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

ORDER MO-1213

Appeal MA-980294-1

The Corporation of the City of London

80 Bloor Street West,
Suite 1700,
Toronto, Ontario
M5S 2V1

80, rue Bloor ouest
Bureau 1700
Toronto (Ontario)
M5S 2V1

416-326-3333
1-800-387-0073
Fax/Téléc: 416-325-9195
TTY: 416-325-7539
http://www.ipc.on.ca

NATURE OF THE APPEAL:

The appellant made a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act) to the Corporation of the City of London (the City). The request was for access to a copy of a contract filed with the City Clerk relating to an agreement between a taxicab company and the University of Western Ontario Students' Council relating to discounted student taxicab fares.

The City denied access to the record on the basis of sections 10(1)(a) and (c) of the Act (third party information). The appellant appealed the denial of access and raised the application of section 16 of the Act, the so-called public interest override.

I sent a Notice of Inquiry to the City, the appellant, the taxicab company and the Students' Council. Representations were received from all parties.

RECORDS:

The record consists of two pages. The first page is an agreement signed by the taxicab company and the Students' Council and the second page is a schedule of flat rates to various destinations. The record provided to me by the City is dated August 31, 1996, and relates to flat rate fares for the period of September 1, 1996 to August 31, 1997. The City indicates that at the time of the request, this was the only record on file with the City.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the City and/or the affected parties (the taxicab company and the Students' Council) must satisfy each part of the following three-part test:

1. the record must reveal information that is a trade secret or scientific, technical, commercial, financial or labour relations information; **and**

2. the information must have been supplied to the institution in confidence, either implicitly or explicitly; **and**

3. the prospect of disclosure of the record must give rise to a reasonable expectation that one of the harms specified in (a), (b) or (c) of section 10(1) will occur.

[Order 36. See also Orders M-29 and M-37]

To discharge the burden of proof under the third part of the test, the parties opposing disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed [Order P-373].

The Ontario Court of Appeal recently overturned the Divisional Court's decision quashing Order P-373 and restored Order P-373. In that decision the Court stated as follows:

> Lastly, as to Part 3, the use of the words **"detailed and convincing"** do not modify the interpretation of the exemption or change the standard of proof. These words simply describe the quality and cogency of the evidence required to satisfy the onus of establishing reasonable expectation of harm. Similar expressions have been used by the Supreme Court of Canada to describe the quality of evidence required to satisfy the burden of proof in civil cases. If the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed. It was the Commissioner's function to weigh the material. Again it cannot be said that the Commissioner acted unreasonably. Nor was it unreasonable for him to conclude that the submissions amounted, at most, to speculation of possible harm. [emphasis added]

[Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41 O.R. (3d) 464 at 476 (C.A.)]

PART 1

Neither the City nor the Students' Council submitted representations respecting the first part of the section 17 test. The taxicab company submits that the information contained in the records, which it clarifies deals with "flat rates" and not "discounted fares", is a programme that was developed for economic benefit to the taxicab company, and therefore qualifies as a "trade secret."

Trade Secret

"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 M-29]

In my view, the contract and the schedule of flat rates is not a formula, pattern, compilation, programme, method, technique, or process or information contained or embodied in a product, device or mechanism. Accordingly, in my view, the records do not contain or reveal a trade secret.

Commercial Information

Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services. The term "commercial" information can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order P-493].

The information contained in the records does relate to the buying and selling of services and, in my view, qualifies as commercial information. Accordingly, the first part of the section 10 test has been met.

PART 2

Supplied in Confidence

Supplied

Because the information in a contract is typically the product of a negotiation process between the institution and the affected party, the content of contracts will not qualify as originally having been "supplied" for the purposes of section 10(1) of the Act. A number of previous orders have addressed the question of whether the information contained in a contract entered into between an institution and an affected party was supplied by the third party. In general, the conclusion reached in these orders is that, for such information to have been "supplied" it must be the same as that originally provided by the affected party. In addition, information contained in a record would "reveal" information "supplied" by the affected party if its disclosure would permit the drawing of accurate inferences with respect to the information actually supplied to the institution [Orders P-36, P-204, P-251 and P-1105].

It is clear from the representations and the contents of the records that the City is not a party to the contract. It is also clear that the role of the City is to review the contract **after** it has been negotiated, not to participate in the negotiations. Based on the information before me, I am satisfied that the records were supplied to the City, and the City was not involved in the negotiation.

