

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

**A REQUEST FOR REVIEW** of a decision of the **HALIFAX REGIONAL SCHOOL BOARD** to deny access to records related to a school bus transportation contract.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** **September 4, 2003**

**ISSUE:** Whether Section 21(1) (confidential information of a third party) supports the decision to deny access to records regarding a school bus transportation contract.

In a Request for Review under the Nova Scotia **Freedom of Information and Protection of Privacy Act**, dated May 7, 2003, the Applicant asked that I recommend to the Halifax Regional School Board (the Board) that it disclose the records requested.

In an application for access, the Applicant requested:

- a copy of the Board's latest Request for Proposals issued to invite bids for the transportation of students;
- a copy of the proposal of the company which won the bid;
- a copy of the contract the winning bidder signed with the Board following the Request for Proposals; and

- a copy of the current contract between the Board and the same company.

*Background information:*

In 1996, the Halifax County-Bedford District School Board, (now the Halifax Regional School Board), which had been operating its own school transportation system, decided to contract a private transportation company to provide the service. In that year two contracts were signed with the winning bidder: A Service Agreement for the transportation of students and an Asset Purchase Agreement, for the purchase of the Board's transportation assets, including the Bus and Service fleets.

In 1998, the Board issued a call for tenders for school bus transportation for students in the former Halifax City School District. Three bidders, including the company which had been the successful bidder in 1996, were chosen and awarded routes. Each company got a brief letter from the Board confirming the awarding. There is no signed contract regarding the 1998 awards. Another contract was signed in 2002 when the Board chose to exercise its right to renew the 1996 contracts.

It's noted that all the contracts except for the 2002 one, were signed before the Board became subject to this **Act**. However, when it became subject to the **Act** in 2000, so did all of the records in its custody or under its control. The Board regards the contracts of 1996 to be relevant to the application.

Because there was no Request for Proposals for the 1998 bids, the Applicant was provided with a copy of the 1998 tender call, and a copy of the winning bidder's proposal. The

last RFP was the one issued to invite the bids of 1996. However, after checking with the Applicant, I am satisfied that the 1998 tender, which, incidentally is a public document anyway, satisfies part of his request. He was denied access to the contracts under the exemption found in **Section 21(1)(a)(ii), (b) and (c)(i)**.

S.21(1) is a mandatory exemption requiring a public body to deny access to confidential information of a third party when certain conditions are met. The particular subsections cited by the Board read:

**21 (1)** The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party.

In accordance with **Section 22**, the Board notified the winning bidder, as a third party, of the application and offered it an opportunity to consent to the disclosure of the information. The third party refused consent.

*The Board's submission:*

In a meeting with an official of the Board I was told that it had made its decision to deny access to the contracts after reading the objections of the third party. The burden of

proof is on the Board to show why the Applicant has no right of access to the contracts. [See s.45(1)]

*The Third Party's Submission:*

The third party recognizes that all three sub-sections of s.21(1)(a)(b) and (c) must apply for the exemption to stand.

With respect to sub-section 21(1)(a)(ii) the third party believes the contracts contain commercial, financial and labour relations information belonging to the winning bidder.

The third party submission also provides support for its position that the information in the contracts was supplied to the School Board in confidence “without the expectation of disclosure” [s. 21(1)(b)]. According to the third party, the information was provided for the sole purpose of contracting with the Board. The contracts have confidentiality clauses requiring both parties not to disclose confidential information, as defined in the contracts, except to others who are parties to the agreement.

With respect to “harm to the third party's interests” [s. 21(1)(c)(i)], the third party's submission states that disclosure of the contracts would allow competitors to undercut bids the transportation company may want to make on tenders to other school boards. The company says disclosing such information, including the term of the contract, would also harm labour relations and provide the union with a “substantially enhanced bargaining position” to the detriment of both the company and the School Board.

The third party also sought support in *Atlantic Highways Corp. et al v. Nova Scotia et al* (1997) N.S.J. No 238 (S.C.) It quotes Justice Kelly, who was alluding to the modifying words in s.21(1)(c), for example, “significantly,” that “such modifiers would seem to imply that the legislature requires a logical and rationally based threshold of ‘speculative proof’ of ‘harm’ or damages of some substance.”

