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

ORDER PO-2721

Appeal PA07-181

Greater Toronto Transit Authority (GO Transit)

Tribunal Services Department
2 Bloor Street East
Suite 1400
Toronto, Ontario
Canada M4W 1A8

Services de tribunal administratif
2, rue Bloor Est
Bureau 1400
Toronto (Ontario)
Canada M4W 1A8

Tel: 416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9188
TTY: 416-325-7539
http://www.ipc.on.ca

BACKGROUND:

The Greater Toronto Transit Authority (GO Transit) retained an organization (affected party #1) to provide Project Management services for the Union Station Rail Corridor expansion project.

The staff of this organization consists of professional engineers. One of their many projects is to improve the signage within Union Station.

GO Transit also contracted with a second organization (affected party #2) by Purchase Order to undertake testing and prepare an objective evaluation of the font, font size and colour which will be used on all signage at Union Station.

NATURE OF THE APPEAL:

GO Transit received a request under the *Freedom of Information and Protection of Privacy Act* (the *Act*) for "…a recent redesign of (station) signage, ostensibly including accessibility for visually-impaired or low-vision riders. This candidate signage project was tested at [named organization] within the last 60 (likely 30) days." The request indicates that printed records were fine but he preferred receiving electronic files and that the request should include:

1. Drawings, illustrations, photographs, or mock-ups of candidate or final designs (whatever is current at the time of receipt of the request)

2. Backgrounders, issue papers and general research leading to the draft or final design of signage in question

3. Documents concerning typeface choice, including research and test, if any

4. Documents concerning test protocols, including testing of visually-impaired people and other people with disabilities. Results of those tests, if available.

The requester states that his request includes "…whatever state the current signage project is in, including draft, beta, preliminary, early, or final forms."

GO Transit denied access to a record responsive to the request pursuant to sections 18(1)(b), 18(1)(f), 18(1)(g) and 18(1)(h) of the *Act*. GO Transit explained that "…the material/report(s) you are requesting are still in the developmental stage and not yet available for public release."

The requester, now the appellant, appealed this decision. In his letter of appeal, the appellant also states that "…signage and way finding in GO Transit stations has a safety component (though not exactly a "grave" one)" and he states that there is a public interest in revealing GO Transit's developmental stages on the basis that "It might be finished improperly and the public could make that conclusion only if interim stages were made available." Accordingly, section 23 of the *Act* was added as an issue in the appeal.

During mediation, the appellant wrote to this office stating that GO Transit now has a final report and he re-iterated that he wishes to obtain access to it. When the mediator contacted GO Transit, she was advised that the report was not yet final. GO Transit subsequently wrote to the appellant

advising that "…this project had been delayed due to other priorities and is scheduled to be finalized sometime in December 2007."

The mediator contacted GO Transit to discuss the records responsive to the request as only one record, the [named organization's] report had been identified as responsive to the request. The mediator asked GO Transit to conduct a further search for records responsive to all parts of the request. GO Transit conducted a further search and located additional responsive records. GO Transit issued a revised decision denying access to the records, in their entirety, pursuant to sections 17(1)(c) (third party information), 18(1)(b), 18(1)(f), 18(1)(g) and 18(1)(h) (economic and other interests) of the *Act*. GO Transit also advised the appellant that it did not have the records in its possession and when it received them it would consider whether a fee estimate applied.

When GO Transit received a copy of the responsive records that were located, it issued a supplementary revised decision stating that it continues to rely on the exemptions cited in its revised decision to deny access to the records in their entirety. GO Transit did not refer to a fee.

The appeal was not resolved by mediation and is now at the adjudication stage of the appeals process.

Initially I sent a Notice of Inquiry to GO Transit and the two affected parties setting out the facts and issues on appeal. I received representations from all three parties.

I then sent a Notice of Inquiry to the appellant along with a complete copy of the representations provided by GO Transit and the two affected parties. The appellant provided representations.

Finally, I provided GO Transit and the affected parties with a complete copy of the appellant's representations and invited them to make representations in reply. I received reply representations from affected party #1 only.

RECORDS:

1. Minutes of Meeting – affected party #1(2 pages)
2. Confused characters (6 pages)
3. Font test (5 pages)
4. Charts – Visual Test at Various Distances (7 pages)
5. Charts – Detailed Statistics Reading at a Distance (13 pages)
6. GO Flyer to participants (1 page)
7. Demographics (1 page)
8. Report – Typeface Font for Signage Trial (37 pages)
9. Key Findings (2 pages)
10. Feedback Form from Participants (58 pages)

DISCUSSION:

THIRD PARTY INFORMATION

GO Transit and the two affected parties submit that section 17(1)(a) and (c) apply to exempt the records from disclosure. Affected party #1 submits that section 17(1)(c) applies to Records 1 and 10 but not Record 6. The representations of affected party #2 relate to Records 2, 3, 4, 5, 7, 8 (except pages 3-4, 35-37) and 9 only. GO Transit submits that section 17 applies to all the records. Sections 17(1)(a) and (c) state:

> 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;
>
> (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, GO Transit and/or the third parties 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

Representations

GO Transit and affected party #2 submit that the withheld records contain technical information for the purpose of the first part of the three-part test. "Technical" information has been defined in prior orders as follows:

> *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].

