

Information and Privacy Commissioner,
Ontario, Canada



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

ORDER MO-3508

Appeal MA15-492

Thunder Bay Catholic District School Board

October 25, 2017

Summary: The Thunder Bay Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for access to information about a particular Request for Proposals relating to the provision of student transportation. The board denied access to some of the information in the records at issue, the Evaluation Forms, citing the mandatory third party information exemption in section 10(1) and the discretionary economic and other interests exemption in section 11.

In this order, the adjudicator finds that the records are not exempt under the claimed exemptions.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(a), (b), and (c), 11(a), (c) and (d).

Orders and Investigation Reports Considered: Order MO-1919, MO-2496-I, MO-3058-F, PO-2853, PO-2987, and PO-3269.

OVERVIEW:

[1] The Thunder Bay Catholic District School Board (the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (*MFIPPA* or the *Act*) for access to the following information in relation to a particular Request for Proposals (RFP) relating to the procurement of student transportation:

The RFP/RFS [Request for Services] Summary and Evaluation Matrix; and
The Route Rates per year of the contract award.

[2] Following third party consultations, the board granted partial access to the responsive records with severances pursuant to the mandatory third party information exemption in section 10(1) and the discretionary economic and other interests exemption in section 11 of the *Act*.

[3] The requester, now the appellant, appealed the board's decision.

[4] As mediation did not resolve the issues in this appeal, the file was transferred to the adjudication stage of the appeals process where an adjudicator conducts an inquiry. I initially sought the representations of the board, which it provided, and five third parties. Of them, three third parties relied on their letters attached to the board's representations. One of these parties also provided similar representations in its letter to the board. Another third party consented to disclosure of some of its information. The remaining third party did not provide representations.

[5] I sent a copy of the board's representations and those of the third party that provided representations to the appellant. The appellant provided representations in response. I sent the appellant's representations to the board and received representations in reply. I then sent the board's reply representations to the appellant and received sur-reply representations in response.

[6] In this order, I find that the information at issue in the records is not exempt under the claimed sections 10(1) and 11 exemptions.

RECORDS:

[7] The board describes the records and the information they contain as follows:

Record	Type of Record	Released?	Board's Description of Information
1	RFS Evaluation Form – Bus Procurement	Partial	Evaluations of bids that refer to confidential commercial and financial information supplied in response to RFS questions regarding technical and mandatory criteria.
2	RFS Evaluation Form Summary/Master – Bus Procurement	Partial	Evaluations of bidders' mandatory and technical criteria and pricing information supplied in confidence by third parties in their bids.

3	Schedule D: Rates Pricing Evaluation	Partial	detailed confidential pricing information supplied by third parties in their bids.
5	RFS Evaluation Form Bus Procurement	Partial	evaluations of bids that refer to confidential commercial and financial information supplied in response to RFS questions regarding technical and mandatory criteria.
6	RFS Evaluation Form Summary/Master – Bus Procurement	Partial	evaluations of bidders' mandatory and technical criteria and pricing information supplied in confidence by third parties in their bids.
7	Schedule D: Rates Pricing Evaluation	Partial	detailed confidential pricing information supplied by third parties in their bids.

ISSUES:

- A. Does the mandatory third party information exemption at section 10 apply to the records?
- B. Does the discretionary economic and other interests exemption at section 11 apply to the records?

DISCUSSION:

A. Does the mandatory third party information exemption at section 10 apply to the records?

[8] The board relies on sections 10(1)(a) to (c), which read:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, if the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;

(b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;

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

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

[10] 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
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 10(1) will occur.

Part 1: type of information

[11] The board states the records contain the informational assets of the third parties and were provided to it through the Student Transportation Services of Thunder Bay Consortium ("STSTB" or "Consortium").³

[12] The board submits that the information contained in the records is clearly commercial information of the third parties, as it is related to the selling of services by the third parties to the Consortium and to the contractual and commercial relationship between the Consortium and the third parties.

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.) (*Boeing Co.*).

² Orders PO-1805, PO-2018, PO-2184 and MO-1706.

³ The board, together with the Lakehead District School Board and Conseil scolaire de district catholique Aurores boreales, formed the Student Transportation Services of Thunder Bay Consortium pursuant to direction of the Ministry of Education and as authorized by the *Education Act*.

[13] The board also states that the pricing information provided to the Consortium in Records 2, 3, 6, and 7 constitutes financial information of the third parties, being clearly related to their pricing practices and financial offers on the contract they were bidding for.

[14] The board further states that the information referred to in Records 1 and 3, includes information about safety and operational processes that the third parties consider to be trade secrets, information related to labour relations with drivers, and financial information related to pricing and pricing methodology.

[15] One third party states in its representations that the route rates provided in its RFP contain confidential financial information.

[16] Another third party states that their information is clearly commercial information in that it deals entirely with the contractual and commercial relationship between it and the board for the provision of bussing services. It states that the records also contain detailed information about safety and operational processes that is commercial information and considered by it to include trade secrets. As well, this third party submits that the records contain labour relations information related to training and incentivizing drivers and financial information related to pricing and pricing methodology.

[17] The appellant did not provide representations on part 1 of the test under section 10(1).

Analysis/Findings re part 1

[18] The records at issue in this appeal consist of the withheld information contained within the RFS and Rate Pricing Evaluation Forms in Records 1 to 3 and 5 to 7.

