Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3722

Appeal MA18-99

Toronto District School Board

January 25, 2019

Summary: The Toronto District School Board (TDSB, or the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for records relating to the contract awarded to a named company by the board's IT Services Department. The board located a contract, purchasing order, a board agenda, and e-mails in response to the request. After receiving notification from the board about the request, the company did not consent to disclosure. The board then issued an access decision, granting partial disclosure of the responsive records. It withheld access to certain information based on a number of exemptions. The company appealed the board's decision on the basis that the information that the board is willing to disclose is exempt under the third party information exemption at section 10(1) of the *Act*. The company did not provide any representations in support of their appeal. In this order, the adjudicator finds that the information at issue is not exempt under section 10(1), and dismisses the appeal.

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

Orders Considered: Orders P-42, PO-2435, PO-3347, PO-3517, PO-3518, PO-3764, PO-3835, MO-2093, MO-3062, and MO-3058-F.

OVERVIEW:

[1] The Toronto District School Board (TDSB, or the board) received a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) that was

forwarded to it[1] by the City of Toronto for records pertaining to the contract awarded to a named company by the board's IT Services Department. In particular, the requester sought access to:

- All records in the possession of the City of Toronto and/or TDSB pertaining to the contract including, but not limited to, the bid documents submitted by the company, correspondence between the city and/or the TDSB and the company; and

- All records in the possession of the city and/or TDSB relating to the company's performance under the contract including but not limited to correspondence, memorandums, notes or other documents.

[2] The requester sought the above records from a specified date to the date of the request, and further requested continuing access to any new records that would be encompassed by the above noted categories for two years following the date of the request.

[3] Before issuing an access decision, the board notified affected parties of the request seeking their representations on disclosure of the records relating to them, pursuant to section 21(1)(a) of the *Act*. One of the affected parties did not consent to disclosure. The board subsequently issued its decision to both the requester and the affected party resisting disclosure, granting partial access to the responsive records. The board withheld certain information under sections 10(1) (third party information), 11 (economic and other interests), and 14 (personal privacy) of the *Act.* Other information was withheld as not responsive to the request. The records were held from release to allow the affected parties an opportunity to appeal.

[4] The affected party resisting disclosure (now appellant) appealed the board's decision to this office.

[5] The requester did not submit their own appeal, so the information that the board decided to withhold is not at issue in this appeal.

[6] Mediation could not resolve the appellant's dispute over the portions of the records that the board was willing to release, so the file moved to the adjudication stage.

[7] The only issue in this appeal is the possible application of section 10(1) (third party information) of the *Act* as it relates to the information that the board is willing to disclose.

[8] I began my inquiry under the *Act* by sending a Notice of Inquiry, setting out the facts and issues on appeal, to the appellant.

[9] The appellant did not provide written representations in response. I decided that

[1] See section 18(2) of the *Act*.

I did not need to seek representations from the board or the requester.

[10] For the reasons that follow, I find that the mandatory third party information exemption at section 10(1) does not apply to the information at issue (the information that the board decided to disclose), and I dismiss this appeal.

RECORDS:

[11] The information at issue is in the following records, which I describe below, and will refer to as follows:

Page number[2]	Description
1-27[3]	The winning bid.
28-39	The board's agenda to a named committee. Includes eight appendices, and some brief of information relating to the appellant.
40-41	The purchase order (re-print) re: appellant's winning bid.
42-209	Various e-mail chains, some with attachments. Some e-mails are internal to the board, and others are between the board and the appellant. Many pages are repeated. One e-mail includes a slide deck presentation of the appellant.

DISCUSSION:

[12] For the reasons that follow, I find that the information that the board decided to disclose is not exempt under the third party information exemption at section 10(1) of the *Act*, and I uphold the board's decision to disclose it.

[13] This third party information appeal was brought by the appellant who won a bid to provide the board with specified IT services. The board decided that the mandatory third party information exemption at section 10(1) of the *Act* applies to discrete sections of the responsive records, and redacted those sections accordingly. This appeal only concerns the information that the board decided to release, not the portions withheld under section 10(1) (because the requester did not file an appeal).

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[2] The responsive records in this appeal were given to this office on a CD in pdf format. There were two sets of page numbers. One set reflects the page number in the 209-page pdf document. The other set of page numbers, inserted by the board, appears in red at the top right-hand corner of most, but not all, pages of the pdf document. For the purposes of this order, I will be using the pdf page numbers (which are also the ones used in the board's index of records).

