persuaded by the experiences of other jurisdictions, most notably the U.S., where disclosure of this information is the norm and competition for these contracts is conducted on a level playing field when it comes to information sharing. As well, the affected party has even acknowledged that differences in financial or other terms could be theoretically attributed to differences in the context and scope of the agreements. While the affected party would have me believe that this possibility is not determinative, I cannot overlook it in weighing the evidence. In addition, in light of comments attributed to the affected party by the appellant, it appears that the landscape for vending and pouring agreements may be shifting, as exclusive rights contracts become a thing of the past. This possibility could impact the way in which cold beverage vending agreements are negotiated in the future.

With respect to future potential relationships, the affected party argues that prospective clients can be expected to demand business terms at least as favourable as those given by the affected party to the Board. The affected party again dilutes its argument by acknowledging that the affected party can seek to justify different terms by pointing to factual distinctions between the Board's and a prospective customer's needs.

In my view, information presented in a proposal yesterday and agreed to today is not useful in determining what a cold beverage vending agreement will look like tomorrow. The appellant has suggested that there will be changes in the negotiation of these agreements and suggests that the affected party has acknowledged as much. With these apparent changes on the horizon current information is of questionable value in the future. I find the affected party's argument speculative and unsupported by detailed and convincing evidence.

With respect to the delivery of the affected party's financial information to the affected party's competitors, the affected party argues that competitors will be able to use this information to fine-tune its bids to other educational institutions. The Board supports the affected party's position on this issue.

In my view, it is not enough for the Board to say, in arguing for non-disclosure of this information, that providing the affected party's competitors with it would enable competitors to anticipate the affected party's revenues on other projects. Aside from stating that the affected party would not have the same information about its competitors, both the affected party and the Board fail 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.

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 provided 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 "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 future tender or requests for proposals by another school board.

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 affected party's and the Board's positions 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 Financial Information could reasonably be expected to result in the harms set out in section 10(1)(a).

Commercial Sales Targets

This category of information appears on one page of the Proposal and in at least four locations in the Contract.

Significantly, the affected party does not present any specific representations that touch upon the information in this category. However, I am prepared to concede that the "competitive disadvantage" argument that it presented above could apply here.

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 find the evidence presented regarding 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).

Methodologies and Programs

This category of information is prominent in both the Proposal and Contract but is particularly visible in the Proposal.

The affected party addresses this category of information in its "competitive disadvantage" discussion. The affected party takes the position that it has spent a considerable amount of time developing key strategic methodologies and different unique approaches to meet the needs of its clients, especially in the public institution field.

The Board has labelled this category as "innovative solutions" and also makes a "competitive disadvantage" argument. 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).

Market Advantage

The information at issue in this category appears in the Proposal on ten pages. It is comprised of one page setting out the names and positions of support team members for the affected party and nine pages dedicated to information documenting the affected party's market advantage. One page of the nine sets out the affected party's cold beverage line of products. The remaining eight pages provide consumer survey and market share data.

In its submissions, the affected party states that it places great value on its trademarks and the marketing advantages they provide. It feels that its success in promoting its products is due in large part to the efficacy of its marketing strategies and tactics. According to the Board, this category of information comprises the affected party's perceived market share and human capital. 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, both the affected party's and the Board's evidence is unpersuasive.

Neither the affected party nor the Board have provided evidence as to why disclosure of the names and titles of the support team members could reasonably be expected to prejudice significantly the affected party's competitive position within the meaning of section 10(1)(a).

In my view, the affected party's product line would appear to be fairly obvious to anyone with even moderate knowledge of the cold beverage industry. Again, neither the affected party nor the Board 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 balance of the information relates to consumer survey and market share data. Again, neither the affected party nor the Board 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).

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 the above four categories.

I now turn briefly to an examination of the section 10(1)(b) harm provision. Notably, the affected party has not submitted any representations on the impact of this provision. The Board submits that the affected party and the Board intended that the information contained in the Proposal and Contract be maintained in confidence, as confidentiality is essential to the integrity of the tender and request for proposal system. The Board warns 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. As well, I would find the Board's arguments more compelling if the affected party had made a similar submission. The Board's 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 more than three years after the Board and the affected party reached an agreement the information contained in the Proposal and Contract is now stale dated.

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(a), (c), (d) and (g) to the information at issue.

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

> A head may refuse to disclose a record that contains,
>
> (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;

> (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;
>
> (g) information including the proposed plans, policies or projects of an institution if the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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.)].

While the Board has claimed the application of sections 11(a), (c), (d) and (g) it has only provided representations regarding sections 11 (c) and (d).

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. School 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]

For example, should the Board choose to negotiate an exclusive contract with a snack food vending services provider 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 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 Peel 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 above, the Board submits that arguably [the affected party]would not have entered into an agreement with the Board had the Board been unwilling or unable to accept the terms of the non-disclosure clause set out as the first term of its Proposal.
>
> The Board submits that vendors will not be willing to participate in a tender, request for proposal or invitation to propose process and subsequent contract process if there is a potential or likelihood that the proprietary commercial and trade secret information supplied will be released publicly. The Board submits that this would not be limited to occasions where the Board is seeking to maximize its revenue generation by entering into branding agreements, but would also impact the tender, request for proposal or invitation to propose process engaged by the Board for all significant purchase agreements.
>
> The tender, request for proposal or invitation to propose process is understood to be a confidential process. Only the final cost, price or revenue generating amount submitted by the successful bidder is disclosed by the Board in public. The Board does not make the confidential proprietary commercial or trade secret information

> supplied in the tender or proposal and included in a contract available on request. These are confidential as between the Board and the third party and must be known to be confidential to ensure that information will be provided to the Board. If such information was commonly disclosed the risk to third parties that their information would be available on request would be too great for, their participation in the tender, request for proposal or invitation to propose process. As evidence the Board points to the terms of the [affected party] Proposal submitted to the Board.
>
> The inability to engage in the tender, request for proposal or invitation to propose process would mean that the Board would be required to pay top dollar or more in order to secure purchase agreements. The number of interested vendors would be significantly reduced thereby increasing to a significant degree the cost to the Board and thus, prejudicing its financial position. The Board submits in the present case that impact would have been of a significant magnitude.

The appellant responds with the following:

> A decision to release the Proposal and Contract, 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 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. Attachments 5-7 and 17 demonstrate this reality. Objective evidence refutes the Board's claim.

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 tender, request for proposal or invitation to propose processes and a subsequent contracting process. In making this argument the Board asserts that the tender, request for proposal or invitation to propose process is understood to be a confidential process. The Board only discloses the final cost, price or revenue-generating amount submitted by the successful bidder to the public. The Board suggests that if the information at issue is disclosed potential

vendors will not participate in the process, in turn, reducing the number of potential partners and driving up its cost of entering into purchase agreements.

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 proposals 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, the suggestion that the pool of potential vendors would be reduced, thus increasing the Board's costs of entering into similar arrangements, is self-serving at best. In this type of vending and pouring agreement it is the vendors that are competing for the Board's business and absorbing the costs, not the Board. The Board does not incur any costs; on the contrary, it only reaps the financial benefits of the relationship.

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.

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 complete copies of the records 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