

**Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 45-1995
June 13, 1995**

INQUIRY RE: A request for review of a decision by BC Transit to release information to Custom Transit Service Providers, including Deltassist Community Services Society

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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 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act) on March 31, 1995.

On October 13, 1994, the applicant, the Independent Canadian Transportation Union Local 1 (ICTU), made a request for information to BC Transit. It asked for copies of the "Annual Operating Agreements" between BC Transit and six named organizations. It also asked that "if budget details for the current year are exempted from release under the Act, we request the Annual Operating Agreements, including budgets, for the previous year."

BC Transit notified the organizations listed in the request, pursuant to section 23 of the Act, as third parties. The Western Society for Senior Citizens' Services (WSSCS) replied to this notification objecting to the release of the information. BC Transit responded to this objection by notifying the WSSCS that it intended to make partial disclosure, withholding only certain information under section 21(1) of the Act on the grounds that its release would be harmful to the business interests of another of the third-party organizations.

Under section 52(2) of the Act, the WSSCS (the third party) then made a request to the Office of the Information and Privacy Commissioner for a review of the decision of BC Transit to release this information. Each of the remaining third parties then joined in this request. (Representations of BC Transit, paragraph 17) The legislated ninety-day time limit for the review of this matter began on December 12, 1994 and expired on March 12, 1995. With the agreement of the parties involved, the review period was extended to March 31, 1995, by which date this Office had received all evidence and submissions.

2. Documentation of the inquiry process

Under section 56(3) of the Act, this Office invited submissions from the ICTU, BC Transit, the WSSCS, and the other third parties to the request for information. On March 3, 1995, these parties were notified that initial submissions were due by March 8, 1995 and final submissions on March 13, 1995.

BC Transit subsequently asked for an extension of these deadlines on the grounds that both its Freedom of Information Coordinator and its principal witness would be absent until March 13, 1995. Based on the Federal Court of Appeal's decision in Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare), (1992) 9 Admin. L.R. (2d) 161, I decided that fairness required me to reschedule the written inquiry to March 31, 1995. The parties were notified of this decision to postpone on March 7, 1995.

On March 22, 1995, the WSSCS notified this Office that another of the third parties to the request for information--the Deltassist Community Services Society (DCSS)--had agreed to make submissions on behalf of both itself and the WSSCS. The DCSS's initial and final submissions were prepared by Philip L. Bryden of Heenan Blaikie. Initial and final submissions for BC Transit were prepared by David Loukidelis of Lidstone, Young, Anderson.

The ICTU prepared its own initial submission. An initial submission was also received from the Surrey Community Resource Society (SCRS), another of the third-party organizations about which the applicant requested information.

3. Issue under review at this inquiry

The issue under review is the applicability of section 21(1) of the Act to the records in dispute. The relevant portions of section 21(1) read:

Section 21: Disclosure harmful to business interests of a third party

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

(a) that would reveal

...

(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

....

Under section 57(3)(b) of the Act, the burden of proof in this inquiry is on the third parties. They must demonstrate that the exception contained in section 21(1) of the Act applies to the information in question, thus requiring BC Transit to withhold the information.

4. The record in dispute

The record in dispute is titled as follows: "Vancouver Regional Custom Transit System, Regional Custom Transit Operating Agreement between British Columbia Transit and Western Society for Senior Citizens' Services, April 1, 1994 to March 31, 1995." There are 14 sections of basic text in 15 pages and 11 schedules that total another 35 pages. The records of the other five third parties appear to be essentially identical. A detailed discussion of these records appears below.

5. BC Transit's case

BC Transit operates a customized transit service for individuals whose mobility is challenged. It funds the handyDART services through custom transit service operating agreements with private sector organizations that are either not-for-profit or commercial operators. When it received the applicant's request for access to these records, it notified the third parties. After consultations with them, BC Transit decided only to withhold certain specified information included in Schedules C and D in particular, dealing with fixed costs, vehicle costs per hour, and total direct cost of operations. (Representations of BC Transit, paragraph 14) On the basis of my Order No. 26-1994, October 3, 1994, BC Transit also decided to withhold two other financial figures from Schedule C.

