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Office of the Information and Privacy Commissioner
Province of British Columbia
Order No. 210-1998
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INQUIRY RE: A request for review of a decision by BC Transit to disclose a record pertaining to a contract with Seaboard Advertising Company

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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 (the Office) on September 19, 1997 under section 56 of the *Freedom of Information and Protection of Privacy Act* (the Act). This inquiry arose out of a request for review of a decision by BC Transit to disclose records concerning a contract with Seaboard Advertising Company, a division of Jim Pattison Enterprises Ltd., (the third party) to Gallop & Gallop Advertising Inc. (the applicant).

2. Documentation of the inquiry process

On May 12, 1997 the applicant requested a copy of the contract between BC Transit and the third party.

After consultation with the third party, BC Transit decided to provide access to the contract. On July 16, 1997 the third party requested a review by my Office of BC Transit's decision to provide access to the contract.

3. Issue under review and the burden of proof

The issue to be reviewed is BC Transit's application of section 21 of the Act to the records in question.

Section 57 of the Act establishes the burden of proof on the parties in this inquiry. Under section 57(3)(b), at an inquiry into a decision of a public body to give an applicant

access to all or part of a record containing non-personal information that relates to the third party, it is up to the third party to prove that the applicant has no right of access to the record or part.

The relevant sections of the Act are as follows:

> 21(1) The head of a public body must refuse to disclose to an applicant information
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> (a) that would reveal
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> (i) trade secrets of a third party, or
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> (ii) commercial, financial, labour relations, scientific or technical information of a third party,
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> (b) that is supplied, implicitly or explicitly, in confidence, and
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> (c) the disclosure of which could reasonably be expected to
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> (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
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> ...
>
> (iii) result in undue financial loss or gain to any person or organization, or
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> ....

4. The record in dispute

The record in dispute is a contract entered into in 1993 between BC Transit and the third party, which gives the third party the right to offer its clients the opportunity to place their advertising at designated locations controlled by BC Transit.

5. Seaboard Advertising Company's case as the third party

The third party states that the applicant is one of its major competitors in an intensely competitive advertising business in this province and across Canada:

> Seaboard's competitive position is based on efficiencies which Seaboard has developed as part of its business structure and strategy. Those efficiencies are reflected in the arrangements which Seaboard makes when it enters into an agreement, typically a licence, by which it obtains the right to place advertising at certain locations for its clients. The core structure of an agreement entered into by

> Seaboard will invariably reflect the business efficiencies which Seaboard has developed. (Submission of third party, p. 1)

The third party has listed eleven items that constitute the core structure of the contract.

The third party objects to the disclosure in full to the applicant of the terms of this contract, since it argues that it would be in contravention of section 21(1)(a)(ii), 21(1)(b), and 21(1)(c)(i) and (iii) of the Act. (Submission of the third party, p. 2) I have discussed below the third party's detailed submissions on each of these subsections.

6. BC Transit's case

BC Transit's basic position is that the contract between itself and Seaboard Advertising has to be disclosed because the test set out in section 21(1)(b) has not been satisfied. BC Transit submits that none of the information in the contract was "supplied" by Seaboard to BC Transit within the meaning of this subsection. (Submission of BC Transit, paragraphs 2, 10) In its view, this is the only issue in this inquiry. (Submission of BC Transit, paragraph 4)

7. Submission of Gallop & Gallop Advertising Inc. as the applicant and Seaboard Advertising's Response

The applicant believes that the "advertising contract" of the third party should be disclosed to it in accordance with BC Transit's initial decision, because agreements of this type are fully negotiated and there is no evidence that the information contained in this agreement was supplied by the third party to BC Transit in a confidential manner. The applicant's BC Manager indicates that "definitive conclusions about financial business details, overheads, general operating costs, and any proprietary expertise cannot be conclusively determined[,] nor can significant insights be gained from information contained within these agreements."

The applicant finally submits that it is in the public interest that this information be disclosed, given the importance of BC Transit's role as a Crown corporation in the public domain.

