

Information and Privacy Commissioner,  
Ontario, Canada



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

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## ORDER MO-2837-F

Appeal MA11-465

Toronto District School Board

January 25, 2013

**Summary:** The appellant made a request to the board for records relating to a particular Request for Proposal. The board withheld some of the records on the basis of the discretionary exemptions in sections 6(1)(b) (closed meeting), 11 (economic and other interests) and 15 (publicly available). In Order MO-2817-I, the board's decision was partially upheld and the board was ordered to exercise its discretion with respect to the application of section 6(1)(b) and 11 to two of the records. In this final order, the board's exercise of discretion is upheld.

**Statutes Considered:** *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, ss. 6(1)(b), 11(c).

### OVERVIEW:

[1] This final order disposes of the issues in Appeal MA11-465 relating to a multi-part request made under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Toronto District School Board (the board) for access to records relating to a particular Request for Proposal (RFP).

[2] On December 10, 2012, I issued Order MO-2817-I, upholding the board's decision in part, but also finding that the board did not exercise its discretion, as required. I ordered the board to disclose some records in whole or in part, and ordered it to exercise its discretion. Accordingly, Order Provision 3 states:

I order the board to exercise its discretion with respect to the project agreement, the power point slide presentation and the publicly available information taking into account the factors set out above in paragraph 104 and to advise the appellant and this office of the result of this exercise of discretion, in writing. If the board continues to withhold all or part of these records, I also order them to provide the appellant with an explanation of the basis for exercising its discretion to do so and to provide a copy of that explanation to me. The board is required to send the results of its exercise of discretion, and its explanation to the appellant, with the copy of this office, by no later than **January 4, 2013**. If the appellant wishes to respond to the board's exercise of discretion and/or its explanation for exercising its discretion to withhold the information, it must do so within 21 days of the date of the board's correspondence by providing me with written representations.

[3] In turn, the board sent a letter to the appellant and this office, setting out its explanation for the basis of its exercise of discretion. The appellant also provided representations containing his response to the board's exercise of discretion.

[4] In this order, I uphold the board's exercise of discretion.

## **DISCUSSION:**

[5] The board was ordered to exercise its discretion with respect to the application of the exemptions in sections 6(1)(b), 11(c) and 15 of the *Act*. In regard to the publicly available records that are responsive to parts 10(f) through (i) of the appellant's request, the board submits that it has provided a copy of these records to the appellant and thus did not make submissions on the exercise of discretion regarding section 15. The appellant did not dispute this disclosure and thus I make no finding on the application of section 15.

[6] Accordingly, the remaining issue to be determined is whether the board properly exercised its discretion under sections 6(1)(b) and 11(c) of the *Act* to withhold the project agreement and powerpoint presentation. The sections 6(1)(b) and 11(c) exemptions are discretionary and permit the board to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

[7] In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose

- it takes into account irrelevant considerations
- it fails to take into account relevant considerations.

[8] In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 43(2)].

[9] Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect
- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information

- the historic practice of the institution with respect to similar information.

[10] The board submits that it has exercised its discretion to withhold these records under sections 6(1)(b) and 11(c). In doing so, the board submits that it considered the principles of the *Act* weighing in favour of access including the principle that information should be available to the public and exemptions from that right should be limited and specific. The board submits that it balanced these access considerations against the possible prejudice to the ongoing commercial concerns of the board. The board states:

As outlined in its submission in Appeal MA11-465 the board has ongoing commercial concerns with respect [to] revealing information related to its negotiations for the solar panel project...

Records 4 and 5 both contain information which can reasonably impact on any future negotiations as outlined in the board's aforementioned submissions.

The board further notes that the passage of time has not eliminated these risks and one or more of the external contingencies which may give rise to the contracting partner [resiling] from the contract still exist as at the date of this decision.

[11] The board also notes that the appellant is not seeking personal information and has not set out his reasons, sensitive or otherwise, for his request.

[12] The appellant reviewed the board's submissions and submits that the board has not exercised its discretion and if it has done so, then not on proper grounds. The appellant argues that the board has simply relied on its earlier decision to withhold the records and has failed to re-exercise its discretion as ordered in Order MO-2817-I.

[13] I have considered both parties' representations and the records at issue. While I do not dispute that the board's decision remains unchanged, I find no evidence to conclude that the board did not re-exercise its discretion as ordered. It is evident from the circumstances surrounding this appeal, that the terms of the agreement between the board and the affected party remain outstanding. I accept that this is a valid consideration for the board to make in its decision on the application of the sections 6(1)(b) and 11(c) exemptions. Accordingly, I find that the board has properly exercised its discretion under these exemptions taking into account all relevant considerations and not taking into account irrelevant ones.

**ORDER:**

I uphold the board's exercise of discretion to withhold the project agreement and slide presentation.

Original signed by: \_\_\_\_\_  
Stephanie Haly  
Adjudicator

\_\_\_\_\_ January 25, 2013