Information and Privacy Commissioner,
Ontario, Canada

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

ORDER MO-3878

Appeal MA18-168

Upper Canada District School Board

December 18, 2019

Summary: A school bus consortium that is not an institution under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) received a request under the *Act* for copies of most recent school bus contracts between a named school bus operator and the consortium for services in Cornwall, Ontario. The consortium issued a decision denying access to the responsive records on the basis of section 10(1) (third party information) of the *Act*. That decision was appealed and it was determined that the decision was properly that of the Upper Canada District School Board (the board), which is an institution under the *Act*. At adjudication, the board, and affected parties (including the consortium) argued that sections 10(1) and/or 11(a), (c), and/or (d) (economic interests) apply to the records. In this order, the adjudicator allows the appeal and orders the board to disclose the records.

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

Order Considered: Orders PO-1763, PO-2435, PO-2676, PO-2758, PO-3572, MO-3058-F, MO-3143, MO-3144, and MO-3145.

OVERVIEW:

[1] A school bus consortium, the Student Transportation of Eastern Ontario (STEO),[1]

[1] A transportation consortium for the Upper Canada District School Board and the Catholic District School Board.

received the following request under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*):

> We are seeking copies of school bus contracts (most recent) between the operator [a named company] and the consortium for school bus transportation services in the municipality of Cornwall, Ontario.

[2] STEO identified two responsive records and notified affected third parties about the request, seeking their views about disclosure of the responsive records.

[3] After receiving and considering the affected third party representations, STEO issued a decision denying access to the records on the basis of the mandatory exemption at section 10(1) (third party information) of the *Act*.

[4] The requester (now the appellant) appealed STEO's decision to the Office of the Information and Privacy Commissioner of Ontario (the IPC, or this office).

[5] Before the appeal was assigned to a mediator, the IPC registrar had discussions with STEO and the Upper Canada District School Board (the board). It was determined that STEO is not an institution under the *Act*, and that the board (which is an institution under the *Act*) should be issuing an access decision.

[6] The board then issued an access decision, denying access to the responsive records on the basis of section 10(1) of *Act*.

[7] During the course of mediation, the mediator had discussions with the appellant and the board. The mediator reviewed the withheld records and confirmed that the records at issue affect the interests of a number of third parties. The appellant asked that the mediator notify the affected third parties of the request and determine whether they would consent to the disclosure of their information to him. The board stated that disclosure of the responsive records could only occur if all of the affected third parties consented because the withheld records equally affect the interests of the third parties. The mediator began to notify the affected third parties. Since one of them did not consent to disclose the information at issue to the appellant, no further notification was made. The mediator advised the appellant of the results of notification, and the appellant stated that he wished to pursue the withheld information at the next stage of the process. Accordingly, the appeal moved to adjudication, where a written inquiry may be conducted.

[8] I began an inquiry under the *Act* by issuing a Notice of Inquiry, setting out the facts and issues on appeal, to the board, STEO (as an affected party), an affected party school board (the Catholic District School Board of Eastern Ontario (CDSBEO)),[2] and

[2] STEO is the transportation consortium for CDSBEO and UCDSB.

twenty-four bus operators (affected parties). In response, I received representations from the board (joint with STEO and CDSBEO) and two bus operators. One of these bus operators consented to disclosure. The bus operator named in the request did not provide representations. During the inquiry, the board raised the possible application of sections 11(a), (c), and (d) to the records. Therefore, I added the issues of late raising of discretionary exemptions and the possible application of section 11. I also sought and received representations from the appellant. Representations were shared in accordance with the IPC's *Code of Procedure*.[3]

[9] For the reasons that follow, I allow the appeal because I find that the records at issue are not exempt under section 10(1) or sections 11(a), (c), or (d). As a result, I order the board to fully disclose the records to the appellant.

RECORDS:

[10] Two records are at issue: Record 1 is a 32-page agreement, with schedules incorporated by reference, and Record 2 is a 2-page renewal "letter agreement."

[11] The board seeks to withhold both records in their entirety. In the alternative, the board resists disclosure of specified portions of Record 1 and all of Record 2.

ISSUES:

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

B. Is the board entitled to the late raising of the discretionary exemption at section 11 during the inquiry?

C. Do one or more of the discretionary exemptions at sections 11(a), (c), and/or (d) apply to the records?

DISCUSSION:

Issue A: Does the mandatory exemption at section 10 apply to the records?