Essentially, BC Transit argues that it has only severed commercial and financial information supplied by the third parties, which, it claims, is in accordance with my interpretation of section 21 of the Act in Order No. 19-1994, July 26, 1994, p. 4 and Order No. 26-1994, October 3, 1994, pp. 6, 7, 8. (Representations of BC Transit, paragraphs 20-27) BC Transit claims that such information was implicitly supplied in confidence. (Representations of BC Transit, paragraphs 28-31)

Furthermore, disclosure of the severed information "could reasonably be expected to cause significant harm to the competitive position of the third parties or, in two cases, interfere significantly with their collective bargaining negotiations." (Representations of BC Transit, paragraph 32 and paragraphs 33-37) The latter point is especially relevant, it argues, because of the impending Request For Proposals for the next five years of handyDART service. BC Transit claims releasing the information in dispute would not give other proposers a financial advantage.

BC Transit asks me to uphold its decision to release certain information in response to the applicant's original request.

6. The third parties' case: Deltassist Community Services Society

The Western Society for Senior Citizens' Services informed me that Deltassist Community Services Society (Deltassist) had agreed to be the test case in this inquiry and thus prepared the main submission. I also received and considered a submission from the Surrey Community Resource Society, the operator of Surrey handyDART, which opposed disclosure of individual operating agreements.

Deltassist narrowed the focus of the present inquiry by agreeing to the release of the 1993-94 and 1994-95 Annual Operating Agreements, except for special information contained in Schedule B, sections B through D; certain figures in Schedule C; and certain figures in Schedule D. (Submission of the Third Party, pp. 4, 5) These are described in greater detail below.

Deltassist disagrees with the basic principle that BC Transit used to guide its decision on disclosure to the extent that it involves confidential commercial information that Deltassist has supplied for purposes of section 21(1) of the Act. In its view, certain additional budgetary information should be protected, "because a person knowledgeable about custom transit in the greater Vancouver area (i.e., Deltassist's potential competitors) would be able to draw accurate inferences about the details of the financial aspect of Deltassist's operating structure" (Submission of the Third Party, p. 5)

Deltassist argues that the information at issue is its own commercial or financial information, that it supplied the service specifications and budgetary information to

BC Transit implicitly in confidence, and that disclosure of that information can reasonably be expected to cause it significant harm. (Submission of the Third Party, pp. 6-14)

With respect to the issue of whether information was supplied "in confidence," Deltassist "submits that the appropriate tests for confidentiality in the present context are whether the third party actually expected that the information at issue would be treated as confidential and whether that expectation was a reasonable one." (Submission of the Third Party, p. 8)

When Deltassist began to offer services to disabled persons in 1982, there were no general service targets for the area and it had to "develop its own estimate not only of the most appropriate organization of the specific services, but even of the general service level appropriate for Delta, based on its own understanding of the demand for custom transit in Delta." (Submission of the Third Party, p. 10) Throughout this period and into the present contract, Deltassist states that it has "continued its pattern of making submissions to BC Transit on the details of the appropriate amount and distribution of service hours with respect to subsequent annual operating agreements." (Submission of the Third Party, p. 11) Deltassist uses this condition to argue that certain financial information it now does not wish to disclose was effectively information "supplied in confidence" to BC Transit.

With respect to the potential for harm from the disclosure of further information about it, Deltassist points out the competitive nature of the bidding process in Delta for custom transit services, which would be compromised by the disclosure of its proprietary information

developed through its experience. Disclosure also would have the potential to interfere with its negotiating position in collective bargaining with the union representing its drivers, the Independent Canadian Transit Union. (Submission of the Third Party, pp. 12-14)

Deltassist submits that the information it is currently seeking to protect satisfies the three tests set out in section 21(1) of the Act.

