OFFICE OF THE
INFORMATION & PRIVACY
COMMISSIONER
— for —
British Columbia

Order 00-41

INQUIRY REGARDING BC TRANSIT RECORDS

David Loukidelis, Information and Privacy Commissioner
September 13, 2000

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Summary: Applicant sought access to a copy of the contract(s) from BC Transit, Thompson-Nicola Regional District and Wells Grey Community Resources Society for provision of a transit program. Section 17(1) did not apply to information in the disputed records. Section 21(1) did not apply to the variable distance costs and monthly payment information but did apply to the fixed monthly costs and the variable hourly costs.

Key Words: Financial or economic interests – monetary value – undue loss or gain – commercial or financial information – supplied in confidence – competitive position.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, ss. 17(1)(b) and (d), 21(1).

Authorities Considered: B.C.: Order 00-08; Order 00-10; Order 00-23.

1.0 INTRODUCTION

This order results from the inquiry conducted by the Executive Director of the Office of the Information and Privacy Commissioner ("Executive Director") concerning a request for review of a decision of BC Transit under the *Freedom of Information & Protection of Privacy Act* ("Act").

2.0 DISCUSSION

On August 16, 1999, I delegated the authority to conduct inquiries to the Executive Director pursuant to s. 49 of the Act. Although s. 49 authorizes delegation of authority to conduct inquiries under s. 56 of the Act, it does not authorize delegation of my authority to make orders under s. 58.

I disqualified myself from this inquiry. The Executive Director conducted the inquiry in this matter. I took no part in the inquiry. The Executive Director prepared a report respecting the inquiry, a copy of which is appended to this order. After receiving the Executive Director's report, I reviewed the filed material and the records in dispute. I have adopted the Executive Director's recommendations, without variation, in this order and this order executes those findings and recommendations.

3.0 CONCLUSION

For the reasons given in the Executive Director's report:

1. under s. 58(2)(a) of the Act, I require BC Transit to give the applicant access to the variable distance costs and the monthly payment information in the records in dispute;

2. under s. 58(2)(c) of the Act, I require BC Transit to refuse access to the fixed monthly costs and the variable hourly costs to the applicant.

September 13, 2000

David Loukidelis
Information and Privacy Commissioner
for British Columbia

APPENDIX TO ORDER 00-41

INQUIRY REGARDING BC TRANSIT RECORDS

REPORT OF THE EXECUTIVE DIRECTOR OF THE OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

1.0 INTRODUCTION

As Executive Director of the Office of the Information and Privacy Commissioner, I conducted a written inquiry under s. 56 of the *Freedom of Information and Protection of Privacy Act* ("Act."). This inquiry arose out of a July 1999 request to BC Transit for a copy of the contract(s) between BC Transit ("public body"), Thompson-Nicola Regional District ("TNRD") and Wells Grey Community Resources Society ("Wells Grey") for provision of a transit program to the Clearwater area.

The public body responded to the request on July 15, 1999. The public body denied access to some information in the records under s. 21 of the Act. That section requires a public body to refuse access to information if disclosure of that information would, within the meaning of s. 21, be harmful to the business interests of a third party. Specifically, the public body withheld information contained in Schedule C (Budget) and Schedule D (Payment Schedule) from the Clearwater Annual Operating Agreement (the Agreement). Only four figures in total were withheld from the applicant and the remainder of the Agreement was released.

The applicant requested a review of the public body's decision to withhold the severed information and stated that he did not believe that this information qualified for exclusion under the Act.

After the inquiry notices had been sent, BC Transit informed this office and the applicant that, in addition to s. 21, it would also be making submissions with respect to the application of s. 17 of the Act to the records in dispute.

2.0 ISSUES

The issues before me in this inquiry are whether the public body correctly applied s. 17(1)(b) and (d) and s. 21 of the Act to four dollar figures from the Agreement. Specifically, the records in dispute are:

(a) a figure representing the fixed monthly costs from the 1999/2000 budget, set out in Schedule "C";

(b) a figure representing the variable hourly costs from the 1999/2000 budget, set out in Schedule "C";

(c) a figure representing the variable distance costs from the 1999/2000 budget, set out in Schedule "C"; and

(d) BC Transit's monthly payment to Wells Grey Community Resources Society, set out in Schedule "D".

Under s. 57(1) of the Act, BC Transit must prove that the applicant has no right of access to the four severed figures pursuant to ss. 17 and 21.