Affected party #2 states:

> [The] Draft Report it produced on "Transit Typeface Font for Signage Trial" contains "technical" information as contemplated by section 17. The Draft Report contains information belonging to an organized field of knowledge that is generally within the category of applied sciences or mechanical arts. The Draft Report was prepared by professionals in the field who have applied their respective knowledge in this area to determine signage font legibility for individuals with low vision in the context of the new Union Station.
>
> The enclosed two academic articles written about typeface legibility, and psychological variables related to it, reflect the considerable breadth, depth and sophistication of the research and literature in this area. The field of knowledge involves an understanding of how individuals with varying degrees of low vision caused by a variety of ophthalmological conditions perceive letters and numbers of differing typeface…[Affected party #2] submits that typeface legibility is an organized field of knowledge and that its application to signage at the new Union Station was the subject of the Draft Report at issue.

Affected party #1 submits that the records contain scientific, technical and trade secret information. Affected party #1 states that disclosure of the records would reveal how the research was developed, and the discussion of options for obtaining the information need to complete the signage redesign, and reveal the methodology developed to conduct the typeface trial. "Scientific" and "trade secret" information have been defined in past orders to mean:

> *Trade secret* means information including but not limited to a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism which

(i) is, or may be used in a trade or business,

(ii) is not generally known in that trade or business,

(iii) has economic value from not being generally known, and

(iv) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy [Order PO-2010].

Scientific information is information belonging to an organized field of knowledge in the natural, biological or social sciences, or mathematics. In addition, for information to be characterized as scientific, it must relate to the observation and testing of a specific hypothesis or conclusion and be undertaken by an expert in the field [Order PO-2010].

The appellant quotes from GO Transit's representations which state that affected party #2 has significant expertise in the study of low vision and that affected party #2 are experts in the field of visual impairments. The appellant does not dispute these statements. The appellant goes on to state, however:

> But the research in question is not a study of low vision or visual impairments. It is an assessment of legibility and usability of signage for all transit users who can see a sign, that is, normally-sighted and low-vision people, possibly with different native languages, but positively excluding those with no vision or no useful vision.

The appellant submits that affected party #2 has no demonstrated expertise in signage, legibility, and typefaces in a "built environment." The appellant also submits that any methodology that is demonstrated in the records would be "industry standard" methodology.

Finding and analysis

I accept the representations of affected party #2 regarding the type of information in the records. Affected party #2 states in its representations that its expertise and knowledge relate to low vision and typeface legibility for individuals with low vision. Affected party #2 states that Phase II of the study is intended to focus more broadly on the population that would use the new Union Station. In this initial study which is the subject matter of the report at issue, the focus was on typeface legibility for individuals with low vision.

Secondly, the appellant describes the methodology which he believes is demonstrated in the records. The appellant does not appear to dispute the fact that the information in the records would contain a methodology of some kind. Nor does the appellant dispute that the area of study, signage typography, is an organized field of knowledge.

From my review of the records, I find that Records 2, 3, 4, 5, 7, 8 (except pages 3-4 and 35-37) and 9 all contain technical information for the purposes of section 17(1) of the *Act*. I accept that affected party #2 has an expertise in the study of low vision, in all of its aspects. I also accept that signage typography and typography including legibility issues as well as low vision and typeface legibility are all part of an organized field of knowledge within the applied sciences. The records at issue relate to affected party #2's study of typeface legibility for the use on signs in the new Union Station and describe the methodology of affected party #2's study. I am satisfied that Records 2, 3, 4, 5, 7, 8 and 9 meet the requirements for part 1 of the test of the application for section 17(1).

I find that the rest of the records do not contain technical information, or scientific or trade secret information as submitted by the first affected party. Record 1 consists of minutes of a meeting between affected party #1 and affected party #2. The minutes focus on the development of the typeface trial. From my review of this record, I am unable to find that it contains trade secret, scientific or technical information. The meeting minutes, while containing a "to-do list" of tasks to complete to run the trial, do not contain a method or methodology belonging to an organized field of knowledge. Nor does it contain a method or process embodied in a product, device or mechanism that is used in a trade or business, not generally know and have economic value from not being generally known. I find that Record 1 contains the basic structure of the typeface trial and does not contain the type of information protected under section 17(1) of the *Act*. Record 10 contains the feedback forms with the comments made by the participants of the study. The feedback forms ask for "any feedback" and the participants are not directed in any way as to the comments they should give. I find that these forms do not contain scientific, technical or trade secret information. Accordingly, Records 1 and 10 do not meet the requirements for part 1 of the test for the application of section 17(1) and thus can not be found to be exempt under sections 17(1)(a) or (c) of the *Act*. However, I will consider whether these records are exempt under section 18 in my discussion below.

Records 6 and 8 (pages 3-4 and 35-37) also do not contain "technical information" or any of the other types of information that are protected by section 17(1). Record 6 is a flyer advertising for participants in the study. Pages 3-4 of the draft Report (Record 8) contain an introduction of the relationship between GO Transit and the two affected parties and briefly describes the study. Pages 35-37 of the draft Report (Record 8) consist of an appendix with generalized information about affected party #2. As the information in these records does not meet the requirements for part 1 of the test for the application of section 17(1) and thus can not be found to be exempt under sections 17(1)(a) or (c) of the *Act*, I will analyze whether they are exempt under section 18 of the *Act*.