[19] The types of information referred to by the board and the third parties as listed in section 10(1) have been discussed in prior orders:

Trade secret means information including but not limited to a formula, pattern, compilation, program, 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.⁴

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.⁵

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.⁶ The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.⁷

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.⁸

Labour relations means relations and conditions of work, including collective bargaining, and is not restricted to employer/employee relationships. 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 dispute⁹
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees,¹⁰

⁴ Order PO-2010.

⁵ Order PO-2010.

⁶ Order PO-2010.

⁷ Order P-1621.

⁸ Order PO-2010.

⁹ Order P-1540.

but not to include:

- names, duties and qualifications of individual employees¹¹
- an analysis of the performance of two employees on a project¹²
- an account of an alleged incident at a child care centre¹³
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation¹⁴

[20] The records are all evaluation forms in chart form. The undisclosed information in Records 3 and 7 is pricing information.

[21] The undisclosed information in Records 1, 2, 5 and 6 is pricing information, as well as numerical scores and the listing of the words "pass" or "fail" in one row. In addition, Records 1 and 5 contain evaluator comments about the RFS bids.

[22] Based on my review of the records, I find that the numerical scores and the listing of the words "pass" or "fail", as well as the evaluator comments, (the scoring information) in the records is not information within the meaning of part 1 of the test. The application of part 1 of the test to scoring information was addressed by Adjudicator Donald Hale in Order PO-2853. In that order, he found that the scoring records:

... do not contain the type of information listed in section 17(1). These records address the [institution's] evaluation of the proposals submitted in response to the RFPs. What differentiates these records from the others however, is the fact that [they] do not contain the actual commercial or financial information that was submitted by the affected party in its proposal. Rather, they simply describe the scoring process and the proposals in general, non-specific terms without reproducing the actual commercial and financial information that the [institution] received in response to the RFP.

¹⁰ Order P-653.

¹¹ Order MO-2164.

¹² Order MO-1215.

¹³ Order P-121.

¹⁴ Order P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.).

[23] Similarly, relying on the findings in Order PO-2853, I find that in this appeal, the evaluator's comments and the pass/fail and the scores assigned to the various components of the bids by the third parties (the scoring information) is not the third party's information within the meaning of part 1 of the test. These portions of the records address the Consortium's evaluation of the bids submitted in response to the RFS. They describe the scoring process and the bids in general, non-specific terms without reproducing the actual information that the Consortium received in response to the RFS.

[24] I agree with the board and the third parties that the pricing information in the records is commercial and financial information regarding the selling of and pricing of bus services to the board.

[25] I do not agree that the records contain technical, trade secrets and labour relations information within the meaning set out above, as they merely contain a general evaluation of various components of the bids.

[26] In conclusion, I find that only the pricing information in the records reveals commercial and financial information with respect to the selling of the third parties' services to the Consortium. Therefore, part 1 of the test under section 10(1) has been met for the pricing information in Records 2, 3, 5, 6 and 7.

[27] As Records 1 and 5 do not contain pricing information, section 10(1) cannot apply to them. I will consider, below, whether section 11 applies to the information at issue in Records 1 and 5.

[28] However, for the sake of completeness, I will also consider whether the scoring information and the evaluator comments meet part 2 of the test.

Part 2: supplied in confidence

Supplied

[29] The board states that the information that is in the records was supplied by the third parties to it. It states that the pricing information in Records 2, 3, 6, and 7 was provided to the Consortium by the third parties in the bid documents they submitted. It further states that the evaluation comments in Records 1 and 5 and the weighted evaluations of mandatory and technical criteria in Records 1, 2, 5 and 6 were created based on the information supplied to the Consortium.

[30] The board relies on Order MO-3058-F, where it states that the IPC recognized that information supplied by bidders in their bids that is subsequently incorporated in the evaluation materials is still supplied within the meaning of section 10(1).

[31] In addition, it states that the information in Records 3 and 7 is subject to the inferred disclosure exception as their disclosure would permit the appellant to have

access to the non-negotiated confidential information supplied in response to the RFS by the successful proponent.

[32] Furthermore, the board submits that the immutability principle applies to the pricing information supplied to the Consortium in response to the RFS, as contained in Records 2, 3, 6 and 7. It states that this pricing information relates to the fixed costs of the third parties and does not change as a result of the success of the bid or otherwise as a result of the bidding process. It submits that as in Order MO-3058-F, even though the information may appear in the final contract, such as the costing information in Records 2, 3, 6 and 7, it was still supplied rather than mutually generated. It states that the pricing information was not the result of any negotiation.

[33] The third parties did not directly address the issue as to whether the information at issue in the records was supplied by them.

[34] The appellant submits that Records 3 and 7, Schedule D - Routes-Pricing Evaluation, comprise rates (fixed, variable, per diem, and total cost of the year) submitted by the winning bidder and can be classed as "submitted by the third party."

[35] Concerning the remaining records, the appellant states that:

...it appears that Records 1 and 5 (RFS Evaluation Form) and Records 2 and 6 (RFS Evaluation Form Summary/Master) comprise weights, scores, comments and rankings (confirmed as generated by the four people noted at the bottom of the Summary/Master, namely the Evaluation Committee, and presumably but not specified, the same Committee doing likewise on the Evaluation Forms);

These four records are clearly reflective of data "generated by the Consortium" and as such not subject to the claimed exemptions under section 10.

[36] In reply, concerning Records 1, 2, 5 and 6, the board states that to the extent that the data may be found to have been generated by it, it was based on the confidential information submitted by the third parties.

