



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

## NOTICE OF INQUIRY

under the *Freedom of Information and  
Protection of Privacy Act* (the *Act*)

<b>Appeal Number:</b>	<b>PA-050178-1</b>
<b>From Decision of:</b>	<b>Greater Toronto Transit Authority (GO Transit)</b>
<b>Request File Number:</b>	<b>ADM-0126-05</b>
<b>Date of This Notice:</b>	<b>April 5, 2006</b>
<b>Representations Due:</b>	<b>April 28, 2006</b>

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### NATURE OF THE APPEAL:

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

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

GO Transit subsequently issued a supplementary decision in which it enclosed additional

information that had been inadvertently omitted as a result of a photocopying error.

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

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

The mediator contacted the third parties in order to determine if they would consent to the release of the severed information relating to them. These third parties did not consent to the release of any additional information.

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

I commenced my inquiry by first seeking representations from GO Transit on all issues and from five affected third parties on issues A and B only. GO Transit submitted representations in response and agreed to share them in their entirety with the appellant. Two of the five affected third parties (the third parties) submitted representations. One of the third party's (third party #1) has agreed to share its representations with the appellant in their entirety ; the second third party (third party #2) has agreed to share the non-confidential portions of its representations with the appellant.

I am now seeking representations from the appellant on all issues and include with this Notice of Inquiry the complete representations of GO Transit and third party #1 and the non-confidential representations of third party #2.

## **RECORDS:**

The following three records remain at issue:

1. Addendum to Rail Infrastructure Construction Operating Agreement (released in part)
2. Canada Strategic Infrastructure Fund Agreement (released in part)
3. Stakeholder Agreement Letter (withheld in full)

## **BURDEN OF PROOF:**

Please note that under section 53 of the *Act*, where an institution refuses access to a record or part of a record, the burden of proof that the record or part of the record falls within one of the specified exemptions in the *Act* lies upon the institution.

## ISSUES:

### SHARING OF REPRESENTATIONS

**Issue A: Do you want me to withhold any portions of your representations from the institution and the third parties? If so, why?**

I may share your representations with the institution and the third parties.

Do you consent to the sharing of your representations in their entirety? If so, please confirm this in writing.

If you do not consent, exactly which portions do you want withheld? Please review the confidentiality criteria set out in the enclosed "Inquiry Procedure at the Adjudication Stage" and explain why these criteria apply to the portions you want me to withhold.

If there is more than one other party, please indicate to which party your confidentiality request applies.

*Please note that if you make no submissions on this issue, I may decide to share some or all of your representations without further notice to you.*

### THIRD PARTY INFORMATION

**Issue B: Does the mandatory exemption at section 17 apply to the records?**

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

Section 17(1) states:

A head shall refuse to disclose a record that reveals a trade secret or scientific, technical, commercial, financial or labour relations information, supplied in confidence implicitly or explicitly, where the disclosure could reasonably be expected to,

- (a) prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group of persons, or organization;
- (b) result in similar information no longer being supplied to the institution where it is in the public interest that similar information continue to be so supplied;
- (c) result in undue loss or gain to any person, group, committee or financial institution or agency; or

- (d) reveal information supplied to or the report of a conciliation officer, mediator, labour relations officer or other person appointed to resolve a labour relations dispute.

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

For section 17(1) to apply, the institution and/or the third party must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; and
2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; and
3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in paragraph (a), (b), (c) and/or (d) of section 17(1) will occur.

### **Part 1: type of information**

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

*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].

*Technical information* is information belonging to an organized field of knowledge that would fall under the general categories of applied sciences or mechanical arts. Examples of these fields include architecture, engineering or electronics. While it is difficult to define technical information in a precise fashion, it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing [Order PO-2010].

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010].

*Labour relations information* has been found to include:

- discussions regarding an agency's approach to dealing with the management of their employees during a labour dispute [P-1540]
- information compiled in the course of the negotiation of pay equity plans between a hospital and the bargaining agents representing its employees [P-653],

but not to include:

- an analysis of the performance of two employees on a project [MO-1215]
- an account of an alleged incident at a child care centre [P-121]
- the names and addresses of employers who were the subject of levies or fines under workers' compensation legislation [P-373, upheld in *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1998), 41 O.R. (3d) 464 (C.A.)]

