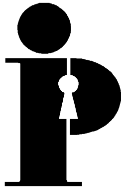


# ORDER PO-2616

## Appeal PA-050178-1

## Greater Toronto Transit Authority

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## NATURE OF THE APPEAL:

This appeal concerns a request made under the *Freedom of information and Protection of Privacy Act* (the *Act*) to the Greater Toronto Transit Authority (GO Transit) for access to "copies of any contracts signed between [GO Transit] and any other party concerning the provision of the Airport Rail Link" to Pearson International Airport (Pearson Airport) in the City of Toronto. The requester (now the appellant) made this request on behalf of a named community group.

In response to the request, GO Transit notified affected parties it believes may have an interest in the requested records. GO Transit then issued a decision advising that, based on the representations received from the affected parties, it would provide partial access to two records and deny access to two other records in their entirety. GO Transit stated in its decision letter that it was denying access to the withheld information pursuant to sections 17(1) (third party information) and 18(1) (economic and other interests of Ontario) of the *Act*.

GO Transit subsequently issued a supplementary decision in which it enclosed additional information that had been inadvertently omitted as a result of a photocopying error.

The appellant appealed GO Transit's initial decision to this office.

During the course of the mediation stage, GO Transit issued another supplementary decision letter setting out the specific subsections of sections 17 and 18 of the *Act* that it is relying upon with respect to the information at issue. GO Transit indicated in that decision letter that it is denying access to the information at issue pursuant to sections 17(1)(a),(b) and (c) and 18(1)(c) of the *Act*.

The mediator contacted the affected parties to determine if they would consent to the release of the severed information relating to them. These affected parties advised that they did not consent to the release of any additional information.

The appellant advised the mediator that he is no longer seeking access to one of the records responsive to his request (Contract NC-2004-GT-009), which had been identified by GO Transit in its initial decision letter. Accordingly, this record and the application of sections 17(1)(a), (b) and (c) and 18(1)(c) to it are no longer at issue.

I commenced my inquiry by issuing a Notice of Inquiry, seeking representations from GO Transit on all issues and from five affected parties on the application of the section 17(1) third party exemption only. GO Transit submitted representations in response and agreed to share them in their entirety with the appellant. Two of the five affected third parties submitted representations. One affected party (affected party #1) agreed to share its representations with the appellant in their entirety; the second affected party (affected party #2) agreed to share the non-confidential portions of its representations with the appellant. Two of the remaining three affected parties wrote to advise that they had no objection to the release of the information at issue. The fifth affected party did not respond to the Notice of Inquiry.

In its representations, GO Transit advised that it had reconsidered its position and has no objection to the release of one of the records, the Canada Strategic Infrastructure Fund Agreement (Infrastructure Fund Agreement), to the appellant in its entirety. Since none of the

affected parties has objected to the release of this record (in fact, two of the affected parties wrote to advise that they consented to its release), I will remove this record from the scope of this appeal. I note that GO Transit provided an unsevered copy of this record with its representations, which were shared with the appellant. However, in order to ensure compliance with section 10 of the *Act*, I ask that GO Transit immediately issue a revised decision letter and provide the appellant with a complete unsevered copy of the Infrastructure Fund Agreement.

I then sought representations from the appellant on all issues and included with my Notice of Inquiry the complete representations of GO Transit and affected party #1 and the severed representations of affected party #2. Portions of affected party #2's representations were severed due to confidentiality concerns. The appellant submitted representations in response. The appellant's representations raised issues in response to those submitted by GO Transit and the two affected parties. As a result, I decided to seek reply representations from GO Transit and the two affected parties and, in doing so, shared the complete representations of the appellant with them. The two affected parties submitted reply representations; GO Transit chose not to do so.

## RECORDS:

The following two records remain at issue:

1. Addendum to Rail Infrastructure Construction Operating Agreement (Addendum Agreement) (released in part)

2. Stakeholder Agreement Letter (Stakeholder Agreement) (withheld in full)

As stated above, GO Transit has claimed the application of sections 17(1)(a),(b) and (c) and 18(1)(c) of the *Act* to all of the withheld information.

## DISCUSSION:

### THIRD PARTY INFORMATION

#### Section 17(1): the exemption

As stated above, GO Transit has raised the application of sections 17(1)(a), (b) and/or (c) to the records at issue.

Affected party #1 has claimed the application of sections 17(1)(a) and (c) to the Addendum Agreement and sections 17(1)(a) and (b) to the Stakeholder Agreement.

Affected party #2's representations are confined to the Stakeholder Agreement and the application of section 17(1)(a) to it.

Section 17(1) states, in part:

> A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,
>
> (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
>
> (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
>
> (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions [*Boeing Co. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. No. 2851 (Div. Ct.)]. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace [Orders PO-1805, PO-2018, PO-2184, MO-1706].

