Information and Privacy
Commissioner/Ontario
Commissaire à l'information
et à la protection de la vie privée/Ontario

ORDER P-1104

Appeal P_9500595

Ministry of Transportation

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NATURE OF THE APPEAL:

The Ministry of Transportation (the Ministry) received a request under the Freedom of Information and Protection of Privacy Act (the Act) for access to a copy of the agreement between the Ministry and a named bus supplier, dated June 2, 1995. The responsive records consist of a 10 page written agreement with attached Schedules A, B and C.

Pursuant to section 28 of the Act, the Ministry notified the bus supplier and 11 municipal transit authorities of the request. The bus supplier objected to the disclosure of any information contained in the records. The Ministry then issued a decision in which it granted access to Schedules A, B and C and denied access to the 10 page agreement pursuant to the exemption under section 17(1) of the Act.

The bus supplier (now the appellant) appealed the Ministry's decision to grant access to the schedules, claiming that they also qualify for exemption under section 17(1) of the Act.

A Notice of Inquiry was sent to the Ministry, the appellant and the original requester. Representations were received from the appellant and the Ministry. The only records which are at issue in this appeal are the three schedules to the agreement. The appeal stems from the Ministry's decision **to disclose** these records to the requester. The Ministry's decision to deny access to the 10 page agreement is not at issue.

DISSCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under section 17(1)(a), (b) or (c) the appellant 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 (a), (b) or (c) of section 17(1) will occur.

[Order 36]

Part One

The appellant submits that the records at issue contain commercial information relating to the contractual negotiations between it and its customers, including terms and pricing information. Having reviewed the records, I am satisfied that they contain commercial information, and part one of the section 17(1) test has been satisfied.

Part Two

In order to satisfy part two of the test, the appellant must establish that the information contained in the agreement was **supplied** to the Ministry and secondly that such information was supplied **in confidence** either implicitly or explicitly.

Supplied

A number of previous orders have addressed the question of whether information contained in an agreement entered into between an institution and a third party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been supplied to an institution, the information must be the same as that originally provided by the third party. Since the information contained in an agreement is typically the product of a negotiation process between the institution and a third party, that information will not qualify as originally having been "supplied" for the purposes of section 17(1) of the Act (Orders 36, 87, 203, P-219, P-228, P_251, P-263, P-581, P-609 and P-807).

Other orders issued by the Commissioner's office have held that information contained in a record would reveal information "supplied" by a third party, within the meaning of section 17(1) of the Act, if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution (Orders P-218, P-219, P-228, P_451, P-472 and P_581).

Based on the information before me, specifically the record itself, it is my view that the information contained in Schedule A (Business Commitments) to the agreement is the product of negotiations between the Ministry and the appellant. The appellant has not provided me with evidence which would confirm that the information in Schedule A is the same as that originally provided to the Ministry, or that its disclosure would permit the drawing of accurate inferences about information actually supplied to the Ministry. Accordingly, I find that the information contained in Schedule A was not "supplied" to the Ministry for the purposes of section 17(1) of the Act. As the second part of the test for the application of section 17(1) of the Act has not been met for Schedule A, the section 17(1) exemption will not apply and I uphold the Ministry's decision to disclose Schedule A to the requester.

With respect to Schedule B (Standard Order Form), however, it is my view that the information contained in this record was supplied by the appellant to the Ministry. This record concerns terms to be proposed by the appellant to the municipal transit authorities as a result of the agreement reached with the Ministry. In my view, these terms would eventually be the subject of negotiations between the appellant and each municipal transit authority, not the Ministry. Accordingly, I am satisfied that accurate inferences can be reasonably drawn about the information which was supplied to the Ministry.

With respect to Schedule C (Guaranteed Maximum Price), based on the terms of the agreement it is not clear to me whether this information was the product of negotiations or was supplied by

the appellant. For the purposes of this order, however, I am prepared to assume that this information was supplied by the appellant.

In Confidence

The appellant submits that the information was supplied specifically in confidence and has always been treated as such. In support of this claim, the appellant points out that there are two sections in the agreement which stipulate that the Ministry will maintain the information in the agreement in confidence.

In Order M-169, I made the following comments with respect to the application of the second part of section 10(1) of the Municipal Freedom of Information and Protection of Privacy Act, whose wording is similar to that found in section 17(1) of the Act:

> In regards to whether the information was supplied **in confidence**, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly.

Based on the information provided to me, I am satisfied that the appellant's expectation that the information contained in Schedule B was communicated to the Ministry on the basis that it was confidential and that it was intended to be kept confidential was reasonable.

With respect to Schedule C, however, it is apparent, based on the information provided by the Ministry, that the information contained in this part of the record was discussed publicly with the municipalities involved, and that the information is largely a matter of public record. Given the nature of the information, a guaranteed maximum price for buses ordered from the appellant, I am not satisfied that the appellant's expectation of confidentiality was reasonable, and I find that part two of the test has not been met for this record. Accordingly, I uphold the Ministry's decision to disclose Schedule C to the requester.

Part Three

The appellant submits that disclosure of the records would significantly prejudice its competitive position, interfere with its contractual negotiations and result in undue loss (or possible gain to its competitors). In support of its position, the appellant submits that its competitors would become aware of sensitive and confidential pricing information as well as becoming aware of matters relating to its order book and production capacity. The appellant further submits that knowledge of the information contained in the record may translate directly into a direct loss of orders or revenue having a measurable pecuniary impact on the appellant. Finally, the appellant states that several portions of the record reveal or refer to information regarding its business affairs, future

production intentions and price structures which, if disclosed, could have a material impact on future negotiations.

Having reviewed the representations which have been provided to me and the records at issue, I accept the submissions of the appellant that disclosure of Schedule B could reasonably be expected to prejudice significantly its competitive position. Thus part three of the test has been met and section 17(1)(a) of the Act applies.

Although I found that the second part of the test had not been met in respect of Schedule C, I think it is worth mentioning that, in my view, the information provided by the Ministry which indicates that the information contained in this record was publicly discussed and is largely a matter of public record is fatal to the appellant's argument under this part of the test as well.

ORDER:

1. I order the Ministry **not** to disclose Schedule B.

2. I uphold the Ministry's decision to disclose Schedules A and C.

3. I order the Ministry to disclose Schedules A and C by sending a copy of these records to the requester by **February 23, 1996** but not before **February 19, 1996**.

4. In order to verify compliance with the provisions of this order, I reserve the right to require the Ministry to provide me with a copy of the records which are disclosed to the appellant pursuant to Provision 3.

Original signed by: January 19, 1996
Holly Big Canoe
Inquiry Officer