Does the record reveal a trade secret or scientific, technical, commercial, financial or labour relations information? Please explain.

**Part 2: supplied in confidence**

*Supplied*

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

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

The contents of a contract involving an institution and a third party will not normally qualify as having been “supplied” for the purpose of section 17(1). The provisions of a contract, in general, have been treated as mutually generated, rather than “supplied” by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party [Orders PO-2018, MO-1706].

*In confidence*

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]

Did the third parties supply the information to the institution? Please explain.

Did the third parties supply the information with a reasonable expectation of confidentiality? Was the expectation explicit or implicit? Please explain.

**Part 3: harms**

***General principles***

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].

***Section 17(1)(a): prejudice to competitive position***

Could disclosure of the record significantly prejudice the competitive position of a person, group of persons or organization? Please explain.

Could disclosure of the record interfere significantly with the contractual or other negotiations of a person, group of persons or organization? Please explain.

***Section 17(1)(b): similar information no longer supplied***

Could disclosure of the record result in similar information no longer being supplied to the institution? Please explain.

Is it in the public interest that similar information continue to be supplied to the institution? What is the harm that would result if similar information were no longer supplied to the institution? Please explain.

***Section 17(1)(c): undue loss or gain***

Could disclosure of the record result in undue loss or gain to any person, group, committee or financial institution or agency? Please explain.

**Section 17(2): tax information**

Section 17(2) states:

A head shall refuse to disclose a record that reveals information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

Section 17(2) does not prevent the taxpayer to which the tax liability accrues from obtaining this information upon request [Order PO-1059-I].

Does the record reveal information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax? Please explain.

**Section 17(3): exception to the exemption**

Section 17(3) states:

A head may disclose a record described in subsection (1) or (2) if the person to whom the information relates consents to the disclosure.

Has the person to whom the information relates consented to disclosure?

**ECONOMIC AND OTHER INTERESTS**

**Issue C: Does the discretionary exemption at section 18(1)(c) apply to the records?**

**General principles**

Section 18(1)(c) states:

A head may refuse to disclose a record that contains,

information where the disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;

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

In our view, the commercially valuable information of institutions such as this should be exempt from the general rule of public access to the same extent that similar information of non-governmental organizations is protected under the statute . . . Government sponsored research is



sometimes undertaken with the intention of developing expertise or scientific innovations which can be exploited.

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

**Section 18(1)(c): prejudice to economic interests**

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

This exemption is arguably broader than section 18(1)(a) in that it does not require the institution to establish that the information in the record belongs to the institution, that it falls within any particular category or type of information, or that it has intrinsic monetary value. The exemption requires only that disclosure of the information could reasonably be expected to prejudice the institution’s economic interests or competitive position [Order PO-2014-I].

Could disclosure of the information in the record reasonably be expected to prejudice the economic interests or competitive position of an institution? Please explain.

**Section 18(2): exception to the exemption**

Section 18(2) states:

- (2) A head shall not refuse under subsection (1) to disclose a record that contains the results of product or environmental testing carried out by or for an institution, unless,
  - (a) the testing was done as a service to a person, a group of persons or an organization other than an institution and for a fee; or
  - (b) the testing was conducted as preliminary or experimental tests for the purpose of developing methods of testing.

Does the record contain the results of product or environmental testing carried out by or for an institution? Was the testing done as a service to a person, group of persons or organization other than for an institution and for a fee? Was the testing conducted as preliminary or experimental tests for the purpose of developing methods of testing?

Please explain.

## **EXERCISE OF DISCRETION**

**Issue D: Did GO Transit exercise its discretion under section 18(1)(c)? If so, should this office uphold the exercise of discretion?**

### **General principles**

The section 18)(1)(c) exemption is discretionary, and permits an institution to disclose information, despite the fact that it could withhold it. An institution must exercise its discretion. On appeal, the Commissioner may determine whether the institution failed to do so.

In addition, the Commissioner may find that the institution erred in exercising its discretion where, for example,

- it does so in bad faith or for an improper purpose
- it takes into account irrelevant considerations
- it fails to take into account relevant considerations

In either case this office may send the matter back to the institution for an exercise of discretion based on proper considerations [Order MO-1573]. This office may not, however, substitute its own discretion for that of the institution [section 54(2)].