For section 17(1) to apply, the institution and/or the third party 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 paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

**Part 1: type of information**

GO Transit submits that the records at issue contain financial information. Affected party #1 also submits that the records contain financial information. Affected party #2, which restricts its submissions to the Stakeholder Agreement, states that this record contains technical, financial and commercial information.

The types of information listed in section 17(1) have been discussed in prior orders:

> *Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].
>
> *Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].
>
> *Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

I adopt these definitions for the purpose of this appeal.

For the most part, the representations provided by the parties are not helpful in deciding this issue. However, affected party #1, in addressing the Addendum Agreement, states that this record contains financial information, specifically, overhead rates and operating costs applicable to its work.

On my review of the records, I am satisfied that they contain commercial and financial information. The Addendum Agreement and Stakeholder Agreement both relate to the provision and operation of commuter railway services between Union Station and Pearson Airport, which in my view qualifies as commercial information. With regard to financial information, the Infrastructure Agreement contains information regarding fees, costs, overhead rates and payment terms relating to the delivery of services identified in the record. The Stakeholder Agreement contains fees regarding the provision of services described in this record. I have no evidence that these records contain technical information, as defined above.

Having determined that the records contain commercial and financial information, I find that part 1 of the test under section 17(1) of the *Act* has been met.

**Part 2: supplied in confidence**

***Introduction***

In order to satisfy part 2 of the test, the affected parties and/or GO Transit must show that the information at issue was "supplied" to GO Transit "in confidence", either implicitly or explicitly.

***Supplied***

The requirement that it be shown that the information was "supplied" to the institution reflects the purpose in section 17(1) of protecting the informational assets of third parties [Order MO-1706].

Information may qualify as "supplied" if it was directly supplied to an institution by a third party, or where its disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party [Orders PO-2020, PO-2043].

The contents of a contract involving an institution and a third party will not normally qualify as having been "supplied" for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than "supplied" by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, PO- 2371, MO-1706]. Except in unusual circumstances, agreed upon essential terms of a contract are considered to be the product of a negotiation process and therefore are not considered to be "supplied" [Orders MO-1706, PO-2371 and PO-2384].

This approach has been upheld by the Divisional Court in *Boeing v. Ontario (Ministry of Economic Development and Trade)*, Tor. Docs. 75/04 and 82/04 (Div. Ct.); motion for leave to appeal dismissed, Doc. M32858 (C.A.).

*Representations*

GO Transit, affected party #2 and the appellant did not provide representations that address the "supplied" issue.

Affected party #1 acknowledges that past decisions of this office have found that the terms of a contract between an institution and a third party do not generally meet the "supplied" test under section 17(1), on the basis that the terms have been mutually generated through negotiation. However, affected party #1 distinguishes the "overhead percentages" included in the Addendum Agreement on the basis that they are "standard for all contracts and are not subject to change or variation." Affected party #1 states that these rates are "not specific to the work covered by the [records] at issue", but are rather applicable to "[its] cost structure in general". Accordingly, affected party #1 feels that these rates should meet the supplied test despite being terms in the

Addendum Agreement. Affected party #1 does not provide representations regarding the supplied test with regard to the contents of the Stakeholder Agreement.

*Analysis and findings*

The application of the supplied test in circumstances involving terms and pricing information contained within a contract has been addressed in a number of previous orders of this office.

In Order PO-2453, Adjudicator Catherine Corban provides a detailed synopsis of recent orders on the "supplied" issue in the context of information in a contract. In that case, Adjudicator Corban states:

> Orders MO-1706 and PO-2371 discuss several situations in which the usual conclusion that the terms of a negotiated contract were not "supplied" would not apply, which may be described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where "disclosure of the information in a contract would permit accurate inference to be made with respect to underlying non-negotiated confidential information supplied by the affected party to the institution". The "immutability" exception applies to information that is immutable or not susceptible of change, such as the operating philosophy of a business, or a sample of its products.
>
> In Order PO-2435, Assistant Commissioner Brian Beamish adopted the view articulated in Orders MO-1706, PO-2371 and PO-2384 that except in unusual circumstances, agreed upon essential terms are considered to be the product of a negotiation process and therefore are not considered to be "supplied".

