Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2856

Appeal MA11-553

Hastings and Prince Edward District School Board

March 19, 2013

Summary: The requester sought access to records related to the successful proposal submitted to the board for school architecture and project management services. The board initially denied access to the proposal and related records, including the scorecards used in ranking proposals, pursuant to sections 10(1) (third party information) and 11 (valuable government information) of the *Act*. After the affected party provided consent, the scorecards and additional portions of the proposal were disclosed and the section 11 claim was abandoned. The appellant raised the public interest override in section 16. In this order, the adjudicator finds that some records contain the personal information of individuals other than the appellant and must be withheld. The adjudicator upholds the board's section 10(1) claim, in part, but orders the disclosure of some information. Finally, the adjudicator finds that the public interest override in section 16 of the *Act* does not apply.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 2(1) definition of "personal information," 10(1)(a) & (c), 14(1), 14(3)(d) and 16.

Orders and Investigation Reports Considered: Orders MO-2151, P-984, PO-1888 and PO-3055.

OVERVIEW:

[1] This order addresses the issues raised by a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Hastings and Prince

Edward District School Board (the board). The requester sought information related to a specified Request for Proposals (RFP) for project management and architectural services for new schools. The records identified were "the winning submission as well as all scorecards, evaluation notes, interview notes, meeting minutes, etc., pertaining to the award of this project".

[2] The board issued a decision letter to the appellant advising that the relevant meeting notes and minutes are available on its website, and that evaluation and interview notes do not exist. The board denied access to the winning proposal and related scorecards, claiming that these records are exempt under sections 10(1) (third party information) and 11 (valuable government information) of the *Act*.

[3] The appellant appealed the board's decision to this office and a mediator was appointed to explore resolution. When contacted by the mediator, the successful proponent (the affected party) consented to the release of some of the information at issue. The board subsequently issued a revised decision letter to the appellant granting access to portions of the proposal and the score cards, in their entirety. This revised decision removes the scorecards and section 11 from the scope of this appeal. Also during mediation, the appellant indicated that she was not interested in receiving the letters of reference (Appendix C) or the names of individuals on the resumes that are included in the records at Appendices A and B, but still wished to obtain the resumes themselves, in order to review the qualifications of the affected party's employees. The appellant also suggested that all of the withheld information should be released pursuant to the public interest override at section 16.

[4] As a mediated resolution was not possible, the appeal was transferred to the adjudication stage of the appeals process, in which an adjudicator conducts an inquiry under the *Act*. The adjudicator originally assigned to conduct the inquiry in the appeal initially sent a Notice of Inquiry seeking the representations of the board and affected party. The non-confidential representations of the board and the affected party[1] were then shared with the appellant, who submitted representations. Next, the adjudicator provided the appellant's representations to the board and the affected party in order to seek reply representations from them regarding the possible application of the public interest override. Reply representations were received and the appeal was moved to the orders stage.

[5] Following the completion of the inquiry, this appeal was transferred to me to write the order. In this order, I find that some of the information in the records is exempt under the mandatory personal privacy exemption in section 14(1) and that section 10(1) of the *Act* applies to most portions of the records at issue. I also find that the public interest override in section 16 does not apply.

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[1] With its representations, the affected party also submitted a legal opinion from a firm consulted regarding the position on section 10(1) of the *Act.* This legal opinion was not shared with the other parties to this appeal and remains confidential, but has been considered in my review.

RECORDS:

[6] Remaining at issue in this appeal are the following portions of the successful proposal: index page (1 page, in part); section 2.11 (1 page, in full); section 2.12 (2 pages, in full); section 3.0 (15 pages, in full); section 5.2 (1 page, in full); Appendix A (7 pages, in full); and Appendix B (3 pages, in full).[2]

ISSUES:

Preliminary Issue: are certain records exempt under the mandatory personal privacy exemption in section 14(1)?

A. Do the records contain confidential third party information that is exempt under section 10(1) of the *Act*?

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of section 10(1) or section 14(1)?

