

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-2855

Appeal MA12-63

York Catholic District School Board

March 15, 2013

Summary: The appellant made a request to the school board for a copy of the successful proposal made in response to an identified request for proposal, and the scoring sheet relating to the proposal. The board denied access to the records on the basis of the exemption in section 10(1) (third party information). The appellant argued that the public interest override in section 16 applied to the records.

In this order, the adjudicator finds that the exemption in section 10(1)(a) applies to part of the proposal and the scoring sheet, but that the other records remaining at issue do not qualify for exemption under section 10(1). The order also determines that the public interest override does not apply to the small portions of the records which qualify for exemption under section 10(1).

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1) and 16.

OVERVIEW:

[1] The York Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information relating to an identified Request for Proposal (RFP). Specifically, the appellant sought access to copies of the winning submission, and "all scorecards,

evaluation notes, minutes of meetings, interview notes, etc., pertaining to the decision of award of this proposal.”

[2] In response to the request, the board issued a decision in which it provided the appellant with the name of the successful proponent (which had been made public) and stated that access was denied to the responsive records on the basis of the exemption in section 10(1) (third party information) of the *Act*.

[3] The appellant appealed the board’s decision.

[4] During mediation, the appellant indicated that she wished to pursue access to the successful proponent’s submission and to the evaluation documents pertaining to the winning proposal. She also took the position that a public interest exists in the records at issue, and that section 16 of the *Act* (the public interest override) applies.

[5] As the records at issue may affect the interests of a third party, the third party was notified of the request, and indicated that it objected to the disclosure of the records.

[6] Also during mediation, the appellant indicated that she was not pursuing access to any bank letters or reference letters. Accordingly, tabs 9 and 16 of the proposal were removed from the scope of this appeal. In addition, the appellant indicated that she was not pursuing access to any personal information which may be contained in the records at issue.

[7] Mediation did not resolve this appeal, and it was transferred to the inquiry stage of the appeals process, where an adjudicator conducts an inquiry under the *Act*. I sent a Notice of Inquiry to the board and the third party, initially, inviting representations on the possible application of sections 10(1) and 16. In addition, because the appellant had indicated that she was not interested in pursuing access to personal information, I also invited the board to identify which information contained in the records is comprised of personal information, as defined in section 2(1) of the *Act*.

[8] The third party provided brief representations in response to the Notice of Inquiry. The board did not provide representations.

[9] In its brief representations, the third party indicated that it was prepared to provide access to six pages of responsive records (consisting of tabs 1, 3, 4, 5 and one of the pages from tab 2). The third party also stated that disclosure of the remaining records would “prejudice significantly the competitive position” of the third party.

[10] I then sent the Notice of Inquiry to the appellant, who provided brief representations in response.

Preliminary matters: Records remaining at issue

[11] As a preliminary matter, I note that both the affected party and the appellant indicated that certain records are no longer at issue.

[12] In its representations, the affected party has indicated that it is not objecting to the disclosure of 6 additional pages of records (consisting of tabs 1, 3, 4, 5 and one of the pages from tab 2). Accordingly, I will not review the possible application of section 10(1) to these records, nor to the portions of the scoring sheet which include the information contained in those 6 pages. Because it is not clear to me whether or not these pages have been disclosed to the appellant, I will order that they be disclosed.

[13] During mediation, the appellant indicated that she is not pursuing access to any records contained in tabs 9 or 16. As a result, those records are not at issue in this appeal. I note, however, that the scoring sheet which refers to each of the tabs includes a summary of the information contained in the records under tabs 9 and 16. As this information is not at issue, I will remove it from the scope of this appeal.

[14] Also during this appeal, with respect to pricing information included in tab 7, the appellant indicated that she was not pursuing access to the names of individuals contained in this record. As a result, the specific names in this tab are not at issue and are removed from the scope of this appeal.

[15] In addition, some background documents provided by the third party in tabs 11 and 15 contain brief references to other named third parties who were not notified in the course of this request and appeal. In the absence of such notification, and in light of the representations of the appellant and the circumstances of this appeal, access to the identities of these third parties is not addressed in this order.

[16] Lastly, the appellant confirmed during this appeal that she was not pursuing access to "personal information" contained in the records. Although invited to do so, neither the board nor the appellant provided representations on what information contained in the records constitutes "personal information." Personal information is defined in section 2(1), in part, as follows:

"personal information" means recorded information about an identifiable individual, including,

- (b) information relating to the education or the medical, psychiatric, psychological, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

[17] Section (2.1) also relates to the definition of personal information. It states:

(2.1) Personal information does not include the name, title, contact information or designation of an individual that identifies the individual in a business, professional or official capacity.

