Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-2983

Appeal MA12-231-2

Limestone District School Board

November 28, 2013

Summary: The Limestone District School Board received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the "Tell Them From Me" survey data from three named secondary schools. The school board denied access to the responsive information pursuant to the mandatory exemption for third party commercial information at section 10(1) and the mandatory exemption related to personal privacy at section 14(1) of the *Act*. The requester appealed the school board's decision. In this order, the adjudicator finds that neither of the mandatory exemptions at sections 10(1) or 14(1) apply to the information at issue and orders it disclosed.

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), 14(1).

Orders and Investigation Reports Considered: Orders M-333 and PO-2435.

OVERVIEW:

[1] The Limestone District School Board (the school board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for the "Tell Them From Me" (TTFM) survey data from three named secondary schools within the dates of September 1, 2006 to June 30, 2011.

[2] The school board advised the requester that due to the large amount of information requested, it required a thirty-day time extension pursuant to section 20 of the *Act* to respond to the request.

[3] The requester advised the school board that she would be content to receive one year of data received in an expeditious fashion and that the school board could take its time to process her request for the remaining four years. The school board responded that despite her modified request, the time extension was still required. As a result, the requester appealed the school board's time extension and appeal MA12-231 was opened.

[4] Appeal MA12-231 was resolved when the school board issued a decision regarding access in response to the requester's clarified request seeking access to one year's worth of numeric responses for each of the three schools involved. The requester confirmed that she did not seek access to narrative data or comments in order to eliminate the possibility of inadvertent release of any personal data such as a comment rendering an individual identifiable.

[5] The school board's access decision in response to the requester's clarified request denied access to the responsive records, in their entirety, pursuant to section 10(1)(a), (b) or (c) (third party information), and section 14(1) (personal privacy), read in conjunction with the presumptions at sections 14(3)(a), (b), (d), (f), (g), and (h) of the *Act*. The school board also took the position that the request was frivolous or vexatious pursuant to section 20.1(1)(a) of the *Act* on the basis that the appellant's intended use of the information was not for the same purpose that it had been collected*.* The school board also stated that it had not yet notified the company retained to administer the survey (the affected party) of the request, but that it intended to invite it to make submissions regarding disclosure of the records.

[6] The requester, now the appellant, appealed the school board's decision to deny access to the records and its position that her request was frivolous or vexatious.

[7] During mediation, the appellant further clarified the request and stated that she sought access to the aggregate data of the results of the surveys conducted at all three schools. She confirmed that she did not seek access to any individual's personal information.

[8] Mediation did not resolve the issues on appeal and the file was transferred to the adjudication stage of the appeal process for an inquiry.

[9] I began my inquiry into this appeal by sending a Notice of Inquiry to the school board, initially. At that time, I also decided to seek representations from the affected party on the possible application of the third party commercial information exemption at section 10(1) of the *Act*. Both parties provided representations in response.

[10] In its representations, the school board advised that it was no longer claiming that the request is frivolous and vexatious. Accordingly, that issue was removed from the scope of this appeal.

[11] I then sought the representations of the appellant. As the appellant's representations raised issues to which I believed that the school board and the affected party should be given the opportunity to reply, I provided them with a complete copy of the appellant's representations. The school board provided reply representations. The affected party chose not to do so.

[12] In this order, I do not uphold the school board's decision to deny access to the requested information. In the discussion that follows, I reach the following conclusions:

- The mandatory exemption for third party commercial information at section 10(1) of the *Act* does not apply to exempt the information at issue from disclosure;

- the records at issue do not contain "personal information" as that term is defined in section 2(1) of the *Act*; and

- the mandatory exemption relating to personal privacy at section 14(1) of the *Act* does not apply to the information at issue.

RECORDS:

[13] The records at issue in this appeal are reports that describe in detail the TTFM student survey results for three individual schools collated during the 2010-2011 school year. There are five reports and each report consists of 18 pages.

ISSUES:

A. Does the mandatory exemption at section 10(1) apply to the records?

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

DISCUSSION:

A. Does the mandatory exemption at section 10(1) apply to the records?

Section 10(1): the exemption

[14] The school board submits that sections 10(1)(a), (b) or (c) apply to the records at issue. The relevant portions 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, if the disclosure could reasonably be expected to,
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> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
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> (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; or

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

[16] For section 10(1) to apply, the institution and/or the third 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
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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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[1] *Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)], leave to appeal dismissed, Doc. M32858 (C.A.)]. 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 [Orders PO-1805, PO-2018, PO-2184 and MO-1706].

