Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 19-1994
July 26, 1994

INQUIRY RE: A Request for Access to Records of BC Transit

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1. Description of the Review

As Information and Privacy Commissioner, I conducted a written inquiry at the Office of the Information and Privacy Commissioner in Victoria, British Columbia on July 8, 1994 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) concerning a request for records in the custody or under the control of BC Transit. The request was made by a private individual (the applicant).

On November 5, 1993 BC Transit entered into a contract with Bombardier Incorporated (the third party) for the purchase of twenty SkyTrain cars.

The applicant wrote to BC Transit on February 4, 1994 to request a copy of the contract with the third party. BC Transit processed the request and on March 24, 1993, after consultation with the third party, provided the applicant with a copy of the contract minus schedules A, C and D (the schedules). BC Transit withheld the schedules under section 21(1) of the Act (disclosure harmful to business interests of a third party). Subsequently, it disclosed a severed version of Schedule A to the applicant.

The applicant requested a review of this decision by the Office of the Information and Privacy Commissioner (the Office). The ninety-day investigation period began on April 12, 1994, and the Office issued a notice of inquiry on June 21, 1994.

2. Documentation of the Inquiry Process

Under sections 56(3) and 56(4) of the Act, the Office invited and received written representations from the applicant, the third party, and BC Transit.

The Office of the Information and Privacy Commissioner provided all parties involved in the inquiry with a one-and-a-half page statement of facts (the fact report), which was accepted by all parties as accurate for purposes of conducting the inquiry.

I accepted certain paragraphs of an affidavit submitted by the third party as appropriately received in camera.

3. Issue under Review

The issue to be decided in this inquiry is whether the applicant's right of access to information about the contractual arrangements of BC Transit outweighs the third party's right to protection of its business interests under section 21(1) of the Act.

Under section 57(1) of the Act, at an inquiry into a decision not to give an applicant access to all or part of a record containing information of a third party, it is up to the head of the public body (BC Transit) to prove that the applicant has no right of access to the record or part. Thus the burden of proof in this case rests with BC Transit.

4. The Records in Dispute

The contract in question is known as the Vehicle Fleet Extension Contract. Its schedules are titled:

Schedule A - SCHEDULE OF CONTRACT PRICES - PURCHASE OF 20 VEHICLES - JUNE 1993 CANADIAN DOLLARS
Schedule C - SCHEDULE OF PAYMENTS
Schedule D - COST ESCALATION SCHEDULE

These schedules contain information on base order pricing, option pricing, the bond premium, additional options, the schedule of payments, and cost escalation.

5. The Applicant's Case

The applicant argues that the public is paying for the SkyTrain cars purchased by BC Transit. As a member of the public, he wants to know what makes up the costs involved. But the records disclosed to him do not contain the information pertaining to cost.

6. The Third Party's Case

The third party is of the view that BC Transit could not disclose the information in dispute because it "falls squarely within the exception to disclosure created in section 21(1) of the Act." This section reads:

21(1) The head of a public body must refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party,

(b) that is supplied, implicitly or explicitly, in confidence, and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,

.....

The third party is of the view that the information in the schedules in dispute is "commercial" and "financial" in character. It was also supplied in confidence and treated as such to date. The third party further argues that disclosure of the specific information can reasonably be expected to cause "significant harm to its competitive position," in part because the market for ALRT (advanced light rapid transit) technology vehicles is small and the number of competitors is equally small: "... a competitor could learn a great deal about its rivals from very little information." This might have a negative impact on a competitive bidding process, such as one currently underway in Kuala Lumpur, Malaysia.

The third party's overall argument seems encapsulated in the following statement: "Disclosure of the Schedules would be releasing not only confidential commercial and financial information but would amount to releasing expertise developed by Bombardier that allows it to compete successfully in a highly competitive market around the world."

7. BC Transit's Case

An affidavit submitted by BC Transit's Freedom of Information and Privacy Coordinator indicates that he made a decision to release the contract in question, minus several schedules, after discussing the matter with a consultant to BC Transit, who had participated in negotiating the contract with Bombardier. The latter's director of marketing and sales concurred with this decision, although he had originally taken the position that the entire contract was confidential.