### **Relevant considerations**

Relevant considerations may include those listed below. However, not all those listed will necessarily be relevant, and additional unlisted considerations may be relevant [Orders P-344, MO-1573]:

- the purposes of the *Act*, including the principles that
  - information should be available to the public
  - individuals should have a right of access to their own personal information
  - exemptions from the right of access should be limited and specific
  - the privacy of individuals should be protected
- the wording of the exemption and the interests it seeks to protect

- whether the requester is seeking his or her own personal information
- whether the requester has a sympathetic or compelling need to receive the information
- whether the requester is an individual or an organization
- the relationship between the requester and any affected persons
- whether disclosure will increase public confidence in the operation of the institution
- the nature of the information and the extent to which it is significant and/or sensitive to the institution, the requester or any affected person
- the age of the information
- the historic practice of the institution with respect to similar information

In denying access to the records, did GO Transit exercise its discretion under section 18(1)(c)?

What factors did GO Transit consider in exercising its discretion?

Did GO Transit exercise its discretion in bad faith or for an improper purpose?

Did GO Transit take into account all relevant factors?

Did GO Transit take into account any irrelevant factors?

### **SEVERANCES:**

Section 10(2) of the *Act* obliges the institution to disclose as much of any responsive record as can reasonably be severed without disclosing material which is exempt. The institution is asked to consider whether there is any undisclosed information which should be disclosed pursuant to section 10(2) and to make representations on that subject.

Please note that pursuant to sections 10(2), 54(1) and 54(3) of the *Act*, the decision maker may order the disclosure of any portions of records which are not found to be subject to an exemption.

### **DOCUMENTATION IN SUPPORT OF REPRESENTATIONS:**

In order to assist the decision maker in this appeal, the parties are requested to submit with their representations any **background materials, documentation, policies, statutory provisions, by-laws, or case authorities**, which support their representations.

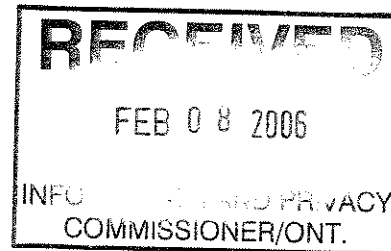
**TESTS:**

The tests mentioned in the Notice of Inquiry are intended to assist the parties to make their representations. Please note that where the IPC has not yet articulated a test, no test is included.

February 8, 2006

Phone: (416) 869-3600 ext.5350  
Fax: (416) 869-3525  
Email: AnnE@gotransit.com

Mr. Bernard Morrow  
Adjudicator  
Information and Privacy Commissioner/Ontario  
Tribunal Services Department  
2 Bloor Street East, Suite 1400  
Toronto, ON M4W 1A8



Dear Mr. Morrow:

**Subject: Notice of Inquiry**  
**Appeal PA-050178-1**  
**Our File ADM-0126-05**

Further to request to provide “representation” with respect to our previous access decisions relative to the above-noted file. We will deal specifically with the records at issue, as per your letter of January 19, 2006.

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

The document was released in its entirety, with the exception of very minor “financial” severances. Our business partner (CN Rail) supported our proposed partial release of this document. (See Attachment #1)

Section 17(1) and Section 18(1)(c) clearly support our decision.

Release of any financial information between the privately controlled CN Rail and GO Transit could very adversely affect our ability to negotiate effectively if we were not in a position to provide a level of security and confidentiality to firms bidding on government contracts, etc.

This document has been severed and released in accordance with the Act.

2. **Canada Strategic Infrastructure Fund Agreement (released in part)**

After a comprehensive review of this document, GO Transit now considers same can be released in its entirety.

The original "severing" was felt to be appropriate to the integrity of our contract and tendering process. However, due to the fact these figures (for the most part) represent "major projects" which will be identified in GO Transit's budget figures, it has been agreed to release same. No concerns have been raised by the other named parties (Ministry of Transportation; Transport Canada).

Severed pages are attached hereto for Release. (See Attachment #2).

