Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3820

Appeal MA16-577

Dufferin-Peel Catholic District School Board

August 21, 2019

Summary: The appellant submitted a request under the *Act* to the board for records relating to a specific request for supplier qualifications (RFSQ) in 2016. After clarifying the request, the board issued a decision letter denying the appellant access to the records pursuant to sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*. The appellant appealed the board's decision. During mediation, the board issued a number of revised access decisions granting the appellant partial access to some responsive records and providing fee estimates for processing the request. The board advised the appellant it would not process his request further until he paid a 50% deposit of the final $1,076.77 estimated fee, as per section 7(1) of Regulation 823. The appellant refused to pay the deposit. Accordingly, the board has not processed the appellant's request and the only records at issue in this inquiry are those that were disclosed, in part, to the appellant during mediation. In this order, the adjudicator upholds the board's fee as reasonable and upholds the board's application of section 10(1)(b), in part.

Statutes Considered: *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56, as amended, sections 10(1)(b) and 45(1); Regulation 823, section 6.

Orders and Investigation Reports Considered: Orders M-1106, MO-2530, MO-3093, PO-2853, and PO-3152.

OVERVIEW:

[1] The appellant submitted a request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) to the Dufferin-Peel Catholic District School Board (the board) for records relating to a specific request for supplier qualifications (RFSQ) from 2016.

[2] The board contacted the appellant to clarify his request. The appellant confirmed he seeks access to all records relating to all bids received, both successful and unsuccessful.

[3] The board issued a decision letter to the appellant denying him access to the responsive records pursuant to the mandatory exemptions in sections 10(1) (third party information) and 14(1) (personal privacy) of the *Act*.

[4] The appellant appealed the board's decision.

[5] During mediation, the board issued a revised access decision granting the appellant partial access to two records. The board relied on section 10(1)(b) of the *Act* to withhold portions of the records.

[6] Following discussions with the mediator and the appellant, the board conducted another search and identified additional responsive records. The board issued a supplemental access decision to the appellant and granted him partial access to the newly located records. The board claimed the application of section 10(1)(b) to withhold portions of these records.

[7] After further discussions with the mediator, the board issued an interim access decision to the appellant with respect to the remainder of the records. The interim access decision included a fee estimate of $4,395.82 and the board advised the appellant that it required a 50% deposit prior to continuing to process his request. In its decision, the board advised that, after reviewing a sample of the records, it anticipated that the exemptions in section 10(1)(a) and 12 (solicitor-client privilege) would also apply to portions of them.

[8] The board later issued a further supplemental decision letter to the appellant granting him further access to responsive records. The board withheld portions of the records under section 10(1) of the *Act*.

[9] The appellant clarified his request. As a result of that clarification, the board issued a revised interim access decision which included a revised fee estimate of $1187.22. The board requested the appellant to pay a 50% deposit prior to it processing his request further.

[10] After reviewing the board's decisions and the records disclosed to him, the appellant confirmed that he pursues access to

1. Completed Assessment Tools – unredacted documents relating to the appellant's company

2. Reference Check Documents – unredacted documents relating to the appellant's company

3. Completed Assessment Tools – unredacted documents relating to parties other than the appellant's company

4. Reference Check Documents – unredacted documents relating to parties other than the appellant's company

5. Reference Request forms – unredacted documents relating to the appellant's company only

6. Back-up and Evaluation Documents – all unredacted documents

7. Correspondence between the appellant and the board relating to de-brief and related back-up documents – all unredacted documents

[11] Upon review of the appellant's revised request, the board issued a revised fee estimate/interim access decision containing a final fee estimate of $1,076.77. The board requested a 50% deposit to continue processing the request, in accordance with section 7(1) of Regulation 823.

[12] The appellant confirmed his interest in pursuing access to the specified information set out above, but refused to pay for redacted records. The appellant also confirmed he pursues complete access to the records the board partially disclosed to him during the course of mediation.

[13] The issues could not be resolved during mediation and the appeal proceeded to the adjudication stage of the appeal process, where an adjudicator may conduct an inquiry to resolve the issues. In this inquiry and order, I am only considering whether section 10(1) of the *Act* applies to the records that were disclosed in part to the appellant during mediation. I will not be considering whether that exemption applies to all 1,195 pages of records because the appellant refused to pay the 50% deposit and the board did not continue to process the records that were not disclosed to the appellant during mediation. I began my inquiry by inviting the board and a number of affected parties to make submissions in response to a Notice of Inquiry, which outlines the facts and issues under appeal. Some of the affected parties are other bidders in the RFSQ process and the others are the referees whose names the appellant provided to the board as part of his bid. The board submitted representations and a number of affected parties responded to the notice. Some affected parties consented to the disclosure of some information relating to them and others claimed the application of section 10(1) of the *Act* to exempt the information relating to them from disclosure.