3.0 DISCUSSION

3.1 Procedural Issue – BC Transit's Late Addition Of Another Exception – On November 17, 1999, notices were sent to both parties, scheduling the matter for an inquiry, and setting the issue under review as the application of s. 21 to the records in dispute. On November 24, 1999, counsel for BC Transit stated that because disclosure of the records "could reasonably be expected to harm the economic interests of BC Transit", BC Transit would also be applying s. 17 to the records in dispute.

The Commissioner has previously stated his view that late additions of exceptions are undesirable (Order No. 00-08). Recognizing that public bodies cannot be held to a counsel of perfection, BC Transit is permitted in this instance, primarily because the applicant did not object, to add s. 17 as an issue under review. I nonetheless strongly discourage all public bodies from last minute additions of discretionary exceptions in this way. It is the policy of this Office to refer requests for review to mediation and the late addition of a discretionary exception is not helpful to that process. I recognize that circumstances may, in a few cases, require public bodies to follow BC Transit's course of action here. Such cases should be the exception and not the rule.

3.2 Relevant Provisions of the Act – The relevant sections of the Act are as follows:

> 17 (1) The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of British Columbia or the ability of that government to manage the economy, including the following information:
> …
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the government of British Columbia and that has, or is reasonably likely to have, monetary value;
>
> …
>
> (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

> 21 (1) The head of a public body must refuse to disclose to an applicant information
>
> (a) that would reveal
>
> (i) trade secrets of a third party, or
>
> (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,
>
> (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
>
> (iii) result in undue financial loss or gain to any person or organization, or
>
> (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

3.3 The Applicant's General Position – The applicant provided a one-page initial submission. He argues that in Order No. 45-1995, the Commissioner ordered the release of financial information contained in a contract with Western Society for Senior Citizens' Services and other third parties. He argues that, "unless the situation with WGCRS is significantly different from that of Order No. 45-1995 in ways that I am not aware of," the information should be released. He also states that freedom of information is key in "maintaining responsible government and freedom of financial information is possibly the most important factor in that."

3.4 The Public Body's General Position – The public body submitted a binder as its initial submission, which contained six affidavits, one *in camera* affidavit, authorities it relied on, background information about BC Transit's Municipal Systems Program, the Request for Proposal Process, Annual Operating Agreements and its legal argument.

In its initial submission, BC Transit states that, in addition to the Act, it is subject to many accountability mechanisms, ranging from financial scrutiny under the *British Columbia Transit Act,* the *Financial Information Act* and the *Ombudsman Act.* While I acknowledge the fact that BC Transit is accountable in many ways to the public through

these other statutes, that fact is not relevant to determining whether or not ss. 17 and 21 of the Act have been correctly applied here.

3.5 Will Release of the Information Harm the Economic or Financial Interests of BC Transit? – In order for information to be withheld under s. 17(1), a public body must demonstrate a reasonable expectation of harm to its economic or financial interests from disclosure of information.

In its initial submission, BC Transit frames the test under s. 17 as follows:

> The clearest and most current statement on the meaning of "reasonable expectation of harm" is found in the Commissioner's Order 324-1999:
>
> > The alleged harm must not be fanciful, imaginary or contrived but rather one which is based on reason. It must be possible for a reasonable person to conclude, based on the evidence, that an identified, or specific, harm to the financial or economic interests of the public body is likelier than not to flow from disclosure of the information. Of course, the evidence in each case will determine whether there is a reasonable expectation of harm from disclosure.

In Order 00-10, the Commissioner observed that such a test, rather than dealing with probabilities, focuses on whether a reasonable person would expect, based on the evidence, that the feared harm could be caused by disclosure. (See, also, Order 00-23.) The feared harm must not be imaginary or contrived and speculative evidence will not suffice.

BC Transit argues that the harm that would result from disclosure of the four figures in dispute is "interference with its competitive bidding process" and says that, if that process were compromised, a number of specific harms would follow.

First, BC Transit states that harm would result from fewer "proposers" bidding for transit service contracts, which would mean increased costs for transit services as fewer companies would compete, and BC Transit would be "forced to accept proposals that are not the lowest cost proposals."

Second, BC Transit argues that disclosure would result in less detailed financial information being provided in proposal documents and in "bottom-up" budgeting by proposers, which will "disguise whether the proposer has effectively considered its own costs."