3. **Stakeholder Agreement Letter (withheld in full)**

This agreement was withheld in its entirety. GO Transit is confident that it meets all the criteria for exemption as covered under Section 17(1) of the Act; namely financial information; given in confidence; and most definitely could harm the competitive position of both GO Transit and SNC-Lavalin Engineering, the party most affected. Prior to making our initial decision, we contacted the third party. A copy of Albert Swetnam's letter of May 17, 2005 is attached. Please pay particular attention to Item #2 in the letter which references confidential obligations between Transport Canada and UPAG (SNC-Lavalin). (See Attachment #3)

Again, GO Transit supports its original decision not to release this document. This decision meets the criteria as set out in the Act.

If you require anything further, please let me know.

Sincerely,



A. Elliott Biebl  
Freedom of Information &  
Protection of Privacy Co-ordinator

Attachments (1)

c: Peter R. Smith, C.M., Chairman



**SNC-LAVALIN**  
**Engineers & Constructors**

ATTACHMENT #3

SNC-LAVALIN  
ENGINEERS & CONSTRUCTORS INC.  
2200 Lake Shore Blvd. West  
Toronto, Ontario  
Canada M8V 1A4

Telephone: (416) 252-5311  
Fax: (416) 231-5356

May 17, 2005

GO Transit  
20 Bay Street, Suite 600  
Toronto, Ontario  
M5J 2W3

Attention: Ms. Ann Elliott Biebl  
Freedom of Information and  
Protection of Privacy Coordinator

Dear Ms. Elliott Biebl

**Re: Freedom of Information  
Access Request ADM-0126-05  
Stakeholder Agreement Letter**


Thank you for your letter dated April 25, 2005.

We object to the disclosure of the Stakeholder Agreement Letter referred to in your letter, for the following reasons:

1. The information comprises confidential technical, commercial, and financial information; and
2. The information was supplied in confidence, pursuant to the confidentiality obligations under the Transport Canada Request for Business Case ("RFBC") process;
3. The release of this information will lead to the following harms to the Union Pearson Airlink Group (UPAG):
  - (a) It will interfere with ongoing negotiations in respect of parallel agreements with other stakeholders (particularly CN) as well as GTAA, and others, by disclosing bargaining positions taken, and provisions accepted, by UPAG, thereby giving other parties a competitive advantage in ongoing negotiations with UPAG; and
  - (b) Based on the foregoing, there would be a potential undue loss to UPAG over the life of the project.

In the result, we must insist that the Stakeholder Letter Agreement not be disclosed.

Yours very truly  
**SNC-Lavalin Engineers & Constructors Inc.**

  
Albert Sweetnam, P.Eng.  
Senior Vice President & General Manager  
Infrastructure & Environment

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**UNION PEARSON AIRLINK GROUP**

c/o SNC-Lavalin Inc.  
2200 Lake Shore Blvd. West  
Toronto, Ontario  
Canada M8V 1A4

Telephone: (416) 252-5311

Fax: (416) 231-5356

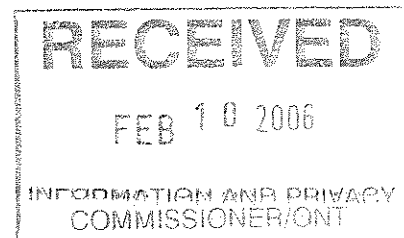
**Information and Privacy Commissioner/Ontario**

Tribunal Services Department  
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Suite 1400  
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**BY FACSIMILE: 416-325-9188**

Attention: Norma Thorney  
Assistant Registrar

**Re: Freedom of Information  
Appeal PA-050178-1  
Stakeholder Agreement Letter (the "Interim Contract")**



Thank you for your letter of April 25.

As you are aware, SNC-Lavalin Engineers & Constructors Inc. on behalf of UPAG ("UPAG" which term in this letter refers to UPAG and each of its members) is involved in ongoing negotiations in respect of the Blue 22 Air Rail Link Project. The existing Interim Contract, as amended from time to time, is intended to form the basis of a comprehensive agreement between UPAG and Go Transit.

We object to the disclosure of the Interim Contract for the following reasons:

1. The information comprises technical, commercial, and financial information; and
2. The information was supplied in confidence, pursuant to the shared understanding and intention of UPAG and Go Transit to conduct the negotiations confidentially, as well as the confidentiality obligations under the Transport Canada Request for Business Case ("RFBC") process;
3. The release of this information will lead to the following harms to UPAG: It will cause significant prejudice to the competitive position of UPAG by disclosing to existing and potential competitors, clients, and other counterparties contractual provisions accepted by UPAG for this mandate; and



4. Based on the foregoing,

- a. there would be a potential undue gain to competitors of UPAG, since competitors would have knowledge of contractual positions which UPAG has accepted or is prepared to entertain in its negotiations with GO Transit, including pricing, liabilities, indemnities, insurance, and other sensitive information;
- b. there would be a potential undue loss to UPAG as a result of competitors, clients, and of UPAG changing their bargaining position to reflect positions accepted by UPAG.