[14] I then invited the appellant to submit representations in response to a Notice of Inquiry and the board's representations, which were shared with the appellant in accordance with Practice Direction Number 7 of the IPC's *Code of Procedure*. The appellant submitted representations.

[15] In the order that follows, I uphold the board's fee estimate as reasonable and

uphold the board's application of section 10(1)(b), in part. I order the board to disclose to the appellant the information that I have found to be not exempt from disclosure.

RECORDS:

[16] The records at issue in this appeal are a master assessment tool (pages 1 and 2), two phone call references (pages 3 and 4), one evaluation summary (pages 5 and 6), four emails that the board sent to referees (pages 7 to 10), and four references (pages 11 to 14).

ISSUES:

A. Should the fee estimate be upheld?

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

DISCUSSION:

Issue A: Should the fee estimate be upheld?

[17] Under section 45(1) of the *Act*, the board is required to charge fees for processing access requests according to the following framework:

> A head shall require the person who makes a request for access to a record to pay fees in the amounts prescribed by the regulations for,
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> > (a) the costs of every hour of manual search required to locate a record;
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> > (b) the costs of preparing the record for disclosure;
> >
> > (c) computer and other costs incurred in locating, retrieving, processing and copying a record;
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> > (d) shipping costs; and
> >
> > (e) any other costs incurred in responding to a request for access to a record.

Other specific and relevant provisions regarding fees for records that do not contain the personal information of the appellant (as is the case here) are found in section 6 of Regulation 823:

6. The following are the fees that shall be charged for the purposes of subsection 45(1) of the *Act* for access to a record:

1. For photocopies and computer printouts, 20 cents per page.

2. For records provided on CD-ROMs, $10 for each CD-ROM.

3. For manually searching a record, $7.50 for each 15 minutes spent by any person.

4. For preparing a record for disclosure, including severing a part of the record, $7.50 for each 15 minutes spent by any person.

The IPC may review an institution's fee and determine whether it complies with the fee provisions in the *Act* and Regulation 823.

[18] In its representations, the board provided the following explanation of its final fee estimate:

Records	**Decision**	**Fee Estimate**
(a) Completed Assessment Tools	Release subject to exemptions for sections 10(1)(a), 14(3)(d) and 12	774 copies Copy fee - $19.35 for scanned copies Redactions @ $1.00 per page Subtotal - **$793.35**
(b) Reference Check Documents	Release subject to exemptions for section 10(1)(a)	186 copies Copy fee - $4.65 for scanned copies Redactions @ $1.00 per page Subtotal - **$190.65**
(c) Reference Request documents – only for [named company]	Release subject to exemptions for sections 10(1)(a), 14(3)(d) and 12	4 copies Redactions at $1.00 per page Subtotal - **$4.00**
(d) Back-up and Evaluation Documents	Release subject to exemptions for sections 10(1)(a), 14(3)(d) and 12	128 copies Copy fee $3.20 for scanned copies

		Based on a random sample, 57% of documents will require redactions - $73.00 Subtotal - **$76.20**
(e) Communication between requester and the Board related to de-brief and related back-up documents	Release subject to exemptions for sections 10(1)(a), 14(3)(d) and 12	103 copies Copy fee - $2.57 for scanned copies Based on a random sample, it is expected that 10% of records will require redaction Subtotal - **$12.57**
		Total $1,076.77

[19] The board submits that the table shows the number of pages associated with each of the five categories of responsive records and the corresponding preparation charge for scanning the records. The board submits it based the charge on scanning an estimated 1200 pages per hour at a rate of $30 per hour. The board submits that the IPC accepted this scanning rate in Order PO-3125.

[20] In categories (a) to (c) in the table, the board submits it anticipates that each page will have redactions based on the exemptions identified in the Decision column. The board states it applied the two minutes per page (equivalent to $1 per page) as the fee estimate for severing the records, as permitted by the IPC's 2018 Guideline on Fee Estimates and Orders MO-1990 and PO-1834.

[21] With regard to categories (d) and (e), the board states there is less certainty whether each page would require a redaction. The board submits it conducted a review of a sample of documents in each category to create an estimated percentage of pages that would require severances. The board identified the percentages in the table and applied a two minute per page (equivalent to $1 per page) fee estimate for the anticipated severances.

