Information and Privacy Commissioner,
Ontario, Canada

Commissaire à l'information et à la protection de la vie privée,
Ontario, Canada

ORDER MO-2742

Appeal MA10-429

Durham District School Board

May 28, 2012

Summary: The appellant made a request to the board for school revenues derived from fundraising and/or fees of each school in the board's district for a specified time period. The board denied access, in full, claiming the discretionary exemption in section 11(c) of the *Act*. The appellant raised the possible application of the public interest override in section 16. In this order, the adjudicator finds that section 11(c) does not apply to the information at issue and orders the board to disclose the record, in full, to the appellant.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, section 11(c).

OVERVIEW:

[1] This order disposes of the issues raised as a result of a request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Durham District School Board (the board) for the following information:

> The section of board financial records that show the amount of school generated funds and amounts raised by parent councils, covering the period from Sept. 1, 2008 to Aug. 31, 2009 or most recent available, for each school in the board (identifying each school by name).

[2] In response, the board issued a decision letter to the appellant,[1] stating:

> We have reviewed your request and will grant partial access to information while exemption is being claimed for the balance.
>
> I am enclosing a copy of the "Consolidated Schedule 4 – School Activities Fund" relating to your request. This form is required for submission annually to the Ministry of Education and shows all the school generated revenues.
>
> We have determined that the request for information by school name is exempt from disclosure under section 11(c) [economic and other interests] of [the *Act*].
>
> [emphasis added]

[3] The record that was disclosed to the requester shows the total amount of school fundraising and other revenues for the years 2008 and 2009, but does not provide the requested school by school breakdown.

[4] The requester, now the appellant, appealed the board's decision to this office. During the mediation stage of the appeal, the mediator arrived at the conclusion that the record disclosed to the appellant was not responsive to the request. The mediator conveyed her view to the board, and also advised that it had not provided this office with a copy of the record(s) to which access was being denied. The board advised the mediator that it could not provide the responsive record because it did not exist in the electronic format requested. The mediator asked the board to issue a revised decision advising the appellant of its position.

[5] The board subsequently issued a revised decision letter to the appellant, advising her that:

> The records do not exist in the format you have requested, school by school. We have determined that the request for the information by school name is exempt from disclosure under section 11(c) of [the *Act*].
>
> [emphasis added]

[6] In view of the above, the mediator asked the board to provide this office with a copy of the records from which the responsive information would be compiled, or a

[1] The appellant is actually two individuals but will be referred to in the singular for purposes of this order.

representative sample of this information. The board subsequently compiled a portion of the responsive information into a representative sample of eight schools, showing "Total Revenues" for each school for the year ended August 31, 2009.

[7] The appeal then moved to the adjudication stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. The adjudicator assigned to the appeal sought and received representations, reply representations and sur-reply representations, which were shared in accordance with this office's *Practice Direction 7*.

[8] The appeal was then transferred to me for final disposition. For the reasons that follow, I find that the exemption in section 11(c) does not apply to the record. Therefore, I do not uphold the board's decision and I order the record to be disclosed, in full, to the appellant.

RECORDS:

[9] The record at issue is a list of the "Schedule of Revenue by School for the Year Ended August 31, 2009". A representative sample of this record shows total revenues for each of eight schools out of the 126 schools operated by the board for the year ended August 31, 2009. However, this order applies to the revenue of all 126 schools in the board's jurisdiction.

DISCUSSION:

Does the discretionary exemption at section 11(c) apply to the responsive record?

[10] Section 11(c) of the *Act* states:

> A head may refuse to disclose a record that contains,
>
> > information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

[11] The purpose of section 11 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2[2] explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same

[2] (Toronto: Queen's Printer, 1980) (the Williams Commission Report).

> extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

[12] For section 11(c) to apply, the institution must demonstrate that disclosure of the record "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.[3]

[13] The need for public accountability in the expenditure of public funds is an important reason behind the need for "detailed and convincing" evidence to support the harms outlined in section 11.[4]

[14] Parties should not assume that harms under section 11 are self-evident or can be substantiated by submissions that repeat the words of the *Act*.[5]

[15] The fact that individuals or corporations doing business with an institution may be subject to a more competitive bidding process as a result of the disclosure of their contractual arrangements does not prejudice the institution's economic interests, competitive position or financial interests.[6]

[16] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[7]

[17] This exemption does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[8]

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[3] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[4] Orders MO-1947 and MO-2363.
[5] Order MO-2363.
[6] Orders MO-2363 and PO-2758.
[7] Orders P-1190 and MO-2233.
[8] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

Representations

[18] The board submits that the information requested does not exist in the format requested and that, in any event, it is exempt under section 11(c) of the *Act*.

