



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

ORDER MO-1246

Appeal MA-990059-1

City of Toronto



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NATURE OF THE APPEAL:

A requester submitted two requests to the City of Toronto (the City) under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The first request was for all records generated by, or in the possession of, the City and its predecessor, the former Municipality of Metropolitan Toronto, including all relevant committees and sub-committees, relating to the drafting, adoption and/or implementation of (i) By-Law No. 168-97, adopted December 18, 1997, and (ii) By-Law No. 449-1998, adopted July 10, 1998. The second request was for similarly described records generated by, or in the possession of, the Toronto Licensing Commission and its predecessor, the Metropolitan Licensing Commission. The requester explained that the by-laws referred to amend By-Law No. 20-85 to enact certain measures regarding collision reporting centres and vehicle repair facilities. The requester further stated:

To facilitate the gathering of these records, we understand that, at minimum, the following committee/sub-committees of City Council and Metro Council have been involved in the formulation and adoption of the above By-Laws: the Human Services Committee of Metro Toronto Council; Metro Toronto Council's Special Purpose Committee on Towing Rates; the Metro Towing Task Force; and City Council's Emergency and Protective Services Committee.

To the extent that there may be any question in this regard, we would also ask that you include within the foregoing requests all relevant records that may have been generated by, or are in the possession of, the City Solicitor, including his predecessor, the Metropolitan Solicitor.

In its reply to the request, the City stated the Toronto Licensing Commission is designated as a separate institution under the Act and, therefore, the City was forwarding the portion of the request related to the Commission to that institution pursuant to section 18 of the Act. The City explained that the remaining portion of the request would involve a search of records maintained by two City departments, "City Legal" and "City Clerk", and that each department would review their records independently and provide the requester with a separate response.

The City issued a decision regarding the "City Legal" records, which was appealed by the requester, and ultimately resolved through the issuance of Order MO-1205.

The City identified records responsive to the "City Clerk" portion of the request, and issued a separate decision letter to the requester. The City granted partial access to some records, and denied access to others, claiming the following exemptions:

- section 6(1)(b) - in-camera meeting
- section 14(1) - personal information
- section 10(1)(a) - third party information

The requester (now the appellant) appealed the City's decision.

During mediation, the scope of the appeal was narrowed to one record, an 80-page report prepared by the Greater Toronto Trucking Association (the GTTA) entitled “Summation of the Towing Industry”. The appellant agreed that he does not require access to any personal information contained in this record. The only remaining exemption claim relied on by the City to deny access to this record is section 10(1)(a).

I sent a Notice of Inquiry to the appellant, the City and the GTTA as an affected party. Only the City provided representations.

Pages 2, 9, 22 and 63 were missing from the copy of the record provided to this Office. The City confirmed that the page numbering of this record was done by the GTTA at the time the record was submitted to the City, and that the copy of the record provided to this Office is identical to the record included in the official record holdings to the City.

DISCUSSION:

THIRD PARTY INFORMATION

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the parties resisting disclosure (in this case the City and the GTTA) 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 City 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 subsection 10(1) will occur.

(See, for example, Orders 36, M-29 and M-37)

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:

With respect to Part 1 of the test for exemption, the Commissioner adopted a meaning of the terms which is consistent with his previous orders, previous court decisions and dictionary meaning. His interpretation cannot be said to be unreasonable. With respect to Part 2, the records themselves do not reveal any information supplied by the employers on the various forms provided to the WCB. The records had been generated by the WCB based on data supplied by the employers. The Commissioner acted reasonably and in accordance with the language of the statute in determining that disclosure of the records

would not reveal information supplied in confidence to the WCB by the employers. 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.), reversing (1995), 23 O.R. (3d) 31 (Div. Ct.)]

PART 1: Type of Information

The City claims that the record in its entirety contains both commercial and financial information. Both of these terms have been defined in past orders of this Office.

“Commercial information” 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).

“Financial information” relates to money and its use or distribution and must contain or refer to specific data. Examples of “financial” information include cost accounting method, pricing practices, profit and loss data, overhead and operating costs (Orders P-47, P-87, P-113, P-228, P-295 and P-394).

The City submits:

The report prepared by the GTTA whose members identify the various services they provide for a fee to the public includes: association or towing companies price lists for towing services and various other customer services pricing schedules and member pricing practices, including profit and loss data tables.

Although characterized by the City as a “report”, the record is actually a collection of various distinct documents relating to the towing industry in the Greater Toronto region. The record includes:

- a press release
- newspaper and magazine articles
- advertisements and flyers designed to inform the public of the towing industry’s problems and/or solicit the public’s support for legislation
- rate schedules for GTTA members

[IPC Order MO-1246/October 22, 1999]

- the GTTA's objections to collision reporting centres
- correspondence to and from various politicians on these issues, and
- and the text of four speeches delivered on the topic.