Part 2: supplied in confidence

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, MO-1706].

In order to satisfy the "in confidence" component of part two, the parties resisting disclosure must establish that the supplier had a reasonable expectation of confidentiality, implicit or explicit, at the time the information was provided. This expectation must have an objective basis [Order PO-2020].

In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was

- communicated to the institution on the basis that it was confidential and that it was to be kept confidential
- treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization
- not otherwise disclosed or available from sources to which the public has access
- prepared for a purpose that would not entail disclosure [Order PO-2043]

Representations

GO Transit advises that the "draft" documents relating to the typeface trial were kept at the affected parties' offices and were not to be publicized until completion and approval by GO Transit. GO Transit states:

> If not approved, the study remains deferred and is considered non-published. Information remains confidential as it is considered non-conclusive.
>
> GO Transit has a public library which is registered as a "Special Library". Refer to Special Libraries Association…"Preliminary" and "Draft" reports are not subject to public viewing. Only internal staff have access rights to the drafts.

> Reports submitted by "third parties" identified as "Confidential" are labelled and catalogued as such to protect the public and research students from viewing.
>
> This report is still in draft form and a final recommendation of the type font, size and colour has not been determined. More research is required in order to make the correct recommendation. Drafts are not intended to be made public. [Order MO-1914]

Affected party #2 submits that the purchase order between itself and GO Transit does not specify ownership of the draft Report. Thus, affected party #2 submits that it "retains all copyright interest in and to the draft Report." Affected party #2 further submits that GO Transit only has an "implied licence" to use the draft Report. Affected party #2 states:

> The Report is noted as a "Draft Unpublished Report". This Report is indeed not the final report and it is anticipated that further study will be done before the report is finalized…Once the studies are completed, GO Transit will make a decision as to the signage that takes into account the needs of the anticipated users of the new Union Station. When a decision is made, it is expected that a public statement will be made that will incorporate the salient recommendations of both studies.

Affected party #2 also confirms that it provided the draft Report to GO Transit on April 27, 2007 and that it was implicitly provided in confidence. Affected party #2 states:

> The information contained in the Draft Report and the records at issue is immutable in the sense that it was not subject to negotiation…As well, the Draft Report indicates in its title that it is a "Draft Unpublished Report" and accordingly was considered to have been provided to GO Transit in confidence. The fact that it is noted as "Unpublished" reflects that intention.

Affected party #2 states that the information was communicated to GO Transit on the basis that it was confidential and it has been treated by them in a manner that reflects concern for protection from disclosure. Affected party #2 states that the draft Report is not otherwise available in public sources and it was prepared for a purpose that did not entail disclosure. Affected party #2 concludes:

> [The] Draft Report is Phase I of the study, involving low vision individuals. Phase II of the study will involve a broader spectrum of potential users of the new Union Station. Once both Reports are reviewed by GO Transit, it will make a decision as to how to proceed. When it does so, we are advised that a final report, containing recommendations, will be publicly available.

The appellant submits that the research conducted by affected party #2 is publicly-funded and should be available to the public. He suggests that affected party #2 did not have a reasonable expectation of privacy as the research would eventually be publicized by GO Transit.

Analysis and Finding

From my review of the representations, I find affected party #2 and GO Transit's representations on ownership to be unhelpful to the supplied in confidence discussion. Affected party #2 claims to retain copyright but GO Transit submits that it will have ownership of the final report. In either case, it is not necessary for me to discuss this issue in great length. Even if the draft Report or final Report is subject to the *Copyright Act*, this does not oust the application of the *Act*. Previous orders of this office have found that while copyright may suggest some measure of ownership it does not, in and of itself, provide a basis to deny access to the information under provisions of the *Act* (see Orders MO-2263 and PO-2337).

I accept that the information at issue, namely the draft report and test results (Records 2, 3, 4, 5, 7, 8 (with the exception of pages 3-4 and 35-37) and 9, was supplied by affected party #2 to GO Transit. Affected party #2 was hired by GO Transit to conduct a study into typeface legibility for individuals with low vision. Affected party #2 conducted the necessary tests and drafted a report which was then provided to GO Transit.

I further accept GO Transit and affected party #2's submissions that affected party #2 had a reasonable expectation of privacy when it provided the information to GO Transit. GO Transit refers to Order MO-1914 in support of its position that a draft record, in a process where a final report (when prepared) will be publicized, does not mean that the draft record is a public record. In Order MO-1914, Adjudicator John Swaigen, in dealing with the issue of whether a draft noise study was supplied in confidence, states:

> The fact that a document is a draft rather than a final version of a report is not determinative of whether the document is supplied in confidence. This will depend on all the circumstances of the case. As illustrated by the reply representations of the Town, there is an expectation that some draft reports are to be kept confidential while others are intended for release to the public.
>
> Nor is ownership of the information in a draft report conclusive evidence of whether it was supplied in confidence, although it may be a significant factor in determining this.
>
> …
>
> However, I do not agree with the appellant that because a final document will be made public, the entire process in which that document is generated is public. The fact that the study was prepared for a purpose that would entail making the final report public does not mean that this would necessarily entail making drafts

> public. Given the statements of both the Town and the consultant that their expectations when the draft was submitted were that it was not intended to be public, on balance I am satisfied that the weight of the evidence supports an inference that information in question was supplied in confidence in the circumstances of this appeal.