[12] For the reasons that follow, I find that the records are not exempt under section 10(1) of the *Act*.

[13] The board and four affected parties participated in the inquiry process, as

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[3] *Practice Direction 7*.

follows:

- two affected parties (CDBSEO and STEO) made joint submissions with the board (together, "the board" for ease of reference),[4] relying on section 10(1)(a) to resist disclosure of the records;

- one bus operator (Affected Party 3) objected to disclosure, but did not directly address the application of section 10(1); and

- one bus operator (Affected Party 4) consented to disclosure.

[14] The board relies on section 10(1)(a), which 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,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[15] 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]

[16] For section 10(1) to apply, a party resisting disclosure 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.

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[4] CDSBEO also provided brief, additional representations, which I have also considered.
[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.

[17] The representations of Affected Party 3 did not directly address the above questions. Rather, this affected party describes the records as "a very personal business agreement" and he does not consent to its disclosure. As I will explain below, based on my review of the records, I find that they are contracts involving an institution under the *Act*[7] and a third party. These contracts are said by counsel for the board to be identical to the ones with twenty-four other third parties, including Affected Party 3. Since the records are in the custody and control of the board, they are potentially accessible under section 4(1) of the *Act*, as contracts between a third party and the board. Since the three-part test was not addressed directly in this affected party's representations, I will not consider those representations further.

Part one: type of information

[18] In this appeal, the board submits that the records contain many of the types of information listed under section 10(1), specifically: a trade secret, and commercial, financial, and/or labour relations information.

[19] The appellant did not take a position on part 1.

[20] Based on my review of the records, I find that they are both commercial contracts. Accordingly, they contain both commercial and financial information, as defined by the IPC:

> *Commercial information* is "information that relates solely to the buying, selling or exchange of merchandise or services."[8]
>
> *Financial information* refers to information relating to money and its use or distribution (for example, pricing practices).[9]

[21] Since the records contain commercial and financial information, they meet part one of the test. In light of this finding, it is not necessary for me to determine whether the records also contain trade secrets and labour relations information, as argued by the board.

Part two: supplied in confidence

[22] Part two of the section 10(1) test itself has two parts: the information at issue must have been "supplied" to the institution by the third party, and this must have been done "in confidence" implicitly or explicitly. If either of these requirements has not been

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[7] See Orders MO-3143, MO-3144, and MO-3145, which found that a school bus consortium is part of the school board for the purposes of the *Act*.
[8] Order P-493.
[9] Order PO-2010.

met, the section 10(1) exemption does not apply, and there no need to decide part three of the test.

"Supplied"

[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] 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]

[24] The board submits that the information at issue was "supplied" to the board[12] by the third party bus operators, but for the reasons that follow, I find that there is insufficient evidence to support that position, except for some information in Schedule "A." As a result, the records, with the exception of some information in Schedule "A," do not meet part two of the test.

[25] The fact that both records at issue are contracts is significant because 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]

[26] There are two exceptions to this general rule that contracts are not "supplied" within the meaning of section 10(1), described as 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

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[10] Order MO-1706.
[11] Orders PO-2020 and PO-2043.
[12] The board asserts that "[t]he information was supplied by the third parties to the [c]onsortium in confidence," but this must be taken to mean that it was supplied to the board in confidence. The representations of the board acknowledge that the IPC has determined that the *Act* applies to records held by consortia such as the one involved in this case (STEO), and that such records are deemed to be in the custody and/or control of the member school board subject to the access request. See footnote 7 and the orders referenced there.
[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*),.

> with respect to underlying non-negotiated confidential information supplied by the third party to the institution.[14]
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> 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]

[27] The board objects to disclosure of the records in full. In the alternative, the board objects to the disclosure of specified portions of Record 1 relating to "pricing and rate information," and all of Record 2. I will discuss the board's position, and alternate position, below.

Objection to disclosure, in full

[28] Although the board objects to disclosure of the records in full, its representations are largely silent on the portions of Record 1 that do not relate to pricing and rate information. Its submissions under part two of the test, before delving into pricing and rate information, contain:

- an assertion that "[t]he information was supplied by the third parties to the [c]onsortium in confidence,"
- an assertion that "the presumption that a contract is 'mutually generated,' and rather than "supplied" does not apply in these circumstances," but instead, the "inferred disclosure" and/or "immutability" exception(s) is/are applicable; and
- a quote from Order MO-3258, which reiterated the definitions of the "immutability" and "inferred disclosure" exceptions.