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) and/or (d) of section 10(1) will occur.

Part 1: type of information

[17] The types of information listed in section 10(1) have been discussed in prior orders:

> *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
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> (i) is, or may be used in a trade or business,
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> (ii) is not generally known in that trade or business,
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> (iii) has economic value from not being generally known, and
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> (iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[2]
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> *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.[3]
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> *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.[4]
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> *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

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[2] Order PO-2010.
[3] Order PO-2010.
[4] *Ibid.*

application to both large and small enterprises.[5] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[6]

Labour relations information has been found to include:

- Discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute.[7]

- Information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees.[8]

but not to include:

- Names, duties and qualifications of individual employees.[9]

- An analysis of the performance of two employees on a project. [10]

- An account of an alleged incident at a child care centre.[11]

- The names and addresses of employers who were the subject of levies or fines under workers' compensation legislation.[12]

[18] The school board submits that the records contain both commercial information and labour relations information. With respect to commercial information, the school board points to Order 16 and Order P-493 in which the term "commercial information" was found to apply to non-profit enterprises and to include such things as market research surveys. The school board submits:

> [The] TTFM survey results are essentially market survey data utilized by a non-profit organization. The [school board's] is engaged in providing services to students and parents in its communities and in particular,

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[5] *Ibid.*
[6] Order P-1621.
[7] Order P-1540.
[8] Order P-653.
[9] Order MO-2164.
[10] Order MO-1215.
[11] Order P-121.
[12] Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

> education service. The TTFM survey compiles data from the users of the [school board's] services and their parents and is then utilized by [school board] to alter, eliminate or enhance the services that it delivers to its students and, in turn, parents.

[19] With respect to whether the information at issue contains "labour relations information" the school board submits:

> [T]he survey results, especially as they relate to the open ended questions, may reveal the names of teachers. This information, to the extent that it may reveal any misconduct or other behavior which must be investigated and actioned by the [school board], may result in a consequent labour relation issue as the vast majority of teachers and other school staff are represented by various teachers or other bargaining agents. As a result, the [school board] further submits that the TTFM survey data may also constitute information relating to "labour relations."

[20] The affected party submits that it is the designer and the proprietary owner of the TTFM survey. It submits that the disclosure of the records, the reports generated as a result of the administration of the TTFM survey, would reveal information that is a trade secret and would also reveal technical information related to the composition of its surveys. It submits that the evaluation system and the survey measures were designed by an internationally renowned researcher well known for "his research on school effectiveness, the assessment of 'value-added' in education, and the design of monitoring of local and national education systems."

[21] The appellant submits that the information that she seeks constitutes reports from the results of the survey that groups responses to thematically associated questions providing comparisons with normative values. As such, she submits that the actual survey questions owned by the affected party will not be revealed and that she is not seeking access to the commercial product.

[22] I do not accept that the reports contain any of the types of information identified in section 10(1), specifically, trade secret, scientific, technical, commercial or labour relations information.

[23] Commercial information, as defined by this office, relates solely to the buying, selling, and exchange of merchandise or services. Taking that definition into consideration, the provision of education to students that does not involve the payment of tuition or fees cannot, in my view, qualify as a commercial activity. Although I acknowledge that previous orders have established that this term can apply to non-profit organizations, in the circumstances I do not accept that the reports contain information that qualifies as "commercial" as that term is contemplated in the *Act*.

[24] As the reports do not make any reference to the behavior or conduct of teachers, administrative staff or other school board employees or refer to any of these types of individuals, I do not accept that they contain information that qualifies as "labour relations" information.

[25] With respect to the affected party's position that the records contain technical information, given that previous orders have established that technical information is information that belongs to an organized field of knowledge falling under the general categories of applied sciences or mechanical arts, I do not accept that the reports fall within the type of information contemplated by that definition. However, I accept that the information at issue more closely relates to the organized field of knowledge that is social sciences. Accordingly, I will consider whether the information might consist of scientific information instead.

[26] In Order MO-1379, Adjudicator Laurel Cropley addressed a number of records including a teacher questionnaire. After reviewing the definition of "scientific information" from Order P-454, she stated:

> Although I do not have any evidence from the parties on this, I am prepared to accept, based on my review of the record, that the development of the Teacher Questionnaire would have involved research that was likely based on the observation and testing of specific hypotheses or conclusions undertaken by experts in the field of psychology as would the development of the Woodcock Johnson test. In my view, this would similarly apply to the application of the tests. Accordingly, I accept that the information contained in these two records falls within the scope of scientific information as it relates to the "social sciences."