I agree with Adjudicator Swaigen's findings and find that they are appropriate in this appeal. The appellant submits that affected party #2 had no reasonable expectation of privacy because its research and study were conducted on behalf of GO Transit and was publicly funded. Thus the report, even in draft form, should be available to the public. GO Transit submits that "draft" reports are not subject to public viewing and affected party #2 confirms that this was their understanding when they submitted the draft report to GO Transit. Based on the representations of GO Transit and affected party #2, I am satisfied that when the records at issue were supplied by affected party #2 to GO Transit, there was an expectation that it was not intended to be public. In sum, I find that the information in Records 2, 3, 4, 5, 7, 8 (except pages 3-4 and 35-37) and 9 were supplied by affected party #2 in confidence to GO Transit and thus part 2 of the test under section 17(1) of the *Act* has been met.

Part 3: harms

To meet this part of the test, the institution and/or the third party 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 failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat the claim for exemption where harm can be inferred from other circumstances. However, only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by a party in discharging its onus [Order PO-2020].

Affected party #2 and GO Transit submit that sections 17(1)(a) and (c) apply to the records.

Representations

Affected party #2 submits the following in support of its position that its competitive position would be prejudiced significantly if the records were disclosed:

> [Affected party #2] has competitors who would wish to engage in studies to determine signage design for individuals with low vision. [Affected party #2] submits that if the Draft Report and other relevant records were disclosed, the appellant or a competitor could appropriate the terms and methodology of the study and duplicate it to the loss of [affected party #2]. As noted, [affected party #2] has used its expertise and knowledge in the area of low vision and of typeface

> legibility for individuals with low vision to design the study for GO Transit and to make recommendations regarding typeface in the context of the new Union Station. Its approach and methodology, based on the expertise that [affected party #2] has, may be used in other studies in other contexts. The value of the methodology and applied expertise would be compromised if the appellant or a competitor obtains this information.
>
> [Affected party #2] submits that it has developed its techniques and methods for undergoing typeface legibility tests over the years through time, effort and its expertise in the field of low vision. As in MO-2070, where the harm in respect of section 17(1)(a) of this exemption was upheld, [affected party #2] submits that its techniques and methods have monetary value and would be useful to its competitors. If disclosed, the appellant or a competitor could duplicate this study and appropriate the methodology to the detriment of the [affected party #2].

On the application of section 17(1)(c), affected party #2 submits:

> [Affected party #2] produced the Draft Report based on its expertise in the field of low vision and signage legibility for individuals with low vision. [Affected party #2's] expertise is apparent from the design and methodology of the study. For example, as was noted in the Draft Report, at page 6, [affected party #2's] Accessible Design Services designed the letter and number string content. The design was based on [affected party #2's] expertise and its work and effort. The design and methodology used in the Draft Report, if disclosed, would represent an unfair or undue loss to [affected party #2] and an undue or unfair gain to a competitor.

GO Transit submits that affected party #2 are experts in the field of visual impairments and that there are few sources of this expertise in the field. GO Transit states that the testing methodology used by affected party #2 is proprietary and that:

> [Affected party #2] and [affected party #1] will suffer undue loss if the Appellant were to use the methodologies/testing in his own consulting work. The Appellant would acquire undue gain. The Appellant writes articles on websites, newspapers, provides consulting services, and speaks about the subject matter at conferences. (Exhibits 2, 4, 5)

GO Transit provided a number of exhibits regarding the appellant as evidence that the appellant is a consultant in the field of web accessibility, design and writing.

The appellant's submissions relating to the harms are twofold. The appellant submits that he is not a competitor of affected party #2, affected party #1 or GO Transit and thus their competitive positions under section 17(1)(a) can not be prejudiced. Secondly, the appellant argues that affected party #2 is not an expert in the field of typeface legibility and thus any testing

methodology disclosed would not result in a loss to affected party #2 under section 17(1)(c) as they are not recognized as experts in this field. The appellant states:

> With a business partner, I have done research into typeface legibility for signage applications – for GO Transit, no less (e.g. "GO Transit Type Treatment Report")…
>
> Next, all my other documents that the respondents somehow managed to copy and paste or otherwise print out consisted of *commentary* on the state of signage and way-finding, particularly research in those areas.
>
> …
>
> The respondents admit,.., that I conduct and present research on typeface legibility at conferences. What they did not manage to figure out is that I also present *critiques* of such research.
>
> …
>
> In fact, had respondent parties done their homework and actually bothered to read my articles, they would understand that I have an extensive background in journalism and criticism. I am interested in the topic of *provably* functional typography and in the issue of accessibility for people with disabilities. It seems necessary to explicitly state that I will read the public records in question and write critiques of them – including critiques of purpose, methods, and results, and always within the confines of fair dealing under the *Copyright Act*.
>
> …
>
> There is no economic interest at stake. I am not now nor will I be in competition with [affected party #2], let alone GO or [affected party #1]. (I don't provide direct services to the blind, operate commuter railroads, or run construction projects.)