[29] Record 1 is an agreement between the board (through STEO) and a named bus operator. It contains agreed-upon terms and conditions regarding the provision of school transportation services, apart from pricing/rate information, such as the parties' obligations and the applicable laws. I find that the board has not established that the portions of Record 1 that do not relate to pricing and rate information were "supplied" by the third parties to the board. From my review of Record 1, it is not evident that those portions of it (that is, those unrelated to pricing and rate information) were "supplied." As a result, these portions of Record 1 do not meet part two of the test, and are not exempt under section 10(1) of the *Act*.

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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.

The board's alternate position

[30] For the reasons set out below, I do not accept the board's alternate position that all portions of Record 1 related to specified pricing and rate information, and all of Record 2, are "supplied" on the basis of the application of the "inferred disclosure" and/or "immutability" exceptions to that information. However, I am prepared to accept the board's position, based on the evidence before me, that each Schedule "A" of Record 1 (one for the board, the other for CDSBEO) contains information that was not negotiated, but supplied, and meets part two of the test. I will examine each of these aspects of the board's alternative position, below.

Specified pricing and rate information in Record 1

[31] In an appendix to its representations, the board listed portions of Record 1 (other than each Schedule "A") containing pricing and rate information that it submits should be withheld. Although the board did not specifically expand on the reasons that this information is exempt in its representations, I have considered the board's short descriptions of these sections found in the appendix to its representations, such as "sets rate and terms of payment." I find that the descriptions of these sections of Record 1 are vague and, thus, do not establish that the sections of Record 1 that they describe were "supplied." In resisting disclosure to pricing and rate information without offering sufficient supporting details under part two of the test, the board has not established why the specified pricing information in Record 1 should be distinguished from the long line of IPC orders that have held that pricing information is the type of information that is negotiable between contracting parties.[16]

[32] Furthermore, I note that the board did not specifically identify either exception to the general rule that the contents of a contract are considered mutually generated, and not "supplied," in connection with these portions of Record 1.

[33] Therefore, there is insufficient evidence before me to accept that the specified pricing and rate information in Record 1 (other than in each Schedule "A") that the board seeks to withhold was "supplied" and not negotiated between the contracting parties. Accordingly, this pricing and rate information in Record 1 does not meet part two of the test, and cannot be exempt under section 10(1) because all three parts of the test must be met for this information to be exempt.

Record 2

[34] The board refers to Record 2 as a "renewal letter." Based on my review of Record 2, it is clear from its face that it is an agreement (in the form of a letter)

[16] See, for example, Orders PO-2435 and MO-3577.

between the board and the contracting bus operator.

[35] The board did not directly address the issue of whether contents of this specific record were "supplied."

[36] However, in the appendix to its representations, the board states that Record 2 "has been subject to a confidential arbitration process and should not be disclosed for confidentiality reasons related thereto." I am unable to conclude from that statement that Record 2 was "supplied" under section 10(1) of the *Act*.

[37] From my review of Record 2, it is not evident that its contents were "supplied" to the board by the contracting bus operator. I find that Record 2 is subject to the general rule that the contents of a contract are mutually generated, rather than "supplied" by the third party. Therefore, I find that Record 2 does not meet part two of the test, and, as a result, is not exempt under section 10(1) of the *Act*.

Schedule "A" of Record 1, for each board

[38] The board argues that Schedule "A" of Record 1 was "supplied" to it by the bus operator because it contains costs that are subject to the immutability and/or inferred disclosure exception(s). As mentioned, there is a Schedule "A" for each of the two member school boards of the consortium. Having reviewed these schedules, I am prepared to accept that at least some of the costs set out within them were not negotiated with the board, but are immutable in nature, and qualify for the "immutability" exception. Given my findings below about part three of the test, it is unnecessary to make definitive findings about the various costs listed in each board's Schedule "A."

Part three: harms

[39] The third part of the test deals with reasonably expected harms to third parties. For the reasons that follow, I find that there is insufficient evidence to accept that either Schedule "A" meets the third part of the test.

