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

ORDER MO-1831

Appeals MA-030349-1 and MA-030393-1

City of Ottawa

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NATURE OF THE APPEALS:

The City of Ottawa (the City) received two requests under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act)* for access to the following information:

Request A-2003-00265 (Appeal Number MA-030349-1)

> The two individual listings of C.U.T.A. [the Canadian Urban Transit Association] stats [statistics] from Para Transpo.
>
> > 1st – Listing of C.U.T.A. stats [pertaining to the operation of] vans only plus [the] percentage [of trips recorded as being] on time.
> > 2nd – Listing of C.U.T.A. stats [pertaining to the operation of] sedans only plus [the] percentage [of trips recorded as being] on time.

Request A-2003-00300 (Appeal Number MA-030393-1)

1) One-way single passenger trips from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
2) Companions and attendants from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
3) Total Passengers carried from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
4) Revenue vehicle service hours from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
5) Revenue kilometres of service from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
6) Total kilometres of service from Jan. 1/02 to and including June 30/02 and July 1 to and including December 31/02.
7) Number of sedans from Jan. 1/02 to June 30/02 and July 1 up to December 31/02.
8) Total cost of the sedan contract from Jan. 1/02 to June 30/02 and July 1 to December 31/02.

The City located the requested information responsive to the first request and disclosed to the requester the Para Transpo statistics published by the Canadian Urban Transit Association (CUTA). In addition, the City informed the requester that, "…CUTA statistics do not include separate figures for Vans and Sedans and they do not include figures on percentage on time". With respect to the second request, the City located a one-page document containing the responsive information. However, in both cases, the City applied the exclusionary provision in section 52(3) of the *Act* to deny access to its own OC Transpo information relating to percentages of trips recorded as being "on time" (the first request) and to the information responsive to the second request. The requester (now the appellant) appealed the City's decision.

I decided to seek the representations of the City initially, by providing it with a Notice of Inquiry setting out the facts and issues in the appeal. The City responded to the Notice by withdrawing

its reliance on section 52(3). Instead, the City claimed the mandatory exemption in section 10(1) and the discretionary exemptions in sections 11(c) and (d) for all of the records. I provided the non-confidential portions of the City's representations to the appellant and to three parties whose rights may be affected by the disclosure of the information contained in the records (the affected parties). I received representations from all three affected parties and the appellant and shared the appellant's representations with the affected parties and the City. I also provided the appellant with copies of the non-confidential portions of the City and the affected parties' representations. I received additional submissions by way of reply from the City, the appellant and from two of the affected parties.

RECORDS:

The information at issue in Appeal Number MA-030349-1 is contained in a record prepared by the City and consists of:

a) percentage on time for Para Transpo cars and vans each month (July 2002 to March 2003 inclusive). The statistics for July to September 2002 are not available.

b) percentage on time for WestWay Para Transpo cabs each month (July 2002 to March 2003 inclusive).

The sole record responsive to the request in Appeal Number MA-030393-1 is a one-page document prepared by the City setting out the requested information for each of the six month periods requested.

DISCUSSION:

THIRD PARTY INFORMATION

Section 10(1): the exemption

Section 10(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 10(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the *Act* is to shed light on the operations of government, section 10(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 10(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 10(1) will occur.

Part 1: type of information

The City and the affected parties submit that the records at issue in both appeals contain information that qualifies as "commercial" information as it "offers direct insight and concrete information relating to Service delivery issues" and is "critical to assessing profitability".

The term "commercial information" in section 10(1) has been discussed in prior orders:

> *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].

In Order P-1621, Assistant Commissioner Tom Mitchinson addressed the definition of the term "commercial information" in relation to "a "Media Analysis" of the coverage of the Ipperwash occupation by a group of native protestors. A "Media Analysis" contains and discusses such things as "the types of messages surveyed in the print and television news media and audience distribution of and reaction to these messages information". He reviewed whether such

information is properly characterized as "commercial information" for the purposes of the *Act* as follows:

> The information contained in these records does not relate in any way to the buying or selling of goods or services. Other than stating that the document has "substantial commercial value", the Ministry has provided insufficient evidence to establish that this information has commercial value within the communications industry, and in any event, the existence of commercial value would not be sufficient to bring this information within the scope of the definition of "commercial information".
>
> In Order P-1114, I specifically rejected the "commercial value" argument in relation to the meaning of "commercial information" as that term is used in the valuable government information exemption at section 18(1)(a) of the *Act*.
>
> > Although an argument could be made that when the information contained on various registration forms is consolidated in bulk on a database such as a microfilm, this new microfilm record might have a commercial **value**, in my view, this is relevant only in determining whether part three of the section 18(1)(a) exemption test has been established, not part one. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information. These two aspects of the exemption must be considered separately. Unless the records themselves **contain** commercial information, the fact that the format in which the information is stored may give the record monetary or potential monetary value will not, on its own, bring the record within the scope of section 18(1)(a).
> >
> > If considerations of potential commercial value were in themselves determinative of the character of the information, enormous amounts of government information would qualify as "commercial information" which, in my view, could not have been the legislature's intention, and would be inconsistent with one of the fundamental principles of the *Act*, that exemptions from the right of access should be limited and specific.
>
> Further, in a decision quashing Order P-373, in which I applied this interpretation of "commercial information", the Divisional Court alluded to the commercial value of information to the requester in concluding that I had erred in finding that the information was not "commercial". (The Court said that the information had a "commercial effect" because the requester was "in a commercially related business"). However, the Ontario Court of Appeal recently overturned the Divisional Court's decision and restored my Order P-373. The Court of Appeal found that "the Commissioner adopted a meaning of the terms [including

