

**REPORT WITH RESPECT TO THE APPLICATION  
FOR REVIEW OF [REDACTED] IN RELATION TO  
INFORMATION REQUESTED FROM THE BOARD OF EDUCATION OF THE  
REGINA SCHOOL DIVISION NO. 4 OF SASKATCHEWAN**

[REDACTED] (the "Applicant") submitted an Access to Information Request Form, wherein the Applicant requested from The Board of Education of the Regina School Division No. 4 (the "Respondent"):

1. All contracts between Freightliner Truck Sales of Regina Ltd. and The Board of Education of Regina School Division No. 4 for the provision and maintenance of school buses.
2. All contracts between Southwest Contractors and The Board of Education of Regina School Division No. 4 for the operation of school buses.

This information was denied by the Respondent, and I quote from a letter dated February 21<sup>st</sup>, 2001 from Debra G. Burnett, Secretary-Treasurer of the Respondent, as follows:

"Please be advised that your request for copies of contractual documents between the Regina Board of Education and Freightliner Truck Sales of Regina Ltd. and Southwest Contractors has been reviewed in accordance with the provision of *The Local Authority Freedom of Information and Protection of Privacy Act*. With reference to the exemption provisions contained in subsections 17 and 18 of the *Act*, it has been determined to refuse to afford access to the records requested. In this regard, your attention is drawn specifically to subsections 17(1)(d), (f) and (g) and subsections 18(1)(b) and (c)."

On June 27<sup>th</sup>, 2001 a Request for Review was received by the Information and Privacy Commissioner, which states as follows:

**"Details of Request**

By way of request dated January 23, 2001, our firm, [REDACTED], made a request of the Regina School Division No. 4 ("RSD") for copies of their

contracts with Freightliner Truck Sales of Regina Ltd. for the provision and maintenance of school buses and with Southwest Contractors for the operation of school buses. By way of letter dated February 21, 2001, the RSD denied our request on the basis of several exemption provisions contained in *The Local Authority Freedom of Information and Protection of Privacy Act* ("Act"). We engaged in various discussions with the RSD and with counsel for the RSD in respect of our request and the reasons for which our request was denied. These discussions were not successful.

We are of the view that there are several reasons for which our request for copies of the above-mentioned contracts should not have been denied:

1. Sections 354 and 355 of *The Education Act, 1995*, S.S. 1995 c.E-0.2 address the issue of the tendering process for the provision of transportation services to a Board of Education. There is nothing in those sections that speak to the confidentiality of any contracts that may be entered into pursuant to that tendering process.
2. There is nothing in the requests for proposals, both for operation of school buses and for pupil conveyance, that would in any way preclude the RSD from producing to a third party any of the contracts that are ultimately negotiated and put into force. At most, the request for proposals stated that the RSD would maintain all proposals in confidence *during the bidding process*.
3. The exemptions contained in subsections 17(1)(d), (f) and (g) of the *Act* do not properly apply to this situation. The contracts in issue have been negotiated, concluded and are presumably being performed. For these reasons, it would not be reasonable to expect that providing access to these contacts would interfere with contractual or other negotiations of the RSD, would prejudice any economic interest of the RSD or would result in any undue benefit or loss to a person. Further, section 17 provides that a head "may" refuse to give access to a record for the above mentioned reasons. The use of the word may as opposed to the word "shall" in this section should be interpreted in such a way that the presumption contained in section 5 of the *Act* is accorded the fullest weight possible when a local authority is considering the exemptions in section 17 of the *Act*.
4. Subsections 18(1)(b) and (c) also have no application in this case. The contract has been concluded between the RSD and Freightliner Truck Sales of Regina Ltd. and Southwest Contractors. The applicant is not interested in receiving financial, commercial, scientific, technical or labour relations information of the parties that contracted with the RSD, but is interested in the terms upon which the contracts were concluded. Further, it is submitted that when the parties entered into

their contacts with the RSD, it would have been implicit that these contracts would be a matter of public record, particularly given that they relate to the provision of operational and conveyancing services within a publicly funded organization. Further, with respect to subsection 18(c), again, it is presumed that these contacts are negotiated and are being performed. Therefore, it cannot be reasonably expected that production of these contacts will result in any financial loss or gain to the parties, would prejudice the competitive position of the parties or would interfere with the contractual or other negotiations between the parties.