[37] In sur-reply, the appellant states that the records are the products of an evaluation and that the "nature of the information" (as in being proprietary) was considered and weighed during that evaluation. He submits that an evaluation is not "information supplied by the third parties" but Committee records of assessment, weighing and ranking information to form the basis of the selection of a successful supplier. He states that none of that proprietary "information" was "incorporated" in the evaluation results other than to be a factor in producing the desired result: the scores and ranks.

Analysis/Findings re: supplied

[38] The board refers to the two exceptions to the general rule that the contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 10(1). These two exceptions are described as the "inferred disclosure" and "immutability" exceptions. However, none of the records are contracts, therefore, these exceptions do not apply.

[39] I must determine whether the information at issue was supplied by the third parties. The requirement that the information was "supplied" to the institution reflects the purpose in section 10(1) of protecting the informational assets of third parties.¹⁵

[40] 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.¹⁶

[41] Records 3 and 7 contain the pricing information of the successful proponent. I find that this information was directly supplied by a third party to the Consortium. The board is part of the Consortium. Therefore, as the information at issue in Records 3 and 7 has been supplied, I will consider below whether it was supplied in confidence.

[42] The remaining records, Records 1, 2, 5 and 6, contain the Consortium's evaluation of the information provided to it by the third parties. This information was not directly supplied to the Consortium by the third parties, nor would disclosure reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[43] I have considered Order MO-3058-F referred to by the board, where the adjudicator stated:

Although the evaluation materials were created by the town's employees or evaluation committee, they incorporate some information taken directly from the affected parties' proposals, or provided by the proponents during their interviews. This information is contained in the chart at page 1 of the evaluation materials, in the interview notes of the evaluation committee, and in the spreadsheet. It includes descriptions of the proponents' methodology and approach to the project, examples of prior or current work, descriptions of their workforce, and the financial details of their proposals. It is typical of the type of information submitted by proponents in support of efforts to obtain a contract and constitutes the

¹⁵ Order MO-1706.

¹⁶ Orders PO-2020 and PO-2043.

"informational assets" of the proponents. I find that this information was "supplied" to the town within the meaning of section 10(1).

[44] In this appeal, Records 1, 2, 5 and 6 are evaluation forms. The board submits that Records 2 and 6 contain specific pricing information, I find that Records 2 and 6 only contain pricing information in the "Cost-bundle" rows. As indicated by the board, these figures are the five-year total cost for the services submitted by the proponents who were not successful. I find that this pricing information in Records 2 and 6 has been supplied by the third parties to the Consortium.

[45] Based on my review of the remaining information at issue in Records 2 and 6 and the information at issue in Records 1 and 5, I find that they do not incorporate information taken directly from the affected parties' proposals, nor do they contain descriptions of the proponents' methodology and approach to the project, examples of prior or current work, descriptions of their workforce, and the financial details of their proposals as was the case in Order MO-3058-F. Instead they contain the Consortium's scoring and evaluation information concerning the third parties' bids.

[46] In particular, I find that scoring information and the evaluator's comments in the records is not information that was supplied by the third parties, but information that was generated by the evaluators of the third parties' bids made in response to the RFS.

[47] Although the scoring information and the evaluator's comments may have been derived, in part, from the third parties' information submitted through the RFS process, it does not qualify as "supplied" because it was generated through the subjective evaluation of such information by the RFS evaluators.¹⁷

[48] Accordingly, I find that, other than the 5-year pricing information in Records 2 and 6, the information in Records 1, 2, 5 and 6 was not supplied and part 2 of the test has not been met for this information. I will consider below whether this information is exempt under section 11.

In confidence

[49] The board states that the third parties had a reasonable expectation of confidentiality when they supplied the confidential information to the Consortium. It states that the RFS issued by the Consortium included the following notice:

...The Municipal Freedom of Information and Protection of Privacy Act, R.S.O. 1990, c. M.36 (sic), as amended, applies to information provided to the Consortium by a Qualified Supplier. **The confidentiality of information supplied by Qualified Suppliers (including their**

¹⁷ See Orders MO-2197, PO-1993, MO-1237 and MO-1462.

Submissions) will be maintained by the Consortium, except as otherwise required by law or by order of a court or tribunal. Qualified Suppliers are advised that their submissions will, as necessary be disclosed on a confidential basis, to the Consortium's advisors retained for the purpose of evaluating or participating in the evaluation of their submissions... [Emphasis in original]

[50] The board states that the information in the bids was supplied with an expectation of confidentiality. It states that this information was subsequently used by the Consortium to create the evaluation materials.

[51] The board submits that the information has been consistently treated in a manner that showed concern for its confidentiality, that the information was not disclosed to the public and is not available to the public, and that it was prepared for a purpose that would not entail its disclosure. It states:

- a. The individual evaluators signed confidentiality agreements to affirm that they would not disclose the confidential and commercially sensitive information supplied by the bidders.
- b. The confidential records are stored in secured archives at the Lakehead District School Board.
- c. The evaluators were not permitted to keep any related records; all records are stored in the secured archives.
- d. Any proposals that were not compliant with the RFS process were returned to the proponent unopened.

[52] The board relies on Order MO-3264, where the names of proponents, evaluator's comments, total price bid for each proponent and the total price per point in the evaluation materials were found to be supplied in confidence.