In addition to the above, we note the following representations which we request be withheld from the Appellant:

In the result, we must reiterate our position that the Interim Contract should not be disclosed.

Sincerely,

**UNION PEARSON AIRLINK GROUP**

A handwritten signature in black ink, appearing to read "Sweetnam", written over a rectangular stamp or box.

Albert Sweetnam, P.Eng.  
Project Director



13-05 104 401135

Affaires juridiques

Law

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ATTACHMENT #1

May 9, 2005

CONFIDENTIAL &  
WITHOUT PREJUDICE

Ms. Ann Elliott Biebl  
Freedom of Information and  
Protection of Privacy Coordinator  
Greater Toronto Transit Authority  
20 Bay Street  
Suite 600  
Toronto, Ontario  
Canada  
M5J 2W3

Ms. Biebl:

Re: Freedom of Information – Access Request ADM-0126-05

This is further to your letter of April 25, 2005 to Mr. Daryl J. Barnett regarding a request that was sent to the Greater Toronto Transit Authority (hereinafter "GO Transit") pursuant to the *Freedom of Information and Protection of Privacy Act* (the "Act"), to disclose the Addendum to the Master Construction Addendum (hereinafter the "Addendum") concluded between GO Transit and Canadian National Railway Company (hereinafter "CN").

CN does not agree with the disclosure of selected information contained within the Addendum. CN wishes to stress that it has thoroughly reviewed all the information contained in the Addendum and that it has made a reasonable effort towards the severance of said Addendum to allow, when possible, for the disclosure of portions of the Addendum in question.

For the reasons outlined below, CN opposes the disclosure of certain information in the Addendum pursuant to Section 17 of the Act. In particular, CN objects to the disclosure of any and all information of a financial nature and, more specifically, all dollar and percentage amounts included on pages 6 and 8 of the Addendum.

For ease of reference, you will find enclosed a copy of the Addendum with sensitive portions to be deleted highlighted in yellow. In principle, CN has no objection to the release of all of the Addendum, provided all dollar and percentage amounts, currently included on pages 6 and 8, are first removed in their entirety.

To be more specific, this page includes reference to specific overhead rates applicable to CN program work, which is of a financial nature and, as it is included in an addendum to a confidential agreement between CN and GO Transit, was supplied in confidence.

Due to the sensitive nature of the financial information included on pages 6 and 8, CN relies on sections 17(1)(a) and (c) of the Act. Specifically, CN regularly enters into infrastructure construction agreements with various third parties across its network. The overhead amounts included in the Addendum would give some indication of the actual costs of CN for undertaking such construction work. Any release of financial information that would provide an indication of CN's costs would undoubtedly compromise CN's bargaining position with third parties bidding on the provision of construction services that CN wishes to contract out. As a result, this could reasonably be expected to interfere with contractual or other negotiations of a third party, CN, with the various subcontractors for construction work. Pursuant to section 17(1)(a) of the Act, this disclosure should accordingly be refused.

For the same reasons, this disclosure could reasonably be expected to result in a material financial loss to a third party, and thus section 17(1)(c) of the Act would apply. To the extent that third-party service providers become aware of CN's own operating costs when undertaking construction work, it could reasonably be expected that obtaining any bid for subcontracted work substantially below CN's own costs would no longer be possible if those costs were disclosed. The loss of lower bids that would otherwise be submitted represents a material financial loss to CN.

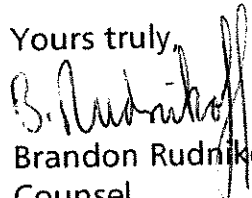
To reiterate, it is CN's position that the disclosure of the relevant information is precluded by the application of sections 17(1)(a) and (c) of the Act. In the alternative, should the application of both sections not be collectively supported by the facts, it is CN's position that the application of any one section, as outlined above, is sufficient to prevent disclosure of the relevant information.