For all of the reasons outlined above, it is submitted that the RSD was not justified in denying our access to the records requested. The presumption contained in section 5 of the *Act* should operate in the applicant's favour in these circumstances.

Please be advised that this request is also being made in respect of the contract recently entered into between the RSD and 627472 Saskatchewan Ltd.

We look forward to your determination in this regard."

On June 28<sup>th</sup>, 2001 the Information and Privacy Commissioner requested from the Applicant a copy of the Formal Response from the School Division declining the request, together with all relevant correspondence with the School Division that had been exchanged regarding the Application. In addition, he requested copies of documents in detail regarding the matter referred to in the penultimate paragraph of their letter with regard to an application respecting the School Division and 627472 Saskatchewan Ltd.

These documents were received on July 4<sup>th</sup>, 2001, with the following information regarding the contract entered into between the School Division and 627472 Saskatchewan Ltd., and I quote:

"please be advised that we have not formally provided an Access to Information Request Form to the Regina School Division #4 in respect of the contract. However, that contract is in the same nature of the contract with respect to which the request was originally made (that is, relating to the operation of school buses and pupil conveyance). We presume that the Regina School Division #4 would refuse access to that contract on the same basis, and therefore request that your review pertain to that contract as well."

Due to a conflict with the Freedom of Information and Privacy Commissioner, Province of Saskatchewan, the matter was referred to me, as Acting Freedom of Information and Privacy Commissioner, on September 4<sup>th</sup>, 2001.

On September 13<sup>th</sup>, 2001, I requested from the Respondent all documents in question. These documents were received by me on October 10<sup>th</sup>, 2001, and I have now had an opportunity to review all documentation.

On October 18<sup>th</sup>, 2001, pursuant to section 43 of *The Local Authority Freedom of Information and Protection of Privacy Act*, I received representation from McDougall Gauley Law Firm, acting for the third party, namely, [REDACTED], and I quote:

“In our view, the provisions of section 17(1) of the Act dealing with “economic and other interests” and section 18(1) of the Act dealing with “third party information” provide the authority for the Board’s declining to provide the requested records.

In our view, the records in question could reasonably be expected to disclose:

1. Financial and commercial information in which the Board has a proprietary interest (17(1)(b)(i));
2. Information, the disclosure of which could reasonably be expected to interfere with contractual negotiations of the local authority (17(1)(d)); and
3. Information, the disclosure of which could reasonably be expected to prejudice the economic interest of the Board (17(1)(f)).

Further, the records in question contain:

1. Financial and commercial information that was supplied in confidence to the Board by Southwest Contract Services (18(1)(b));
2. Information, the disclosure of which could reasonably be expected to result in financial loss, prejudice the competitive

position and interfere with the contractual or other negotiations of Southwest Contract Services. (18(1)(c)).

On November 2<sup>nd</sup>, 2001 I received further representation from solicitors for the Respondent. Included in the material was further documentation as follows:

- a) Request for Proposal Number 30-1910, operation of school buses and other people transport vehicles (The Operation RFP) invited bids from firms interested in operating all or a portion of the school buses and other people transport vehicles commencing August 2001; and
- b) Request for Proposal Number 30-1909, lease of school buses and other people transport vehicles (The Lease Maintenance RFP) invited bids from firms interested in leasing and/or maintaining the Board school buses and other people transport vehicles commencing August 2001.

The Board, in their submission, relies on section 17 and 18 of the *Act* to withhold access to the requested records by the Applicant. The following are the relevant sections of section 17(1) that the Respondents rely on:

*“17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:*

*...*

*(b) financial, commercial, scientific, technical or other information:*

*(i) in which the local authority has a proprietary interest or a right of use; and*

*(ii) that has monetary value or is reasonably likely to have monetary value;*

*...*

*(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;*

*...*

*(f) information, the disclosure of which could reasonably be expected to prejudice the economic interest of the local authority; or*

*(g) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person.”*

As stated by both the Applicant and the Respondent, the *Act* contains both discretionary and mandatory exceptions to the rule that the records in possession of the Board must be disclosed.