DISCUSSION:

Preliminary Issue: are certain records exempt under the mandatory personal privacy exemption in section 14(1)?

[7] As stated in the introduction, the appellant apparently does not seek access to the names and personal information of the affected parties' employees.[3] Specifically, in appealing the board's access decision to this office, the appellant wrote that it would be acceptable to "block out any personal information pertaining to individuals…" The appellant reiterated this statement in her representations provided during the inquiry.

[8] During mediation, the appellant also advised the mediator that she wished to pursue access to the information severed from the records, except the letters of reference (Appendix C) and "personal information." In describing this latter category of information, the appellant clarified that she did not seek access to the names of individuals on the resumes of the affected party's employees, only their qualifications.

[9] With respect to the resumes in Appendices A and B, the board submitted that although these were professional profiles, they contain personal information. The affected party refers to these appendices containing the "personal information of our staff and consultants" and submits that:

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[2] Appendix C, Letters of Reference, is removed from the scope of the appeal and is not at issue.
[3] My analysis in this section treats the affected party's consultants in the same manner as its employees.

> We do not have permission from our employees to release their resumes to [the] public. Those resumes contain personal timelines and career information.
> …
> Resumes contain past work experience, education, locations and dates of events that occurred during their history as employees of other firms.

[10] This office did not seek representations specifically directed at whether qualified "personal information" was information the appellant intended to remove from the scope of the appeal, nor were the parties asked to provide submissions on the definition of "personal information" or the personal privacy exemption. Based on the appellant's comments about access to employee information, however, I have concluded that the uncertainty surrounding this issue must be addressed as a preliminary matter.

[11] Information that qualifies as "personal information" according to the definition of the term in section 2(1) of the *Act* cannot be disclosed to any person other than the individual to whom the information relates, unless the personal information fits within certain exceptions. The relevant exemption here is section 14(1), which is intended to protect the privacy interests of individuals. Further, given the mandatory nature of the exemption, I am satisfied that it is appropriate to determine its application on my own initiative and on the basis of my review of the records, as well as consideration of the parties' comments.

Definition of "personal information"

[12] I have reviewed the records to determine whether they contain "personal information" and, if so, to whom it relates. "Personal information" is defined in section 2(1) of the *Act*, and encompasses "recorded information about an identifiable individual" that fits within eight listed categories.

[13] Section 2(2.1) also relates to the definition of personal information and 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.

[14] 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.[4] However, even if information relates to an individual in a professional, official or business capacity, it may still qualify as personal information if the information reveals something of a personal nature about the individual.[5]

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[4] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[5] Orders P-1409, R-980015, PO-2225 and MO-2344.

[15] To begin, pursuant to section 2(2.1) of the *Act*, I find that the names, titles and designations of the affected party's employees on their resumes (or professional profiles) do not qualify as their "personal information." [6] However, these same records also contain information relating to the employment or educational history of the affected party's employees. I find that the information contained in the profiles that relates to each individual's past job experience, affiliations and project experience fits within paragraph (b) of the definition of "personal information". This is consistent with a line of orders that have found that resumes typically include personal information as that term is defined in section 2(1).[7]

[16] As stated, the appellant's position is that the "qualifications" of the affected party's employees ought to be disclosed without the names of the individuals. As I understand the argument, severing the names would render the information unidentifiable; that is, it would no longer relate to an "identifiable individual", as required.[8] However, even if the names are severed, the professional profiles contain sufficiently detailed information about each individual that it is reasonable to expect that they may be identified. Accordingly, I am satisfied that the employment or education history of each employee whose profile appears in Appendix A or B qualifies as the personal information of individuals other than the appellant for the purpose of section 2(1) of the *Act*.

Unjustified invasion of personal privacy

[17] Where a requester seeks the personal information of another individual, section 14(1) prohibits an institution from releasing this information unless one of the exceptions in paragraphs (a) through (f) of section 14(1) applies. The only exception that could possibly apply in the circumstances of this appeal is section 14(1)(f) which states:

> A head shall refuse to disclose personal information to any person other than the individual to whom the information relates except,
>
> > if the disclosure does not constitute an unjustified invasion of personal privacy.