[40] Parties resisting disclosure must establish a risk of harm from disclosure of the record that is well beyond the merely possible or speculative, but need not prove that disclosure will in fact result in such harm.[17] The failure of a party resisting disclosure to provide detailed evidence will not necessarily defeat the claim for exemption where harm can be inferred from the records themselves and/or the surrounding circumstances. However, parties should not assume that the harms under section 10(1)

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[17] *Accenture Inc.* v. *Ontario (Information and Privacy Commissioner)*, 2016 ONSC 1616, *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, [2014] 1 S.C.R. 674, *Merck Frosst Canada Ltd.* v. *Canada (Health)*, [2012] 1 S.C.R. 23.

are self-evident or can be proven simply by repeating the description of harms in the *Act*.[18]

[41] Parties should provide detailed evidence to demonstrate the harm. How much and what kind of evidence is needed will depend on the type of issue and seriousness of the consequences.[19] The Notice of Inquiry sent to the parties specifically stated that, 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 evidence to support the harms outlined in section 10(1).[20]

[42] Here, the bus operator named in the request did not provide representations in the inquiry. Therefore, I am in a position of deciding the question of reasonably expected harms without recent evidence from the party in the best position to provide it; they had provided representations at the notification stage (about two years ago), which I will discuss below. Based on my review of the information in each Schedule "A" and my consideration of the surrounding circumstances in this appeal, I cannot infer harms under section 10(1) of the *Act* from the information in each Schedule "A."

[43] However, for the sake of completeness, I will go on to consider the board's arguments on the question of reasonably expected harms.

[44] The board submits that disclosure of the information at issue could reasonably be expected to lead to the harms set out in sections 10(1)(a) of the *Act*.

[45] Section 10(1)(a) 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,
>
> > (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization[.]

[46] The board relies on the representations of the third party bus operators (including the one named in the appeal) who objected to disclosure at the notification stage (when STEO notified the affected party companies about the request, almost two years ago).

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[18] Order PO-2435.
[19] *Ontario (Community Safety and Correctional Services)* v. *Ontario (Information and Privacy Commissioner)*, cited above.
[20] Order PO-2435.

[47] I have considered the notification-stage submissions that the board attached to its representations. In particular, I considered the representations of the bus operator named in the request, since the records before me relate to that third party. Having reviewed those representations, I find that they appear to have been time-sensitive. There is insufficient evidence before me that the considerations mentioned in those representations are still relevant, or were relevant when I sought representations during the inquiry. This weighs against finding that the harms contemplated under section 10(1)(a) would reasonably be expected to result from disclosure of the information in Schedule "A."

[48] I have also considered the age of the information itself in each Schedule "A." It is several years old. Given the nature of this information and its age, I am not satisfied that its release would reasonably be expected to result in the harms contemplated under section 10(1)(a), even if the bus operator named in the request is currently in negotiations (and I have insufficient evidence to accept that that is the case). It also is worth noting, on the issue of competitive position, that this office has long 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.[21]

[49] In addition, the board relies on Order MO-3058-F to argue that pricing information, such as a breakdown of rates into detailed financial components has been found to meet part three of the test. However, Order MO-3058-F is not helpful to the board because it involved a different kind of record (the winning bid, which had not been incorporated into a contract), so different considerations could apply. In addition, it is clear from that order that the adjudicator had been provided with detailed evidence that demonstrated that the information at issue could be used to the advantage of competitors and the disadvantage of the third party. I do not have that here, with any specificity, from the bus operator named in the request (or any other bus operator who might have an "identical" Schedule "A" to that bus operator's, as suggested by the board's representations regarding the form and content of the records at issue).

[50] For these reasons, I am not satisfied that either school board's Schedule "A" meets part three of the test. Since all three parts of the test must be met to be exempt under section 10(1), and each board's Schedule "A" does not meet part three, these schedules (which are portions of Record 1) are not exempt under section 10(1).

Issue B: Is the board entitled to the late raising of the discretionary exemption at section 11 during the inquiry?

[51] In their joint representations, the board, STEO, and the CDSBEO raised the

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[21] *Ibid*.

application of section 11 during the inquiry.