[18] To qualify as personal information, the information must be about the individual in a personal capacity. As a general rule, information associated with an individual in a professional, official or business capacity will not be considered to be "about" the individual.¹

[19] Tab 10 of the records contains a one-page list of the memberships and associations of certain individuals, and attaches the certificates relating to those memberships. Tab 17 contains a one-page list of the professional certifications and licenses of named individuals, and also attaches the actual certifications and the resumes of these individuals. The appellant has stated that she is not pursuing access to personal information. Personal information includes an individual's education or employment history, but not their names, titles or designations in their professional capacity. The one-page list of the names of individuals and their professional certifications and licenses in tab 17 contains the names, titles and designations of these individuals, and I will consider the application of section 10(1) to this page. The other records under tabs 10 and 17 (as well as the portion of the scoring sheet relating to tab 10) contain personal information as they consist of individual's resumes, membership information, and copies of certificates. Accordingly, these other records are removed from the scope of this appeal.

RECORDS:

[20] The records remaining at issue consist of:

1) the following portions of the third party's proposal:

- Introductory page, Cover letter and Table of contents
- Tab 2: Addendum/addenda documents (4 pages)
- Tab 6: One-page breakdown of various costs – Appendix E
- Tab 7: Pricing sheet (2 pages) (with individual's names severed)
- Tab 8: Affected party Year of Business Establishment (one page)
- Tab 11: Capacity, Availability and Preparedness (one page) with a two-page attached table of current open projects and expected completion (with identities severed).

¹ Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.

- Tab 12: Affected party Organization Chart (one page) and Project team (one page)
- Tab 13: One-page sub-consultant sheet
- Tab 14: Affected party Financial Information (one page)
- Tab 15: Completed projects list (one page) (with identities severed).
- Tab 17: List of project team members – professional certifications and licenses (one page summary)
- Tab 18: Process Management description (3 pages) and attached proposed project schedule (one page)
- Tab 19: Value added services description (3 pages)
- Tab 20: Inspection and testing report disclaimer (one page)

2) the board's scoring sheet relating to the third party's proposal (7 pages), except for severed information about the affected party's proposal relating to tabs 9, 10, 15 and 16.

ISSUES:

- A. Does the mandatory exemption at sections 10(1)(a) and/or (c) apply to the records?
- B. Does the public interest override at section 16 apply to any withheld information?

DISCUSSION:

Issue A. Does the mandatory exemption at sections 10(1)(a) and/or (c) apply to the records?

[21] As identified above, the board denied access to the responsive records on the basis of section 10(1) of the *Act*. Only the affected party provided representations in support of the position that the records are exempt under sections 10(1)(a) and (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, where 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;

[22] Section 10(1) is designed to protect the confidential “informational assets” of businesses or other organizations that provide information to government institutions.²

[23] 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.³

[24] For section 10(1) to apply, 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 paragraph (a), (b) and/or (c) of section 10(1) will occur.

[25] The board did not provide representations on this issue. The affected party only provide very brief representations on this issue.

[26] For section 10(1) to apply, each part of the three-part test set out above must be satisfied. Because of my finding, below, that much of the information at issue does not meet the third part of the three-part test, I will only review the application of the first two parts of this test to one page from tab 14 of the affected party’s proposal (and the corresponding information contained in the scoring sheet).

Part 1: type of information

[27] In order for a record to fit within this part of the three-part test, its disclosure must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information. Financial information has been defined in prior orders as follows:

² *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.).

³ Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.⁴

[28] Tab 14 is a one-page sheet entitled “[Affected Party] Financial Information.” It contains specific information relating to the affected party’s fiscal year end for a specific year, and includes dollar amounts and percentages.

[29] I am satisfied that this information constitutes financial information for the purpose of section 10(1) of the *Act*. I am also satisfied that this same information contained on the portion of the scoring sheet relating to tab 14 is, similarly, financial information for the purpose of the *Act*.

Part 2: supplied in confidence

[30] 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.⁵

[31] 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.⁶

[32] In order to satisfy the “in confidence” component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.⁷

[33] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization

⁴ Order PO-2010.

⁵ Order MO-1706.

⁶ Orders PO-2020, PO-2043.

⁷ Order PO-2020.

- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.⁸

[34] Based on my review of the proposal, I am satisfied that it was supplied by the affected party to the board in response to the board's RFP. Accordingly, I am satisfied that the page of information contained in tab 14 was supplied to the board by the affected party within the meaning of section 10(1).

[35] I am also satisfied that this page of information was "supplied in confidence." I note that it is the only page in the proposal which is specifically marked "Confidential" by the affected party. In the circumstances, I am satisfied that this page of information was supplied in confidence by the affected party to the board.

[36] I also find that disclosure of the portion of the scoring sheet which contains this same information (set out in the part of the scoring sheet relating to tab 14), would reveal the information supplied by the affected party contained on the one-page under tab 14.

[37] Accordingly, I find that the second part of the three-part test has been met for the information in tab 14, as well as for this same information contained on the portion of the scoring sheet relating to tab 14.

Part 3: harms

[38] To meet this part of the test, the party resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.⁹

[39] The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus.¹⁰

⁸ Order PO-2043.

⁹ *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

¹⁰ Order PO-2020.

Section 10(1)(a) and (c)

[40] The affected party provided very brief representations on this issue, stating that disclosure of the information remaining at issue will “prejudice significantly the competitive position of the affected party.” Earlier in this appeal, it had stated that the proposal contains “confidential information” which it did not consent to release because to do so would impact its competitiveness.