> "commercial information"] which is consistent with his previous orders, previous court decisions and dictionary meanings. His interpretation cannot be said to be unreasonable" (see *Ontario (Workers Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner)* (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.)).
>
> Therefore, I find that the records do not contain commercial information for the purposes of section 17(1). I also find that these pages do not contain any of the other categories of information outlined in that section.

I adopt the reasoning expressed by Assistant Commissioner Mitchinson in Order P-1621 for the purposes of the present appeal.

The record at issue in Appeal Number MA-030349-1 consists of a list of statistics showing the "on-time percentage" for two contractors over certain specified periods of time. The sole document at issue in Appeal Number MA-030393-1 consists of certain statistics describing, among other things, passenger use, revenues and the total cost of a particular contract for two time periods.

In my view, this information does not fall within the ambit of the definition of "commercial information", or any of the other categories of information, in section 10(1). Specifically, I also find that the records at issue in both appeals do not contain information "relating to the buying or selling of goods or services". Rather, the information simply outlines certain historical facts regarding the performance of existing contracts.

As all three aspects of the test under section 10(1) must be met in order for the records to qualify for exemption, I find that the records are not exempt under section 10(1).

ECONOMIC OR OTHER INTERESTS

The City also takes the position that the records are exempt from disclosure under the discretionary exemptions in sections 11(c) and (d), which read:

> A head may refuse to disclose a record that contains,
>
> (c) information whose disclosure could reasonably be expected to prejudice the economic interests of an institution or the competitive position of an institution;
>
> (d) information whose disclosure could reasonably be expected to be injurious to the financial interests of an institution;

In Order P-1190 (upheld on judicial review in *Ontario Hydro v. Ontario (Information and Privacy Commissioner)*, [1996] O.J. No. 4636 (Div. Ct.), leave to appeal refused [1997] O.J. No. 694, Assistant Commissioner Mitchinson stated in reference to the provincial counterpart of section 11(1)(c):

> In my view, the purpose of section 18(1)(c) is to protect the ability of institutions such as Hydro to earn money in the market-place. 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.

For sections 11(b), (c), (d) or (g) 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.)].

The City submits that its ability to work with its Para Transpo service providers would be adversely affected by the disclosure of the information contained in the records. It argues that the disclosure of the statistical information could be used to "paint an unfair picture" of the performance of the service providers and would subject them to unfair and undue criticism. It goes on to add that:

> This in turn may be expected to be harmful to the City's financial position in that it may jeopardize the City's ability to maintain a good working relationship with its contractor. It may also diminish the City's ability to work with future contractors in the same way if they believe that information the City requests from them concerning performance may be made public.

The City goes on to make additional confidential representations in support of its position and concludes its submissions on the application of this exemption as follows:

> . . . the City wants to be able to continue to receive such detailed information from its contractors in the future so that it may continue to negotiate with them and revise services as required. The City submits that a cooperative relationship is dependent on confidentiality. It these statistics were disclosed, the City's ability to attract future contractors may be jeopardized, which could diminish the City's ability to undertake a truly competitive process in future tenders. This would ultimately be injurious to the City['s] competitive position. It may lessen the City's ability to secure the best service provider, which is injurious to the City's financial interest.

In my view, the City has not provided the kind of "detailed and convincing" evidence required to establish that the disclosure of the information contained in the records could reasonably be

expected to result in the harms contemplated by sections 11(c) and (d). I find that the disclosure of the statistical information in the records could not reasonably be expected to adversely affect the ability of the City to continue to obtain contractors who are interested in providing Para Transpo services to it. In my view, it is implausible to assume that the disclosure of this information could reasonably be expected to result in the harms to the City's economic or financial interests. I do not accept that there is a reasonable prospect that such contractors would be reluctant to bid on these contracts in future because the information contained in these statistical reports may subject them to criticism from some source.

Accordingly, I find that the discretionary exemptions in sections 11(c) and (d) have no application to the information contained in the records at issue in these appeals.

ORDER:

1. I order the City to disclose the information contained in the records at issue to the appellant by providing him with copies by **October 19, 2004** but not before **October 14, 2004**.

2. In order to verify compliance with Order Provision 1, I reserve the right to require the City to provide me with copies of the records that are disclosed to the appellant.

Original signed by: September 13, 2004
Donald Hale
Adjudicator