[3] The board identified the bid documents as going to page 28, but based on my review of the CD provided to this office, page 28 is the first page of an agenda. Also, page 1 is a cover e-mail indicating that the bid is attached.

[14] Since the appellant is the party resisting disclosure, it had the onus to prove that section 10(1) applies to the information that the board is prepared to disclose in the responsive records.[4] The appellant did not provide written representations in support of its appeal. Without the appellant's representations, there is no evidence before me, other than the records themselves, as to whether the information in the records meets the three-part test for the section 10(1) exemption to apply.

[15] However, since the section 10(1) exemption is a mandatory exemption, I will independently assess whether this exemption applies to the information at issue.

[16] Section 10(1) says:

> 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;
> >
> > (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;
> >
> > (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

[17] Section 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions.[5] 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.[6]

[18] For section 10(1) to apply, the appellant must prove that each part of the following three-part test applies:

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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[4] Order P-42.
[5] *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.*).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

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.

[19] I will assess each record (or type of record) separately, below. I will explain why none of the records, except for some e-mails, meet part two of the test, and why none of the e-mails meet part three of the test. Since each record must meet all three parts of the test to be exempt under section 10(1), and each of the records fails either part two or part three of the test (without deciding whether they meet any other parts, respectively), none of the records are exempt under the third party information exemption.

Part 1: Type of information

[20] Although I was not provided with representations to demonstrate that the records at issue contain any of the types of information belonging to the appellant that section 10(1) seeks to protect, I am prepared to find that the winning bid, purchase order, board agenda, and e-mails contain commercial and/or technical information, as defined by the IPC:

> *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.[7] The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information.[8]
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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.[9]

[21] Since the records contain commercial and/or technical information relating to the appellant, they meet part one of the test.

Part 2: Supplied in confidence

[22] Part two of the three-part test itself has two parts: the information at issue must

[7] Order PO-2010.
[8] Order P-1621.
[9] Order PO-2010.

have been "supplied" to the city by the appellant, and the appellant must have done so "in confidence", implicitly or explicitly. If the information was not supplied, section 10(1) does not apply, and there is no need to decide the "in confidence" element of part two (or the harms in part three) of the test.

[23] 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.[10]

[24] 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.[11]

The winning bid

[25] From my review of the winning bid, it is clear that the successful bid would become the contract and that no separate agreement would be entered into. This office has treated such successful bids as contracts,[12] and I will therefore refer to the winning bid in this appeal as "the contract."

[26] 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). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.[13]

[27] As mentioned, the appellant did not provide representations in this appeal. Based on my review of the contract, I find that, as a whole, it reflects the agreed-upon terms that were the result of negotiation between the parties. Once the board accepted the appellant's bid, the information became negotiated, rather than supplied.

[28] I turn to the question of exceptions to the general rule that contracts are negotiated, not "supplied".

Does one of the two exceptions apply to this contract?

[29] There are two exceptions to the general principle that contracts are not "supplied": the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] See, for example, Orders PO-3764, MO-2093, and MO-3058-F.
[13] This approach was approved by the Divisional Court in *Boeing Co.*, cited above, and in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al.,* 2013 ONSC 7139 (CanLII) (*Miller Transit*),.

confidential information supplied by the third party to the institution.[14] The immutability exception applies where the contract contains information supplied by the third party, but the information is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.[15]

[30] In the absence of representations demonstrating that either exception applies, I find that neither does. Based on my review of the contract, I would be engaging in speculation to find that it contains information that would fall under either exception.

[31] Since neither exception applies to the contract, I find that the contract does not meet part two of the test, and the section 10(1) exemption does not apply to it. It is, therefore, unnecessary for me to examine whether the contract meets the "in confidence" element of part two of the test, or the harms requirement in part three. Accordingly, I find that section 10(1) does not apply to the contract and I uphold the board's decision to disclose it.

The purchase order

[32] The purchase order is a record that flows from the contract, and therefore, my reasoning about the contract not being supplied applies to this record.[16] Accordingly, I uphold the board's decision to disclose this record.