*The Applicant’s submission:*

The Applicant provided his arguments in point form:

- No information has been provided indicating that either the successful bidder or the Board expected the contracts to be held in confidence;
- The word “supplied” found in sub-section (b) of s.21(1) connotes that the successful bidder has a proprietary interest in the information. He cites two Reviews from this Office, FI-00-75 and FI-01-37, which note an observation in *Atlantic Highways* that contracts are usually the result of give and take between the parties and that it is difficult to determine which party “supplied” which information;
- The procurement policy of the Province expects contracts to be treated as public information as soon as an award is made;
- The Nova Scotia Supreme Court (*Atlantic Highways*) believes that there should only be “rare circumstances” where it could be in the public

interest not to disclose information in a contract. Any personal information can be protected from disclosure through severing;

- Again citing *Atlantic Highways*, there is an “obvious danger” in using the protection of the “commercial information” argument to keep the public from information it needs to assess the acts of public bodies; and
- The transportation company has already revealed proprietary information in its 1998 tender which the Applicant has been provided with and which include
  - a certificate of insurance;
  - a vehicle maintenance program;
  - a driver training program;
  - its safety procedures; and
  - a pricing proposal and a separate one for “noon runs.”

The Applicant concluded by noting that the Board’s tender specifications indicated that the successful bidder would be required to enter into a contract with the Board on terms reflecting the bidder’s proposal and “other terms as mutually agreed to.” He feels the public has a right to know what the “other terms” are.

**Conclusions:**

The costs for student transportation appear in the Board's financial statement which, when approved, become a public document. A reader of the statement could discover the costs of student transportation to the Board.

With respect to s.21(1)(a)(ii), the **Act** does not provide definitions for "commercial," "financial," "labour relations," "scientific" or "technical" information. The third party must prove that the records contain information meeting the definition of one of the above.

Definitions for these words can be found in an order of the Ontario Information and Privacy Commissioner (PO-1911), upheld on appeal. In the absence of definitions in this **Act**, I adopt the Ontario Commissioner's.

"Commercial" information is information which relates solely to the buying, selling or exchange of merchandise or services.

"Financial" information refers to information relating to money and its use or distribution and must contain or refer to specific data.

"Technical" information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields are architecture, engineering or electronics.

"Labour relations" information is information concerning the collective relationship between an employer and its employees.

I agree with the third party that the records at issue contain commercial and financial information. But that sub-section requires that the information be "of a third party"

which I interpret to mean “belonging” to a third party. To paraphrase Justice Kelly in *Atlantic Highways*, it is difficult to isolate from a negotiated contract commercial and financial information of one of the parties to the agreement.

It is also difficult to identify the particular negotiating techniques of the company which the third party claims would be exposed if the contracts were disclosed.

It is my view that the contract does not contain “labour relations information” as defined above. The obligations accepted in the contract by the successful bidder or the term of the contract cannot, in my view, be described as “labour relations information.”

Sub-section 21(1)(b) requires that confidential information was supplied to the Board by the third party. In earlier Reviews I concluded that, for a third party to claim a proprietary interest in the information in the contract, that information would have had to remain relatively unchanged during the negotiating process. (*FI-99-36, FI-99-107, FI-00-75, FI-01-27*). I have also cited *Atlantic Highways* in which the judge said that the information in contracts “was so intertwined with Provincial input by way of the requirements of the ‘Request for Proposals’ or modified by the negotiating process that it clouds AHC’s claim to a proprietary interest in the information.” The information found in the company’s tender, which has been given to the Applicant, was, of course, “supplied” by the company.

On that point alone, sub-section (b) cannot be applied to the contracts themselves. Consequently the exemption under s.21(1) does not stand.



Neither the Board nor the third party addressed severing. **Section 5(2)** gives an applicant the right of access to information that is part of a record but is not exempt when that information can “reasonably be severed.”

During this Review I have considered **Section 2** of the **Act** which requires that public bodies be “fully accountable” to the public to ensure fairness in decision-making and to facilitate informed public participation in policy formulation. In my view, the details of contracts to transport school students would be of considerable public interest requiring full accountability.

**Recommendations:**

That the Board disclose:

1. From Volume I, the Asset Purchase Agreement, dated February 28, 1996  
[with the exception of the personal names in section 5.02(a)]
  - ▶ Schedule I; and
  - ▶ The agreement dated March 8, 1996 under Tab 12;
2. From Volume III the Service Agreement dated March 8, 1996, including Schedules A and B and the record under Tab 39;
3. the letter to the third party, dated May 29, 1998 signed after the Call for Tenders of May 14, 1998;
4. the entire Agreement dated May 22, 2002.

**Section 40** of the Act requires the Halifax Regional School Board to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of the decision.

**Dated** at Halifax, Nova Scotia this 4<sup>th</sup> day of September, 2003.

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Darce Fardy, Review Officer