[18] Therefore, if a record contains the personal information of an individual other than the appellant, the only way that such a record can be disclosed is if I find that disclosure would not constitute an unjustified invasion of personal privacy of that

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[6] Orders MO-2151, MO-2176 and MO-2283. This finding is consistent with other orders of this office that pre-dated the amendments to the definition of "personal information" in 2006 that codified the distinction between personal and professional contexts.
[7] See Orders P-727, MO-1444 and MO-2151.
[8] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

individual. For the section 14(1)(f) exception to apply, it must be established that disclosure would not be an unjustified invasion of personal privacy.

[19] Sections 14(2), (3) and (4) of the *Act* provide guidance in determining whether disclosure of personal information would result in an unjustified invasion of personal privacy. Section 14(2) provides some criteria for the institution to consider in making this determination. Section 14(3) lists the types of information the disclosure of which is presumed to constitute an unjustified invasion of personal privacy. Finally, section 14(4) refers to certain types of information whose disclosure does not constitute an unjustified invasion of personal privacy.

[20] As the personal information in Appendices A and B consists of the employment and educational history of a number of identifiable individuals, it appears that it may be subject to the presumption in section 14(3)(d). A number of past orders have determined that information contained in resumes[9] and work histories[10] falls within the scope of section 14(3)(d). I agree. Accordingly, I find that the presumption against disclosure in section 14(3)(d) applies to the personal information contained in the profiles in Appendices A and B.

[21] The Divisional Court has held that once a presumption against disclosure under section 14(3) has been established, it cannot be rebutted by either one or a combination of the factors set out in 14(2). If a section 14(3) presumption against disclosure is established, it can only be overcome if the personal information at issue fits within section 14(4) or if the "compelling public interest" override at section 16 applies.[11] I find that section 14(4) does not apply in the circumstances of this appeal.

[22] In addition, I find that the personal information in the resumes in Appendices A and B cannot reasonably be severed from the information that I found did not qualify as personal information, above, because they are inextricably intertwined. In my view, severing the records for the purpose of disclosing the names, titles and designations of the affected party's employees would result in the disclosure of meaningless pieces of information.[12]

[23] Therefore, subject to my consideration of section 16 below, I find that disclosure of Appendices A and B would constitute an unjustified invasion of the personal privacy of individuals other than the appellant and that the information is exempt under section 14(1) of the *Act*.

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[9] Orders M-7, M-319 and M-1084.
[10] Orders M-1084, MO-1257 and MO-2847.
[11] *John Doe v. Ontario (Information and Privacy Commissioner)* (1993), 13 O.R. (3d) 767.
[12] See Orders PO-2627, PO-2999 and MO-2525.

A. Do the records contain confidential third party information that is exempt under section 10(1) of the *Act*?

[24] The board claims that the withheld records, or portions of records, are subject to the mandatory exemption in section 10(1) of the *Act*. The affected party joins the board in opposing disclosure of the severed portions of its successful bid proposal.

[25] The relevant parts of section 10(1) state:

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

[26] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[13] 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.[14]

[27] Section 42 of the *Act* provides that the burden of proof that a record, or a part thereof, falls within one of the specified exemptions in the *Act* lies with the head of the institution. Affected parties who rely on the exemption provided by section 10(1) of the *Act* share the onus of proving that this exemption applies.[15]

[28] For section 10(1) to apply, I must be satisfied that each part of the following three-part test is met:

> 1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
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> 2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and

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[13] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade),* [2005] O.J. No. 2851 (Div. Ct.).
[14] Orders PO-1805, PO-2018, PO-2184 and MO-1706.
[15] Order P-203.

> 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) or (d) of section 10(1) will occur.

[29] For the reasons set out below, I find that section 10(1) applies to most of the information that has not yet been disclosed to the appellant.