[52] As a preliminary matter, I note that unless there are exceptional circumstances, only the board, as the institution responsible for the access decision, is entitled to claim a discretionary exemption, not STEO and the CDSBEO as affected parties. I find that no such exceptional circumstances have been identified in this case. Accordingly, I am considering the representations in relation to late raising and section 11 as only coming from the board, not the board and STEO and/or the CDSBEO.

[53] The IPC's *Code of Procedure* (the *Code*) provides basic procedural guidelines for parties involved in appeals before this office. Section 11 of the *Code* addresses circumstances where institutions seek to raise new discretionary exemption claims during an appeal. Section 11.01 states:

> In an appeal from an access decision an institution may make a new discretionary exemption claim within 35 days after the institution is notified of the appeal. A new discretionary exemption claim made within this period shall be contained in a new written decision sent to the parties and the IPC. If the appeal proceeds to the Adjudication stage, the Adjudicator may decide not to consider a new discretionary exemption claim made after the 35-day period.

[54] The purpose of the policy is to provide a window of opportunity for institutions to raise new discretionary exemptions without compromising the integrity of the appeal process. Where the institution had notice of the 35-day rule, no denial of natural justice was found in excluding a discretionary exemption claimed outside the 35-day period.[22]

[55] In determining whether to allow an institution to claim a new discretionary exemption outside the 35-day period, the adjudicator must also balance the relative prejudice to the institution and to the appellant.[23] The specific circumstances of each appeal must be considered individually in determining whether discretionary exemptions can be raised after the 35-day period.[24]

[56] The appellant objects to the board's ability to raise section 11 during the inquiry, citing prejudice to its interests, and the public interest, through delay of the inquiry and disclosure of the records.

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[22] *Ontario (Ministry of Consumer and Commercial Relations v. Fineberg)*, Toronto Doc. 220/95 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 1838 (C.A.). See also *Ontario Hydro v. Ontario (Information and Privacy Commissioner)* [1996] O.J. No. 1669 (Div. Ct.), leave to appeal dismissed [1996] O.J. No. 3114 (C.A.).
[23] Order PO-1832.
[24] Orders PO-2113 and PO-2331.

[57] I appreciate that the consideration of section 11 has contributed to some delay in the adjudication of this appeal.

[58] However, I agree with the board that late reliance on a discretionary exemption does not prejudice the appellant because raising section 11 has not impacted the initial disclosure decision to withhold all the information at issue, and the appellant was given an opportunity to provide representations on the possible application of section 11 during the inquiry. These are circumstances that weigh towards allowing the board to claim section 11 during the inquiry, and I will do so.

Issue C: Do the discretionary exemption at sections 11(a), (c), and/or (d) apply to the records?

[59] The board claims that sections 11(a), (c), and/or (d) apply in this case, but for the reasons that follow, I am unpersuaded that any of these exemptions apply to the records at issue.

[60] Sections 11(a), (c), and (d) state:

> 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[.]

[61] 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*.[25]

Section 11(a): information that belongs to government

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

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[25] *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.

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 one

[63] The types of information listed in section 11(a) have been discussed in prior orders, and have the same definitions as those under section 10(1).

[64] Here, the board submits that the records contain commercial and financial information.

[65] I accept this submission for the same reasons discussed under part one of the section 10(1) test, as the records contain information relating to money and its use or distribution (financial information), and relate solely to the buying, selling or exchange of merchandise or services (commercial information). Therefore, the records meet part one of the test for section 11(a).

Parts two and three

[66] The board submits that the information belongs to it (as well as to STEO and CDSBEO). The appellant submits that this is "plainly incorrect in the context of a negotiated contract." Without clear evidence regarding which information, if any, in the contracts specifically belongs to the board, I am unwilling to accept that there is any such information.

[67] Further, I am unpersuaded to accept the board's position that the information in the contracts "belongs to" the board in the way that Order PO-1763 assessed "price lists and other types of confidential information" (in other types of records). I acknowledge that Order PO-1763 explained that the "belongs to" requirement extends beyond ownership in the traditional intellectual property sense, as the board argues. However, in citing "customer or supplier lists, price lists, or other types of confidential information" as examples of information that an institution would have "a substantial interest in protecting from misappropriation by another party" under section 11(a), Order PO-1763 also stated the following key point:

> 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*. [Emphasis added.]