[53] The board also relies on Order MO-3058-F, where the adjudicator determined that the evaluation materials were supplied with a reasonably held expectation of confidentiality and that the confidentiality provision in the RFP did not negate the expectation of confidentiality regarding the proponents' RFP proposals. The adjudicator found that this confidentiality provision is an expression of the institution's intent to maintain the confidentiality of the proposals, and it is reasonable for the affected parties to rely on it.

[54] The third parties that responded to the Notice of Inquiry state that their information submitted in response to the RFS is confidential information.

[55] The appellant states that he has received disclosure of evaluation materials from

other institutions. He refers to the RFS's statement that the "...Pricing Evaluation Form will be attached to, and form part of, the agreements between the Boards and the Successful Supplier(s)..." in support of his position that the RFS proponents did not have a reasonable expectation of confidentiality.

Analysis/Findings re: in confidence

[56] In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier of the information had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis.¹⁸

[57] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances are considered, 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 by the third party in a manner that indicates a concern for confidentiality
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure¹⁹

[58] Based on my review of the information remaining at issue in the records and the parties' representations, I find that the information I have found to have been supplied, was supplied in confidence by the third parties. This information was communicated to the board on the basis that it was confidential and that it was to be kept confidential, treated consistently by the third party in a manner that indicates a concern for confidentiality, not otherwise disclosed or available from sources to which the public has access, and prepared for a purpose that would not entail disclosure.

[59] I have considered the appellant's submissions in particular that he has received other similar information, however, in this order I am considering only the information at issue in the records before me.

[60] In conclusion, I find that part 2 of the test has been met for the pricing information at issue in Records 3 and 7, as well as for the pricing information in the

¹⁸ Order PO-2020.

¹⁹ Orders PO-2043, PO-2371 and PO-2497, upheld in *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (ON SCDC); 298 DLR (4th) 134; 88 Admin LR (4th) 68; 241 OAC 346.

“Cost-bundle” rows in Records 2 and 6, as I find this information is supplied in confidence.

[61] As noted above, I also find that part 2 of the test has not been met for the information at issue in Records 1 and 5 and the remaining information in Records 2 and 6 as I have found this information not to have been supplied.

Part 3: harms

[62] The party resisting disclosure must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁰

[63] 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 the surrounding circumstances. However, parties should not assume that the harms under section 10(1) are self-evident or can be proven simply by repeating the description of harms in the *Act*.²¹

[64] In applying section 10(1) to government contracts, 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

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

[65] I have only found that the pricing information in the records is information that meets part 2 of the test under section 10(1).

[66] The board submits that information submitted in a competitive procurement is by its very nature aimed at providing information that makes the proponent competitive. Concerning the pricing information, it states that:

This information forms the basis of the differentiation between the services offered by each proponent. This information shows how individual companies have innovated in the provision of the services they sell. If this

²⁰ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²¹ Order PO-2435.

²² Order PO-2435.

information were disclosed, competitors would have the information that differentiates each proponent from the other.

Route rates provided by third parties constitute confidential, financial information that was submitted in confidence and which, if made public, would prejudice the competitive position of the proponents in the market. In competitive procurement, price often holds a significant weight in relation to other factors. In this RFS, the pricing component was evaluated at a weight of 25%...

The information contained in Records 3 and 7 is the breakdown of the bid price into detailed financial components...

If the information contained in the records is released, then other businesses seeking to enter the student transportation market and losing bidders in the Consortium's region would have a competitive advantage - they would know the successful bid rate below which future bids must be entered...

In addition, preparation of bids in response to RFS is a time consuming process on which third parties expend significant resources. This is increasingly so in the student transportation business as the move to competitive procurement changes the market. It is through competitive procurement that student transportation bus companies maintain and/or expand their market share, or lose their market share. As a result, maintaining their competitive advantage is of great significance...

[67] One third party states that the route rates in the records represent what it is willing to charge the customer to perform the requested service. It states that if this information were made public, competitors would have an unfair advantage should the services go to RFP in the future as they could deduce its cost base and what it would be willing to price its services. With this information, it submits that its competitors could set their price accordingly while it would have no such corresponding information on their competitors' bids.

[68] Another third party states that pricing, among other criteria, form the basis of the differentiation of its service offering. It states that:

The request for information under the *Act* is being made for commercial purposes and for the purpose of undermining the competitiveness of the RFP bid process. Disclosure ... will provide those competitors with an unfair advantage and will interfere with [its] competitive position

[69] The appellant provided one set of representations on part 3 for all of the claimed section 10(1) exemptions. He states that he is seeking the evaluation forms that contain numerical scores reflecting the value attached by evaluators. He states that the third

parties' prices for bussing services is not the only variable in the RFS valuation, and it is not even the predominant one.

[70] The appellant further states that as the competition for school bus transportation contracts is not an on-going and frequent (say annual or semi-annual) event, the information gleaned from a Pricing Evaluation Form is not relevant and could not influence competing bids for imminent work. He states:

The reality is that contracts are signed for five year terms (with one year/maximum two year extensions as required).

The relevancy of information five years after the fact (or conversely, five years hence) can only be described as dubious at best and totally misleading at worst.

All the elements of a proprietary cost model of "inputs" (e.g. changed CDN/US dollar differential affecting new bus purchases, wage rate changes, availability of trained drivers, enhanced safety practices, increased reliance on mechanical upgrades due to fleet aging etc.) would have made whatever factors went into a cost model five years previously essentially useless.

Analysis/Findings re: section 10(1)(a)

[71] I have found that part 2 of the test has been met for the pricing information of the successful proponent at issue in Records 3 and 7, as well as for the pricing information in the "Cost-bundle" rows in Records 2 and 6.

