



Information and Privacy
Commissioner/Ontario

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

ORDER P-779

Appeal P-9400205

Toronto Area Transit Operating Authority
(GO Transit)



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NATURE OF THE APPEAL:

This is an appeal under the Freedom of Information and Protection of Privacy Act (the Act). The Toronto Area Transit Operating Authority (GO Transit) received a request for copies of service contracts between GO Transit and its current suppliers of vending machines (the suppliers) located at the various GO Transit stations. Partial access to the records was granted. The requester appealed the decision to deny access to the remaining records.

The records include standard form tender documents dated October, 1989 completed by each supplier and the licence agreements between GO Transit and each supplier. The information in the records that remains at issue in this appeal consists of the percentage rents or rates of commission paid by the suppliers to GO Transit, a list of other locations serviced by each supplier and the name and address of the supplier's bank reference (if provided).

GO Transit relies upon the following exemption for withholding the above:

- third party information - section 17(1)

A Notice of Inquiry was provided to the appellant, GO Transit and the five suppliers. Representations were received from the appellant and four of the suppliers.

DISCUSSION:

THIRD PARTY INFORMATION

GO Transit has claimed that section 17(1)(a) applies to the records.

For a record to qualify for exemption under section 17(1)(a), GO Transit and/or the suppliers 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 section 17(1)(a) will occur.

Failure to satisfy the requirements of any part of the test will render the section 17(1) claim invalid.

I will begin my analysis by considering part three of the test. For this part of the test to apply, GO Transit and the suppliers are required to establish a clear and direct link between the disclosure of the information at issue and the harm that is alleged (significant prejudice to their competitive position). The mere possibility of harm is not adequate. There must be a reasonable probability that the harm will result from disclosure.

In their representations, the suppliers submit that disclosure of the information at issue would significantly prejudice their competitive positions in the upcoming re-tendering process, particularly if the rates of commission were known to potential competitors. One of the suppliers states that disclosure of the information may cause it to lose the upcoming tender and result in financial harm. With respect to the information relating to other serviced locations and the bank references, the supplier submits that disclosure of this information would be detrimental to its relationship with these references.

The appellant states that recent tender documents from GO Transit indicate that the highest bidder will not necessarily be successful. The appellant argues that, on that basis, the rates of commission in tenders will not be the determining factor and no harm would result from disclosing this information.

The appellant submits that disclosure of the commission rates would serve to expand the pool of potential bidders for these contracts by allowing smaller "Mom and Pop" vending businesses to determine, based on the previously successful commission rates, whether it would be worthwhile to make a bid.

I have carefully reviewed the representations of the parties. I am not satisfied, on the basis of the evidence provided, that the suppliers have established a clear and direct link between the disclosure of the information at issue and the harm set out in section 17(1)(a). I find that part three of the test has not been met.

Because of the finding which I have made, it is not necessary for me to consider the first or second parts of the section 17(1) test.

The result is that the section 17(1) exemption does not apply and that GO Transit must disclose the information in the records to the appellant.

ORDER:

1. I order GO Transit to disclose the information at issue in the records to the appellant within thirty-five (35) days after the date of this order and not earlier than the thirtieth (30th) day following the date of this order.

2. In order to verify compliance with the provisions of this order, I reserve the right to require GO Transit to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 1.

Original signed by: _____
Mumtaz Jiwan
Inquiry Officer

_____ October 13, 1994