The board's agenda to a named committee

[33] I do not find that this record meets part two of the test. This record appears to have been prepared by the board. The agenda seems to set out that the contract was awarded to the appellant, and in an appendix to the agenda, it discloses the appellant's name and pricing information. Since the contract was awarded to the appellant, I find that disclosure of the name and pricing information would be disclosure of information that was negotiated, not supplied. As the pricing information in the agenda was a result of the negotiations between the appellant and the board, it was not supplied for the purposes of section 10(1). Accordingly, it is not necessary to discuss the "in confidence" portion of part two of the test, or the harms issue of part three, in relation to the board's agenda.

[34] Therefore, section 10(1) does not apply to the information at issue in the board's agenda, and I uphold the board's decision to disclose it.

Various e-mails and attachments

[35] The e-mails at issue cover time periods both before and after the contract was awarded.

[36] Despite a lack of representations from the appellant, I am prepared to find that

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[14] Order MO-1706, cited with approval in *Miller Transit*, above at para. 33.
[15] *Miller Transit*, above at para. 34.
[16] Orders PO-3347, PO-3517, PO-3518, PO-3835, and MO-3062.

e-mails dated before the award of the contract and which contain pricing information consist of information supplied in confidence to the board, and therefore meet part two of the test.

[37] As for the e-mails generated after the award of the contract, without explicit evidence of an expectation of confidentiality on the part of the appellant, there is minimal evidence before me of an implicit expectation of confidentiality in the supply of information (such as the appellant's slide deck) to the board.

[38] Nevertheless, even if all the e-mails were to be considered as having met part two of the test, as discussed below, they do not meet part three.

Part 3: harms

Various e-mails and attachments

[39] The bulk of the records at issue in this appeal (pages 42-209) consist of e-mails. I do not find that these records meet part three of the test, as explained below.

[40] Under part 3 of the section 10(1) test, the appellant, as the party resisting disclosure had to provide evidence about the potential for harm resulting from disclosure. The appellant had to demonstrate a risk of harm that is well beyond the merely possible or speculative although it did need not to 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.[17]

[41] The appellant did not submit any evidence to explain whether the prospect of disclosing the e-mails, including the e-mail attaching a slide deck presentation it prepared, gives 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. This means that the appellant did not explain, for example, whether disclosing the records (including some pricing information) could reasonably be expected to "prejudice significantly" its competitive position [section 17(1)(a)] or result in an undue loss or gain for itself or any other person or group [section 17(1)(c)]. In any event, the IPC has in past decisions held that the fact that a third party contracting with the government may be subject to a more competitive bidding process in the future, does not in itself significantly prejudice its competitive position,[18] so I am unwilling to infer this type of harm by disclosure without representations from the appellant.

[42] Because the appellant did not submit representations on the application of section 10(1), there is little evidence before me, other than the e-mails (and any attachments) themselves, as to whether the information in these records meets the three-part test for the exemption to apply.

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[17] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 (CanLII) at paras. 52-4.
[18] See, for example, Order PO-2435.

[43] Having reviewed the records myself, I find that on their face, they do not meet part three of the test. Many of these e-mails are parts of e-mail chains, and repeated, and are internal to the board and/or contain information about the board's property (its computer servers). I do not find it reasonable to conclude that the appellant could suffer any of the harms contemplated by section 10(1) by the disclosure of the board's internal e-mails, despite mentions of the appellant. Even when the appellant is a sender or recipient, it is not clear to me from the face of these e-mails how the appellant could reasonably be expected to suffer any of the harms set out in section 10(1) by disclosure. In my view, it would be speculation on my part to conclude otherwise, having reviewed the records and not having received any evidence from the appellant.

[44] Therefore, I find that there is insufficient evidence for me to conclude that the appellant could reasonably be expected to suffer any of the harms contemplated by section 10(1)(a) to (d) from the disclosure of the e-mails, including any attachments. Accordingly, I find that these records do not meet part three of the test and are not exempt from disclosure under section 10(1) of the *Act*.

[45] I note that a personal cell phone number was redacted in an e-mail appearing on page 152 of 209 on the basis of the mandatory personal privacy exemption at section 14(1) of the *Act*, but not in a duplicate of that e-mail on page 174 of 209. The duplicate should be likewise be redacted.

ORDER:

1. I uphold the board's access decision to disclose the information at issue in its entirety (with the exception described in paragraph 45 of this order).

2. I order the board to disclose the records to the requester by **March 4, 2019** but not before **February 26, 2019.**

3. In order to verify compliance with this order, I reserve the right to require the board to provide me with a copy of the record sent to the requester, pursuant to paragraph 2 of this order.

Original signed by: January 25, 2019

Marian Sami
Adjudicator