[27] However, in Order MO-1476, having considered Adjudicator Cropley's reasoning in Order MO-1379, former Assistant Commissioner Tom Mitchinson found that the results of the application of the scientific methods in a survey did not qualify as scientific information for the purposes of section 10(1). He stated:

> As a preliminary matter, it is clear to me that the appellant, as a company that is involved in survey research, is engaged in an area of study dealing with an organized field of knowledge, which can properly be characterized as a social science. As such, the methods employed by the appellant in conducting its work are the results of scientific development, testing and analysis.
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> However, I am not persuaded that the information contained in the actual records at issue in this appeal deal with "the observations and testing of specific hypotheses or conclusions." … [T]he information contained in the

> records in this case reflects the application of the scientific methods used by the appellant in undertaking the survey research, not the actual observation and testing of specific hypotheses or conclusions. Although I accept that the appellant engages in a social science and applies its scientific knowledge and expertise when undertaking survey work, I find that the results of this work as reflected in the records at issue in this appeal do not themselves reveal any "scientific information," as that term has been defined by this Office.

[28] In keeping with the former Assistant Commissioner's reasoning,[13] in the current appeal, while I accept that the creation and development of the survey questions was done by an expert in the field of social sciences and the survey itself might qualify as scientific information, I do not accept that the compilation of the survey results in the form of a report contains or reveals any "scientific information" within the meaning of that term. I acknowledge that during the creation of the survey the affected party would have engaged in the observation and testing of specific hypotheses or conclusions. However, I find that the information contained in the reports at issue merely reflect the application of the final product that resulted from that observation and testing.

[29] Finally, I accept that the survey questionnaire itself might reveal a unique method, formula, pattern or compilation of information embodied in a product used by the affected party's business. However, I do not accept that the reports that detail the aggregate survey results contain or reveal information that might qualify as a "trade secret."

[30] I have found that the information at issue does not qualify as trade secret, technical, scientific, commercial or labour relations information within the meaning of those terms as defined by this office. As a result, the first part of the section 10(1) test has not been established. Despite the fact that all three parts of the section 10(1) test must be met for the exemption to apply, for the sake of completeness I will continue with my analysis and go on to determine whether the other parts of the section 10(1) test have been met.

Part 2: supplied in confidence

<u>*Supplied*</u>

[31] 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.[14]

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[13] The former Assistant Commissioner's reasoning is also in keeping with Orders PO-1666 and PO-1732.
[14] Order MO-1706.

[32] 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.[15]

[33] The reports at issue were prepared and compiled by the affected party. Although they were prepared using information gathered from on-line surveys completed by students of the school board, the surveys were both created and administered by the affected party for the purpose of preparing those reports. The reports were then provided to the school board. Having considered the information at issue, I accept that the reports themselves qualify as having been "supplied" to the school board as they were directly provided by the affected party.

<u>In confidence</u>

[34] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier (in this case, the affected party) had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.[16]

[35] 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
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure.[17]

[36] Addressing the "in confidence" component of part two of the test, the school board's representations focus on the fact that the participants who completed the survey were advised that "the information that they submit [would be kept] in a secure and anonymous fashion" and, therefore, that they had a reasonable expectation that "their information [would] be confidential." The school board does not make any submissions that address whether the supplier of the information, the affected party,

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[15] Orders PO-2020 and PO-2043.
[16] Order PO-2020.
[17] Orders PO-2043, PO-2371 and PO-2497.

had a reasonable expectation that the information in the reports would be kept in confidence.

[37] Regarding the confidentiality of the information that it supplied to the school board, the affected party submits:

> [The affected party] grants clients a non-transferable and exclusive right to use the reports generated by [the affected party] for their own purposes provided they do not distribute or otherwise make available to third parties the survey questions accessible within the survey site. The client acknowledges that the survey questions are the proprietary information of [the affected party].
>
> The data was supplied directly to [the school board] on the basis that they were confidential and were to remain confidential. Furthermore, the survey data would not be disclosed or available from sources to which the public has access beyond that of the reports the school chooses to release. Also, the data and subsequent reports released by [the affected party] were prepared for a purpose that would not entail disclosure.