In response, the third party points out that the applicant does not have any direct knowledge about the circumstances under which the third party and BC Transit agreed to this contract, and it does not provide any evidence to support the argument that such agreements are fully negotiated. Finally, the third party queries why the applicant would want the information in the contract if it does not provide significant insights into its proprietary business expertise. (Reply Submission of the third party, p. 1)

8. Discussion

Section 21(1)(a)(ii): commercial, financial, labour relations, scientific or technical information of a third party,

The applicant submits that ten items in the contract satisfy the definition of either commercial information or commercial and financial information. (Submission of the applicant, p. 3) It relies on Order No. 26-1994, October 3, 1994, p. 6, and Order No. 19-1994, July 26, 1994, p. 4, in this connection.

There is no dispute on this branch of the test. I accept that the information in the contract falls within the scope of section 21(1)(a)(ii) of the Act.

Section 21(1)(b): that is supplied, implicitly or explicitly, in confidence,

The third party submits that information in a negotiated contract can be "supplied in confidence" relying on Order No. 26-1994, pp. 7-8. (Submission of the third party, pp. 3-4) In that Order, I indicated that information in a negotiated contract may have been "supplied in confidence" where: (1) the third party has provided original or proprietary information that remains relatively unchanged in the contract; or (2) 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.

While some of the information in the contract may have been the subject of negotiation, the third party submits that it remains information it "supplied" for the purposes of the Act, either in the form originally supplied in response to BC Transit's Request for Proposal (RFP), or in the form supplied by Seaboard in response to positions taken by BC Transit during negotiation of the contract. (Submission of the third party, p. 4)

According to the third party, this commercial and financial information reflects its business methods in an intensely competitive environment - "disclosure of the information would allow one competitor to engage in a form of 'reverse engineering' in order to discover another competitor's business methods...." (Submission of the third party, p. 4)

The third party also submits that the information was supplied to BC Transit implicitly in confidence, before the Act was in effect. The "commercial climate" that prevailed at that time was one "which expected that such information should and would be treated as confidential." Further, BC Transit's RFP promised a general blanket of confidentiality, subject only to disclosure of certain information to the unions with which BC Transit had collective agreements. The information that might be disclosed is in fact limited to completed BC Transit Form AFT-1 "for the Proposer and each of its proposed Sub-contractors in order to evaluate whether they are eligible to do contracted out work

under the terms of the Collective Agreements by which BC Transit is bound." (Affidavit of Scott Corbell, Exhibit A) The contract has also "been treated as confidential by the parties throughout most of its life." (Submission of the third party, pp. 4, 5)

BC Transit denies that the contract contains a confidentiality clause. (Affidavit of Chris Harris, paragraph 11) It points out that much of the information contained in the contract was publicly disclosed as part of the RFP.

The central issue of this inquiry is whether the information was "supplied" to or "negotiated" with BC Transit. BC Transit's Director, Information and Privacy, Chris Harris, stated in his July, 1997 decision letter that:

> While, in your [Seaboard's] letter of June 17th, you have asserted that the agreement 'was *negotiated* in confidence,' you do not claim that the information contained in it was in fact *supplied* to BC Transit in this manner. The wording of the contract itself, as well as internal records, indicate that the substantive details found in the agreement were in fact 'negotiated' with you by BC Transit, with the result that the requirement of section 21(1)(b) has not been met. (Submission of BC Transit, page 13)

BC Transit relied on Order No. 26-1994 for the purpose of distinguishing between information "supplied" to and "negotiated" between the two parties, concluding "that no indirect supply of confidential business information was in issue" and that "no Seaboard-supplied information was to be found in the Contract." (Submission of BC Transit, pp. 15, 16, 17, 23)

