



**Information and Privacy
Commissioner/Ontario**

**Commissaire à l'information
et à la protection de la vie privée/Ontario**

ORDER P-647

Appeal P-9300559

Interim Waste Authority Limited



80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Télééc: 416-325-9195
TTY: 416-325-7539
<http://www.ipc.on.ca>

ORDER

BACKGROUND:

The Interim Waste Authority Limited (the Authority) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to all correspondence, minutes of meetings or memoranda to file between the Authority, a named consulting firm and two railway companies. The requester is a member of a resident's association which is concerned about the transport of solid waste through its community.

The Authority located a number of records that were responsive to the request. The Authority also determined that the release of these documents might affect the interests of the two railway companies and, pursuant to section 28(1) of the Act, notified these parties that an access request had been received. The railway companies were invited to make representations on whether the documents in question should be released.

One of the companies consented to the disclosure of the documents which it had provided to the Authority. The second company, however, objected to the release of the documents which it had authored.

The Authority then considered the submissions of the second railway company and decided to grant access to the responsive records in their entirety. The railway company (now the third party appellant) appealed the Authority's decision to the Commissioner's office.

During the mediation of the appeal, the original requester narrowed her request to three of the records which were originally at issue. Further mediation was not successful and notice that an inquiry was being conducted to review the Authority's decision was sent to the railway company, the Authority and the original requester. Representations were received from the railway company only.

The records at issue in this appeal consist of three covering letters to which are attached individual feasibility studies for the transport of solid waste to and from a variety of different locations.

PRELIMINARY ISSUE:

In its representations, the railway company argues that the costing and related information found in the records should be kept confidential by virtue of section 350 of The Railway Act. This provision reads as follows:

Where the information concerning the costs of a railway company or other information that is by its nature confidential is obtained from the company by the [National Transportation] Agency in the course of any investigation under this Act or the National Transportation Act, 1987, the information shall not be published or revealed in such a manner as to be available for the use of any other person, unless in the opinion of the Agency the publication is necessary in the public interest.

At the outset, I find that this section applies exclusively to documentation provided to the National Transportation Agency. The provision, therefore, has no application to records supplied to institutions which are subject to the Act. I accept the point, however, that some of the information which railway companies may supply to government agencies will have an inherent economic value.

THIRD PARTY INFORMATION:

The sole issue in this appeal is whether the mandatory exemption provided by sections 17(1) (a), (b) and (c) of the Act applies to the third party information contained in the three documents.

For a record to qualify for protection under section 17(1), the party resisting disclosure of the record (in this case the railway company) 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 sections 17(1)(a), (b) or (c) will occur.

In addition, where an institution receives a request for access to a record which contains third party information, the institution is required to disclose as much of the record as can reasonably be severed without releasing the information which falls under the section 17(1) exemption.

Part One of the Test

In its representations, the railway company submits that the records contain information respecting developmental and operational costs, the economics to be derived from capital

investments and information about prospective routes. I have carefully reviewed the contents of these documents and am satisfied that they contain both financial and commercial information for the purposes of part one of the section 17(1) test.

Part Two of the Test

To satisfy this component of the test, the railway company must establish that the information contained in the records was **supplied** to the Authority and secondly that such information was supplied **in confidence** either implicitly or explicitly.

Based upon my review of the records, I am satisfied that the contents of these documents were supplied to the Authority (through its consultants) by the railway company.

I must now determine whether this information was supplied in confidence. In its representations, the railway company states that the documents were provided with the explicit understanding that these materials were being tendered in confidence. The company submits that this expectation of confidentiality is confirmed by the language found on the covering letters which are attached to Records 1 and 3. The company also states that this expectation was confirmed in subsequent correspondence exchanged between the two parties.

I have carefully reviewed the records and the representations provided to me. I am satisfied that the information contained in the three documents was supplied by the railway company explicitly in confidence. Accordingly, I find that the second part of the section 17(1) test has been satisfied.

Part Three of the Test

To satisfy part three of the test, the railway company must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that would lead to a reasonable expectation that the harms described in sections 17(1)(a), (b), or (c) of the Act would occur if the information was disclosed (Order 36).

To support its reliance on section 17(1) of the Act, the railway company makes the following submission:

... Marketing strategies, having transportation as a key element should not be disclosed to competing shippers or transporters. A close tailoring of rates, operations efficiencies and economics derived from capital investments, for example, loading or unloading facilities would result in unequal competition if disclosed ...

In addition, in the submissions which the company made to the Authority prior to the filing of the appeal, it advanced the following arguments:

The [railway company's] feasibility study and concepts provided [the Authority's consultants] with various scenarios that require the building of rail lines from the [railway company's] main line, into potential landfill sites as well as other sensitive issues surrounding the management of GTA waste.