Although various pages or documents included in the "report" may individually satisfy the requirements of "commercial" or "financial" information, the record as a whole does not. Considered in its totality, the record does not relate to the buying and selling of goods and services, nor does it relate to money and its use or distribution. Rather, it represents a consolidation of various specific documents, created independently of each other, and presented, as the title suggests, as a summation of the state of the towing industry, as seen from the perspective of the GTTA. Each separate document must be reviewed on its own to determine if it contains commercial or financial information for the purposes of section 10(1)(a).

I find that documents containing information which relates directly to the buying or selling of towing services qualifies as "commercial" information. This includes suggested highway rates (1992), the competitive rate schedule (1993), tow truck charges, hook-up costs, waiting times, comparative hook-up costs, statistics dealing with the towing industry and operating costs. I also find that documents containing profit and loss data, revenue and expenses, price lists, hourly rates of various towing operators, information pertaining to the actual income and/or salaries of tow truck operators, monthly expenses and driver commissions qualify as both "commercial" and "financial" information. This information is found on pages 5, 7, 31, 39-48, 50-56, 58-59, 61, 69, 73-76 and 78.

Accordingly, the first requirement for exemption under section 10(1) of the Act has been established only for the above-noted pages. The rest of the pages do not meet the first requirement of the section 10(1) exemption claim and, because all three requirements must be established, they do not qualify for exemption.

PART 2: Supplied in Confidence

In order for this part of the section 10(1) test to be met, the information must have been supplied to the City in confidence, either implicitly or explicitly.

The City points out that the record was submitted by a member of the GTTA directly to a former City Councillor for his consideration. The Councillor was a member of the Human Services Committee (the HSC) of Metro Council, and the City states that this Committee was "engaged in extensive and contentious public debate related to the drafting and adoption of By-law 20-85" at the time the record was submitted. Accordingly, I find that the record was supplied for the purposes of section 10(1) of the Act.

The cover page of the record includes the statement "THIS REPORT IS CONFIDENTIAL". The City points out that the record:

... did not form part of the [HSC]'s public agenda or supplementary agenda as a communication submitted as a whole or presented by way of a deputation at the HSC meetings of May 14 and 15, 1996. This report is maintained by City staff in the HSC working files in a sealed envelope marked "confidential - access restricted."

I am satisfied that the information in the record was communicated to the City with an explicit and reasonably-held expectation that it would be treated confidentially; it has been treated consistently by the City as a confidential document; it is not otherwise available to the public; and it was prepared for a purpose that would not entail disclosure (Order P-561). Therefore, I find that the second requirement of the section 10(1) exemption has been established.

PART 3: Harms

To discharge the burden of proof under the third part of the test, the City and/or the GTTA 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 City states that section 10(1)(a) of the Act applies. Under this section, information that satisfies the first two requirements must be withheld if disclosure could reasonably be expected to,

prejudice significantly the competitive position or interfere significantly with the contractual or other negotiations of a person, group or persons, or organization.

The City submits:

GTТА is an association that consists of 400 independent tow truck operators in the business of providing services to the public in the Greater Toronto area. It is a highly competitive business with various members offering a range of towing services. The programs and services offered by the members are the means by which they generate their income. Competitors, such as operators of CRCs, in possession of that information, could modify their procedures and otherwise upgrade their services or undercut their service costs to achieve an unfair competitive advantage over GTТА members.

A significant consideration in evaluating competitive harm in the present case was that the towing business is a single function service which is relatively simple and straightforward. Accordingly, there are comparatively few opportunities to distinguish one towing business from another and thus maintain or improve market position. Research indicates that profit margins are low and supply/demand ratios are currently not favourable. The commercial and financial information contained in the report illustrates the sometimes small differences in service levels and pricing which affect market share.

There are many small companies in the towing business and which stay in business on a month to month basis. Disclosure of the commercial and financial information would cause competitive harm to the towing companies listed, however, it is likely that small companies would be disproportionately harmed given their limited ability to weather service mirroring and corresponding price undercutting.

I accept the theory put forward by the City. However, in the absence of any representations from the GTTA which would substantiate the expectation of prejudice to the competitive position of towing operators, in my view, this expectation of harm is only reasonable if the commercial and/or financial information is relatively contemporary, relates to identifiable business entities, and is not otherwise publicly known.