[19] The board states that the appellant requested and received similar information from eight other school boards in the Greater Toronto Area (GTA). The appellant then, the board submits, published an article[9] in a major newspaper portraying a "great divide" between elementary schools in the GTA in terms of school and community generated funding.

[20] The board submits that disclosure of the record at issue would negatively impact the financial situation of the schools in the board's district, and would also serve to identify schools as being either "have" or "have not" schools. The board argues that the appellant published the information from eight school boards, but did not qualify the data. The raw data that was published, the board states, did not reflect other factors such as:

- The size and density of the school community;
- The level of enrolment;
- Specialized programming offered at the school;
- One-time fundraising goals and projects;
- Parental involvement in the school;
- Economic and social factors; and
- Long-term trends.

[21] The board submits that as a result of failing to take the above factors into consideration, the article was damaging and misleading. For example, the board states that if a school has no extraordinary activities planned, they do not need to engage in fundraising. Therefore, the board concludes that comparing one school's fundraising efforts to another's is misleading.

[22] The board also submits that the information in the records, if disclosed, will cause the following harms to the economic interests of its schools:

- Negative attention will be drawn to schools on the lower end of the fundraising chart, which will lead members of the public to draw negative conclusions about the quality of the school;

- Students attending "have not" schools will be stigmatized as being underprivileged or coming from communities with economic difficulties. There is also a bias that associates economic difficulties with lower

[9] The board provided a copy of the article, dated February 28, 2011, to this office.

> student achievement, which would create enrolment difficulties and affect the long-term reputation of the identified "have not" school;
>
> - There is an operational risk that, in response to the raw data, parents will attempt to enroll or transfer their children to "have" schools or may remove they children from "have not" schools and the board altogether;
>
> - Individuals who participate in school community councils will be easily identifiable if the names of the schools are published. This publication may dissuade future participation in fundraising by those individuals who have not been able to achieve the same fundraising successes as their counterparts;
>
> - Parents whose children attend "have" schools may elect to contribute less to programs and trips, or sources of funding that had previously existed may be cut off; and
>
> - The efforts of "have not" schools to fundraise would be undermined, which would have a negative impact on both the students and the community.

[23] The appellant submits that disclosure of the fees and fundraising amounts for individual schools in the board's district will not affect the board's economic interests. The appellant also states that seven other school boards in the GTA disclosed the same type of information in response to access requests made by her.

[24] In addition, the appellant submits that schools are publicly funded institutions with a per-student funding formula put in place by the provincial government to equalize education across the province "at a time when some boards were richer than others." The appellant believes that fees and fundraising are now filling the gaps between the formula and the true cost of education.

[25] Further, the appellant submits that the provincial government asks school boards for a breakdown of fees and fundraising and will be tracking these amounts to determine if school fees are being collected or used for items or activities that are legislated to be paid for by school boards.

[26] The appellant states:

> Equalized funding means that there is nothing to be lost or gained by [the board's] insistence that they don't have the information in the format requested or that it has financial implications for the board.

[27] The appellant also states that the provincial government has issued a fee guideline and a draft fundraising guideline[10] that promote transparency of reporting how fees and fundraising amounts are generated and spent. For example, the appellant states that the fundraising guideline suggests that schools post fundraising amounts raised and spent on their respective school websites.

[28] With respect to the format of the requested information, the appellant states that she would be "happy" to receive the information either electronically or in hard copy.

[29] In reply, the board submits that the fact that other school boards have chosen to release their information has no bearing on this appeal. Each board, it argues, is entitled to take its own position based on its exercise of discretion and advice from legal counsel.

[30] The board also states that the appellant has been able to accumulate sufficient data from the other school boards to satisfy the purpose of the inquiry and that there is no value that would be gained from the release of the information. On the contrary, the board argues, there is a "substantial amount of harm" that could be done to individual schools and their communities should the information be disclosed.