[72] Records 2 and 6 contain the Cost-bundle information for four proponents, including the successful proponent.

[73] The successful proponent did not provide representations in response to the Notice of Inquiry.

[74] The second proponent did not provide representations, instead providing a written consent to disclosure of its "...pricing and economics of our submission."

[75] The third and fourth proponents provided representations.

[76] The third proponent, as referred to above, submitted that disclosure of its route rates could result in competitors deducing its cost base and what it would be willing to price its services.

[77] The fourth proponent submits that the appellant's request is being made for commercial purposes and for the purpose of undermining the competitiveness of the RFP bid process. It states that disclosure will provide its competitors with an unfair

advantage and will interfere with its competitive position.

[78] The board has disclosed the five-year total cost or price charged by the successful proponent for each bundle of routes in Records 3 and 7. It has withheld that same information for the successful proponent in Records 2 and 6, without an explanation.

[79] I find that the board has not provided sufficient evidence to support a harms claim under section 10(1)(a) of the *Act* for the Cost-bundle information of the successful proponent in Records 2 and 6 as this information has already been disclosed in Records 3 and 7.

[80] Regarding the Cost-bundle information in Records 2 and 6 for the remaining proponents, I disagree with the board and the third parties that did provide representations that disclosure of this information could result in an unfair advantage to other proponents should their bussing services go to RFP in the future. I find that disclosure of the five-year Cost-bundle information could not result in other proponents deducing the cost base and what each third party would be willing to price its services at.

[81] From my review of the more detailed disclosed information in Records 3 and 7, the 5-year Cost-bundle figures reveal a total for five years of providing bussing services for specific distances travelled, for a bundle of routes, and is specific to the routes and timing of the services. I do not have sufficient evidence to find that disclosure of the Cost-bundle figures could result in the harms set out in section 10(1)(a).

[82] The remaining information at issue is found in Records 3 and 7 and is the detailed pricing information of the successful proponent. This third party did not provide representations in response to the Notice of Inquiry. Included in the board's representations was a copy of a letter to the board from this third party sent at the request stage, which reads:

In response to your notice of information request under the privacy act, we would like to go on record as having no objections to the releasing of the requested information as long as all bidder information is released at the same time and equally.

In order for our company to not be affected under section 10 we would need to be assured that the release of our information would be in conjunction with the release of all bidders' information whether they were successful bidders or not. Also, we would want to ensure the same amount and type of information be released for all bidders that participated

[83] This letter of the successful proponent does not address the application of section 10(1) to the records, including the harms component.

[84] Based on the lack of specific representations from the successful proponent and my review of the representations of the board, I find that I do not have sufficient evidence that disclosure of the information at issue in Records 3 and 7 could significantly prejudice the competitive position of the successful proponent or interfere significantly with its contractual or other negotiations.

[85] The information at issue in Records 3 and 7 is specific to the time period and routes and distances set out in these records and is only 25% of the evaluation of the RFS. I do not have sufficient evidence to find that details of the pricing in Records 3 and 7, which are for a five-year term, could reasonably be expected to result in the harms set out in section 10(1)(a).

[86] Accordingly, I find that section 10(1)(a) does not apply to exempt the information at issue in the records.

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

[87] Only the board and one third party provided specific representations in support of this exemption.

[88] The third party merely stated that disclosure will result in it no longer supplying similar information to the board.

[89] The board states that:

As the province moves towards competitive procurement for student transportation, all bus companies will be expected to provide their commercial information in response to bid requests. If the information that is supplied is shared, then the ability of bidders to differentiate the service they seek to offer will be decreased, thereby causing significant harm to proponents seeking to sell their services. Proponents may choose to share less information in their bid submissions to prevent the sharing of their competitive commercial, financial and technical information with their competitors...

It is of significant importance to the public that students continue to be transported to school...

The board has been advised that if this information is disclosed, third parties will no longer supply such information to the board.

Analysis/Findings re: section 10(1)(b)

[90] I find that if the third parties want to provide bussing services to the Consortium, which is in charge of transportation for three school boards, including the institution in this appeal, it will need to continue to provide pricing information. Pricing information is

a key and necessary component of any bid to provide bussing services.

[91] Therefore, I find that I do not have sufficient evidence to find that disclosure of the information at issue could result in similar information no longer being supplied.

[92] Accordingly, I find that section 10(1)(b) does not apply to exempt the information at issue in the records.

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

[93] Only the board and one third party provided specific representations in support of this exemption.

[94] The board did not provide direct representations on pricing and part 3 of the test under section 10(1)(c). Instead, it states that if the information in the records of the third parties is disclosed, then the third parties will lose:

- Their right to privacy in that information is lost.
- The investments that they have made in innovations.
- The investments they have made in differentiating their service.
- The investments they have made in preparation of confidential bids that they may choose to use in different markets across the province.

[95] The third party that provided representations on section 10(1)(c) also did not provide direct representations regarding pricing. It states that:

... [it] is an innovator and industry leader in service, training, safety and operations planning. It holds this position due to its substantial and ongoing investment in innovation in all these areas. Disclosure of this information will create an undue gain in favour of our ...competitors who have not made similar investments in innovation. [It] will suffer a concomitant undue loss of its investment.

Disclosure to [its] competitors will also have the effect of stifling investment in innovation.

Analysis/Findings re: section 10(1)(c)

[96] I find that I do not have sufficient evidence to determine that disclosure of the detailed pricing information of the successful proponent and the 5-year Cost-bundle pricing of the other proponents could result in undue loss or gain to the third parties.