[38] The appellant submits that she is not seeking access to the commercial product that was purchased by the school board from the affected party (the survey itself). She submits that rather, she is seeking access to the reports generated as a result of the administration of the survey that are the property of the school board. She submits:

> The content of these reports are presented at school assemblies, staff meetings and at many other schools and school boards [they are] published openly on school websites.

[39] She also submits that the affected party's website provides a detailed outline of the content of the survey and the resulting reports. She acknowledges that although the outline "does not include the exact wording of the questions, it provides a significant amount of information about the areas that are inquired upon in this instrument." Finally, the appellant points to another Ontario school and several other Canadian schools that publish some or all of their TTFM survey reports online. With her representations, the appellant provided copies of the TTFM reports belonging to other schools, as well as the links to find the reports online.

[40] In reply, the school board states that the appellant's submissions are "somewhat misleading." It submits that the information acquired through the TTFM survey is shared at school assemblies, staff meetings and school council meetings in a "very general and extremely limited way."

[41] It submits that the appellant's position that the reports are the "property of the school board" is incorrect. It submits that it does not own the data, but only has limited access to the data as it is actually "acquired, possessed and owned by the [affected party] under the terms of the contract between [the school board] and [the affected party.]"

[42] Also in reply, the school board states that the survey data is of "no value without knowing the questions that the survey participants were asked or responded to when participating in the survey" and that for it to have value, the survey questions must be known as well.

[43] Finally, the school board submits that the appellant's reference to the fact that other schools or school boards make some of their survey results public is not persuasive because:

- The appellant makes reference to two school boards in Ontario and one school board in Saskatchewan which is "by no means evidence of a prevailing practice in Ontario or Canada." It submits that the limited reference to other boards may indicate that the prevailing practice is not to public or disclose this kind of information secured through survey's like TTFM.

- One of the Ontario school boards referred to by the appellant does not utilize the TTFM survey.

- There is no evidence that the participants in the other surveys did so under the condition that their responses remain anonymous and confidential.

[44] Having considered the representations of the parties and the specific information that is at issue in this appeal, the reports collated from the TTFM survey responses, I find that it was not supplied to the school board "in confidence" by the affected party, as is required by part two of the section 10(1) test.

[45] In my view, although the affected party submits generally that the data was supplied on the basis that it was confidential and was to remain confidential and that the customer has a non-transferable right to use the reports for its own purposes, the affected party's representations specifically assert its proprietary interest over the survey itself with its specifically formulated questions. The terms and conditions portion of the agreement between the affected party and the school board,[18] as well as the affected party's representations, clearly state that the school board can use the information contained in the reports generated from the survey results for its own

[18] The terms and conditions were provided by the school board together with its representations.

purposes provided that it does not distribute or make available the survey questions. It states in its representations "the survey data would not be disclosed or available from sources to which the public has access *beyond that of the reports the school chooses to release.*" Accordingly, I do not accept that the affected party had a reasonably held belief that the information contained in the reports themselves, would be kept "in confidence" by the school board.

[46] Moreover, as submitted by the appellant, the affected party's website contains a 13-page PDF document entitled "TTFM 2.0 Student Survey Framework."[19] This document contains a comprehensive description of the various topics that are covered by the survey, the subdivisions of those topics and a general description of the types of questions posed. The specific wording of the questions is not revealed. However, the document reveals the general headings that are used in the reports to explain how the results of certain topics are reported. For example, the online document states that responses to questions relating to students' engagement in school sports are reported as "percentage of students engaged in school sports." As these general headings are readily available on the affected party's website, I do not accept that when they appear on the actual report, a reasonable expectation of confidentiality with respect to the same headings can exist. Given that the remaining information in the reports are the aggregate results of information that was provided to the affected party by anonymous students, I find that the affected party could not have had a reasonably held belief that the information in the reports that are at issue was supplied "in confidence."

[47] I disagree with the school board's submissions that the fact that other school boards publish their TTFM results online is not persuasive. I find this to be relevant to the determination of whether the affected party had a reasonable expectation that the information contained in the reports are to remain "in confidence." One of the Ontario based school boards referred to by the appellant makes its TTFM reports available online regularly. Although one of the other school boards referred to by the appellant is based in Saskatchewan, it also regularly publishes its reports from the TTFM survey online. In my determination of whether the *Act* applies to exempt the information from disclosure, it is not necessary for me to establish whether there is a "prevailing practice" in Ontario or Canada to disclose or not to disclose this type of information, rather, it is necessary for me to determine whether the affected party had a reasonably held belief that the information would be kept "in confidence." In my view, the fact that there is evidence before me that at least two schools from other school boards regularly publish TTFM survey reports online supports a finding that the affected party could not reasonably have expected that the information contained in the reports themselves be kept "in confidence."