[31] In addition the board submits that the fee guideline referred to by the appellant discusses accountability to the school community, which is defined in the guideline as including parents, staff, and contributors, but not the public at large. The board states, that the appellant is not a member of the school community as contemplated by the fee guideline.

[32] With respect to the draft fundraising guideline, the board submits that this document is not binding on the board, but instead establishes best practices to serve an "aid" to school boards.

[33] In sur-reply, the appellant submits that the fact that the other school boards disclosed the same type of information suggests that they did so knowing that there was no basis to refuse it.

[34] In addition, the appellant argues that the board is not a private company and could not be harmed financially by the disclosure of the information at issue. In fact, the appellant states, the disclosure of the information at issue could result in more funding from the province.

[35] Lastly, the appellant submits that the province's fee guidelines suggest that fee information be posted on the Internet, which is publicly available world-wide and that

[10] The appellant provided a copy of the draft fundraising guideline to this office.

the fundraising guideline, once finalized, may be binding. In any event, the appellant states, the fee guideline, which has a similar intent and similar language to the fundraising guideline, is being followed by the boards.

Finding and analysis

[36] In this appeal, the board is relying solely on the discretionary exemption in section 11(c) of the *Act*. As previously stated, the purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.[11]

[37] I have carefully reviewed the board's representations and the information at issue and I am not persuaded that the board has satisfied the requirements of the section 11(c) exemption. The board made a number of arguments why it believes the record should not be disclosed, such as:

- the possible social stigma attached to being a student in a "have not" school;
- negative conclusions being drawn about the quality of a particular school;
- undermining fundraising efforts;
- deterring participation of school councils and parents in fundraising; and
- tarnishing the reputation of the school and/or the community.

[38] The economic harm that the board described is that, because of the consequences listed above, parents will attempt to enroll or transfer their children to "have" schools or may remove their children from "have not" schools and the board altogether. This is the basis of the board's section 11(c) argument that if the record is disclosed, there will be a reasonable expectation of prejudice to the board's economic interests or competitive position.

[39] In my view, the evidence adduced by the board amounts to a speculation of possible harm, which is insufficient to meet the requirement of section 11(c). The record contains information concerning the revenues generated by individual schools in the board's district. Upon review of the board's representations, I find that it has failed to provide the requisite detailed and convincing evidence to demonstrate that disclosure

[11] Order P-1190.

of the record could reasonably be expected to prejudice its economic interests or competitive position.

[40] While I acknowledge that if there were a decline in student enrolment, the board could reasonably be expected to experience a loss in revenue from the province. However, the board has not demonstrated that disclosure of the record "could reasonably be expected to" lead to a corresponding decline in enrolment of students in its schools because parents would choose to enroll their children in a different school board simply on the basis of knowing each school's revenues. Without further evidence to link the disclosure of the information at issue with the identified harms, I find the board's argument to be speculative at best. Had the board provided evidence, for example, that the disclosure of the other GTA school boards' information caused declining enrolment in their boards, which in turn prejudiced their economic interests or competitive positions, I may have come to a different conclusion.

[41] Consequently, I find that section 11(c) does not apply to the record at issue, as disclosure of the record could not reasonably be expected to prejudice the board's economic interests or competitive position.

[42] In addition, I am not persuaded by the board's argument that the record does not exist in the format requested. The appellant has made it clear in her representations that her request is for the information either electronically or in hard copy. Further, the board was able to provide a representative sample of the information at issue to this office in hard copy. Therefore, the board has demonstrated that it is capable of compiling the information in a hard copy format.

[43] In conclusion, I find that the discretionary exemption in section 11(c) of the *Act* does not apply to the information at issue. Having found that the exemption does not apply, it is not necessary to address the public interest override. I will order the board to disclose the record, including the information for all of the schools in the board's district, to the appellant.

ORDER:

1. I order the board to disclose the "Schedule of Revenue by School for the Year Ended August 31, 2009" for all 126 schools in the board's district to the appellant by **July 2, 2012** but not before **June 26, 2012**.

2. In order to verify compliance with order provision 1, I reserve the right to require the board to provide me with a copy of the records that are disclosed to the appellant.

Original signed by: May 28, 2012
Cathy Hamilton
Adjudicator