[68] Without evidence regarding how the information in the contracts resulted from the board's expenditure of money or the application of skill and effort to develop that contractual information, I am unwilling to accept that the information found in the records is of the nature addressed in Order PO-1763 and "belongs to" the board under

part two of the test.

[69] In addition, the fact that the board would have expended some effort to enter into the contracts is not sufficient evidence that the records have monetary value to the board resulting from any such expenditure of money or the application of skill and effort. Therefore, I find that the records do not have monetary value to the board, so they do not meet part three of the test.

[70] For these reasons, the records do not meet the three-part test above, and are, therefore, not exempt under section 11(a) of the *Act*.

Sections 11(c) (prejudice to economic interests) and 11(d) (injury to economic interests)

[71] As set out below, there is insufficient evidence to accept the board's position that the exemptions at sections 11(c) and/or (d) apply.

[72] The section 11(c) exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution's economic interests or competitive position.[26] The purpose of section 11(c) is to protect the ability of institutions to earn money in the marketplace. 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 section 11(c) 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.[27]

[73] The section 11(d) exemption requires an institution to show that disclosure of the information in the records could reasonably be expected to be injurious to the financial interests of the institution.

[74] Here, the board argues that disclosure of the records would prejudice its economic or financial interests, specifically, its interests in not paying more than they otherwise would for school bus transportation. It argues that disclosure would benefit prospective bus operators in future competitive processes by revealing rates and terms that were agreeable to the board in the past (but that were not established through a competitive process, and at a time when the board did not have significant power in determining which companies it would do business with). The board argues disclosure would allow prospective bus operators to bid at higher rates than they would otherwise

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[26] Orders PO-2014-I, MO-2233, MO-2363, PO-2632 and PO-2758.
[27] Orders P-1190 and MO-2233.

bid. It argues that that would injure the board's economic or financial interests (under section(s) 11(c) and/or (d)) by depriving the board of the chance to obtain the best value for money, especially in times of fiscal constraint.

[75] The appellant submits that these arguments "ignore the commercial reality" regarding the board's position vis-à-vis new or renewing bus operators, as reasoned in Order PO-2758 where similar arguments were considered and not accepted. I agree. In Order PO-2758, the adjudicator recognized certain facts relevant to contracts involving government bodies:

> . . . [the institution] has significant power in determining which companies to do business with. [The institution] offers an environment in which a large body of individuals require access to [the specified services related to the contract].
>
> Even more importantly, [the institution's] arguments ignore an absolutely fundamental fact of the marketplace. That is to say, if a competitor (or renewing party) truly wishes to secure a contract with [an institution], it will do so by charging lower fees to [the institution] than its competitor, resulting in a net saving to [the institution]. . . .To argue that disclosure of the rate information at issue would produce the opposite result flies in the face of commercial reality. In my view, this is a totally different situation than in Order PO-1745, where there was an obvious danger that customers would move to a casino where the slot machines had a lower 'hold percentage.' For all these reasons, I find that [the provincial equivalent of section 11(c)] does not apply.

[76] The appellant submits, and I find, that the above reasoning in PO-2758 applies to this appeal. I find the board's submission that disclosure of the commercial and financial information in the records could harm its economic/financial interests and competitive position to be speculation. I am satisfied that if a new or renewing bus operator wishes to secure a contract with the board, it will do so by charging lower fees, resulting in net savings to the board. There is insufficient evidence to accept that this commercial reality is altered by the ongoing legal proceedings and/or the circumstances under which the prices and terms were established (including limitations on the companies the board could contract with). Given this commercial reality, I am unpersuaded that Orders PO-2676 and PO-3572 are of assistance to the board, as submitted. Neither of those cases involved responsive records that were contracts and the board did not sufficiently explain why the reasoning related to very different types of records in those cases should be applied to negotiated agreements.

[77] For these reasons, I find that the board has not established that the records qualify for an exemption under sections 11(c) and/or (d).

[78] Since I have found that the records are not exempt under sections 10(1), 11(a), 11(c), or 11(d), I will order the records disclosed to the appellant.

ORDER:

1. I allow the appeal and do not uphold the board's decision.

2. I order the board to fully disclose both records to the appellant by **January 27, 2020** but not before **January 21, 2020**.

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 appellant, pursuant to paragraph 2 of this order.

Original signed by: December 18, 2019

Marian Sami
Adjudicator