In Confidence

In regards to whether the information was supplied in confidence, part two of the test for exemption under section 10(1) requires the demonstration of a reasonable expectation of confidentiality on the part of the

supplier at the time the information was provided. It is not sufficient that the business organization had an expectation of confidentiality with respect to the information supplied to the institution. Such an expectation must have been reasonable, and must have an objective basis. The expectation of confidentiality may have arisen implicitly or explicitly [Order M-169].

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:

(1) Communicated to the institution on the basis that it was confidential and that it was to be kept confidential.

(2) 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.

(3) Not otherwise disclosed or available from sources to which the public has access.

(4) Prepared for a purpose which would not entail disclosure.

[Order P-561]

The contract was filed with the City under section 15(1) of By-law No. L.-123-155, the City's Taxicab and Limousine Licensing By-law, which states:

> The rates for fares to be charged by the owners and drivers of taxicabs for the conveyance of passengers shall be exactly as shown in Schedule "A" (Taxicab Tariff), attached hereto and forming part of this by-law, and no higher or lower amount than that contained in the said Schedule shall be charged or payable, whether such rates and charges are determined by distance or by time; provided that an owner and a customer may enter into a contract, in writing, for services to extend for the period of a year or more on runs between fixed points at an agreed tariff, but a duplicate original of such contract must first be filed with and approved by the City Clerk; **provided, however, that the said contracts shall not be deemed to be public documents and shall not be made available by the City Clerk to anyone other than the parties to the said agreement**. [emphasis added.]

Based on the terms of the By-law and the statements in the representations, I find that the information was communicated to the City on the basis that it was confidential and that the City was to keep it confidential. I am also satisfied that the taxicab company had consistently treated the information in a manner which indicates a concern for its protection from disclosure prior to providing it to the City.

However, once the contract is accepted by the City, the taxicab company and the Students' Council disclose the information on the second page of the record to students at the University of Western Ontario. "Cabcards" are made available to students, and each "Cabcard" has the flat rates printed on the back. In the information before me, there is nothing which suggests that each student who receives a Cabcard is bound by any sort of confidentiality agreement. Additionally, the appellant states that since being denied access to this information by the City, he has procured a Cabcard, and provided me with a copy of it. In these circumstances, I am not satisfied that the information on the second page of the contract is not otherwise disclosed or available from sources to which the public has access. I also find that neither the City nor the taxicab company has established that the second page of the record was prepared for a purpose which would not entail disclosure.

On the other hand, I am satisfied that the first page of the record is not otherwise available to the public, and was prepared for a purpose which would not entail disclosure and, therefore, the second part of the test has been met with respect to this page.

Because all three parts of the test must be met for information to be withheld under section 10(1) of the Act, the second page of the record does not qualify for exemption, and should be disclosed to the appellant.

PART 3

To discharge the burden of proof under the third part of the test, the City and/or the taxicab company must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed.

The Students' Council submits that, "... should this contract be made public, there is potential for future negotiations between [the taxicab company] and the University Students' Council being impaired as a result." (Section 10(1)(a))

The taxicab company submits that since the Cabcard program was initiated in 1995, it has seen a significant increase in business from students at the University of Western Ontario. The taxicab company submits that this market share now represents approximately 25% of its business during the months of September to April, and disclosure or other sharing of information would cripple the business it has sought to initially obtain and subsequently retain. (Section 10(1)(a))

The taxicab company also submits that it entered into this agreement and provided it to the City on the understanding that it would not be disclosed as public information. It indicates that if this record is disclosed, the information would no longer be supplied to the City and the students currently using the Cabcard program would suffer as a result. (Section 10(1)(b))

Finally, the taxicab company submits that disclosure of the contract would provide free information to the appellant when in fact the taxicab company has taken great efforts to research, compile negotiate, draft and comply with the contract. It argues that disclosure would mean an undue loss to it and an undue gain to the appellant. (Section 10(1)(c))

The first page of the record simply indicates that the flat rates are attached, the period of time during which they will be honoured, and the identification requirements for students wishing to take advantage of the flat rate fares. The flat rates have already been made available to a significant number of individuals (the students at the University of Western Ontario) and, in my view, the disclosure of the additional information found in the first page of the record would not itself lead to a reasonable expectation that one or more of the harms described in section 10(1) would occur if the information was disclosed. Accordingly, I find that the third part of the test has not been met, and section 10(1) does not apply.

ORDER:

1. I order the City to disclose the records to the appellant by sending him a copy by **June 23, 1999** but not earlier than **June 18, 1999**.

2. In order to verify compliance with this order, I reserve the right to require the City to provide me with a copy of the records disclosed to the appellant pursuant to Provision 1.

Original signed by: May 19, 1999
Holly Big Canoe
Adjudicator