

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2836-F

Appeal MA11-281

Toronto District School Board

January 25, 2013

Summary: The appellant made a request to the board for records relating to a specific Request for Proposal. The board denied access to the responsive records on the basis of the discretionary exemptions in sections 6(1)(b)(closed meeting), 7(1)(advice or recommendation), 11(a), (c), (e) (economic or other interests). In Order MO-2816-I, the adjudicator upheld the board's decision in part and ordered the board to exercise its discretion for records withheld under section 6(1)(b). 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, section 6(1)(b).

OVERVIEW:

[1] This final order disposes of the issues in Appeal MA11-281 relating to a two 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-2816-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 Records 19 and 20 taking into account the factors set out above in paragraph 69 and to advise the appellant and this office of the results 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 a copy to 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 with his response to the board's exercise of discretion.

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

DISCUSSION:

[5] The sole issue to be determined is whether the board properly exercised its discretion under section 6(1)(b) to withhold records 19 and 20. The section 6(1)(b) exemption is discretionary and permits 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.

[6] 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.

[7] 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)].

[8] 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.

[9] The board submits that, in exercising its discretion to withhold the records under section 6(1)(b), 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 the right of access should be limited and specific. The board states that these considerations must be balanced against the prejudice to any of the ongoing commercial concerns regarding its negotiations for the solar panel project. The board states:

Records 19 and 20 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 that 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.

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

[11] The appellant reviewed the board's submissions on its exercise of discretion and submits that the board has not exercised its discretion and if it has exercised its discretion, then it did not consider proper grounds. The appellant's argument is that the board has simply chosen to rely on its earlier decision to withhold all the records and has failed to re-exercise its discretion as ordered in MO-2816-I.

[12] I have considered both parties' representations and the records at issue. While I do not dispute the appellant's argument that the board originally denied access to the records I find no basis to conclude that the board did not re-exercise its discretion as ordered. It is evident from the circumstances 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 section 6(1)(b) exemption. Accordingly, I find that the board has properly exercised its discretion under section 6(1)(b) taking into account relevant considerations and not taking into account irrelevant ones.

ORDER:

I uphold the board's exercise of discretion to withhold records 19 and 20 under section 6(1)(b).

Original signed by: _____
Stephanie Haly
Adjudicator

January 25, 2013