[97] I also agree with the appellant that, as the competition for school bus transportation contracts is not on-going and frequent (say annual or semi-annual)

event, the information gleaned from a Pricing Evaluation Form is not relevant and could not influence competing bids for imminent work.

[98] The bussing contracts are for five year terms, and in the circumstances, there is not sufficient evidence to support a finding of harms after this term should the pricing information be disclosed under part 3 of section 10(1)(c).

[99] Accordingly, I find that section 10(1)(c) does not apply to exempt the information at issue in the records.

[100] Therefore, I find that part 3 of the test under section 10(1) has not been met.

[101] In conclusion, I have found that section 10(1) does not apply to the information at issue in the records. I will now consider whether section 11 applies to this information.

B. Does the discretionary economic and other interests exemption at section 11 apply to the records?

[102] The board relies on sections 11(a), (c) and (d), which read:

A head may refuse to disclose a record that contains,

- (a) trade secrets or financial, commercial, scientific or technical information that belongs to an institution and has monetary value or potential monetary value;
- (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
- (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

[103] The purpose of section 11 is to protect certain economic interests of institutions. Generally, it is intended to exempt commercially valuable information of institutions to the same extent that similar information of non-governmental organizations is protected under the *Act*.²³

[104] For sections 11(c) or (d) to apply, the institution must provide detailed and convincing evidence about the potential for harm. It must demonstrate a risk of harm that is well beyond the merely possible or speculative although it need not prove that

²³ *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (the Williams Commission Report) Toronto: Queen's Printer, 1980.

disclosure will in fact result in such harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.²⁴

[105] The failure to provide detailed and convincing evidence will not necessarily defeat the institution's claim for exemption where harm can be inferred from the surrounding circumstances. However, parties should not assume that the harms under section 11 are self-evident or can be proven simply by repeating the description of harms in the *Act*.²⁵

[106] The fact that disclosure of contractual arrangements may subject individuals or corporations doing business with an institution to a more competitive bidding process does not prejudice the institution's economic interests, competitive position or financial interests.²⁶

Section 11(a): information that belongs to government

[107] For section 11(a) to apply, the institution must show that the information:

1. is a trade secret, or financial, commercial, scientific or technical information;
2. belongs to an institution; and
3. has monetary value or potential monetary value.

Part 1: type of information

[108] The board identifies the specific information in the records, as follows:

The criteria used by the Board to evaluate RFS bids and the actual evaluations of the bids in Records 1, 2, 5 and 6 is the board's commercial information, being specifically and solely related to the purchase of student transportation services.

The prices that are included in Records 2, 3, 6, and 7 are financial information, being price lists of vendors that are subsequently paid for the purchase of student transportation services.

[109] As noted above under section 10(1), I agree with the board that the information

²⁴ *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.

²⁵ Order MO-2363.

²⁶ Orders MO-2363 and PO-2758.

in the records includes commercial and financial information. I rely on my findings above to find that part 1 of the test has been met under section 11(a).

Part 2: belongs to

[110] The board states that:

This commercial and financial information belongs to the board, which has a substantial interest in protecting the information from misappropriation. The board has expended financial and human resources to develop the RFS process and to evaluate the bids that were submitted. The information sought is consistently treated as confidential by the board - for example, evaluators sign confidentiality agreements and proponents are assured that their information will be kept confidential. Proponents are advised of the uses and potential disclosures of the information they supply.

[111] The appellant did not provide representations on part 2.

Analysis/Findings re: part 2

[112] For information to “belong to” an institution, the institution must have some proprietary interest in it either in a traditional intellectual property sense – such as copyright, trade mark, patent or industrial design – or in the sense that the law would recognize a substantial interest in protecting the information from misappropriation by another party.

[113] Examples of information belonging to an institution are trade secrets, business-to-business mailing lists,²⁷ customer or supplier lists, price lists, or other types of confidential business information. In each of these examples, there is an inherent monetary value in the information to the organization resulting from the expenditure of money or the application of skill and effort to develop the information. If, in addition, the information is consistently treated in a confidential manner, and it derives its value to the organization from not being generally known, the confidential business information will be protected from misappropriation by others.²⁸

[114] I agree with the board that the records, which are its evaluation forms of the RFS responses, belong to the board as part of the consortium. I agree that the board through the Consortium has expended financial and human resources to develop the

²⁷ Order P-636.

²⁸ Order PO-1736, upheld on judicial review in *Ontario Lottery and Gaming Corporation v. Ontario (Information and Privacy Commissioner)*, [2001] O.J. No. 2552 (Div. Ct.); see also Orders PO-1805, PO-2226 and PO-2632.

RFS process and to evaluate the bids that were submitted and that the records were treated in a confidential manner.

[115] Therefore, part 2 of the test under section 11(a) has been met.

Part 3: monetary value

[116] The board states that there is a monetary value of the information at issue in the records. It states that, if disclosed, there is a negative impact on bidders and potential bidders who may feel constrained in respect of the information they provide to the board. It submits that this would result in the board making decisions based on less information.

[117] The appellant states that the records, the Rate Evaluation Forms and score sheets, do not have monetary value as there is not a market and willing buyers for this kind of data. He also submits that the board:

...does not claim there is a "value" but claims further actions may be possible ("no qualified bidders" etc.) which does not fit the definition "of intrinsic value"...