Part 1: type of information

[30] According to the board, since the records at issue describe the approach and methodology unique to the affected party, they contain technical information and trade secrets for the purpose of section 10(1).

[31] The affected party claims that the records contain not only those two types of information, but scientific, commercial and financial information as well. The affected party also mentions "personal staff information" in relation to the concept of labour relations information, but as I have addressed the exemption of this personal information as a preliminary matter, above, I will not refer to this submission again.

[32] The affected party submits that the withheld records contain the identified types of information in the form of:

- research and development in mechanical, electrical, and civil engineering and green building technology specific to schools (scientific);
- operations and processes for working with clients in the capital education field (technical);
- marketing of services (commercial); and
- approach and methodology (trade secrets).

[33] Other parts of the affected party's representations provide additional detail and description of the types of information in the records and connect it to specific portions of the proposal that were withheld. However, as these representations are confidential, they will not be set out further in this order.

[34] The appellant addresses the type of information contained in the records only briefly, stating:

> The Board and Affected Party mention the confidentiality of the Scientific, Technical, Commercial information, which do not apply to [a] Project Management and Architectural Services project. As well, they mention "trade secrets" – there is nothing in a building that is a trade secret.

Analysis and findings

[35] Based on my consideration of the records and the representations provided, I conclude that the relevant types of information, as discussed in prior orders, are as follows:

> Technical information is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing (Order PO-2010).
>
> 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 (Order 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).

[36] I adopt these definitions for the purpose of this appeal.

[37] Based on my review of the records, I am satisfied that they contain information that fits within the definitions of technical, commercial and financial information as those categories of information have been defined in past orders of this office.

[38] In particular, I agree with the affected party's position that the records contain technical information, namely architectural, engineering and design information regarding the proposed school construction projects. I am also satisfied that the records contain commercial information because they address the provision of design and project management services to the board. Finally, I also conclude that the records contain financial information, namely information about the cost accounting methodology and practices of the affected party. I find, however, that the withheld information in the records at issue does not consist of scientific or trade secret

information, as those terms are defined and applied in the review of section 10(1) of the *Act.*[16]

[39] In summary, I find that the information contained in the records constitutes technical, commercial and financial information for the purposes of part 1 of the test for exemption under section 10(1) of the *Act*.

Part 2: supplied in confidence

[40] In order for me to find that the second part of the test under section 10(1) has been met, I must be satisfied by the evidence that the affected party "supplied" the information at issue to the board in confidence, either implicitly or explicitly.

[41] 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.[17] 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.[18]

[42] In order to satisfy the "in confidence" component of part 2, the party 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 (Order PO-2020).

[43] 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,

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[16] *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which (i) is, or may be used in a trade or business; (ii) is not generally known in that trade or business, (iii) has economic value from not being generally known, and (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy (Order PO-2010). *Scientific information* is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field (Order PO-2010) [emphasis added].

[17] Order MO-1706.

[18] Orders PO-2020 and PO-2043.

- not otherwise disclosed or available from sources to which the public has access, and
- prepared for a purpose that would not entail disclosure [Order PO-2043].

Representations

[44] The board expresses its support for the positions taken by the affected party with respect to the sought-after disclosure of the withheld portions of the successful proposal. Apart from this, the board's representations on this part of the section 10(1) test are brief, merely stating that the proposal was submitted in confidence in response to the RFP and was "supplied … with an expectation of some confidentiality."

[45] The affected party states that it supplied the information to the board with an expectation of confidentiality. Specifically, the affected party submits that in response to the board's direction, the proposal outlines its particular approaches, techniques and methodology. According to the affected party, the undisclosed content of its proposal contains proprietary or informational assets that have been developed over many years.