On the issue of affected party #2's methodology, the appellant states the following:

> In fact, [affected party #2] has no demonstrated "expertise" in signage, legibility, and typefaces in the built environment. As such, [affected party #2] researchers are such greenhorms in the field that all the "methodology" they came up with is surely industry-standard.
>
> How do you test typeface legibility of signage? You decide what fonts to test, you decide on materials and colours, you manufacture some candidate signfaces, you qualify and recruit subjects, you ask their opinions or get them to perform

tasks, you collate and publish the results. There: That's your methodology. There *is* no other methodology.

[Affected party #2] seems so oblivious to the fact that what it is doing is self-evident that it actually admits:

> Item 2 shows the types of font sizes that [affected party #2] chose to study and also reflects the responses that were analyzed in the study…[A]ll the other records at issue reveal the types of fonts and their sizes, the letters and numbers chosen, and their order.

Of course they do. You are testing *fonts* and *signage*.

> Disclosure would also reveal the methodology of the Draft Report in respect of the type of lighting used, the distance between the viewer and the signage, as well as type of lighting used, the distance between the viewer and the signage, as well as details about sign construction and elevation. This information is at the core of the proprietary nature of the Draft Report.

[Affected party #2] is not claiming to invent a new, commercially available, patentable, or otherwise "proprietary" set of systems for lighting, distance measurement, sign construction, or getting up on a ladder and bolting a sign at a certain height, ... Font, size, lighting, distance, and sign construction and elevation are what are being tested and aren't "methods". They are basic experimental facts that would have to be reported in any scientific work. [emphasis in original]

The appellant also notes that affected party #2 has not claimed that it has any other clients for signage work.

Analysis and Finding

I have reviewed the parties' representations and the records and I find that GO Transit and affected party #2 have not provided me with the detailed and convincing evidence needed to establish the harms in section 17(1)(a) of the *Act*.

On the application of section 17(1)(a), affected party #2 argues that competitors could use the methodology in the records to duplicate the study and would significantly prejudice their competitive position. Affected party #2 does not explain who its competitors are and the industry it is competing in. Are its competitors other organizations with visual impairment expertise or are they organizations focused on signage design and accessibility issues? Are these markets competitive and how would disclosure of the information at issue in this appeal prejudice affected party #2?

Affected party #2 refers to Order MO-2070 in their representations in support of their position that the disclosure of the information could reasonably be expected to significantly prejudice their competitive position. In Order MO-2070, the records at issue consisted of two responses to Request for Proposals made by an affected party to the City of Barrie. The subject matter of the Request for Proposals dealt with alternative voting methods, and electronic voting systems. Adjudicator Catherine Corban found that the records contained commercial, financial, and technical information as well as trade secrets belonging to the affected party. After reviewing the records and representations of the affected party, Adjudicator Corban found the following with respect to two attachments submitted by the affected party:

> Having reviewed both these attachments, I accept the affected party's arguments that they provide considerable detail about the affected party's methods and techniques for both the implementation and functioning of their product. It is evident that these methods and techniques, some of which might qualify as trade secrets, have been developed over a great deal of time and trial and error. I accept that their disclosure could reasonably be expected to result in prejudice to the affected party's competitive position…

In regard to another attachment which contained a "client list," Adjudicator Corban found:

> Attachment 10 of Record 2, "User's List", and page 6 of Record 5, are both lists of the affected party's clients that were using an electronic voting system as of April 2000 and 1997, respectively. I accept that disclosure of these client lists could reasonably be expected to result in prejudice to the competitive position of the affected party…Client lists are created and compiled as a result of a significant degree of work on the part of the company to whom the list relates, and disclosure could reasonably be expected to provide a competitor with a significant advantage facilitating their ability to compete with the affected party and attempt to woo existing clients away from the affected party.

I find the circumstances in the present appeal to be quite different than those presented in the appeal in Order MO-2070. Affected party #2 did not provide the same detailed and convincing evidence as did the affected party in Order MO-2070 and the records themselves do not contain "considerable detail about the affected party's methods and techniques." Nor do the records at issue contain the client lists of affected party #2. Without the detailed and convincing evidence, I find affected party #2's claims of the expected prejudice to their competitive position to be speculative and unsubstantiated.

GO Transit states in its representations that affected party #2 are experts in the field of low vision studies and that there are "very few sources" with similar expertise. In addition, the draft Report (Record 8) makes reference to the fact that GO Transit and affected party #1 approached affected party #2 to conduct the study. The fact that there are very few sources with similar expertise and the fact that GO Transit approached affected party #2 directly leads me to believe that affected party #2 has few competitors in this area. From my review of the parties'

representations and the records at issue, I understand that there is an interest in the field of typeface legibility and signage design; however, I am unable to discern that there is a highly competitive industry and that affected party #2 stands to suffer prejudice by disclosure of the information at issue.