Analysis/Findings re: part 3

[118] To have "monetary value", the information itself must have an intrinsic value. The purpose of this section is to permit an institution to refuse to disclose a record where disclosure would deprive the institution of the monetary value of the information.²⁹

[119] The mere fact that the institution incurred a cost to create the record does not mean it has monetary value for the purposes of this section.³⁰ Nor does the fact, on its own, that the information has been kept confidential.³¹

[120] In Order PO-3629, the records at issue were spreadsheets with cost estimates. In that order, Ontario Power Generation (the OPG) submitted that the information at issue was financial information, developed by it, at its expense and has proprietary value to the company, because disclosure would adversely affect the OPG's ability to secure contracts and in the case of nuclear refurbishment disclosure would deprive OPG of the opportunity to negotiate with bidders' contracts with the most favourable pricing.

²⁹ Orders M-654 and PO-2226.

³⁰ Orders P-1281 and PO-2166.

³¹ Order PO-2724.

[121] Similarly, in this appeal the board has claimed that disclosure of the information at issue in the records would result in bidders on bussing services providing less information in their bids, thereby adversely affecting the board's ability to make fulsome decisions on the bids.

[122] In Order PO-3269, the adjudicator dismissed this argument that the information at issue had intrinsic monetary value and came within section 18(1)(a).³² She determined that the OPG's submission relates to the harms that will result from its disclosure, not whether disclosure of the information would deprive OPG of its monetary value. She found that the fact that the disclosure of the information at issue would adversely affect OPG's ability to secure contracts in the future did not mean that the information at issue also has an intrinsic monetary value.

[123] I adopt the reasoning in Order PO-3269 and find that the information at issue in the records, namely the evaluators' comments and scoring and the pricing information, does not have intrinsic monetary value. I find that the board's submissions relate to harms that will result from disclosure, not whether disclosure of the information would deprive it of its monetary value.

[124] Therefore, I find that part 3 of the test under section 11(a) has not been met and the information at issue in the records is not exempt under section 11(a).

Section 11(c): prejudice to economic interests, and

Section 11(d): injury to financial interests

[125] Concerning section 11(c), the board states that disclosure of confidential information in response to a procurement process could severely limit the ongoing ability of the board to solicit bids. It states that:

- a. School boards, through consortia, are required to use a competitive process in order to ensure value for services purchased. This process would be compromised if the records are disclosed.
- b. Third parties have already indicated to the board that if the confidential commercial, financial and technical information is disclosed, they will not continue to provide such information to the board.
- c. If third parties feel constrained in the submission of information to the Consortium, the Consortium will have less information on which to base its selection of the most competitive bid.

³² Section 18(1)(a) of the *Freedom of Information and Protection of Privacy Act (FIPPA or the provincial Act)*, is the provincial equivalent of section 11(a) of *MFIPPA*.

d. Furthermore, the Consortium made assurances in the RFS documentation that the information submitted to it would be kept confidential and would not be disclosed unless it were required to do so by law or by an order of the IPC.

e. If the Consortium were to exercise its discretion in a manner inconsistent with the assurances given to bidders, the Consortium would undermine the trust that is required to maintain successful commercial relationships, and would be acting in a manner contrary to the assurances provided to bidders, which could draw liability, as well as negatively impact the board's competitive position as a trusted purchaser of student transportation services.

[126] Concerning section 11(d), the board states:

Similarly, for the purpose of 11(d), the disclosure of the records would be injurious to the financial interests of the board.

a. The impact on the board being able to attract potential bidders would have a significant impact on its financial interests and could result in the board paying higher rates for student transportation services.

[127] The appellant did not provide direct representations on these two exemptions.

Analysis/findings re: sections 11(c) and 11(d)

[128] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions.³³

[129] This exemption is arguably broader than section 11(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.³⁴

³³ Orders P-1190 and MO-2233.

³⁴ Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.

[130] In Order PO-2987, at issue was similar information as is at issue in this appeal, namely, information regarding how the Ontario Power Authority (the OPA) scored and evaluated an RFP.³⁵

[131] In that appeal, one of the orders the OPA relied on in opposing disclosure of the withheld information was Order MO-1919. Adjudicator Daphne Loukidelis in Order PO-2987, in finding that sections 18(c) and (d) did not apply, found that this order did not assist the OPA because the adjudicator did not uphold the institution's exemption claims of sections 11(c) and (d) to deny access to very similar records.³⁶

[132] In rejecting the exemption claim under sections 11(c) and (d), Adjudicator Stephanie Haly in Order MO-1919, stated:

The majority of the records that the City claims are exempt under sections 11(c) and (d) all relate to the evaluation and scoring of the various proposals submitted by the affected parties in response to the RFP. Page 3 as stated above contains a fee breakdown. Pages 5, 6, 8 and 9 of the Group I records all relate to scoring, ranking or comments about the various submissions of the affected parties. The City's submission that disclosure of this information would telegraph to potential bidders what the City is looking for in a successful proposal and thus could reasonably be expected to prejudice its economic interests or be injurious to its financial interests is unsupported. In fact, I am unconvinced that the City would not receive better proposals once organizations are aware of the way in which the City evaluates a proposal. Furthermore, the City's submission that disclosure of the information on page 3 of the Group I records would result in future RFP proponents not conducting the detailed analysis necessary to make a knowledgeable and realistic proposal is speculative at best. The City has not provided "detailed and convincing" evidence that disclosure of these pages of the Group I records could reasonably be expected to either prejudice its economic interests or competitive position, or be injurious to its financial interests.