[46] The affected party also submits that its proposal was prepared for a purpose that would not entail disclosure or availability to the public. Further, the affected party maintains that all information provided to the board was accompanied by a "confidential disclosure statement." The affected party relies on the confidentiality statement transmitted to the board with the proposal, which states:

> This communication is intended as a private communication for the sole use of the primary addressee and those individuals listed for copies in the original message. The information contained in this communication is private and confidential and if you are not an intended recipient you are hereby notified that copying, forwarding or other dissemination or distribution of this communication by any means is prohibited. If you are not specifically authorized to receive this communication and if you believe that you received it in error please notify the original sender immediately. This is proprietary to [the affected party].

[47] The appellant's representations do not address the "supplied" or "in confidence" elements of part 2 of the test for exemption under section 10(1).

Analysis and findings

[48] I have reviewed the records and the representations provided by the parties. For the following reasons, I am satisfied that the information at issue was "supplied" to the board, in support of the affected party's school design and project management bid.

[49] This office has previously found that RFP proposals provided to an institution as part of the process followed in seeking a supplier of goods or services through a competitive selection process are "supplied" for the purposes of part 2 of the test under section 10(1). Information contained in proposal documents that remains in the form originally provided by a proponent is considered not to be the product of any negotiation between the institution and that party.[19] Information such as the operating philosophy of a business, or a sample of its products, is thus considered relatively immutable and not susceptible to change.[20] I agree with this reasoning, and I will apply it in this appeal.

[50] It is generally accepted that the purpose of section 10(1) is to protect the "informational assets" of a third party that is doing business with an institution. In my view, the information that has been withheld in this appeal qualifies as the informational assets of the affected party, in that it represent the methodology and approach employed by this proponent in addressing issues mandatory to the fulfilling of the RFP requirements. I am satisfied that this information appears in the form it was submitted by the affected party, and I find that it meets the definition of "supplied" accordingly.

[51] I am also satisfied by the representations of the affected party that it reasonably expected that the information it supplied to the board would be treated in a confidential manner by the board. I have considered the confidentiality statement prepared by the affected party and the other indications provided as to the manner in which the information prepared for the RFP was handled to maintain that confidentiality. In the circumstances, I find the affected party's evidence regarding its expectation of confidentiality to be persuasive.

[52] Therefore, I find that the undisclosed portions of the affected party's proposal were supplied in confidence for the purpose of part 2 of the test for exemption under section 10(1). I now turn to part 3 of the test.

Part 3: harms

[53] To meet this third part of the test, the parties resisting disclosure (in this case, the board and the affected party) must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm" with the release of the information. Evidence amounting to speculation of possible harm is not sufficient.[21]

[54] Parties should not assume that harms under section 10(1) are self-evident or can be substantiated by submissions that repeat the words of the *Act* (Order PO-2435). The

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[19] See, for example, Orders MO-1368, MO-1504, PO-2637 and PO-2987.
[20] Order PO-2433.
[21] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

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 (Order PO-2020).

[55] Sections 10(1)(a) and (c) have been cited by the parties opposing disclosure of the records. As previously noted, this mandatory exemption will apply to certain types of information:

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

Representations

[56] The board submits that it considered that harm would result from disclosure of sections 2.11, 2.12 and 3.1 of the proposal because they were prepared using the affected party's skills and knowledge and access to them would improperly benefit the affected party's competitors. The board's concern with section 5.2 centres on the section containing "legal information submitted at the request of the Board," the disclosure of which may harm the affected party's reputation "if misunderstood or used either intentionally or unintentionally."

[57] The affected party's representations address each withheld part of its proposal submission on a section-by-section basis. Large portions of these representations were held to be confidential earlier in the inquiry process and were not shared with the other parties. However, I have considered them in their entirety and, where possible, these representations are outlined in a more general manner in this order.

[58] In its non-confidential representations, the affected party states that the field of education architecture is highly specialized and competitive and its particular handling of construction, design and client management is its signature strength. According to the affected party:

> The profession of architecture is based on methodologies, strategies and techniques that are crafted individually by each firm, based on the specific personalities involved and areas of business that the practice focuses on.