Section 17(1) is discretionary. The Applicant submits that because the word “may” is used, this section should be interpreted so that the presumption contained in section 5 of the *Act* is accorded the fullest weight in considering the exemptions in section 17.

I agree the onus is on the Respondents to establish that their case falls within the exceptions.

Section 18 relied on by the Respondents is mandatory using the word “shall”.

In order to establish that access to the Requested Records may be refused in the circumstances of the Applicant’s request, the Board submits the following:

1. In accordance with *The Education Act, 1995*, the Board’s pupil transportation contracts are preceded by a competitive bid process. While the length of the pupil transportation contracts awarded by the Board vary from case to case, the Board’s pupil transportation contracts are subject to a competitive bid process approximately every three to six years.
2. The underlying purpose of a competitive bid process is to help the Board obtain the best overall solution that meets the Board’s needs at the best price. Naturally, this is contingent upon the Board’s ability to ensure fair and robust competition amongst bidders.
3. It is the Board’s position that releasing the Requested Records, directly or indirectly, to persons likely to compete for Board’s future pupil transportation contracts may reasonably be expected to result in the following:
  - (a) prejudice to the economic interest of the Board (see section 17(1)(f) of the *Act*);
  - (b) disclosure of financial, commercial or other information that has monetary value to the Board (see section 17(1)(b) of the *Act*); and
  - (c) interference with future contractual or other negotiations of the Board (see section 17(1)(d) of the *Act*);

- (d) undue benefit to persons competing for the Board's future pupil transportation contracts (see section 17(1)(g) of the Act).

4. In specific support of the above, the Board submits as follows:

- (a) Considerable time, effort, research, expertise and expense is involved in the preparation of successful bids for the Board's pupil transportation contracts. The bussing industry is highly expertise based and the solutions and pricing offered to the Board by successful bidders typically incorporate such expertise.
- (b) It is very important for the Board to be able to provide bidders with an opportunity to propose expertise-based solutions and pricing. By doing so, the Board is able to take full advantage of the bidders' expertise and, ultimately, obtain the best overall solution for the Board at the best price. The Operations RFP and the Lease/Maintenance RFP are both good examples of how the Board seeks out expertise-based solutions and pricing within the framework of a competitive tendering process.
- (c) It is important to distinguish between a tendering process such as that found in the Operations RFP and the Lease/Maintenance RFP, and the type of tendering process where the Board is able to describe its requirements with precision and bidders simply provide pricing based on meeting those requirements. In the type of tendering process used by the Board for pupil transportation services, the best interest of the Board are served by allowing bidders with expertise and experience in the bussing industry to offer solutions and pricing developed as a result of such experience and expertise. In the second type of tendering process, the requirements of the Board are fully developed in the tender documents themselves and, as such, bidders are not being asked to reveal their expertise in order to assist the Board in finding the best solution.
- (d) Given the type of tender process used by the Board for its pupil transportation contracts, and given that the same basic services are put to tender approximately every three to six years, there is a serious risk that providing competitors with access to the Requested Records will be detrimental to the future interest of the Board. This is because, without assurance that the confidentiality of expertise-based bids will be protected after the successful bidder's solution and pricing is reduced to a formal written contract, it is reasonable for the Board to expect that qualified bidders will choose not to participate in the Board's future tendering processes. Alternatively, bidders will be reluctant to offer their best and most innovative solutions and pricing for fear that they will not be adequately protected from disclosure to competitors once enshrined in a contract.
- (e) The end result, therefore, is a lowering of the quality and quantity of bids received by the Board for its pupil transportation contracts. This, in turn, can reasonably be expected to result in prejudice to the economic interest of the Board and a loss of information (i.e. the loss of the best solutions and pricing from bidders) that the Board has a right to use and that has clear monetary value to the Board.