GO Transit's submissions and evidence presented appear to suggest that the appellant may be a competitor in the typeface legibility market. The appellant admits that he has done work for GO Transit in the past and he admits that he would use the information in the record to provide a critique of the study conducted by affected party #2. Despite the evidence provided by GO Transit on the work done by the appellant, I find that the appellant is not a competitor of affected party #2 and agree with the appellant that the majority of his work deals with the critique of typeface legibility and accessibility issues. The appellant does not make claims to being an expert or knowledgeable in low vision accessibility issues. Even if the appellant were to publish his critique of the study conducted by affected party #2, or present his findings at a conference, I am not satisfied that this would significantly prejudice affected party #2's competitive position.

Finally, affected party #2 and GO Transit do not make representations on whether disclosure would significantly interfere with the contractual or other negotiations between them. In addition, I have no evidence in the records that there are ongoing contractual issues or negotiations between them. As such, I find that section 17(1)(a) does not apply to the records at issue.

Regarding section 17(1)(c), I am persuaded by the appellant's argument in his representations that the testing methodology described by affected party #2, including use of font, size, lighting, location are standard ways of testing signage readability. To be clear, once affected party #2 picked the font types to test and designed the letter and number string content, the actual testing is conducted in the manner described by the appellant.

Affected party #2 references the letter and number string content on page 6 of the draft Report (Record 8) as an example of the expertise that went into designing the methodology used in the study, and the loss that would occur upon disclosure. The letter and number string were designed by affected party #2's Accessible Design Services in order to properly test each font. I note that affected party #2's Accessible Design Service is a consulting service run by affected party #2 on a fee-for-service basis. From my review of the records and the representations, I agree with affected party #2 that the rationale for the letter and number string content used in the study is technical information which was supplied in confidence to GO Transit. I accept that work and effort were expended by the Accessible Design Service to develop the rationale for the letter and number strings used in the study. I note that the letter and number strings are also contained in the photographs on pages 7, 8, 9, 10 and Appendix A of Record 8. The letter and number strings are also contained in the Font Test on Record 3. I find that disclosure of the information in these records could reasonably be expected to result in undue loss to affected party #2.

However, affected party #2 and GO Transit do not specify other content in the records as examples of its expertise or work completed by the Accessible Design Service. Nor was I able to discern from my review of the records, other examples of technical information whose disclosure would result in undue loss to affected party #2 or undue gain to the appellant. I find that GO Transit and affected party #2 have not provided me with the detailed and convincing evidence necessary to establish that it would suffer undue loss if the information in the records (with the exception of my discussion above regarding Records 3 and 6) is disclosed.

GO Transit in its representations states that it will own the final report upon completion; however, GO Transit will not own the background intellectual property or methodologies used to prepare the report that belonged to affected party #2. Further in its representations, GO Transit submits that the testing methodology used by affected party #2 is proprietary and can only be acquired through professional education, research and extensive working experience in this particular field.

From my review of the records, I find that GO Transit's claims that the records at issue contain affected party #2's proprietary information or intellectual property are not substantiated by either the records or representations of the parties. Affected party #2 makes no claims that the records contain trade secret information or that any of the information is "intellectual property." Accordingly, I am unable to find that disclosure of the information in Records 2, 4, 5, 7 and 9 could reasonably be expected to result in undue loss or gain to affected party #2 or the appellant.

In conclusion, I have found that section 17(1)(c) only applies to the letter and number string information on pages 6 and 7 of Record 8, the pictures on pages 7, 8, 9, 10, Appendix A of Record 8 and all of Record 3. The rest of the records are not exempt under section 17(1) and I will deal with these records below in my discussion of section 18.

ECONOMIC AND OTHER INTERESTS

GO Transit claims that sections 18(1)(b), (f) and (g) apply to the records at issue. In its representations, GO Transit states it is no longer relying on 18(1)(h) of the *Act*. To be clear, I will be considering the application of section 18 to Records 1, 2, 4, 5, 6, 7, 8 (page 3-4, 35-37), 9 and 10 which I found not exempt under section 17. Sections 18(1)(b), (f), (g) state:

> A head may refuse to disclose a record that contains,
>
> (b) information obtained through research by an employee of an institution where the disclosure could reasonably be expected to deprive the employee of priority of publication;
>
> (f) plans relating to the management of personnel or the administration of an institution that have not yet been put into operation or made public;

> (g) information including the proposed plans, policies or projects of an institution where the disclosure could reasonably be expected to result in premature disclosure of a pending policy decision or undue financial benefit or loss to a person;

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 sections 18(1)(b) and (g) 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.)].

GO Transits submits the following with respect to the application of sections 18(1)(b), (f) and (g):

> Disclosure will deprive the authors, [Affected Party #1], [Affected party #2] and GO Transit, of priority of publication.
>
> Once the final report is received, government approvals, priorities and budget allocations must be considered prior to the initiation of study recommendations. GO Transit will be required to:
>
> a) review recommendations
>
> b) obtain appropriate Board and Ministerial approvals prior to implementation and public disclosure
>
> c) obtain government funding
>
> d) initiate manufacturing of signs through internal or external sources

e) incorporate standards in corporate policy/procedures and administer operation

Premature disclosure of this information will impact or create public expectations that could limit the decisions that GO Transit can make. This will ultimately affect policy decisions, plans relating to the administration of the institution that have not been put into operation or made public.

GO Transit will suffer an undue financial loss if study recommendations are questioned and further analysis is required.

The Appellant will acquire technical knowledge resulting in an undue financial benefit.