[48] Accordingly, I find that the "in confidence" component of part two of the section 10(1) has not been met for the information at issue. As all three components of the

[19] www.thelearningbar.com/doc/TTFM2StudentSurveyFramework.pdf.

section 10(1) test must be met for the exemption to apply, I find that section 10(1) cannot apply to exempt the information at issue in this appeal, the TTFM survey reports, from disclosure. However, as noted above, for the sake of completeness, I will go on to determine whether any of the harms outlined in section 10(1)(a), (b), or (c) would result were the information disclosed and whether part three of test has been established.

Part 3: harms

General principles

[49] To meet this part of the test, the institution and/or the third party must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient.[20]

[50] 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.[21]

[51] 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 10(1).[22]

[52] 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.*[23]

Section 10(1)(a): prejudice to competitive position

[53] The school board submits that one of the harms identified in section 10(1)(a) is whether the disclosure of the information would "interfere significantly with the contractual or other negotiations of a person, group or persons of organization." It submits:

> The survey questions are, pursuant to the contract between the [school board] and [the affected party], clearly owned by the [affected party]. Furthermore, the raw data acquired is similarly the property of the [affected party] and the [school board] is granted an exclusive right to

[20] *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).
[21] Order PO-2020.
[22] Order PO-2435.
[23] Order PO-2435.

> use the reports generated by [the affected party]. The [school board] is not permitted to distribute the information or otherwise make it available to third parties especially as it would reveal the survey questions which are the exclusive properly of the [affected party]. As a result, the [school board] submits that the disclosure of this information pursuant to the request of the requester would be a significant interference with the contractual relationship between the [school board] and the [affected party].

[54] The affected party also submits generally that "[t]he disclosure of this information is likely to influence both current and future contracts" that it might enter into. However, it also submits that that disclosure of the information could significantly prejudice its competitive position. Specifically, it submits:

> A wide release of our reports would reveal the technical components of our company that were supplied in confidence with the license agreement.

[55] In the circumstances of this appeal, I do not accept that I have been provided with sufficiently detailed and convincing evidence to establish that the disclosure of the information at issue, the reports compiled from survey results, could reasonably be expected to significantly interfere with the contractual negotiations between the school board and the affected party.

[56] The school board's submissions on this issue focus on the fact that the disclosure of the reports would reveal the survey questions themselves. As stated above, in my view, the disclosure of the reports would not reveal the actual survey questions posed to the students in the online survey, and the terms and conditions the affected party imposes on its customers permit the school board to use the reports for their own purposes, provided they do not distribute or make accessible to third parties the survey questions on the survey site. The school board makes no submissions to explain how disclosure of the specific information contained in the reports might interfere with their contractual negotiations. As a result, I find that it has not provided me with sufficiently detailed and convincing evidence to demonstrate that this harm could reasonably be expected to occur.

[57] The affected party's submissions on this issue simply state that disclosure of the reports "is likely to influence both current and future contracts" that it enters into. Again, in the absence of detailed and convincing evidence to demonstrate that disclosure of the information at issue would "interfere significantly with the contractual other negotiations of a person, group of persons, or organization" I find that this component of the harm test in section 10(1)(a) has not been established.

[58] Additionally, I do not accept that I have been provided with the requisite detailed and convincing evidence to establish that there is a reasonable expectation that disclosure of the specific information at issue could reasonably be expected to prejudice significantly the affected party's competitive position. As repeatedly stated, the records at issue are reports that provide only the aggregate results of TTFM student surveys. They do not reveal the survey questions themselves or other information about the methodology behind the survey's construction. Having reviewed the reports closely, I find that much of the information that appears in them is unique to each school as it is the information that was provided by the survey participants. I do not accept, nor have I been provided with evidence to suggest, that this information might useful to a competitor.

[59] With respect to the elements of the report that were created by the affected party including the general headings used to present the aggregate results of certain topics, as previous noted, some these general headings appear in the RRFM 2.0 Student Survey Framework PDF document that is found on the affected party's website, and from this document the format of such headings is easily discernable. Additionally, several schools already have a number of years' worth of TTFM survey reports accessible online on their website. Without detailed and convincing evidence from either of the parties resisting disclosure, I do not accept that the disclosure of similar information from other schools could reasonably be expected to prejudice significantly the affected party's position.