[22] The appellant submits that it appears that the board's fee estimate is comprised mainly of redaction fees. The appellant states he declined to pay for the board's fee because he requested unredacted documents. The appellant also submits that he should not be required to pay a 50% deposit in advance because the search and photocopying fees were less than $100. The appellant claims that the redaction/preparation fees are not valid because he requested unredacted records.

[23] Based on my review of the board's representations and fee estimate, I am prepared to uphold its fee estimate. In reviewing the board's fee estimate, I am required to ensure that the estimated amounts are reasonable in the circumstances and that they were calculated in accordance with the *Act* and Regulation 823. The burden of establishing the reasonableness of the estimates rests with the board.[1] To meet this burden, the board was required to provide an adequate explanation of how the fee estimate was calculated, as well as sufficiently detailed evidence to support the estimate.

[24] In its current fee estimate and representations, the board's $1076.77 reflects its charges for scanning fees and preparation or redaction. It appears that the board no longer claims a fee for the search or the CD-ROM containing the records. In addition, it does not appear that the board ever claimed photocopying fees; rather it charged the appellant a "copy fee" for scanning paper copies to electronic format. The board did not include a search fee or CD-ROM fee in its final revised fee estimate dated June 25, 2018 and did not make representations on these fees in its representations during the inquiry. Therefore, I accept that the board is not claiming fees for search or the CD-ROM and the appellant is not required to pay for these fees in accordance with the board's original fee estimate.

[25] The board estimated a fee of $1,047 for the preparation fees, specifically redaction of records. The fees that can be charged by the board for preparing the records for disclosure fall under section 45(1)(b) of the *Act* and section 6.4 of Regulation 823. The rate for this activity is $30.00 per hour and the IPC has accepted a calculation of 2 minutes per page for severing records.[2] The board adopted this rate, which results in a rate of $1 to sever a page of records. I considered the board's evidence about the approximate percentage of pages that would require severances and accept that it reviewed a representative sample in preparing its fee estimate. I also considered the appellant's argument that he should not be required to pay for any redaction fees because he requested unredacted records. I confirm for the appellant's benefit that the board is entitled and, in fact, required in certain cases, to redact and withhold certain information from disclosure under the *Act*. Therefore, while I appreciate the appellant's desire to obtain complete access to the requested records, I confirm that the board is permitted to charge preparation fees for making certain appropriate severances in preparing the records for disclosure.

[26] On balance, I accept that the board appropriately estimated the proportion and number of pages that would require severance. Upon review of the records at issue in this appeal and the board's representations, I uphold the board's fee estimate of $1,047 for the redaction of the records.

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[1] Order 86.
[2] Orders MO-1169, PO-1721, PO-1834 and PO-1990.

[27] In addition, the board estimated a $29.77 fee for scanning the 1,195 estimated pages to a CD-ROM.[3] The IPC has considered and established the method for accounting for scanning records to convert them to an electronic format for disclosure on a CD or USB. In Order MO-2530, the adjudicator observed that Regulation 823 does not specifically refer to scanning paper records to provide the information on CD or USB. However, because the activity is a necessary component of producing paper records in electronic format, the adjudicator found that scanning can be considered to be an activity that falls under section 6.4 of Regulation 823 as a charge "for preparing a record for disclosure." In Order PO-3152, the adjudicator concluded that an appropriate estimate of time required to prepare and scan paper records for disclosure on CD was 1,200 pages per hour.[4] The board used this rate for its fee estimate for the 1,195 estimated responsive records. I accept that it is reasonable for the board to charge the appellant $30.00 for each hour required to scan paper records to prepare them for disclosure on CD-ROM at a rate of 1,200 pages per hour. Accordingly, I uphold the board's fee of $29.77 for scanning the paper records into electronic format.

[28] In conclusion, the board's evidence supports its fee estimate for responding to the appellant's request. Therefore, I find that the board's fee estimate is reasonable and I uphold it. To confirm, the board may require the appellant to pay a deposit equal to 50 per cent of the estimate (i.e. $538.39) before taking any further steps to respond to his request, as per section 7(1) of Regulation 823. In addition, should the actual redactions made by the board result in fewer redactions or severances than anticipated by the fee estimate, the board should adjust its final fee accordingly.

Issue B: Does the mandatory exemption at section 10(1) apply to the records?