If Senior Management does not approve, recommendations would not be put into effect and the study would remain deferred and may or may not be brought forward, at a later date.

In support of GO Transit's representations, affected party #1 submitted the following:

The work that is the subject of this appeal is believed to be new research in this field. As such, the public disclosure of the information, before the work is completed, could potentially deprive the research organization of priority of publication. The issue of publishing the results of the study, as part of the research agency's broader mandate, was discussed and priority of publication was established as an objective of the work. That is, the research group was retained on the basis that they would be able to publish the results of the work once it had been approved by GO Transit.

As the work has moved into a second stage, the information requested under this appeal has not yet been finalized, approved by GO Transit or published by the research organization.

GO Transit has a set of internal processes for the formal approval of work undertaken on its behalf…As a result, the work is not finalized and the plans have not yet been put into operation or made public.

The public disclosure of the work that is the subject of this appeal would reveal how the signage policy is being developed and potentially allow the appellant to benefit.

The appellant submits that the affected party #2 is an outside consultant and not an "employee" of GO Transit. In addition, the appellant notes that there is no "extant" signage policy decision on the part of GO Transit.

Section 18(1)(b): research

For section 18(1)(b) to apply, GO Transit must show that:

(i) the record contains information obtained through research of an employee of the institution, and

(ii) its disclosure could reasonably be expected to deprive the employee of priority of publication.

Previous orders have upheld the exemption in circumstances where cogent evidence was provided to support the position that an employee intended to publish a specific record [Order PO-2166].

I agree with the appellant's submission on the application of this exemption. There is nothing in GO Transit or affected party #2's representations which implies or details that there is an employer and employee relationship between these two organizations. Similarly, there is nothing in GO Transit or affected party #1's representations which implies or details that there is an employer and employee relationship between GO Transit and affected party #1. While the records contain information obtained through research, the research conducted was not done by an employee of GO Transit. Accordingly, I find that this exemption does not apply to the records remaining at issue.

Section 18(1)(f): plans relating to the management of personnel

In order for section 18(1)(f) to apply, GO Transit must show that:

1. the record contains a plan or plans, and

2. the plan or plans relate to:

   (i) the management of personnel, or
   (ii) the administration of an institution, and

3. the plan or plans have not yet been put into operation or made public [Order PO-2071]

In Order P-348, former Commissioner Tom Wright considered the question of what constitutes a "plan" for the purposes of section 18(1)(f). He stated:

> The eighth edition of The Concise Oxford Dictionary defines "plan" as "a formulated and especially detailed method by which a thing is to be done; a design or scheme". In my view, the record cannot properly be considered a "plan". It contains certain recommendations which, if adopted and implemented

> by the institution, might involve the formulation of a detailed plan, but the record itself is not a plan or a proposed plan.

This office has since adopted Commissioner Wright's definition of a "plan" for the purposes of section 18(1)(f), and I adopt his reasoning in the present appeal.

From my review of the records and the representations of the parties, I find that section 18(1)(f) does not apply. GO Transit submits that the draft Report (Record 8) is in a "draft" form and that "a final recommendation of the type font, size and colour has not been determined. More research is required in order to make the correct recommendation." GO Transit further, in its representations quoted above, sets out the process once a final report is received which includes getting government approvals, priorities and budget allocations prior to the initiation of study recommendations. I find that the conclusions in the draft report cannot properly be considered a plan. Like the record at issue in Order P-348, the study contains certain recommendations which, if adopted and implemented by GO Transit, might involve the formulation of a plan. As stated above, Record 1 contains meeting minutes that relate to the study. Record 2 is a document entitled "Confused Characters." Record 4 is chart information regarding visual tests at various distances. Record 5 contains charts about Detailed Statistics Reading at a Distance. Record 6 is a flyer created by affected party #2 to recruit participants for the study. Record 7 is a document about GO Transit Demographics. Pages 3-4 and 35-37 of Record 8 are generalized information about affected party #2. Record 9 contains the key findings of the study and Record 10 contains the feedback forms from the participants in the study. None of these records are themselves or collectively a plan or proposed plan relating to management of personnel or the administration of GO Transit. Accordingly, section 18(1)(f) does not apply to exempt the records from disclosure.

Section 18(1)(g): proposed plans, policies or projects

In order for section 18(1)(g) to apply, GO Transit must show that:

> 1. the record contains information including proposed plans, policies or projects of an institution; and
>
> 2. disclosure of the record could reasonably be expected to result in:
>
> (i) premature disclosure of a pending policy decision, or
> (ii) undue financial benefit or loss to a person.
>
> [Order PO-1709, upheld on judicial review in *Ontario (Minister of Health and Long-Term Care) v. Goodis*, [2000] O.J. No. 4944 (Div. Ct.)]

For this section to apply, there must exist a policy decision that the institution has already made [Order P-726].

As stated above, GO Transit submits that the records contain information including a proposed plan or policy for their signage development. As above, in my discussion on section 18(1)(f), I find that the information at issue in the record does not contain the proposed plans, policies or projects of GO Transit. I have described the records in my discussion above and the records remaining at issue predominantly contain chart information about the study, confused characters, meeting minutes, feedback forms, and generalized information about affected party #2. GO Transit has not provided me with the "detailed and convincing" evidence to establish a reasonable expectation of harm under section 18(1)(g) if the information at issue is disclosed. As such I find that section 18(1)(g) does not apply to exempt the information at issue from disclosure.