[41] After reviewing the records and representations, I find that, with one exception, the records remaining at issue do not qualify for exemption under section 10(1)(a) or (c).

[42] Based on the nature of the information contained in tab 14, I am satisfied that the disclosure of the confidential financial information relating to the affected party’s fiscal year end could reasonably be expected to prejudice significantly the competitive position of the affected party for the purpose of section 10(1)(a). Previous orders have determined that the disclosure of this type of information, relating to information from financial statements of an affected party, can be considered, on its face, to cause harm for the purpose of sections 10(1)(a).¹¹ As a result, I find that the information in tab 14, and this same information contained on the portion of the scoring sheet relating to tab 14, qualifies for exemption under section 10(1)(a).

[43] With respect to the other responsive records remaining at issue in this appeal, I have not been provided with sufficient evidence to satisfy me that the disclosure of these records could reasonably be expected to prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of the affected party, nor that disclosure would result in undue loss or gain to any person. Much of this information is standard form information relating to the RFP process (for example, the introductory page, cover letter and table of contents) or general information about the company and its personnel (information in tabs 8, 11, 12, 15 and 17). The other portions of the records remaining at issue (tabs 2, 6, 7, 8, 13, 18, 19 and 20) relate more directly to the specifics of the proposal but, in the absence of detailed and convincing representations in support of the affected party’s position that disclosure will result in the harms under sections 10(1)(a) or (c), I find that the these portions of the records do not qualify for exemption under those sections.

[44] In addition, and in the absence of detailed and convincing evidence, I find that the remaining information contained in the scoring sheet, which contains some of the information contained in the proposal, and also includes the board’s scoring for the different aspects of the proposal, also does not qualify for exemption under section 10(1)(a) or (c).

¹¹ See, for example, Orders MO-1769, P-1179 and P-1360.

[45] In summary, I find that the information in tab 14, and this same information contained on the portion of the scoring sheet relating to tab 14, qualifies for exemption under section 10(1)(a), but that the other information remaining at issue does not qualify for exemption under section 10(1).

Issue B. Does the public interest override at section 16 apply to any withheld information?

[46] As identified above, the appellant argues that the public interest override at section 16 of the *Act* applies in the circumstances of this appeal, as there exists a compelling public interest in disclosure of the records.

[47] Section 16 states:

An exemption from disclosure of a record under sections 7, 9, 10, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

[48] In order for section 16 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

[49] In considering whether there is a “public interest” in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act's* central purpose of shedding light on the operations of government.¹² Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing or enlightening the citizenry about the activities of their government or its agencies, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices.¹³

[50] The word “compelling” has been defined in previous orders as “rousing strong interest or attention.”¹⁴

[51] The appellant’s representations on the public interest focus primarily on the importance of transparency of information relating to the school board’s use of funds and to the board’s decision-making processes.

¹² Orders P-984, PO-2607.

¹³ Orders P-984, PO-2556.

¹⁴ Order P-984.

[52] In this appeal, I have found that most of the information remaining at issue does not qualify for exemption under section 10. The only information which I have found qualifies for exemption relates to the confidential financial information of the affected party relating to its fiscal year. In the circumstances, I am not satisfied that there exists a sufficiently compelling public interest in the disclosure of this information to clearly outweigh the purpose of the section 10 exemption.

[53] First, the representations of the appellant focus primarily on the public interest in the board's decision-making process, not on the type of information contained in the information which I have found qualifies for exemption under section 10. Furthermore, on my review of the information which I have found qualifies for exemption under section 10, I am not satisfied that a compelling public interest exists to override the application of the exemption to those records. The information is particular financial information relating to the affected party's previous fiscal year, and I am not satisfied that there exists a public interest in this information.

[54] Accordingly, I find that the public interest override in section 16 of the *Act* does not apply to this information.

ORDER:

1. I uphold the application of the exemption in section 10(1)(a) to the information in tab 14, and this same information contained on the portion of the scoring sheet relating to tab 14.
2. I find that the remaining information does not qualify for exemption under sections 10(1)(a) and/or (c) and order the board to provide these records to the appellant by **April 23, 2013** but not before **April 16, 2013**. For clarity, this consists of the following information: the introductory page, cover letter, table of contents, tabs 1, 2, 3, 4, 5, 6, 7 (with individual's names severed), 8, 11 (with identities severed), 12, 13, 15 (with identities severed), 17 (only the one page summary), 18, 19 and 20, as well as the scoring sheet (except for the relevant portions of tabs 9, 10, 14, 15 and 16). Along with a copy of this order, I am providing the board with a highlighted copy of tabs 7, 11, 15 and the scoring sheet, highlighting in green the portions of those records which should not be disclosed.

3. I find that the public interest override in section 16 does not apply to the information which I have found to be exempt under section 10(1).

Original signed by: _____
Frank DeVries
Adjudicator

_____ March 15, 2013