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

ORDER MO-2562

Appeal MA10-102

Thames Valley District School Board

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NATURE OF THE APPEAL:

This order resolves the issues arising out of a request made to the Thames Valley District School Board (the Board) under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for a copy of pricing information relating to identified snow removal and sanding tenders for three school zones.

The Board identified a responsive record, consisting of a list of the names of snow removal contractors used by the Board in the relevant school zones, along with the dollar value of their winning bids. Prior to issuing a decision to the requester, the Board notified 25 affected parties, pursuant to section 21(1) of the *Act*, seeking their views regarding disclosure of the record.

The Board subsequently issued an access decision to the requester and the affected parties, advising of its decision to disclose the record in its entirety. However, the record was not released at that time, to allow 30 days for the affected parties to appeal the Board's decision to this office.

Only one of the affected parties (now the appellant) appealed the Board's decision, relying on the mandatory exemption found in section 10(1)(a) and (c) of the *Act* (third party information), and this office opened an appeal file in relation to the appellant's information. The Board subsequently released the record to the original requester, but withheld the information relating to the appellant.

The file moved to the mediation stage of the process. Mediation of this appeal was not possible and the matter then moved to the adjudication stage, which takes the form of an inquiry under the *Act*. During the inquiry, I sought representations from the appellant initially and on two subsequent occasions, but did not receive representations from him. I then notified the appellant that, in the absence of representations, I would proceed to issue this order.

For the reasons that follow, I uphold the Board's decision to disclose the record in its entirety to the original requester.

RECORD:

The information at issue in this appeal is one line of a chart containing the appellant's name and the price charged by him for his snow plowing and sanding services. The chart also contains similar information relating to 24 other individuals. This information has been released by the Board to the requester.

DISCUSSION:

THIRD PARTY INFORMATION

Although the appellant did not provide representations in this appeal, in his original letter of appeal to this office, he advised that he was relying on section 10(1)(a) and (c) of the *Act*.
Section 10(1) of the *Act* states, in part:

> 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;
>
> . . .
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or
>
> . . .

Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 confidential information of third parties that could be exploited by a competitor in the marketplace (Orders PO-1805, PO-2018, PO-2184, MO-1706).

For section 10(1) to apply, the institution and/or the third 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 paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

In his original appeal letter, the appellant referred to the information in the record as his bid for providing snow removal services to the Board. I have reviewed the record and confirm that the information at issue consists of the appellant's name and the price for his snow removal and sanding services.

The types of information listed in section 10(1) have been discussed in prior orders, two of which are relevant to this appeal, as follows:

> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I find that the record contains information that meets the definitions of both "commercial information" and "financial information," as it sets out the appellant's price for the provision of a particular service. Therefore, the requirements of part 1 of the section 10(1) test have been met.

Part 2: supplied in confidence

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 (Order MO-1706).

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party (Orders PO-2020, PO-2043).

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party. This approach was approved by the Divisional Court in *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, cited above. [See also Orders PO-2018, MO-1706, PO-2496, upheld in *Grant Forest Products Inc. v. Caddigan*, [2008] O.J. No. 2243 and PO-2497, upheld in *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475 (Div. Ct.)].

As previously indicated, the appellant did not provide representations. However, in his appeal letter, he discussed the harm that he would incur, should the information at issue be released. The appellant stated that the release of the bid would significantly interfere with his competitive

position as it would encourage new contractors to undercut competitive tender prices without acknowledging the economics and operating costs of the business.

The appellant is silent on the issue of whether the bid was "supplied in confidence" as contemplated by section 10(1) of the *Act*. In the absence of any evidence from the appellant, and having reviewed the record, I am satisfied that the price of the snow removal and sanding service was not "supplied" to the Board by the appellant. This represents the amount that the appellant was reimbursed for services provided pursuant to his agreement with the Board and cannot be said to have been "supplied" by him to the Board.

Further, past orders of this office have held that a fee for service is not information that is "supplied" by a vendor to an institution, but is negotiated between the parties. In particular, the acceptance or rejection of a vendor's bid by an institution is a form of negotiation. (Order PO-2435).

In summary, I find that the appellant's name and fee for service represents a contract between the Board and the appellant that was subject to negotiation and was not, therefore, "supplied" as that term in used in section 10(1).

Accordingly, it is not necessary for me to address the "in confidence" component of part 2 of the section 10(1) test before concluding that the part has not been established. Because all three parts of the section 10(1) test must be met in order for the exemption to apply, I find that section 10(1) is not applicable in this appeal.

ORDER:

1. I dismiss the appeal and uphold the Board's decision to disclose the record in its entirety. The Board shall do so by **December 3, 2010** but not before **November 29, 2010**.

Original Signed by: October 28, 2010
Brian Beamish
Assistant Commissioner