BC Transit further argues that disclosure of the monthly fixed payment would prompt "labour to demand wage increases."

Finally, BC Transit argues that this case will serve as a precedent for the release of detailed cost information with respect to other service areas, which would adversely

affect the success of the competitive bidding process in encouraging the provision of cost-efficient transit services in areas outside the lower mainland and Victoria.

BC Transit relies on Order No. 206-1997, Order No. 126-1996 and Order No. 315-1999 to support its s. 17 position.

In his reply submission, the applicant counters that disclosing the figures would *lower* the costs of transit, as it would allow competitors to underbid existing contractors, which would necessarily cause "payments by BC Transit to decrease, not increase." The applicant states that his point is supported by the affidavit of Jack Keough of the WGCRS. Keough deposed that disclosure of the information would likely result in its competitors using "this information to underbid us in the next RFP and win the contract away from us."

The applicant also states that "the argument that few companies would bid is probably invalid. By making the RFP process more open and transparent, it is possible that more companies might be tempted to bid, not fewer." He also states that the argument that labour would demand higher wages if the information were disclosed "underestimates" the sophistication of today's union leaders.

The argument that proposers will supply less information in their bids and, hence, hinder the evaluation process is not credible since the BC Transit *requires* the information to be supplied, and even adds a proviso that proposals lacking compulsory data may be rejected.

Based on the evidence, I am not convinced that disclosure of the severed information would force BC Transit in the future to accept higher bids, nor that the lowest proposal would necessarily be bid at the last contract price or higher. I do not accept that this is an inevitable or reasonably expected outcome, as there is a host of other factors that come into play in the competitive bidding process. In my opinion, the harm anticipated by BC Transit from the release of the information is speculative. The evidence before me does not support such a conclusion.

3.6 Is the Information "Financial" or "Economic" Information of BC Transit and Does it Have Monetary Value? – With respect to s. 17(1)(b), BC Transit argues as follows:

> The Act does not define the terms "financial" and "economic." In Order No. 19-1994, the Commissioner followed the decision of the Federal Court of Canada in *Information Commissioner* v. *Minister of External Affairs* [1990] 3 F.C. 665. In that decision, Mr. Justice Default held that information would be "deemed to be financial or commercial information when it relates to material that is commonly referred to as such, in keeping with the ordinary dictionary definition of those terms." (p. 672)

> …
> "Financial interests" and "economic interests" are defined in Section C.4.8 of Policy and Procedures Manual issued by the Freedom of Information and Privacy Branch as follows:
>
> **"Financial interests"** refers to the financial position of a public body or the government of British Columbia. It includes the management of assets and liabilities, and the ability of the public body or the government to protect its own interests in financial transactions with third parties … harm to the financial interests of a public body or the government of British Columbia could involve monetary loss, or loss of assets with a monetary value.
>
> **"Economic interests"** refers to the broader interests of the public body or the government of British Columbia in managing the production, distribution, and consumption of goods and services.

Section 17(1)(b) requires proof that (i) the information at issue is financial or commercial information and (ii) the information has monetary value. The public body argues that, on the clear meaning of the term, the fixed monthly costs, variable hourly costs, variable distance costs and the monthly payment by BC Transit are financial or commercial information. Clearly, the fixed monthly costs, variable hourly costs, variable distance costs and the monthly payment made by BC Transit are financial information.

Again, s. 17(1)(b) permits a public body to withhold "financial … information that belongs to a public body … and that has or is reasonably likely to have, monetary value." In order to meet the burden of proof that the information at issue belongs to the public body, BC Transit submits that Clause 9 of the Proposal Instructions for Operating Companies expressly provides that "all information supplied by proposers becomes the property of BC Transit." I accept that the information "belongs to" BC Transit.

The public body argues that the severed information has monetary value because it would have great value to prospective competitors of incumbent operating companies. It is therefore something for which a reasonable person could be expected to pay if it were for sale, giving the information "monetary value" for the purposes of s. 17(1)(d) of the Act.

Simply because information would be of interest, or benefit, to others does not mean that it has independent monetary value to BC Transit and is protected from disclosure under s. 17(1)(b). There is, in my opinion, a clear distinction between information (including intellectual property) that the public body may wish to sell or license, and that reasonably could be said to have monetary value, and information that would simply be beneficial in some sense, or of interest, to a competitor. I do not accept that s. 17(1)(b) applies to the information in dispute.