[133] The adjudicator, in making her determination in Order PO-2987, also relied on Order MO-2496-I, which concerned similar procurement information. In that order, Adjudicator Bernard Morrow found that sections 11(c) and (d) did not apply to information relating to the City of Toronto's 3-1-1 info line. In that order, Adjudicator

³⁵ Order PO-2987 was reconsidered in Reconsideration Order PO-3062-R where the adjudicator upholds the disclosures ordered in Order PO-2987 with some modifications based on information removed from the scope of the appeal by the requester.

³⁶ Sections 10(1), 11(c) and 11(d) of the municipal *Act* are the equivalents of sections 17(1), 18(1)(c) and (d) in the provincial *Act*.

Morrow stated:

In my view, the City has provided speculative unsupported assertions of economic and financial harms in the event the information in the records is disclosed. The suggestion that disclosure will place a chill over third parties when they consider participating in future RFPs is self-serving and lacks the requisite detailed and convincing evidence to establish a reasonable expectation of harm. The City's view, that providing the appellant and the public with insight into the evaluation process (including the scoring criteria used to determine the winner) would lead to the harms in sections 11(c) and (d), is again self-serving. To conclude, the City has not met the harms test under sections 11(c) and (d) and I, therefore, find that these exemptions do not apply to the records at issue.

[134] The adjudicator in Order PO-2987 found the OPA's arguments regarding the scoring and scoring rubric and the evaluation summary in the records to be speculative and insufficiently persuasive to support a finding that sections 18(1)(c) or (d) apply to them.

[135] In that appeal, the OPA postulated that third parties, namely future proponents, might act in certain ways if the information at issue is disclosed, including taking action to exploit or manipulate the RFP process. The adjudicator stated that the OPA had not been able to point to experience with this happening or otherwise provide a reasonable basis for her to conclude that such "exploitation" might reasonably be expected to occur. Among the arguments she rejected as speculative in nature was the OPA's assertion that disclosure of the information would result in proponents submitting "carefully presented" or "gilded" bids that are lower in quality because they are simply tailored to fit the criteria, rather than genuinely and comprehensively addressing the bid requirements.

[136] As well in order PO-2987, the OPA's consultant suggested that its competitive and economic position would be affected adversely by disclosure of the scoring because this would "undermine the consistency of the process, and the perception of it which might, in turn, result in some proponents not bidding at all." Adjudicator Loukidelis found that the OPA had not explained sufficiently how disclosure would adversely affect the process. She stated:

Further, I am not persuaded that disclosure of the scores could reasonably be expected to result in a disinterest or disinclination on the part of the industry in competing for government contracts. I am similarly unmoved by the argument that disclosure of the scoring and related information would prejudice the OPA's competitive interests as a customer because the information provided by proponents "could result in a loss of competitive advantage." The information that is at issue, other than input in record 7 from the affected parties' bids is not, in my view, the type of

information alleged (i.e. sensitive commercial and/or technical information). In the circumstances, I find that this position is not sufficiently supported by the content of the records to weigh in favour of the application of section 18(c) or (d) to the information at issue...

[137] I rely on the findings in Order PO-2987 and the orders cited therein to find that the board has not provided sufficient evidence to establish that disclosure of the information at issue in the records could reasonably be expected to result in harm to the board's economic or financial interests for the purpose of sections 11(c) and/or (d).

[138] In particular, I find that disclosure of the information at issue in the records could not reasonably be expected to severely limit the ongoing ability of the board to solicit bids with fulsome information. The third parties are in the business of providing bussing services to school boards. The board through the Consortium, that includes other boards in the region, as set out in the disclosed prices paid by it in the records, is a significant purchaser of these services.

[139] As noted above, the third parties were informed in the RFS that *MFIPPA* applies to information provided to the Consortium by them and that the confidentiality of information supplied by them would be maintained by the Consortium, except as otherwise required by law or by order of a court or tribunal. Therefore, the third parties were fully aware that their information could be subject to disclosure under the *Act*.

[140] The board has indicated in its submission under section 11(c), that if the information at issue in the records is disclosed contrary to its assurances of confidentiality it "could draw liability and ... negatively impact the board's competitive position as a trusted purchaser of student transportation services."

[141] The board has not explained what liability it could be subjected to or how its competitive position could be negatively impacted. Nor can I ascertain such from my review of the records. I note that the RFS clearly indicated that any information submitted to the Consortium was subject to disclosure under *MFIPPA*.

[142] Accordingly, I do not accept the board's submission under section 11(c) that disclosure could draw liability, as well as negatively impact the board's competitive position as a trusted purchaser of student transportation services.

[143] The board is a significant purchaser of bussing services through the Consortium. I do not accept the board's submission under section 11(d) that disclosure of the information at issue could reasonably be expected to impact the Consortium being able to attract potential bidders or have a significant impact on its financial interests, thereby resulting in it paying higher rates for student transportation services.

[144] I find that the board's representations lack the requisite evidence to establish a reasonable expectation of harm under both sections 11(c) and (d) and that, therefore, these exemptions do not apply.

[145] In conclusion, as I have found that neither the claimed sections 10(1) or 11 exemptions apply to the information at issue in the records, I will order this information disclosed.

ORDER:

I order the board to disclose the information at issue in the records to the appellant by **November 29, 2017** but not before **November 27, 2017**.

Original Signed by: _____

Diane Smith
Adjudicator

October 25, 2017 _____