Ms. Ann Elliott Biebl  
Page 3 of 3  
05/09/2005

CN is prepared, as required, to provide forthwith all necessary affidavits in support of the above positions.

I trust that these explanations are sufficient, but please do not hesitate to contact the undersigned at 514-399-6635 should you have any questions. Thank you very much for your assistance in this matter.

Yours truly,



Brandon Rudnikoff  
Counsel

Encl.

Cc : Daryl Barnett

**Representations of Canadian National Railway Company ("CN")**

**For the Information and Privacy Commissioner's Inquiry under the  
*Freedom of Information and Privacy Act* (the "Act")**

**Appeal Number:** PA-050178-1

**From the Decision of:** Greater Toronto Transit Authority (GO Transit)

**Request File Number:** ADM-0126-05

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**Issue A:**

CN consents to the disclosure of any and all of its representations in this document to the appellant.

**Issue B:**

CN maintains its objection to the disclosure of certain information contained in the Addendum to Rail Infrastructure Construction Operating Agreement (hereinafter the "Addendum"), and submits that the Information and Privacy Commissioner of Ontario (hereinafter the "Commissioner") does not have the jurisdiction to decide this issue. In the alternative, it is CN's submission that the exemption in section 17(1) of the Act applies to the information CN wishes to withhold from disclosure.

**Jurisdiction**

CN respectfully submits that, as a local undertaking within the legislative authority of the Parliament of Canada, the Greater Toronto Transit Authority is outside the jurisdiction of the Commissioner. In the leading Supreme Court of Canada case of *Her Majesty the Queen in the Right of the Province of Ontario v. Board of Transport Commissioners* [[1968] S.C.R. 118], it was held unequivocally that a commuter rail service operating over CN tracks was a local work or undertaking subject to federal jurisdiction. Accordingly, it is submitted

that the Commissioner does not have the authority to compel disclosure of the information in question, as the matter should be addressed through the office of the Information Commissioner of Canada.

### **Application of section 17(1) of the Act**

Notwithstanding CN's submission that the Commissioner's office is not the appropriate forum to rule on this matter, the information CN wishes withheld is nevertheless of a financial nature that could reasonably be expected to prejudice CN's competitive position and cause CN to incur an undue loss. The specific exemptions listed under sections 17(1)(a) and (c) would thus apply to all dollar and percentage amounts included on pages 6 and 8 of the Addendum, which CN had requested be withheld.

### **Type of information**

To be more specific, this page includes reference to specific overhead rates applicable to CN program work. In various decisions and orders of the Information and Privacy Commissioner, overhead and operating costs have been specifically enumerated as information of a financial nature and, accordingly, it should be uncontroversial that the numbers in question qualify as financial information for the purposes of section 17(1) of the Act [PO-2010].

It has been decided, in past decisions of the Privacy Commissioner, that the terms of a contract between a government institution and a third-party cannot necessarily be qualified as information that has been "supplied" by a third party for the purpose of section 17(1) of the Act [PO-2018]. Nevertheless, underlying that conclusion is the assumption that the contents of a contract have been mutually generated between the parties through negotiation. The information in question can be distinguished, however, in that the overhead percentages included in the Addendum are standard for all contracts and are not subject to variation or negotiation. It is submitted, therefore, that CN's overhead percentages remain, for the purpose of section 17(1) of the Act, information supplied by a third party, notwithstanding their inclusion in a contract with a government institution.

### **In confidence**

As the overhead costs in question were included in an addendum to a confidential agreement between CN and GO Transit, they were implicitly, if not

explicitly, supplied in confidence. The information in question was communicated exclusively for the purpose of providing GO Transit with an indication of the ultimate costs of the program work described in the Master Construction Agreement and, as part of a confidential contract, it was expected that such information would be kept confidential by all parties. This information is not otherwise disclosed or available from sources to which the public has access, and it is consistently treated as confidential information, to which only a limited number of employees within CN have access. It is for these reasons that CN had an objectively reasonable expectation of confidentiality.

### **Harms**

Due to the sensitive nature of the financial information included on pages 6 and 8, CN relies on sections 17(1)(a) and (c) of the Act.