3.7 Will Release of the Information Result in Undue Loss or Gain to a Third Party? – BC Transit has also withheld the information in dispute under s. 17(1)(d), which allows a public body to withhold information if the disclosure of that information would result in "undue financial loss or gain to a third party." Section 17(1)(d) requires that the

public body show there is a reasonable expectation that disclosure of the severed information could result in "undue financial loss or gain to a third party." BC Transit submits as follows:

> In order to be successful, public bodies responsible for performing business functions and involved in business transactions must be able to comply with accepted business practices regarding the confidentiality of financial and commercial information.
>
> The financial information in response to RFP's was provided on the understanding that it would not be made public. As such, it has been the practice of BC Transit to maintain the confidentiality of financial or commercial information provided to it by competitors bidding on transit service contracts.
>
> We submit that disclosure of the confidential financial information will likely result in financial loss to Wells Grey and the concurrent financial gain to their competitors. It would create a precedent that would be unfair to incumbent Operating Companies and create an unearned windfall for their competitors.

The affidavit evidence provided by BC Transit is that the provision of transit services in British Columbia is incredibly competitive and that transit businesses are extremely cautious with respect to the confidentiality of cost figures.

The question is whether disclosure of the information in dispute would result in "undue" harm to the third party. "Undue" is defined in the *Oxford English Dictionary* as "excessive or disproportionate." In Order 00-08, the Commissioner stated "the word 'undue' must be given real meaning, determined in the circumstances of each case. Generally speaking, that which is 'undue' can only be measured against that which is 'due'." In Order 00-10, he stated:

> When is a financial gain or loss "undue"? As is the case with the significant harm test under s. 21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation. See Order 99-018.
>
> The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation. See, for example, the judgement of Cartwright J. (as he then was) in *Howard Smith Paper Mills Ltd.* v. *The Queen* (1957), 29 C.P.R. 6 (S.C.C.), at p. 29. As Cartwright J. noted in *Howard Smith*, above, interpretation of the word 'undue' is not assisted by simply substituting different adjectives for that word. That which is undue can only be measured against that which is due. The Legislature did not, however, provide such a frame of reference for the purposes of s. 21(1)(c)(iii). It is necessary, therefore, to approach the issue of what is undue financial loss or gain in the

> circumstances of each case. This analysis can to some extent be guided by decisions in previous similar cases, which will give some sense of what may be undue in the present situation. The evidence does not convince me that this test has been met.

I do not accept that the release of the financial information in this case could reasonably be expected to result in undue financial loss or gain to a third party. For example, the amount of the contract has been disclosed; however, the monthly payment for the same contract has not been disclosed. It seems unusual for one figure to be released and the other withheld. BC Transit argues that if the amount of the successful bid is made public, it will become nearly impossible for the "winner" of the bid to remain competitive.

Using this logic, payment schedules would almost never be released, under the guise of protecting the competitive interest of the "winning" bidder and protecting that bidder from "undue" loss. Businesses who contract with public bodies must have some understanding that those dealings are necessarily more transparent than purely private transactions. Even if one assumes loss could be expected to the third party, such loss would not be "undue."

3.8 Would Disclosure of the Information Harm the Business Interests of the Third Party? – Section 21 incorporates a three-part test, each part of which must be met before the section can apply. The first part of the test requires that the withheld information is "commercial" or "financial" information of a third party." The second part of the test requires that the information that would be revealed by the disclosure must have been "supplied in confidence." The third part of the test is that disclosure of the information must result in one of several harms, in this case, significant harm to the competitive position of Wells Grey. BC Transit submits that the severed information is "plainly commercial or financial information of and supplied by, the third party, Wells Grey." While I accept that the information is "financial", I do not accept that all of it is financial information "of the third party."

Fixed Monthly Costs

BC Transit says that the fixed monthly cost figure is identical to the information supplied by Wells Grey in its bid. I accept that this information is financial information supplied by the third party.

BC Transit submits that disclosure of the fixed monthly cost figure in Schedule "C" of the Wells Grey Agreement could reasonably be expected to cause significant harm to the competitive position of Wells Grey in the next Request for Proposal. Wells Grey has provided affidavit evidence that the release of this information would result in such harm. On the evidence before me, I accept that the release of this information, in the competitive bidding climate for transit services in British Columbia, would cause significant harm to Wells Grey.