> We have developed a very particular method of delivering service to our clients. … Clients seek us out because we have a unique way of doing business and designing schools for them. We have won 52 Awards of Design. …
>
> By becoming public knowledge, this information could potentially lead to other firms copying our philosophy and techniques. We would lose the competitive edge that took us many years and immeasurable cost to develop.

[59] The affected party also claims that disclosure could reasonably be expected to result in the undue loss of its "intellectual assets" to a competitor obtaining the content of the records. The affected party submits that disclosure of its "approach" would lead to it being known and matched by competitors, "no longer allowing us to be unique to our prospective clients."

[60] Regarding section 5.2, the affected party notes that pursuant to the board's request, they (and other proponents) disclosed certain information related to legal processes and conflicts of interest. The affected party opposes disclosure of this section of the proposal on the basis that the information may harm its reputation.

[61] The appellant does not address the "harms" component of the test for exemption under section 10(1). More generally, she states her impression that the information she is seeking does not fall "into the parameters cited." Her other representations focus on claims that there is a public interest in disclosure of the information, which will be addressed in the next section of this order.

Analysis and findings

[62] Many past orders of this office have addressed the treatment of information provided in response to RFP processes under section 10(1) of the *Act*. The result, in terms of disclosure of the information in an RFP, will naturally differ from one appeal to the next, based on the evidence before the adjudicator, including the parties' submissions, the content of the records and other circumstances. Regardless of the conclusion, however:

> The decision whether to disclose information contained in a tender document must be approached in a careful way, applying the tests as developed over time by this office while appreciating the commercial realities of the tendering process and the nature of the industry in which the tender takes place.[22]

[22] Order PO-1888. See also Order PO-3055.

[63] With this approach in mind, I have carefully considered the submissions and evidence provided by the parties, and I have reviewed the information remaining at issue closely. With two exceptions, I am satisfied that disclosure of the withheld information could reasonably be expected to lead to the harms contemplated by sections 10(1)(a) or (c).

[64] In the circumstances of this appeal, I accept the position of the affected party that the field of education architecture is highly specialized and competitive. In my view, the competitiveness of the field is especially intense given the context of school boards simultaneously confronting budget constraints and the realities of aging school buildings in serious need of repair or expansion.

[65] After reviewing the records, as well as the representations of the board and the affected party, I am satisfied that the disclosure of most of the withheld portions of the record could reasonably be expected to result in the harms identified in section 10(1)(a) of the *Act*. In particular, I find that the affected party has provided me with sufficient evidence to demonstrate that disclosure of sections 2.11, 2.12 and 3.1 of its proposal would disclose its unique approaches in education architecture design and project management. I accept the affected party's position that disclosure of the information in these sections would provide a detailed description of its operating philosophy, as well as the methods and approaches that it proposed regarding the board's school building projects. In turn, I am satisfied that this would consequently allow existing and potential competitors to modify their own approach and methodology in order to formulate more effective responses to similar RFPs. Accordingly, I find that disclosure of these sections could reasonably be expected to result in a loss of competitive advantage amounting to significant prejudice to the affected party's competitive position. I find, therefore, that sections 2.11, 2.12 and 3.1 of the affected party's proposal satisfy the third part of the test and that they are exempt under section 10(1)(a).

[66] In the circumstances, it is not strictly necessary for me to determine if disclosure of the same information from the affected party's proposal could reasonably be expected to result in undue loss to the affected party for the purpose of section 10(1)(c). However, for similar reasons, I would have found that disclosure of these parts of the proposal could reasonably have been expected to result in undue loss to the affected party and undue gain to its competitors, as contemplated by section 10(1)(c).

[67] However, as suggested above, there are two exceptions to my finding under part 3 of the test for exemption under section 10(1). The first exception relates to the withheld portions of the index, which include the titles or headings for certain sections in the affected party's proposal. Neither the board nor the affected party provided representations in support of the position that disclosure of the index would result in the types of harm that section 10(1)(a) and (c) seek to prevent. As I have not been provided with sufficient evidence upon which to base a finding of harm, and there being

no harm evident from review of the index itself, I find that its disclosure could not reasonably be expected to result in either of the harms in sections 10(1)(a) or (c). The undisclosed portions of the index, therefore, do not meet part 3 of the section 10(1) test for exemption.