If this information were to be released, it may affect property values due to [certain steps which the railway company would be required to take]. This release of information may adversely affect the competitive position of the railway company ... as it may affect fair market value within the GTA area ... and interfere with contractual negotiations with ... potential land owners.

With these arguments having been summarized, it would be useful to describe the three documents at issue in this appeal in greater detail. Each of the records consists of a covering letter to which is attached a document referred to as a "feasibility study". Each feasibility study provides a list of scenarios for the transport of solid waste from one geographical location to another. If the three records are regarded collectively, a total of 16 scenarios are discussed in total.

The feasibility studies are typically divided into five sections. These refer to (1) the region and municipality involved, (2) the route transport-scenario (i.e. where the waste will be picked up and where it will be dropped off), (3) the various steps which the region or the Authority would need to take for the scenario to operate, (4) the commitments of the railway company and (5) costing estimates provided by the railway company for the scenario in question. In some cases, the feasibility studies also contain notes which relate to the assumptions used for costing purposes.

I have carefully reviewed the contents of the records as well as the representations provided to me. I find that the sections of the feasibility studies which relate to the railway company's commitments and its costing estimates could, if disclosed, reasonably be expected to prejudice significantly the company's competitive position. I also find that the notes attached to the feasibility studies, as well as those portions of the covering letters which elaborate on these subjects, are similarly exempt from disclosure under section 17(1)(a) of the Act.

I must now determine whether the remaining sections of the feasibility studies which identify the region and municipality involved, the route-transport scenario and the proposed commitments for the region or Authority, also qualify for protection under sections 17(1)(a), (b) or (c) of the Act.

With respect to the application of sections 17(1)(a) and (c), the railway company indicates that the release of the feasibility studies **may** affect property values of properties in the vicinity of the new routes and **may** adversely affect the competitive position of the railway company. For an affected person to establish that these provisions apply to exempt a record from disclosure, however, the party must demonstrate that the harms envisioned under sections 17(1)(a) or (c) **could reasonably be expected** to occur. While the railway company states that the outcomes which it describes may arise, it does not indicate that they are likely to occur. Thus, I find that the railway company has failed to meet the standard of proof contemplated under these provisions of the Act.

In arriving at this conclusion, I have also taken into account that the records contain no less than 16 separate route-transport scenarios, some of which link the same two geographic locations. In addition, the Authority has advised the Commissioner's office that it recently made the decision to use trucks, rather than railway cars, to move the solid waste through the corridors in question. On this basis, the railway's concern that the release of route information would increase property values in these locations - to the detriment of the company - is no longer sustainable.

For these reasons, I find that the railway company has not provided the detailed and convincing evidence necessary to establish that the third part of the test for the application of either sections 17(1)(a) or (c) of the Act applies to the three specified sections of the feasibility studies. The same conclusion applies to the portions of the covering letters not previously exempted from disclosure in this order.

The railway company next argues that the information contained in the records is exempt from disclosure under section 17(1)(b) of the Act. In order to meet the requirements of this provision, the railway company must demonstrate, through the provision of detailed and convincing evidence, that:

- (1) the disclosure of the information in the records could reasonably be expected to result in similar information no longer being supplied to the institution; and
- (2) it is in the public interest that similar information continue to be supplied to the institution in this fashion.

[Order P-604]

This railway company structures its submissions in the following manner:

[The railway company] ... would not be in a position to disclose similar information in subsequent similar operations and therefore could not competitively bid, which would have an adverse impact on the supply of transportation services.

In addressing this argument, it is important to note that the information contained in the records was provided by the railway company to the Authority for the ultimate purpose of securing a contract for the transport of solid waste. In my view, irrespective of the disclosure scheme mandated under the Act, transportation companies would continue to have a strong incentive to provide detailed information to the Authority with a view towards winning these sort of haulage contracts in the future.

For this reason, and based on the very general nature of submissions advanced by the railway company on this point, I find that section 17(1)(b) of the Act does not apply to the information contained in the three records.

To conclude, therefore, I find that only some parts of the covering letters and feasibility studies (which portions I have highlighted along with the copy of the order to be sent to the Authority) qualify for exemption under section 17(1)(a) of the Act. The remaining parts must, therefore, be disclosed to the original requester.

ORDER:

1. I order the Authority **not** to disclose those parts of Records 1, 2 and 3 which are highlighted in yellow on the copy of the records which is being sent to the Freedom of Information Co-ordinator for the Authority along with this order.
2. I order the Authority to disclose the remaining parts of the Records 1, 2 and 3 to the original requester within thirty-five (35) days of the date of this order and not earlier than the thirtieth (30th) day following the date of the order.
3. In order to verify compliance with this order, I order the Authority to provide me with a copy of the records disclosed to the original requester pursuant to Provision 2, **only** upon request.

Original signed by: _____ March 18, 1994 _____ Irwin Glasberg
Assistant Commissioner