Variable Hourly Costs

The withheld variable hourly cost is not the same figure that was originally supplied by Wells Grey to BC Transit in its proposal. The evidence before me is that this figure was the product of negotiations between the two parties. BC Transit and Wells Grey argue that because this figure approximates the original figure, the figure "remains relatively unchanged" and should be withheld.

The Commissioner has previously ruled that information derived from negotiations does not normally qualify as information "supplied" by the third party, unless it would reveal the original information supplied to the public body. This is consistent with decisions elsewhere regarding the 'supply' test. BC Transit, within the meaning of s. 21(1)(b), states that the figure in the agreement "reflects Wells Grey's consultation with BC Transit." I do not find, based on this evidence, that release of this figure would accurately reveal the original figure supplied by Wells Grey. Unfortunately, both BC Transit and Wells Grey did not opt to comment on the exact degree of similarity between the two figures in an *in camera* submission. This, however, does not change the fact that the figure in dispute was a negotiated figure. However, as I find that the *fixed monthly costs* should be withheld, disclosure of the *variable hourly costs* would reveal the exact amount of fixed monthly costs, and the *variable hourly costs* must therefore, be withheld.

Variable Distance Costs

BC Transit and Wells Grey admit that the variable distance cost is a figure supplied by BC Transit and was not supplied by the third party. However, they argue that the information is "appropriate to sever regardless" because the number is the same number supplied in other Agreements of other related companies. In the alternative, they submit that the information should be withheld under s. 17 of the Act. Rob Dunlop, General Manager of the North Okanagan Handicapped Association, deposes that the variable distance cost is "made up largely of fuel costs, tire maintenance and inspection costs." It appears to me that this figure is essentially a standard industry calculation, as is evidenced in the affidavit of Michael Colborne of Pacific Western Transportation Limited. He deposes that "[I]t is well-known in the industry that the *variable distance costs* are basically the fuel consumption rate and tire mileage efficiency rate multiplied by the total revenue kilometers provided by BC Transit in the RFP." In any case, even if I were to decide that the information is "financial" information supplied by the third party, I do not consider the disclosure of this figure would result in one of the harms specified under s. 21.

Monthly Payment

Finally, with respect to the withheld monthly payment, Steve New of BC Transit's Municipal Systems Program, deposes that, because this figure is derived from the total fixed monthly costs, variable hourly costs, variable distance costs and maintenance costs (a figure already disclosed), this number is effectively based on information supplied by Wells Grey and therefore disclosure would reveal the actual information. BC Transit has

already disclosed all of the direct operating costs excluding the fixed monthly costs, the variable hourly costs and the variable distance costs. It does not escape me that one could easily calculate the sum of those three figures by simply subtracting the known costs from the total of the direct operating costs. The *actual* amounts for those figures cannot be inferred, but the aggregate amount has essentially already been disclosed. In any event, I am not persuaded that disclosure of the monthly amount would reveal the underlying supplied information. Furthermore, the monthly amount of the contract is, in part, based on information that changed as a result of negotiations or discussions between BC Transit and Wells Grey. It is not reasonable to conclude that the monthly payment is "supplied" to BC Transit by Wells Grey. Nor has BC Transit or Wells Grey reasonably shown that significant harm would result to the third party, and I find therefore, s. 21 does not apply to the monthly payment.

4.0 FINDINGS AND RECOMMENDATIONS

For the reasons given above, I find that BC Transit is not authorized by s. 17(1)(b) and (d) of the Act to refuse to disclose the variable distance costs, the monthly payment, the fixed monthly costs or the variable hourly costs in the records in dispute. For the reasons given above, I find that BC Transit is not required by s. 21(1) of the Act to refuse to disclose the variable distance costs or the monthly payment information in the records in dispute. Therefore, I recommend that the Commissioner require, under s. 58(2)(a) of the Act, BC Transit to give the applicant access to the variable distance costs and the monthly payment information in the records in dispute.

I also find for the reasons given above, that BC Transit is required by s. 21(1) of the Act to refuse access to the fixed monthly costs and the variable hourly costs and I recommend that the Commissioner require, under s. 58(2)(c) of the Act, BC Transit to refuse access to the fixed monthly costs and the variable hourly costs.

September 13, 2000

ORIGINAL SIGNED BY

Lorrainne A. Dixon
Executive Director
Office of the Information and Privacy Commissioner