Specifically, CN regularly enters into infrastructure construction agreements with various third parties across its network. The overhead amounts included in the Addendum would give some indication of the actual costs of CN for undertaking such construction work. Any release of financial information that would provide an indication of CN's costs would undoubtedly compromise CN's bargaining position with third parties bidding on the provision of construction services that CN wishes to contract out. As a result, this could reasonably be expected to interfere with contractual or other negotiations of a third party, CN, with the various subcontractors for construction work. Pursuant to section 17(1)(a) of the Act, this disclosure should accordingly be refused.

For the same reasons, this disclosure could reasonably be expected to result in a material financial loss to a third party, and thus section 17(1)(c) of the Act would apply. To the extent that third-party service providers become aware of CN's own operating costs when undertaking construction work, it could reasonably be expected that obtaining any bid for subcontracted work substantially below CN's own costs would no longer be possible if those costs were disclosed. The loss of lower bids that would otherwise be submitted represents a material financial loss to CN.

Given the extensive capital investments CN makes to maintain and improve its physical plant, such infrastructure construction agreements are concluded in the ordinary course of business on a regular basis. Accordingly, the threat of

harm to CN's interests is real and CN's expectations of harm are objectively reasonable and more than just speculation. It should be noted that the arguments that failed to meet the evidentiary burden for proving harm in the leading case of *Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)*, required a negative (and subjective) interpretation of the disclosed information in order to cause harm. In the present case, no such interpretation is required. Mere disclosure of the financial information allows it to be used by contracting parties bidding on construction work for CN.

### **Conclusion**

To reiterate, it is CN's position the Commissioner does not have jurisdiction to compel disclosure in this case. In the alternative, it is submitted that the disclosure of the relevant information is precluded by the application of sections 17(1)(a) and (c) of the Act. Should the application of both sections not be collectively supported by the facts, CN respectfully submits that the application of any one section, as outlined above, is sufficient to prevent disclosure of the relevant information.





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

April 5, 2006

**PERSONAL & CONFIDENTIAL**

**VIA COURIER**

Mr. Michael Sullivan  
72 Church Street  
Weston, ON  
M9N 1N3

Dear Mr. Sullivan:

**RE: Notice of Inquiry  
Greater Toronto Transit Authority (GO Transit)  
Appeal PA-050178-1**

Your appeal is now in the inquiry stage. The *Freedom of Information and Protection of Privacy Act* (the *Act*) provides that parties involved in an inquiry are entitled to make representations to this office. It is the practice of this agency to invite the parties to submit their representations in writing. Representations generally include comments on the facts and issues in the appeal, as well as any documents or other relevant evidence.

I have received representations from the Greater Toronto Transit Authority (Go Transit) and two affected third parties. I am enclosing a Notice of Inquiry which summarizes the facts and issues in the appeal.

Please find attached the complete representations of Go Transit and one affected third party and the severed representations of the second affected third party. Please note that portions of the second affected third party's representations have been withheld due to confidentiality concerns.

If you believe that there are additional factors which are relevant to this appeal, please refer to them. The deadline for receipt of representations is **April 28, 2006**. Please send them to this office, to the attention of Norma Thorney, Assistant Registrar.

The representations you provide to this office should include all of the arguments, documents and other evidence you rely on to support your position in this appeal. Your representations may



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be shared with the Greater Toronto Transit Authority (Go Transit) and the Third Parties, unless there is an overriding confidentiality concern. The procedure for the submitting and sharing of representations is set out in the attached document entitled *Inquiry Procedure at the Adjudication Stage*. Please refer to this document when preparing your representations.

Once representations are received, they will be considered by me in making my decision in this appeal, and an order will be issued to resolve the outstanding issues. I will not be contacting you again during this process unless I need to clarify something in your representations.

**Should your representations not be received by the date specified in this letter, the decision making process will proceed, and an order may be issued in the absence of these representations.**

If you have any questions about any aspect of your appeal, please contact Ms. Thorney, Assistant Registrar at (416) 326-0004 or our toll free number 1-800-387-0073.

Yours truly,

A handwritten signature in black ink, appearing to read 'Bernard Morrow', with a long horizontal flourish extending to the right.

Bernard Morrow  
Adjudicator

Encl.

cc: Ms. Ann Elliott Biebl  
Freedom of Information Co-ordinator  
Greater Toronto Transit Authority (Go Transit) (letter only)

cc: Third Parties – with identity of appellant severed (letter only)