[29] The records at issue in this appeal are a master assessment tool (pages 1 and 2), two phone call references (pages 3 and 4), one evaluation summary (pages 5 and 6), four emails that the board sent to referees (pages 7 to 10), and four references (pages 11 to 14).

[30] In its representations, the board submits that the exemption in section 10(1)(b) applies to the information withheld from disclosure. Section 10(1)(b) states,

> 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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[3] I note the board originally claimed a $10.00 fee for a CD-ROM, but it no longer claims this fee in the revised fee estimate. Given the original fee for the CD-ROM, I consider the scanning fee to be associated with scanning records to convert them to an electronic format.

[4] This was adopted in Orders MO-3340, MO-3502 and PO-3855.

> 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.

[31] 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 market.[6]

[32] For section 10(1) to apply, the party or parties resisting disclosure 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

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.

[33] In this appeal, there are a number of parties resisting disclosure: the board and a number of the affected parties (some of whom were bidders in the RFSQ process and others who were referees) who were notified during the inquiry. For clarity, I will identify these affected parties separately as the bidders and the referees. I note that a few bidders consented to the disclosure of the information relating to them on the master assessment tool at pages 1 and 2 of the records. Given my findings below, it is not necessary for me to identify and distinguish the bidders that did and did not consent to this disclosure.

Part 1: Type of Information

[34] To satisfy part 1 of the section 10(1) test, the parties resisting disclosure must show that the records contain information that is a trade secret or scientific, technical, commercial, financial or labour relations information.

[35] The board did not specifically address part 1 of the section 10(1) test. A number of the bidders described the information at issue as their "sensitive corporate business

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[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.).
[6] Orders PO-1805, PO-2018, PO-2184 and MO-1706.

information" or "confidential business information." Another bidder submitted that the information contained in the master assessment tool constituted its financial information. One of the referees submitted that the information at issue contained commercial information within the meaning of section 10(1).

[36] I note that a number of the bidders opposed the disclosure of their RFSQ materials. I confirm that none of these materials are before me in this inquiry. To be clear, I am only considering whether portions of the assessment tool, an evaluation summary and various reference documents are exempt from disclosure.

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

> *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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> *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.[9]

[38] The information at issue consists of the withheld portions of a master assessment tool (pages 1 and 2), two phone call references (pages 3 and 4), one evaluation summary (pages 5 and 6), four emails that the board sent to referees (pages 7 to 10), and four references (pages 11 to 14).

[39] Based on my review of the records, I find that the master assessment tool and the evaluation summary do not contain the types of information contemplated by section 10(1) of the *Act*. Order PO-2853 addresses the application of part 1 of the section 17(1) [the provincial equivalent of section 10(1) of the *Act*] test to scoring information. In that order, the adjudicator 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 proposal 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

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

> 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.

[40] I adopt this analysis for the purposes of this appeal. The master assessment tool contains the scoring information and assessed items for the RFSQ in relation to each company. The record itself does not contain these bidders' commercial or financial information within the meaning of part 1 of the test. Rather, the master assessment tool reflects the board's evaluations of the submissions made in response to the RFSQ and do not reproduce the actual information the board received. Therefore, I find that the master assessment tool does not contain the bidders' financial or commercial information. I note that the only information at issue in this record is the names of the bidders.

[41] Similarly, I find that the evaluation summary (pages 5 and 6) does not contain commercial or financial information within the meaning of part 1 of the test. The information withheld in the record consists of an evaluator's handwritten comments identifying the bidder, who is not the appellant, and some scoring information relating to this bidder's submission. During the inquiry, I notified this bidder and they consented to disclosure of the information at issue in this appeal that relates to them.[10] The record does not reproduce the information submitted by the bidder nor does it reproduce the comments provided to the referees during the RFSQ process. Instead, the information at issue consists of general and summary scoring information relating to the bidder's submission. Therefore, I find that the information at issue in the evaluation summary and the master assessment tool does not satisfy part 1 of the section 10(1) test.

[42] With regard to the remainder of the records at issue, which relate to the board's invitation for references, I find that they contain commercial information relating to the selling of services to the board. However, I find that these records do not contain financial information.