[60] Taking all these factors into consideration, including the representations of all of the parties, I do not accept that I have been provided with sufficiently detailed and convincing evidence to establish that the disclosure of the specific information contained in the reports could reasonably be expected to prejudice significantly the affected party's competitive position.

[61] Accordingly, I find that school board and the affected party have failed to establish that either of the harms contemplated by section 10(1)(a) could reasonably be expected to occur if the reports were disclosed.

Section 10(1)(b): similar information no longer supplied

[62] The school board's representations with respect to this section focus on that fact that the information contained in the surveys was supplied by the students anonymously and confidentiality and were that information disclosed it would have a "chill effect" on participation rates.

[63] I disagree with the school board's position in this respect as the reports themselves contain anonymized information and not specific answers provided by specific individuals. Moreover, section 10(1)(b) specifically addresses the harm that could reasonably be expected to occur if the *affected party* chooses to no longer supply

its third party commercial information, the reports of the aggregate survey results, to the institution and not information that was supplied by the institution (in this case via the students who completed the surveys) to the affected party.

[64] The school board's representations however, raise the possibility that the reports might contain the personal information of the students who responded to the surveys. In my view, they are more relevant to the discussions below relating to personal information and whether its disclosure would amount to an unjustified invasion of personal privacy of the individual to whom it relates under section 14(1). Accordingly, subject to my findings in those sections, I will consider the school boards submissions to this effect below.

[65] The affected party's representations also focus on how, were the reports disclosed, schools or school boards may choose to no longer have their students complete the survey which, it submits, could reasonably be expected to give rise to the harm contemplated by section 10(1)(b). It submits:

> [The affected party's] evaluation tools, including TTFM, have been positioned in the educational marketplace as a tool that provides leading indicators of student health and wellness and the factors that contribute to school effectiveness. The survey instruments and reporting tools were not designed to provide trailing indicators; that is, measures to hold schools accountable or judge the relative effectiveness of schools. This is reinforced in the marketing and sales, and is emphasized during all facets of the procedural and product training with schools and districts after they make the decision to purchase the solution. [The affected party] stresses with all stakeholders that the findings will not be released to the public or used to rank or rate schools.

[66] The affected party submits that if principals, students or parents believed that the data were to be made public, or that schools were to be rank ordered on any of the measures, they would not participate in the survey. It submits:

> Teacher's federations would rightly take exception to the use of the data being used in that manner. With their strong influence in Ontario and elsewhere, they would call upon teachers not to compete the TTFM survey which would result in catastrophic loss of business for the [affected party].

[67] As with the school board's representations, the affected party's representations focus on the information that is provided to the affected party by the school board, and not the information that the affected party supplied to the school board. For the harm in section 10(1)(b) to be established, the disclosure of the information at issue must reasonably be expected to result in similar information no longer being supplied *to the*

institution by the affected party. In Order M-333, Inquiry Officer Anita Fineberg established that section 10(1)(b) applies to situations in which the affected party might choose, as a result of the prospect of disclosure, to decline to provide an institution with similar information in the future. In that order, Inquiry Officer Fineberg stated that section 10(1)(b) does not apply to situations in which an institution might choose to decline to request the supply of similar information from the affected party in the future so as to avoid having to disclose that information, even if it would be in the public interest for the institution to continue to receive the information.

[68] I agree with the reasoning established in Order M-333 and find it relevant in the circumstances of this appeal. In keeping with that reasoning, section 10(1)(b) does not apply if the school board might choose to decline to have the affected party supply it with reports as the affected party's representations suggest. Section 10(1)(b) might apply if it can be demonstrated that the affected party might choose, as a result of the prospect of disclosure, to decline to provide the school board with the reports.

[69] In the current appeal, the reports form part of the affected party's commercial product that it delivers to its customers. Should it choose not to supply the reports to the school boards it loses the business of those customers who may seek to purchase that product. As a result, I do not accept that I have been provided with detailed and convincing evidence to demonstrate that were the reports disclosed, the affected party could reasonably be expected to decline to provide the school board with reports of this type in the future.

[70] Accordingly, I find that the harm contemplated by section 10(1)(b) has not been established.