[68] The second exception relates to section 5.2 of the proposal, which is the section requiring disclosure of legal or conflict of interest matters. The affected party offered submissions respecting the possible harm it claimed would result from disclosure of the information. However, I have read section 5.2, and I note that its content is nearly identical to the representations submitted in this appeal on the subject, which were shared with the appellant. While acknowledging the affected party's concerns, I am not persuaded that disclosure of this particular information could reasonably be expected to result in the affected party experiencing harm to its competitive position or undue loss in the form of damage to its reputation. Accordingly, I find that this information does not meet the requirements of part 3 of section 10(1).

[69] As all three parts of the test for exemption under section 10(1) must be met, I find that the index and section 5.2 of the affected party's proposal are not exempt and must be disclosed to the appellant.

[70] In sum, I find that sections 2.11, 2.12 and 3.1 of the proposal are exempt under section 10(1)(a), while the index and section 5.2 are not exempt under section 10(1)(a) or (c). I will now review whether section 16 applies to the information I have found to be exempt under section 10(1), such that it must be disclosed to the appellant.

B. Is there a compelling public interest in disclosure of the records that clearly outweighs the purpose of sections 10(1) or 14(1)?

[71] I have found that some portions of the proposal and two of the appendices qualify for exemption under section 10(1)(a) or 14(1). The appellant takes the position that the public interest override in section 16 applies to all of the information withheld by the board and that it should be disclosed.

[72] Section 16 of the *Act* 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 [my emphasis].

[73] Section 16 could be applied to override the third party information or personal privacy exemptions if two requirements are satisfied. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemptions.

[74] 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 (Order P-984). 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 the citizenry about the activities of their government, 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 (Order P-984).

[75] The existence of a compelling public interest is not sufficient to trigger disclosure under section 16. This interest must also clearly outweigh the purpose of the established exemption claim in the specific circumstances of the appeal.

[76] The *Act* is silent as to who bears the burden of proof in respect of section 16. This onus cannot be absolute in the case of an appellant who has not had the benefit of reviewing the requested records before making submissions in support of his or her contention that section 16 applies. To find otherwise would be to impose an onus which could seldom if ever be met by an appellant. Accordingly, this office will review the records with a view to determining whether there could be a compelling public interest in disclosure which clearly outweighs the purpose of the exemption (Order P-244).

Representations

[77] In its initial representations, the board maintains that there is no public interest in this appeal "as the interest appeared private in nature and a great degree of disclosure of information has already been provided to the appellant."

[78] While the affected party admits that the board is perhaps in a better position to address this issue, it nonetheless provides its perspective, as follows:

> We feel there is no interest, other than from one of our competitors wanting to learn more about how we operate, and our methods for designing schools. …
>
> [We] do not believe that releasing our information sheds any light on how this Board operates as government. Releasing these sections does however shed light on how we as a private, competitive business operate and design schools…
>
> We find a compelling public interest does not exist … [because the record] only represents how we function internally as a firm of designers and technologists, how our staff relates to each other, what our scientific and management technologies are and the confidential information of our team and past clients.

[79] The appellant argues that it is both unfair and unreasonable to withhold the information requested. She submits that:

> As a taxpayer, I have the right to know and to be assured that the award of these schools were [sic] handled properly and without favoritism. It is extremely important to have transparency when and where taxpayer's money is involved.

[80] The appellant sets out information from the website for "Education in Ontario" which refers to reforms "for transparency and effectiveness," including "moving towards transparent financial reporting that allows parents and the public to hold school boards and the government more accountable for education funding." The website excerpt provided also mentions "easy access to the implications of the decisions at a local level…"

[81] The board and the affected party were asked to provide representations in reply to the appellant's position on the public interest. In reply, the board submits that the records in question would not inform "the public about the activities or operation of the board itself, but rather only the activities and informational assets" of the affected party. Reiterating its previous submission that the request appears to be private in nature, the board insists that "Interest in a single bid document does not constitute a public interest." Further, the board adds that there is no evidence that this issue has raised any public interest.