[43] In conclusion, I find that part 1 of the test has been met for the two phone call references (pages 3 and 4), four emails that the board sent to referees (pages 7 to 10), and four references (pages 11 to 14). I find that the master assessment tool (pages 1 and 2) and the evaluation summary (pages 5 and 6) do not contain the type of information listed in section 10(1) of the *Act*. Therefore, section 10(1) cannot apply to

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[10] I note that this bidder provided partial consent to the disclosure of information relating to them. They did not consent to the disclosure of certain pages in their submission or staff resumes they submitted. These records are not before me in this inquiry. The only information relating to this bidder in this inquiry is the scoring information at pages 1, 2, 5 and 6.

exempt the information at issue in the master assessment tool and the evaluation summary. As no other mandatory exemptions apply to the information in these records and the board did not claim a discretionary exemption for it, I will order the board to disclose the master assessment tool and evaluation summary to the appellant, in full.

Part 2: Supplied in Confidence

[44] 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.[11]

[45] Information may qualify as supplied under section 10(1) if it was directly supplied to an institution by a third party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.[12]

[46] In order to satisfy the *in confidence* component of part 2 of the section 10(1) test, 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.[13]

[47] In determining whether an expectation of confidentiality is based on reasonable and objective grounds, all the circumstances of the case 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 disclosure.[14]

[48] The records that remain at issue are two phone call references (pages 3 and 4), four emails that the board sent to referees (pages 7 to 10), and four references (pages 11 to 14). There are six referees identified in these records. During the inquiry, I notified all six referees. Four referees did not consent to the disclosure of information relating to them and two did not respond to my notice. Of these, three referees claimed

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[11] Order MO-1706.
[12] Orders PO-2020 and PO-2043.
[13] Order PO-2020.
[14] Orders PO-2043, PO-2371 and PO-2497, *Canadian Medical Protective Association v. Loukidelis*, 2008 CanLII 45005 (SCDC).

the application of section 10(1)(b) to the information relating to them. Specifically, the referees submitted that the information they provided to the board was supplied in confidence and with the understanding that it would not be disclosed to anyone other than those evaluating the RFSQ submissions.

[49] The board submits that the referees submitted the reference information at issue in confidence. The board notes that it chose the referees from a list of seven potential references provided by the appellant during the RFSQ process and these referees could be identified if the records are disclosed to the appellant. The board submits that it expressly provided the referees with the assurance that all responses would be kept "strictly confidential."

[50] Based on my review of the records remaining at issue, I am satisfied that the information at issue in the references at pages 3, 4, and 11 to 14 was supplied in confidence to the board. I find that the referees provided their comments to the board with a reasonably held expectation that the information would be treated confidentially. Based on my review of the board and the referees' representations, I find that the references were provided to the board on the basis that they were confidential and would be kept confidential. I am also satisfied that the reference information was treated consistently by the referees in a confidential manner. Therefore, I find that part 2 of the section 10(1) test is satisfied for the records at pages 3, 4, and 11 to 14.

[51] However, I am not satisfied that the information contained in pages 7 to 10 of the records was supplied in confidence to the board. The board confirms that it sent these request letters to a subset of references it canvassed. Based on my review, these records are standard form emails sent by the board's agent on behalf of the board during the RFSQ process to referees soliciting references. Furthermore, the board selected the referees from a list provided by the appellant to the board in its RFSQ submission. The records do not contain information supplied by the referees to the board. Therefore, these records were not supplied to the board. Given these circumstances, I find that the records were not supplied by the referees to the board. Accordingly, I find that the second part of the section 10(1) test is not satisfied for the records at pages 7 to 10 and they are not exempt from disclosure. However, for the sake of completeness, I will consider the application of part 3 of the section 10(1) test to pages 7 to 10 below.

Part 3: Harms

[52] The parties resisting disclosure must provide evidence about the potential for harm. In this case, the board and the affected parties (i.e. the referees) identified in pages 3 and 4 (two phone call references), 7 to 10 (emails from the board soliciting references), and 11 to 14 (four references) of the records 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.[15]

[53] The failure of a party resisting disclosure to provide sufficient evidence demonstrating a reasonable expectation of the harms contemplated in section 10(1) 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 the harms in the *Act*.[16]

[54] The board submits that it relies regularly on the candid comments and ratings of references to make informed decisions on the quality of candidates responding to commercial bid tenders. The board submits that ordering disclosure of the reference information that remains at issue would give rise to a reasonable risk that references (who receive no remuneration or other consideration for the references) will not provide similar information in the future or fearing reprisal, may not be honest about a candidate's shortcomings.

[55] The board, referring to Order MO-3093, submits that that IPC has found that the disclosure of references and reference summaries would give rise to a reasonable risk of harm under section 10(1)(b).

[56] In addition, the board submits that the disclosing the names of the referees will "assist in attempts to 'reverse engineer' scores" and identify individual references and the scores they provided.