The Affidavit of the Director, Management Services, "provides evidence supporting Mr. Harris' conclusions that the Contract information was all negotiated between the parties, including Seaboard's payments to BC Transit, its commissions to sales agents, and management of bad debts for the purposes of the Contract. [The Director's] evidence is that the contract contains information *negotiated* by the parties, and not any information 'supplied' by Seaboard. His evidence is that none of the information in the Contract could be used to derive underlying information of Seaboard." (Submission of BC Transit, paragraph 26; Affidavit of T. Sharp, paragraphs 7 and 8; and Affidavit of Chris Harris, paragraphs 9 and 10) However, I note that the Director "was not directly involved in negotiation of the Contract," and his conclusion above is based on his "familiarity with the terms of the Contract itself, and [his] knowledge of the circumstances relating to negotiation and settlement of the Contract...." (Affidavit of T. Sharp, paragraphs 4, 7)

The third party submits that the information it is trying to protect exactly fits the examples that I gave in Order No. 26-1994, because the information supplied remains relatively unchanged in the contract, and disclosure 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. In essence, the third party maintains that it has expended

"efforts in developing and maintaining the proprietary information that make up the core structure of the License" and its disclosure would permit its major business competitor "to draw accurate inferences about Seaboard's business information and business concepts." (Reply Submission of the third party, p. 2)

I agree with BC Transit's submission that information cannot be construed as having been supplied in confidence by the third party if it is "identical" to the information within the RFP Agreement or the RFP itself. (Reply Submission of BC Transit, paragraph 5, and the *in camera* Affidavit of Valder Belgrave, paragraphs 8 and 10, which describe the provisions in the contract agreement and in the sample agreement included in BC Transit's RFP that "are the same as each other, and also describes the provisions in those two agreements that are very similar or that have only minor differences.") In fact, the reply submission of BC Transit, with its accompanying affidavits, presents, in convincing detail, the sources of the information in the contract so as to completely undermine the third party's claim that this information was "supplied" to BC Transit. (Reply Submission of BC Transit, paragraphs 6 to 12)

In conclusion, I accept BC Transit's summary statement on the matter:

> ...none of the Core Structure was 'supplied' by Seaboard within the meaning of s. 21(1)(b) of the Act. The affidavit evidence, and the documents before you, either directly demonstrate that information in the Licence Agreement was initially released by BC Transit as part of the RFP, effectively to the world at large, or permit you to infer, with conviction, that any information *not* included in the RFP was negotiated by the parties and not 'supplied' by Seaboard in confidence either directly or secondarily. (Reply submission of BC Transit, paragraph 13)

I find that the third party has failed to establish that the information was supplied in confidence.

Section 21(1)(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,... (iii) result in undue financial loss or gain to any person or organization,

The third party fears the financial and competitive harm that would occur with disclosure of the core structure of its standard licencing agreement, which it enters into "with minimal modifications, to obtain locations for the placement of outdoor advertising." (Submission of the third party, p. 5) See Order No. 26-1994. In addition, the third party points out that this specific contract expires in May 1998, and it "will almost certainly be asked by Transit to respond to a further RFP in the coming months." Thus, it contends that disclosure to a major competitor "can reasonably be expected to interfere significantly with Seaboard's negotiating position" with respect to both the forthcoming RFP and other business opportunities.

It is the third party's submission "that the *Act* should not be interpreted in a manner which creates an artificial business risk, nor should it become a ready shortcut for a business competitor to obtain otherwise jealously guarded information about a rival's hard-earned market advantage." (Submission of the third party, pp. 5-6)

BC Transit does not dispute this branch of the test. Since I have concluded that the third party has failed to establish that the information was supplied implicitly or explicitly in confidence under section 21(1)(b), it is not necessary to address the final branch of the section 21 test.

9. Review of the Records in Dispute

After reviewing the detailed submissions and affidavits of the various parties, I reviewed the contract itself. There is little information in the record that could be regarded as of a sensitive character. Most of the information is the same type of language that appears in the original RFP issued by BC Transit.

I agree with the submission of BC Transit that the third party has not met its burden of proof in this inquiry. (Reply Submission of BC Transit, paragraph 19)

10. Order

I find that BC Transit was not required by section 21 of the Act to withhold the record in dispute. Under section 58(2)(a) of the Act, I require BC Transit to disclose the record in dispute to the applicant.

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David H. Flaherty
Commissioner

January 14, 1998