[82] In its reply representations, the affected party echoes the board's submission that there is no evidence that "this matter has raised any interest or attention to anyone other than the appellant which further emphasizes that this is solely a private interest." The affected party also submits that:

> In past cases, no public interest was found where … a significant amount of information has already been disclosed and this is adequate to address any public interest consideration. This is precisely what has happened in this case. The appellant's stated concerns are that the "schools were handled properly and without favoritism." A significant amount of information including the bid information and score cards has already been disclosed which would sufficiently address any concerns of the appellant as to how the School Board made its decision. The information requested simply relates to the appellant's desire to know how [we operate… T]here is no public interest in the inner workings of [the affected party].

[83] In view of my conclusion on section 16 below, I do not find it necessary to set out the further submissions of the parties regarding whether the interest here "clearly outweighs" the purpose of the established exemption claim.

Analysis and findings

[84] In order for me to find that section 16 of the *Act* applies to override the exemption of the records I have found qualify under sections 10(1) or 14(1), I must be satisfied that there is a compelling public interest in the disclosure of those particular records that clearly outweighs the purpose of the third party information or personal privacy exemptions.

[85] To begin, I acknowledge the importance of institutional accountability for RFP processes, and I agree that a public interest exists in the disclosure of information related to them to ensure that they are conducted in a fair and unbiased manner. However, I do not accept the appellant's position that a public interest that is compelling in nature exists in this case. Specifically, I accept the position taken by the board and the affected party that no evidence has been provided to establish that there was a general or public interest in this particular RFP that would lead to the request in this appeal transcending the realm of private interest. The appellant has not provided sufficient evidence to support her position that a public interest in this RFP exists, beyond general assertions regarding her entitlement to the information "as a taxpayer" and expressions of concern about "favoritism." Moreover, although the appellant directed my attention to content on a provincial government website about "transparent financial reporting that allows parents and the public to hold school boards and the government more accountable for education funding," no connection is made between the outlined principles and the specific records at issue. In my view, the appellant has failed to provide evidence to demonstrate a connection between the proposal submission of the affected party and a public interest in accountability for "education funding" in the province.

[86] Would disclosure of the records for which I have upheld the third party information or personal privacy exemptions shed light on the government's actions or decisions with respect to the appellant's stated interest? Having reviewed the exempt records once again for this purpose, I must answer the question in the negative. I agree with the board and affected party that disclosure of the information that I have found to be exempt would not serve to inform the public about the activities of the board in commissioning the architecture and project management services for these schools. Therefore, I find that the exempt information would not add "to the information the public has to make effective use of the means of expressing public opinion or to make political choices."[23]

[87] In the circumstances, I find that there is no compelling public interest in the disclosure of the exempt portions of the affected party's proposal. As I have found that there is no compelling public interest in the disclosure of the information in section 2.11, 2.12 and 3.1 of the proposal, or Appendices A and B, I find that the "public

[23] Order P-984.

interest override" provision in section 16 does not apply in the circumstances of this appeal.

ORDER:

1. I order the board not to disclose the professional profiles of the affected party's employees and consultants in Appendices A and B, as they are exempt under section 14(1) of the *Act*.

2. I uphold the board's decision to deny access to sections 2.11, 2.12 and 3.1 of the affected party's proposal pursuant to section 10(1)(a) of the *Act*.

3. I order the board to disclose the index and section 5.2 of the proposal by **April 29, 2013,** but not before **April 22, 2013**.

4. In order to verify compliance with provisions of this Order, I reserve the right to require the board to provide me with a copy of the records disclosed to the appellant.

Original signed by: March 19, 2013
Daphne Loukidelis
Adjudicator