7. Discussion

Section 21

In my previous decisions, I have attempted to apply this section in such a way as to protect, from disclosure, confidential business information that meets the three parts of the test in section 21. I see no reason to depart from these broad lines of interpretation in the present case.

Commercial or financial information

Section 21(1) sets out a three-part test for the protection of business information about third parties. In this Order, I accept that the first part of the test has been met under section 21(1)(a)(ii): the information requested by the applicant is "commercial or financial information of a third party." (i.e., Deltassist)

Information "supplied in confidence"

The second part of the test in section 21(1)(b) requires the commercial or financial information of the third party to have been "supplied, implicitly or explicitly, in confidence" by the third party to the public body.

In Order No. 26-1994, I decided that information generated during negotiations between a public body and a third party could fall within the "supplied in confidence" element of section 21(1) in some cases. In that Order (page 8), I provided two examples where this could occur:

1. Where the third party has provided original or proprietary information that remains relatively unchanged in the contract; and
2. Where disclosure of the information in the contract would permit an applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the Act.

As stated in Order No. 26-1994, the "accurate inference" test extends the definition of "supplied" to include information where disclosure of the seemingly innocuous information would allow the applicant to see into the financial and commercial affairs of a third party in ways that are precluded by section 21(1) test.

In order to understand how the second part of the section 21(1) test applies to the information under review, it is important to understand the accumulation and flow of information from

Deltassist to BC Transit. From 1973 to 1990, Deltassist provided free transportation service for the disabled. In 1982, the GVRD and UTA (BC Transit's predecessor) put out a Request For Proposal (RFP) for the provision of custom transit services for disabled persons in the Municipality of Delta. Deltassist won the competition and entered into a series of arrangements for the period from 1982 to 1990. In 1990, BC Transit put out another Request For Proposal (RFP) for the provision of custom transit services in the area.

My review of the records and submissions of the parties shows that the third-party business information of Deltassist was supplied, in confidence, by Deltassist to the GVRD and UTA at the time of the original Request For Proposal. By applying the "accurate inference" test to the information, the reasonable person can infer that the information distributed by BC Transit in the RFP process is substantially the same as the information that Deltassist originally provided to the GVRD and UTA prior to the RFP process. When Deltassist won the contract, the information in the resulting contract retained sufficient identity to tie it to the information originally supplied, in confidence, by Deltassist to the GVRD and the UTA. But at the point where the information surfaced in the RFPs that were distributed to any interested party (through a process that sequentially involved both the GVRD/UTA groups and then BC Transit), it had, in my judgment, lost its original character of having been supplied in confidence. It thus fails to meet the second part of the test for section 21(1)(b).

BC Transit is thus correct in stating that it essentially supplied much of the information in dispute:

The information in question was originally supplied by BC Transit to all prospective contractors - as part of BC Transit's request for proposals - and any juggling or reallocation of the information as a result of dealings between BC Transit and Deltassist does not change the fact that no accurate inference about Deltassist's underlying 'financial' or 'commercial' information can be drawn from that information. (Reply of BC Transit, paragraph 15)

BC Transit characterizes its differences with the third parties as follows:

In large part, Deltassist attempts to persuade you that because of its long involvement in handyDART service, dating back over 20 years, it has somehow created the information that is now provided by BC Transit every time it requests proposals for this service from all interested parties, and as part of annual budget setting. Deltassist's attempts to characterize this information as being the information reflected in the current operating agreement do not overcome the fact that BC Transit has supplied the information that remains 'relatively unchanged' in the contract. Moreover, with the exception of the information that BC Transit did decide to sever, disclosure of this information would not permit any accurate inference of underlying commercial or financial information of Deltassist. Any underlying information was originally supplied by BC Transit to all potentially interested parties. (Reply of BC Transit, paragraph 18)

I agree with BC Transit's statement above that it supplied the actual information that remains relatively unchanged in the contract.