By way of background, in Order PO-2435, Assistant Commissioner Beamish rejected the Ministry of Health and Long-Term Care's argument that proposals submitted by potential vendors in response to a Government Request for Proposal (RFP), including per diem rates, are not negotiated because the Government either accepts or rejects the proposal in its entirety. Assistant Commissioner Beamish observed that the Government's option of accepting or rejecting a consultant's bid is a "form of negotiation":

> The Ministry's position suggests that the Government has no control over the per diem rate paid to consultants. In other words, simply because a consultant submitted a particular per diem in response to the RFP release by [Management Board Secretariat (MBS)], the Government is bound to accept that per diem. This is obviously not the case. If a bid submitted by a consultant contains a per diem that is judged to be too high, or otherwise unacceptable, the Government has the option of not selecting that bid and not entering into a [Vendor of Record] agreement with that consultant. To claim that this does not amount to negotiation is, in my view, incorrect. The acceptance or rejection of a consultant's bid in response to the RFP released by MBS is a form of negotiation. In addition, the

> fact that the negotiation of an acceptable per diem may have taken place as part of the MBS process cannot then be relied upon by the Ministry, or [Shared Systems for Health], to claim that the per diem amount was simply submitted and was not subject to negotiation.
>
> It is also important to note that the per diem does not represent a fixed underlying cost, but rather it is the amount being charged by the contracting party for providing a particular individual's services.

The record at issue in Order PO-2453 contained the bid information prepared by the successful bidder in response to a Request for Quotation issued by the Ministry of Natural Resources. It contained, among other things, the successful bidder's pricing for various components of the service to be delivered and the total price of its quotation bid.

Concluding that the terms outlined by the successful bidder formed the basis of a contract between it and the Ministry and were not supplied pursuant to part 2 of the test under section 17(1), Adjudicator Corban states in Order PO-2453:

> Following the approach taken by Assistant Commissioner Beamish in Order PO-2435, in my view, in choosing to accept the affected party's quotation bid, the information, including pricing information and the identification of the "back-up" aircraft, contained in that bid became "negotiated" information since by accepting the bid and including it in a contract for services the Ministry has agreed to it. Accordingly, the terms of the bid quotation submitted by the affected party became the essential terms of a negotiated contract.
>
> Additionally, having reviewed the information at issue, I do not find, nor have I been provided with any evidence to show, that any of the information at issue is "immutable" or that disclosure of the information, including the pricing information, would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied to the Ministry by the affected party. I have also not been provided with any evidence to show that the pricing information reflects the affected party's underlying costs. In fact in my view, the information contained in the record itself appears to point to the opposite conclusion that the amounts charged by the affected party are for the provision of particular services.

I adopt the above analysis for the purposes of the appeal before me. In my view, both the Addendum Agreement and the Stakeholder Agreement do not on their face contain the type of information that falls into the "inferred disclosure" or "immutability exceptions". While I acknowledge the view expressed by affected party #1 that the overhead costs and percentages are standard for all contracts and not subject to change or variation, for the reasons outlined in Orders PO-2435 and PO-2453, I am satisfied that these figures represent essential terms of a negotiated agreement for the delivery of services by affected party #1 to GO Transit.

In conclusion, the information at issue does not meet the "supplied" portion of part 2 of the test. Accordingly, it is not necessary for me to comment on the "in confidence" portion of this test. As all parts of the test must be met, the fact that part 2 is not met is sufficient for me to find that section 17(1) does not apply.

**ECONOMIC AND OTHER INTERESTS**

As stated above, GO Transit has also raised the application of the discretionary exemption in section 18(1)(c) to the withheld portions of the Addendum Agreement.

Section 18(1)(c) states:

> A head may refuse to disclose a record that contains,
>
> > information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

The purpose of section 18 is to protect certain economic interests of institutions. The report titled *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy 1980*, vol. 2 (Toronto: Queen's Printer, 1980) (the Williams Commission Report) explains the rationale for including a "valuable government information" exemption in the *Act*:

> In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

For section 18(1)(c) to apply, the institution must demonstrate that disclosure of the record "could reasonably be expected to" lead to the specified result. To meet this test, the institution must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient [*Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)].

The purpose of section 18(1)(c) is to protect the ability of institutions to earn money in the marketplace. This exemption recognizes that institutions sometimes have economic interests and compete for business with other public or private sector entities, and it provides discretion to refuse disclosure of information on the basis of a reasonable expectation of prejudice to these economic interests or competitive positions [Order P-1190].

GO Transit provides the following brief statement in support of its reliance on section 18(1)(c):

> Release of any financial information between the privately controlled [affected party #1] and GO Transit could adversely affect our ability to negotiate effectively if we were not in a position to provide a level of security and confidentiality to firms bidding on government contracts, etc.

In my view, the submission offered by GO Transit amounts to a vague reference to speculative harms should the information at issue be disclosed to the appellant. The suggestion of harm put forward by GO Transit does not qualify as detailed and convincing evidence of a reasonable expectation of harm. Accordingly, I find that the section 18(1)(c) exemption does not apply in this case.

## ORDER:

1. I order GO Transit to immediately issue a revised decision letter and provide the appellant with a complete unsevered copy of the Infrastructure Fund Agreement.

2. I order GO Transit to disclose the Addendum Agreement and the Stakeholder Agreement to the appellant by **November 14, 2007** but not before **November 6, 2007**.

Original Signed By: October 10, 2007
Bernard Morrow
Adjudicator