Pages 5 and 7 contain suggested highway towing rates for 1992 and the GTTA competitive rate schedule for 1993. No individual towing companies are identified on these pages. Absent evidence that would demonstrate how disclosure of rates which are now 6-7 years old could reasonably be expected to cause competitive harm to any towing companies, I am not persuaded that it would.

Pages 72-76 comprise the text of a speech given by a representative of the towing industry to a meeting of the Metro Licencing Commission, and pages 77-78 comprise a different speech given by the same individual to the Special Purpose Committee on Towing Rates. Pages 73-76 and 78 contain commercial information. There is no indication that these meetings were closed to the public. I find that the disclosure of information concerning towing rates, which would appear to have been communicated publicly during the deliberations of these two public bodies, could not reasonably be expected to result in prejudice to the competitive position of any towing operator.

Pages 31-32, 68-71 and 50-56 are letters authored by a member of the GTTA. The first two are addressed "To Whom It May Concern", and are dated in February and March 1996. Based on their content, they appear to have been submitted to one of the committees considering the by-law amendments involving the towing industry. Neither letter contains any reference to confidentiality. Absence evidence to the contrary, I am not persuaded that disclosure of the information concerning towing rates and business income contained on pages 31 and 69, which would appear to have been submitted as part of the public consultation process, could reasonable be expected to result in competitive harm to any towing operator.

The third letter (pages 50-56) is addressed to a Metro Councillor and is dated February 22, 1996. It too would appear to have been submitted as part of the by-law review process. The majority of the letter describes the author's view of the hypothetical operating expenses of a typical towing operator, and I find that disclosure of these parts could not reasonably be expected to harm the competitive position of the author or any other actual towing operator. However, on page 54, the author provides actual operating expenses for his company, and attaches pages 55 and 56, which are detailed financial statements outlining the company's expenditures and accounting methods. I accept that disclosure of the commercial and financial information on these three pages could reasonably be expected to result in competitive harm to this particular towing operator, and this information qualifies for exemption under section 10(1)(a).

Pages 57-61 is a package prepared by the GTTA in response to an article in the Toronto Sun dealing with comparisons of towing charges in Toronto, Montreal and Vancouver. Page 57 is a cover note which appears to indicate that the package was submitted to the Metro Licence Commission. It attaches page 58, which is a chart comparing rates in the three cities; page 59, which is a french-language chart issued by Statistics Canada outlining some demographic statistics for these three cities; and page 61, which is a

document apparently obtained from the Metro Licence Commission on rates payable to towing operators under contract to the Ontario Provincial Police. Page 59 is clearly a publicly available document and does not qualify for exemption under section 10(1)(a). The commercial information on pages 58 and 61 would appear to have been submitted as part of the public consultation process and, based on the evidence before me, I am not persuaded that their disclosure could reasonably be expected to result in competitive harm to any towing operator.

Pages 39-46 constitute a report which analyses hook-up and waiting times for a list of various towing companies associated with the GTTA. The rates charged by each company are listed, together with average wait and hook-up times. Given the competitive nature of the towing industry, as outlined by the City, I accept that disclosure of this commercial information could reasonably be expected to result in harm to the competitive position of these companies. I find that all three parts of the test have been established for these pages, and they qualify for exemption under section 10(1)(a).

Pages 47-48 list the number and relative percentage of cars released from various named towing operators during the period October 1995 through March 1996. No rates are included on these pages, and I find that disclosure of the numbers and percentage figures alone could not reasonably be expected to result in competitive harm to any of the listed towing operators.

In summary, I find that pages 39-46, 55-56, and the portion of page 54 which contains commercial and financial information, satisfy all three requirements of section 10(1)(a) and therefore qualify for exemption. All other parts of the record do not qualify for exemption and should be disclosed, subject to the severance of any personal information contained in the record.

ORDER:

1. I uphold the decision of the City not to disclose pages 39-46, 55-56, and the portion of page 54 which contains commercial and financial information. I have attached a highlighted version of page 54 with the copy of this order sent to the City's Freedom of Information and Privacy Co-ordinator which identifies the portions that should **not** be disclosed.
2. I order the City to disclose the rest of the record to the appellant, subject to the severance of pages 11 and 12, and those portions of pages 24, 25 and 62 that contain personal information. I have attached a highlighted version of pages 24, 25 and 62 with the copy of this order sent to the City's Freedom of Information and Privacy Co-ordinator which identifies the portions that should **not** be disclosed. These should be disclosed to the appellant by **November 29, 1999** but not before **November 22, 1999**.
3. In order to verify compliance with the provisions of this order, I reserve the right to require the City to provide me with a copy of the record which are disclosed to the appellant pursuant to Provision 2.

Original signed by: _____

Tom Mitchinson
Assistant Commissioner

October 22, 1999