[57] A number of the referees submitted representations claiming that section 10(1)(b) of the *Act* applied to withhold the reference information from disclosure. One referee states that it would not provide further references to the board if it were exposed to reprisal for its statements regarding references. Similarly, another referee submits that allowing the disclosure of its reference statement would "taint" the RFSQ process and no third party would provide future references for fear of reprisal.

[58] The appellant did not address the application of section 10(1)(b) to the records. The appellant claimed that he should have complete access to the requested records.

[59] The records that remain at issue are phone calls or written references at pages 3, 4, and 11 to 14 and the emails sent by the board's agent to solicit references at pages 7 to 10. Based on my review of these records and the information at issue, I find

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[15] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31 at paras. 52-54.
[16] Order PO-2435.

that the disclosure of the information at issue in pages 3, 4 and 11 to 14 could reasonably be expected to result in the referees refusing to provide similar information to the board in the future. It is clearly in the public interest that referees provide full and candid references and comments regarding possible vendors to the board. These references are an important factor in the board's decision making process and I am satisfied they are required for the board to make informed decisions on the quality of candidates. Given these circumstances, I am satisfied that section 10(1)(b) applies to the information that remains at issue as it is reasonable to expect that referees would be less candid and fulsome in their comments if there was the possibility that these comments would be disclosed to the candidates.

[60] I find support for this finding in Order M-1106, which was followed in Order MO-3093. In Order M-1106, the adjudicator considered the application of section 10(1)(b) to reference information and stated,

> In my view, the disclosure of information of this sort could reasonably be expected to result in a reluctance on the part of referees to make candid and complete comments to institutions and that this source of information could potentially evaporate.
>
> Similarly, I agree with the comments of Inquiry Officer Cropley in Order M-892 regarding the importance of the availability of complete reference information when the expenditure of public funds on projects of this sort is contemplated. I agree that it is in the public interest that such information continue to be supplied to institutions without fear of disclosure and possible recrimination.

I adopt these findings and find that the information withheld from the reference documents at pages 3, 4, and 11 to 14 of the records is exempt under section 10(1)(b). I find that disclosure could reasonably be expected to result in similar information no longer being supplied to the board where it is in the public interest that similar information continue to be so supplied. Therefore, I find that the reference information on pages 3, 4, and 11 to 14 of the records is exempt under section 10(1)(b) of the *Act*.

[61] However, I find that the information at issue in records 7 to 10, specifically, the names of the referees who received emails soliciting references from the board's agent, is not exempt under section 10(1)(b). The board confirmed that the appellant provided it with a list of referees to contact during the RFSQ process and the board contacted a number of these referees for references. Given these circumstances, it is unclear how the disclosure of the names of the parties solicited for references would reasonably be expected to result in the harms contemplated by section 10(1)(b).

[62] In any case, the board submitted that the disclosure of the names of the referees in these records would allow the appellant to "reverse engineer" scores and identify individual references and the scores they provided. The records at pages 7 to 10 are standard form emails sent by the board to specific referees soliciting their

references. The records do not reveal any other information regarding the references provided. The board has disclosed the cumulative scores and rankings to the appellant. However, in the absence of further information regarding the scores provided by each referee and/or their comments, I find that the board has not provided sufficient evidence to demonstrate how the disclosure of the names of the referees in these records could reasonably result in the appellant "reverse engineering" the scores each referee assigned to it. Therefore, I find the board has not provided sufficient evidence to demonstrate that section 10(1)(b) applies to exempt the information at issue in pages 7 to 10 from disclosure. As no other mandatory exemptions apply to the information in pages 7 to 10 and the board did not claim a discretionary exemption for it, I will order the board to disclose these emails soliciting references to the appellant, in full.

[63] In conclusion, I uphold the board's decision to withhold portions of pages 3, 4, and 11 to 14 under section 10(1)(b) of the *Act*. However, I find that section 10(1) does not apply to pages 1, 2, 5, 6, and 7 to 10 of the records and will order the board to disclose them to the appellant.

ORDER:

1. I uphold the board's fee estimate as reasonable.

2. I uphold the board's application of section 10(1)(b) to withhold portions of pages 3, 4, and 11 to 14.

3. I find that the information at issue in pages 1, 2, 5, 6, and 7 to 10 is not exempt under section 10(1)(b) of the *Act* and I order the board to disclose these pages, in full, to the appellant by **September 30, 2019** but not before **September 23, 2019**.

Original signed by
Justine Wai
Adjudicator

August 21, 2019