In general, I accept the position of BC Transit with respect to its right to disclose information that it specifically supplied to potential contractors in the 1990 Request For Proposals.

I also accept BC Transit's formulation of the interrelationship in this case between the second and third branches of the section 21 test: "In a sense, Deltassist's submissions conflate the issue of harm with the requisition of supply. The fact that disclosure of certain information may, in Deltassist's estimation, cause harm to its interests does not mean that the information in question was supplied by it to BC Transit for the purposes of the second branch of the s. 21 test." (Reply of BC Transit, paragraph 19)

In its reply submission, Deltassist invited me to be guided by the legislative intent of section 21 as set out in the heading, "Disclosure harmful to business interest of a third party," by allowing it to "colour" my interpretation of the three-part test set out in the section by taking "a broad rather than a narrow approach to the meaning of 'supplied in confidence' ..." (Reply of the Third Party, p. 2) It argues that "where a third party uses its business expertise in confidentially negotiating the details of provisions that ultimately appear in a contract with a public body and the result of the disclosure of those contract terms will be harm to the business interests of the third party, the outcome of these discussions should not be disclosed." (Reply of the Third Party, pp. 2, 3) I find that this characterization of the second part of the section 21 test is not persuasive.

Significant harm to the competitive interest of Deltassist

The third part of the three-part test in section 21(1) requires a reasonable expectation that disclosure of the information could "significantly harm the competitive position" of Deltassist, or "interfere significantly with the negotiating position" of Deltassist. Deltassist made substantial arguments in favour of a finding of "significant harm" if BC Transit were to disclose the information. However, while I accept that disclosure of the information could reasonably be expected to harm the competitive position of Deltassist, I do not believe that disclosure would cause "significant" harm.

The information that was "supplied in confidence" by Deltassist to BC Transit was subsequently disclosed by BC Transit to the transportation community in the RFP process. In my opinion, BC Transit's disclosure of the information does not change the fact that Deltassist originally supplied the information in confidence for the purposes of section 21(1)(b) of the Act. However, this dissemination of information during the RFP process means that a disclosure under the Act is unlikely to meet the higher threshold of "harm significantly" rather than just "harm." My conclusion arises from the fact that Deltassist's information has remained relatively unchanged throughout its dealings with BC Transit, both before the RFP process and today. The result is that disclosure of Deltassist's information during the RFP process means that a subsequent disclosure under the Act today could not harm Deltassist's competitive position, at least not at the level of "significant harm."

For the same reasons, I find that disclosure of the information could not reasonably be expected to "significantly" interfere with the negotiating position of Deltassist under section 21(1)(c)(i).

I therefore find that Deltassist has not met the third part of the three-part injury test in section 21(1)(c)(i).

The specific records in dispute

There is a difference of opinion between BC Transit and the third parties about only a minimal amount of information. In each instance, BC Transit wishes to disclose them, and the third parties oppose the release. BC Transit's position is that the information was provided by BC Transit and therefore does not meet the test of "supplied in confidence."

The records in dispute in this matter are contained in the Operating Agreements between the parties in:

- 1 Schedule B section B) subsection i) ii) iii) and v),
- 2 Schedule B, section C),
- 3 Schedule B, section D) (but not including "Total Annual Revenue"),
- 4 Schedule C (two amounts), and
- 5 Schedule D, section 1) subsection c) ii).

Schedule B) section B) is a matrix showing values in three fields:

- number and type of vehicle,
- hours of operation, and
- in-service revenue hours.

Subsections i, ii, and iii show these values for weekdays, Saturday and Sunday respectively. This matrix appears in the Request for Proposal (RFP) to provide the service as well as the Operating Agreements which are the subject of this inquiry.