In summary, I find that none of the discretionary exemptions in sections 18(1)(b), (f) or (g) apply to the records.

PUBLIC INTEREST IN DISCLOSURE

The appellant claims that there is a compelling public interest in disclosure of the records and that section 23 of the *Act* is applicable. Thus, the appellant argues that the exemptions set out in section 17 does not apply to exempt the information contained in the draft Report (Record 8) which I have found exempt under section 17(1)(c), namely the letter and number strings.

Section 23 states:

> An exemption from disclosure of a record under sections 13, 15, **17**, 18, 20, 21 and 21.1 does not apply where a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption.

For section 23 to apply, two requirements must be met. First, there must be a compelling public interest in disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption.

In considering whether there is a "public interest" in disclosure of the record, the first question to ask is whether there is a relationship between the record and the *Act*'s central purpose of shedding light on the operations of government [Order P-984]. Previous orders have stated that in order to find a compelling public interest in disclosure, the information in the record must serve the purpose of informing the citizenry about the activities of their government, adding in some way to the information the public has to make effective use of the means of expressing public opinion or to make political choices [Order P-984].

A public interest does not exist where the interests being advanced are essentially private in nature [Orders P-12, P-347, P-1439]. Where a private interest in disclosure raises issues of more general application, a public interest may be found to exist [Order MO-1564].

The word "compelling" has been defined in previous orders as "rousing strong interest or attention" [Order P-984].

Any public interest in *non*-disclosure that may exist also must be considered [*Ontario Hydro v. Mitchinson*, [1996] O.J. No. 4636 (Div. Ct.)].

Representations

The appellant submits the following in support of his position that there is a compelling public interest in disclosure of the records:

> First, I am a member of the public. Through my published critique, the public at large will have access to information about the research practices of a public body. Further, publicly-funded research cannot be "supplied in confidence," as [affected party #2] asserts…Research must be published so that other researchers can scrutinize and attempt to reproduce the findings. Research paid for by a public body is a public document.
>
> POSSIBLE MISDIRECTION OF PUBLIC FUNDS
>
> There is an important whistleblower or accountability-of-public-funds aspect to releasing the research records.
>
> [Affected party #1] strains the envelope of credulity somewhat when it writes:
>
> > It is our opinion that there is no compelling interest in disclosing the records that are the subject of this appeal. The research does not shed light on the functioning of government, impact public opinion or affect political choices.
>
> The *Act* does not limit "public interest" to those narrow topics. In any event, the first claim is false: The research adamantly *does* "shed light on the functioning of government," viz its use of scarce public dollars for potentially questionable research and its use of more of those dollars to bury that research.

The appellant also submits that there is potentially a public safety issue and states:

> I remind all parties that I never claimed there was a "grave" public-safety aspect to the records in question. You will *probably* not lose life or limb in the hypothetical, but possible, scenario in which [Affected party #1], [Affected party #2], and GO Transit decided on a typeface up front and wrote research to back up that choice post-facto.

> On the other hand, while GO Transit claims that it, "[Affected party #1] Consultants, and [Affected party #2] have considered all of the safety components in this study," in fact it is my contention that all parties know so little about typography that the research will recommend use of typefaces that aren't *sufficiently better* than the current Helvetica. In the case of an exit sign, statistically distinguishable increases in legibility could save lives. By choosing the wrong fonts due to ignorance, the research would fail to identify typefaces with the *highest increase* in legibility over Helvetica. That could, but probably would not, have a safety implication.

GO Transit, affected party #1 and affected party #2 submit that the appellant's interest in the information at issue is primarily a private one, and even if there is a public interest in the records, this interest is not compelling.

Analysis and finding

I have carefully reviewed the portions of the record which I have found exempt under section 17(1)(c) of the *Act* and the representations of the appellant. Although I may accept that there may be a public interest in the use of public funds, the research practices of government agencies and the public safety issues of proper signage, there is insufficient evidence before me to support a finding that there is a compelling public interest in the kind of information I have found to be exempt under section 17(1) of the *Act*. Disclosure of this information would not shed light on GO Transit's research spending policies nor would it address the public safety issue. For this reason, I find that the public interest override provision, in section 23, has no application to the information I have found exempt under section 17(1)(c) on pages 6 and 7 of Record 8, the photographs on pages 7, 8, 9, 10 and Appendix A, and all of Record 3.

ORDER:

1. I uphold GO Transit's decision to refuse access under section 17(1)(c) to all of Record 3 and those portions of Record 8 which I have highlighted on the copy of Record 8 provided to GO Transit with this order.

2. I order GO Transit to provide the appellant with copies of those portions of the record which are not highlighted in the copy of Record 8 that was provided to GO Transit as well as all of Records 1, 2, 4, 5, 6, 7, 9 and 10 by November 5, 2008 but not before October 30, 2008.

3. In order to verify compliance with the terms of Order Provision 2, I reserve the right to require GO Transit to provide me with copies of the records that are disclosed to the appellant.

Original signed by: September 30, 2008
Stephanie Haly
Adjudicator