Section 10(1)(c): undue loss or gain

[71] The school board submits generally that its earlier submissions support a finding that an undue loss or gain will result from the disclosure of the records, but does not provide any further explanation as to what type of loss or gain would be incurred, by whom, or evidence to suggest that such loss or gain might be undue.

[72] The affected party also submits generally that the disclosure of the information could reasonably be expected to result in it suffering undue financial loss, presumably from the loss of business that it suggests would occur were the information disclosed as schools or school boards might not choose to participate in the survey.

[73] As noted above, this office has found that 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.*[24] Additionally, as previously stated, the parties resisting disclosure

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[24] Order PO-2435.

must provide "detailed and convincing" evidence to establish a reasonable expectation that the harm might occur were the information disclosed.

[74] In the circumstances of this appeal, while I concede that it is possible that the affected party might be concerned about lost revenues should the records at issue in this appeal be disclosed, I am not satisfied that either it or the school board have provided me with the type of detailed and convincing evidence necessary to establish a reasonable expectation of harm in this respect. The possible loss of revenue is clearly speculative. The product that the affected party provides appears to be relatively unique in the marketplace and, from the affected party's representations, is based on the research and work of an internationally renowned expert in the field of the design and monitoring of education systems, amongst other things. The school board's representations suggests that the survey results that it receives from the TTFM surveys provides valuable insight that may assist in the improvement of schools and programs.

[75] In the absence of sufficiently detailed and convincing evidence to establish that there is a reasonable expectation that the disclosure of the reports would result in an undue loss to the affected party, I find that the harm at section 10(1)(c) has not been established.

[76] Accordingly, the school board and the affected party have failed to establish a reasonable expectation of any of the harms outlined in section 10(1) should the records at issue be disclosed, and I find that the third part of the section 10(1) test is not satisfied.

[77] As stated earlier, all three parts of the section 10(1) test must be met for the records to qualify for exemption. In this case, I have found that none of the components of the three-part test have been established. Accordingly, the records at issue do not qualify under the third party commercial information exemption set out in section 10(1).

B. Do the records contain "personal information" as defined in section 2(1) and, if so, to whom does it relate?

[78] In order to determine whether the mandatory exemption at section 14(1) applies, it is necessary to decide whether the record contains "personal information" and, if so, to whom it relates. That term is defined in section 2(1) as follows:

> "personal information" means recorded information about an identifiable individual, including,
>
> (a) information relating to the race, national or ethnic origin, colour, religion, age, sex, sexual orientation or marital or family status of the individual,

(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,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, telephone number, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except if they relate to another individual,

(f) correspondence sent to an institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to that correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual, and

(h) the individual's name if it appears with other personal information relating to the individual or where the disclosure of the name would reveal other personal information about the individual;

[79] The list of examples of personal information under section 2(1) is not exhaustive. Therefore, information that does not fall under paragraphs (a) to (h) may still qualify as personal information.[25]

[80] 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.[26]

[81] 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.[27]

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[25] Order 11.
[26] Orders P-257, P-427, P-1412, P-1621, R-980015, MO-1550-F and PO-2225.
[27] Orders P-1409, R-980015, PO-2225 and MO-2344.

[82] To qualify as personal information, it must be reasonable to expect that an individual may be identified if the information is disclosed.[28]

Representations

[83] The school board submits that the information at issue constitutes "personal information" as that term is defined in section 2(1) of the *Act*. It submits:

> [T]he TTFM survey provides the opportunity for participants to answer open ended questions and to provide comment about various things during the course of the survey. In doing so, students and parents often reveal names of students at schools, teachers, administrators or other persons. The participant's answers to open ended questions often reveal the race or ethnic origin of a student or teacher, their religion, age, sexual orientation or other prohibitive grounds of discrimination outlined in the *Human Rights Code.* Some information may also reveal the level of education for teachers and students and/or other personal information. All of the information provided is the personal opinion of a survey participant and sometimes, that personal opinion may be offered in response to open ended questions. That is, a personal opinion about another student, teacher, school program or various other things related to the school.
>
> [S]ometimes the ethnic origin, national origin or religion of an individual is revealed in the survey data and where that individual is a minority in the school, readers of the survey data may be able to ascertain who that person is without the name being revealed if they have knowledge of the makeup of that particular school.
>
> In this regard the [school board] takes the position that the information provided as part of the TTFM survey is undoubtedly "personal information" for the purposes of section 2(1) and in particular, subparagraphs (a), (b), (c), (e), (g) and (h).