- (f) Further, providing access to the Requested Records to persons competing for the Board's pupil transportation contracts would result in such competitors having intimate knowledge of the details of the final contracts awarded by the Board. It is reasonable for the Board to expect that this would seriously undermine and interfere with the Board's future contractual negotiations since the Board's current pupil transportation contracts would become the base level for future contracts. In other words, providing competitors with access to the Requested Records would interfere with the ability of the Board to obtain future contracts that contain terms and conditions more favourable than those currently contained in the Requested Records.
- (g) In addition, the Board reasonably expects that the disclosure of the Requested Records to a known competitor will result in an undue benefit to that competitor. This is because, for many of the same reasons noted above, the competitor would be able to take unfair advantage of the expertise-based solutions and pricing offered by successful bidders in previous tendering process.
- (h) Finally, it is important to note that the new approach to pupil transportation developed by the Board through the Operations RFP and the Lease/Maintenance RFP presents the Board with new commercial opportunities. Specifically, the Board has leased a fleet of new school buses and other pupil transport vehicles. The Board has also engaged a third party contractor (Southwest Contract Services) to provide basic school bus operations. Given that basic school bus operations may not, at all times (i.e. during the day when students are not being transported, holidays, summers), take full opportunity of the Board's fleet, the Board is investigating the opportunity to provide additional bussing services (such as charter services) to third parties. Releasing the Requested Records to competitors or potential customers of the Board would seriously interfere with the ability of the Board to effectively pursue these other opportunities. For example, competitors and potential customers would be able to reverse engineer or otherwise determine the Board's underlying costs in providing such services. The Board reasonably expects that this would interfere with its economic interests and would also interfere with future contractual negotiations of the Board.

The Applicants, as previously stated, feel the exceptions to section 17(1)(d), (f) and (g) do not apply to this situation. They feel the confidentiality of the bidding process applies during the bidding process and there is nothing in the proposal that would preclude the release of this information to a third party. Also, the fact that the contracts have already been negotiated and concluded would not interfere with the contractual, or other, negotiations of the Board.

I disagree with this suggestion and feel the Respondents have raised some very valid points, which show a monetary value to the Board and could interfere with future contractual negotiations of the Board. This could also result in undue benefit to persons competing for the



Board's future contracts. The Board has satisfied me that the exceptions in section 17(1)(b), (d) and (f) do apply.

The Respondents, as well as the Third Parties, also rely on section 18(1):

*"18(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*

*...*

- (b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;*
- (c) information, the disclosure of which could reasonably be expected to:*
  - (i) result in financial loss or gain to;*
  - (ii) prejudice the competitive position of; or*
  - (iii) interfere with the contractual or other negotiations of;**a third party;*

A review of the documentation clearly indicates to me that release of these documents that do fall within the definition of 18(1)(b) could reasonably be expected to result in financial loss or gain or prejudice the competitive position and interfere with contractual or other negotiations of a third party as set out in 18(1)(c). Without the consent of the third party, which has not been given, these documents, according to the *Act*, "shall" not be released.

The Applicants pointed out that the requirements for tender as set out in *The Education Act 1995*, section 354 and 355 do not speak of confidentiality of contracts pursuant to the tendering process. I have reviewed the *Act* and the Board is required, pursuant to *The Education Act 1995*, to annually publish a Statement of Public Accounts showing the actual operation of the Board.

With operating expenditures relating to public transportation in excess of \$10,000.00, the Board must state:

- (a) the purpose of each contract;
- (b) the name of the party with whom the Board has contracted; and
- (c) the name of the party to whom payments under the contract were made.

(Sections 4 and 5 of *The Board of Education Public Accounts Regulations*)

This is a matter of public record; and therefore, outside of the scope of the *Act* section 3(1).

The Applicant stated they were not interested in receiving financial, commercial, scientific, technical or labour relations information of the parties that contracted with the Regina School Board, but were interested in the terms upon which the contracts were concluded.

I reviewed the documents with this in mind, and do not see how I could sever the documents so that the terms of the contract are separate from the confidential information.

Therefore, for the reasons above mentioned, I recommend the Regina School Board not release the documents, or any portion of them.

On November 6, 2001 I received further representation on behalf of Freightliner Truck Sales Regina Ltd. and Thomas Bus Centre Ltd. They object to release of the documents based on the exemptions 17(1(b)(i), (d), (f), (g) and 18(1)(b) and (c).

I have previously dealt with these sections, and my decision would apply also to the documents concerning Freightliner Truck Sales Regina Ltd. and Thomas Bus Centre Ltd.

Dated at the City of Swift Current, in the Province of Saskatchewan, this 17<sup>th</sup> day of November, 2001.

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FRANK A. MacBEAN, Q.C.  
Acting Freedom of Information  
and Privacy Commissioner  
Province of Saskatchewan