Based on various consultations, the Coordinator decided that disclosure of the information in the schedules could "reasonably be expected to result in significant harm

to Bombardier's competitive position in the advanced light rapid transit ("ALRT") market;" that "disclosure of information would enable either a Bombardier competitor, or a prospective customer, to derive valuable information as to Bombardier's overhead structure and the pricing of its ALRT products, and as to Bombardier's Contract cash flow;" and that "disclosure of the information could significantly harm Bombardier's competitive position in the ALRT market." (Affidavit of Christopher C. Harris, paragraph 24)

BC Transit essentially decided that the information in dispute is "commercial information" belonging to Bombardier, that it was explicitly supplied in confidence to BC Transit, and that its disclosure would cause "significant harm" to Bombardier's competitive position, thus meeting, in its view, the three-part harms test established under section 21 of the Act. Given the language of section 21, this means that BC Transit was required to deny access to the information sought.

In summary, BC Transit argues that releasing this commercial and financial information would enable a competitor or prospective customer to gain significant insight into Bombardier's overhead structure, to determine Bombardier's non-recurring costs, to learn Bombardier's internal cost structure for labour and materials, and to determine Bombardier's cash flow under the contract.

8. Discussion

I am of the opinion that BC Transit has met the three-part test set out under section 21 of the Act. First, the information in dispute is clearly commercial and financial information of Bombardier. (I am following in this regard the decision of the Federal Court of Canada in Information Commissioner v. Minister of External Affairs, [1990] 3 F.C. 665, at 672; and the recent order of the Information and Privacy Commissioner /Ontario in its Inquiry Re Ministry of Housing, Order P-610, January 13, 1994, at page 3).

However, I am at least somewhat concerned about BC Transit and Bombardier's argument that the information sought in this case was supplied in explicit confidence, which is the second part of the test. In particular, the evidence for establishing the necessary precondition for the use of section 21 was not as "explicit" as it might have been, at least based on the material supplied to me. The Coordinator for BC Transit states that he was told by Bombardier that the information was to be so treated, and he and Bombardier supplied me with copies of a "Proprietary Information" statement that was apparently sent to BC Transit by the bidder. (Affidavit of Christopher C. Harris, paragraphs 10, 23 and exhibit "F"; Affidavit of J. Donald Hunt, paragraphs 10-14.) Despite these several assertions, which were repeated by the counsel representing the two companies, I am concerned about the lack of specific evidence that the proprietary statement actually formed part of Bombardier's original proposal, since I was simply given copies of the seven-line statement without being shown, for example, that it originally appeared at the start of the contract material that was prepared and submitted.

Perhaps this point was made implicitly (which is all that the section requires); I would prefer such claims of confidentiality to be more explicit in future so as to put all parties to such a contract on appropriate notice.

I also acknowledge that the proprietary information statement in question does contain internal evidence that it was prepared for BC Transit. It reads:

> The information contained in this Document is to be considered proprietary information and is submitted to BC Transit, solely for the purpose of documenting the Offer of Bombardier Inc.
>
> The information contained in this Document shall not be disclosed in any manner by any party without written permission from Bombardier Inc., except as is strictly necessary for the evaluation of the Offer by BC Transit.

I do accept the fact that the parties to the contract have consistently treated the information contained in the schedules in a confidential manner, both during and after the signing of the contract.

With respect to the third element of the section 21 harms test, I accept BC Transit's submission that the section 21 test is met "where there is a reasonable expectation of harm, not a certainty that harm will follow from disclosure." The Act thus contains general protections for the commercial interests of a private business; the Legislature evidently acknowledged the need to protect the legitimate interests of private businesses.

I also agree that a public body will normally have to rely on the representations of the third party to establish reasonable expectations of harm. (Again I am following a decision of the Information and Privacy Commissioner/Ontario, in its Inquiry Re Ministry of Industry, Trade & Technology, Order 36, December 28, 1988, at page 7).

In the present case, I accept that disclosure of the records in dispute could reasonably be expected to harm the competitive position, or interfere with the negotiating position of Bombardier.

9. Order

Under section 58(2)(b) of the Act, I confirm the decision of the BC Transit not to release the remaining information in Schedules A, C, and D to the applicant.

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David H. Flaherty
Commissioner July 26, 1994