[84] The appellant submits that the TTFM survey is administered as an anonymous survey. She submits that the anonymity of the survey is acknowledged in the school board's representations which stated:

> Each participant is assigned a password so that they may access the TTFM survey online via a secure website. The password is unique but does not identify the individual engaging in the survey. To the extent that such information may be available, the [affected party that administrates the

[28] Order PO-1880, upheld on judicial review in *Ontario (Attorney General) v. Pascoe*, [2002] O.J. No. 4300 (C.A.).

> survey] is required, pursuant to its contract with the [school board], to maintain confidentiality with respect to the [school board's] account with them and any passwords that are issued to users of the data or participants in the survey.

[85] She also submits that the affected party's website states: "TTFM is completely anonymous."

[86] The appellant further submits:

> I have modified my request to exclude all narrative, open-ended answers in order to eliminate the possibility of inadvertent exposure of an individual's identity in the data. The reporting of TTFM response, grouped by school will not identify any individual. I note that a document available on the [affected party's] website notes that data is suppressed if there are less than 5 responses in order to avoid the inadvertent identification of individuals.
>
> Nevertheless, if there is a concern that the inclusion of responses about race of aboriginal descent may risk revealing individual responses, then I would request that this information be removed from the records released. With this modification, the TTFM reports that I have requested do not contain any personal information from a <u>an identifiable</u> individual. [emphasis in original]

[87] In its reply, the school board submits that:

> Removing as now requested by [the appellant], the answers to the open-ended questions in the TTFM survey does not eliminate the fact that "personal information" may be revealed by disclosure of the survey results. The risk of disclosing personal information still exists and, therefore, the [school board] maintains its earlier submissions.

Analysis and finding

[88] I have carefully reviewed the records at issue in this appeal, which consists of reports on the results of the TTFM surveys conducted at three different secondary schools. In my view, they do not contain any information that qualifies as "personal information" within the meaning of that definition at section 2(1) of the *Act*.

[89] The records at issue are reports that detail information that has been collected and collated from surveys completed by students. The reports topically group general subject matters addressed in the survey and the results are presented in percentages. I have not been provided with copies of the completed surveys themselves, however,

from my review, the reports do not contain any specific survey questions or answers to those questions. The reports do not include any narrative comments provided by individuals who have completed the survey that may reveal personal information about identifiable individuals such as students, teachers, administrators or other people. I also do not accept that the reports contain any information that might reveal the level of education for identifiable teachers or students, as suggested by the school board.

[90] The school board expresses concern that disclosure of some of the information contained in the reports would reveal ethnic or racial origin of an identifiable individual where that individual is a minority in the particular school and the recipient of the information has some knowledge of the makeup of that school. I note that the last section in all of the reports address students with aboriginal status. Although I am not convinced that disclosure of this information, as it appears in the reports, would reveal the ethnic or racial origin of an *identifiable* individual, given the percentage figures are sufficiently low, I accept that it is a possibility. As the appellant has agreed to remove the inclusion of responses regarding race or aboriginal descent any results regarding this information found on page 18 of all of the responsive reports may be removed from the scope of the appeal.

[91] Accordingly, with the exception of the results regarding the percentage of students that responded to the survey as having aboriginal status, I do not accept that the disclosure of any of the information in the reports at issue would reveal information that qualifies as "personal information" within the meaning of that term.

C. Does the mandatory exemption at section 14(1) apply to the information at issue?

[92] 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) to (f) of section 14(1) applies. As stated above, for section 14(1) to apply the information must amount to the "personal information" of an identifiable individual.

[93] As I have found that, with the possible exception of the results section listed on page 18 which have been removed from the scope of this appeal, the information in the reports at issue do not contain any information that qualifies as "personal information" as that term is defined in section 2(1) of the *Act*, the mandatory exemption at section 14(1) cannot apply in the circumstances of this appeal.

[94] I have found that neither of the mandatory exemption at sections 10(1) or 14(1) apply to the information at issue, and no other exemptions have been claimed. Accordingly, I will order the information at issue disclosed.

ORDER:

1. I order the school board to disclose the records at issue, with the exception of the last section on page 18 of each survey that provides information regarding students with aboriginal status, to the appellant by **January 6, 2014** but not before **December 30, 2013**.

2. In order to verify compliance with this order, I reserve the right to require the school board to provide me with a copy of the information disclosed to the appellant pursuant to order provision 1.

Original signed by: November 28, 2013
Catherine Corban
Adjudicator