The RFP is issued to cover a five-year period. It contains a chart showing certain values for the above three fields. However, the values contained in the RFP differ from those in the current year's Operating Agreement. It would appear the values used for each successive contract year may be varied through negotiations. (See Submissions of the Third Party, Affidavit of James Poole, Exhibit D) It also appears the original hours in the RFP were based on the previous year's experience (see representation of BC Transit--Bruce Chown Affidavit). Mr. Chown had indicated in his affidavit that the total annual hours of service are fixed by BC Transit and operators may ask BC Transit to re-allocate the mix between week days and weekends or adjust the hours of service. However, in his letter to Ms Irene McRae, he seems to suggest even the total hours allocated are negotiable. (Submission of the Third Party, Affidavit of James Poole, Exhibit D) This seems to be confirmed in Mr. Chown's letter to Ms McRae dated April 16 in which he indicates the service level hours have been increased "... as we discussed." Finally, in another letter to Ms McRae, Mr. Chown advises her that an operational agreement for the five-

year period would be entered into "... subject to satisfactory negotiations of the service level and budget for 1990/91."

Subsection v deals with volunteers and their reimbursement for miles driven. This section does not appear to be specifically addressed in either submission. However, the total amount is shown on the budget in Schedule C and discussed below.

Section C) of Schedule B is also a matrix. It presents a variation of the information shown in section B). In this variation, the information is totalled for each month of the contract year. The third party has chosen to amend their original position and now agrees to release the single figure totalling the hours of service in the matrix. The remaining information laying out the division of hours by month should be treated no differently than the information in section B).

Section D) of Schedule B discusses the ceiling amounts to be expended on optional services provided by taxis. As with "volunteers" above, this section does not appear to be addressed specifically in either submission. However, the total annual amounts are again shown in the budget and discussed in Schedule C.

Schedule C is the budget. Two amounts are contentious: "Vehicle Costs per Kilometre" and "Supplementary Taxi Service (and Volunteers)." Mr. Chown, in his affidavit, infers that vehicle costs per kilometre may be subject to negotiations. He also deals directly with the other contentious matter saying "Similarly, the budget for 'Supplementary Taxi Service (and Volunteers)' in Schedule C is suggested by BC Transit, although the operator's views on the BC Transit set budget are considered by BC Transit and changes may therefore result." This process of "suggestion" and "counter suggestion" would normally be referred to as negotiations.

Schedule "D", 1) c) i) deals with volunteers and their per kilometre reimbursement. Again this specific amount does not seem to be discussed specifically in the arguments. However, one should resist the temptation to deal with this amount in a like manner to the annual budget for volunteers and taxi above. Only two of the six operators use volunteer drivers, both reimburse them at the same rate, and have different annual budgets for this specific service. It seems possible this per kilometre amount is set by BC Transit.

1. B)(i) to (iii): These figures concern the number and type of vehicles that the operating company has to make available on various days, the hours of operation, and the in-service revenue hours. BC Transit states that it supplied the two latter items in the September 1990 Request For Proposals at figure 1. (Reply of BC Transit, paragraph 16)

2. B)(v): This concerns the provision of volunteer drivers and their compensation.

3. B)(c): This concerns calculation of annual revenue hours on a monthly basis.

4. D): This concerns supplementary taxi service.

Schedule C: Budget

5. There are 15 separate dollar amounts listed in this budget. The parties all agree that five, mostly small amounts, may be disclosed. They also agree that seven other financial figures, mostly large amounts, should not be disclosed. BC Transit provided the two remaining items, which may be disclosed.

Schedule D: Payment Schedule

6. The various parties have agreed to the non-disclosure of payment amounts. Since BC Transit supplied the figure on reimbursable costs per kilometre, it may be disclosed.

7. Order

Under section 58(2)(a) of the Act, I require BC Transit to give the applicant access to the part of the record in dispute, because it is not required to refuse access.

David H. Flaherty
Commissioner

June 13, 1995