



**Information and Privacy  
Commissioner/Ontario**

**Commissaire à l'information  
et à la protection de la vie privée/Ontario**

# **ORDER M-288**

**Appeal M-9300122**

**Township of Kitley**



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# ORDER

## BACKGROUND:

A request was received by the Township of Kitley (the Township) under the Municipal Freedom of Information and Protection of Privacy Act (the Act) for access to the following records relating to an invitation by the Township to submit tenders for garbage collection:

- A copy of the Performance Bond provided to the Township by [the successful bidder] as stipulated by Item #4 of the "Statement Governing Tender Requirements". This bond is also referred to in Clause #17 of the contract which was provided by the Township as part of the tender package for the garbage collection contract.
- A copy of the complete tender package submitted to the Township by [the successful bidder] including all supporting documentation.
- A copy of the contract executed between the Township of Kitley and [the successful bidder] for the collection of garbage within the township and transport to the Laidlaw landfill site as well as all supporting documentation.
- Copies of any correspondence between the Township of Kitley and [the successful bidder] between December 1, 1992 and January 21, 1993.

Pursuant to section 21 of the Act, the Township notified the successful bidder, whose interests might be affected by the disclosure of the requested records. The successful bidder objected to the disclosure of any of the records, except for the contract. The Township subsequently issued a decision granting the requester access to the contract and denying access to the remainder of the records under section 10(1) of the Act.

The requester appealed the decision of the Township. He claims that there is a public interest in the disclosure of the information.

During mediation, the Township disclosed some portions of the remaining records. Further mediation was not successful and notice that an inquiry was being conducted to review the decision of the Township was sent to the Township, the appellant and the successful bidder (the affected person). Representations were received from all three parties.

## THE RECORDS:

The following portions of the records are at issue in this appeal:

Record 1: Letter of Credit

parts of paragraphs 1, 2 and 3; paragraphs 4, 5, 6, 7 and 8 in their entirety; notations on the top of pages one and two, and bottom of page two

Record 2: Tender

part of paragraph 6, and paragraph 7 in its entirety

Record 3: Statement Governing Tender Requirements

part of paragraph 3

Record 4: Appendix to Statement Governing Tender Requirements

handwritten dollar figures at the bottom of the page

Record 5: Letter from Township's solicitor to the affected party

paragraphs 2 and 3 in their entirety

I note that the description of the five types of garbage collection has been severed from paragraph 6 of Record 2, yet disclosed in the handwritten notations on the bottom of Record 4. The Freedom of Information and Protection of Privacy Co-ordinator of the Township has confirmed that this list has been disclosed. Accordingly, only the dollar figures contained in Records 2 and 4 for each type of collection are at issue in this appeal.

## **ISSUES:**

- A. Whether the mandatory exemption provided by section 10(1) of the Act applies to the portions of the records at issue.
- B. If the answer to Issue A is yes, whether there exists a compelling public interest in the disclosure of the information at issue which outweighs the purpose of the section 10(1) exemption.

## SUBMISSIONS/CONCLUSIONS:

**ISSUE A: Whether the mandatory exemption provided by section 10(1) of the Act applies to the portions of the records at issue.**

The Township and the affected person have submitted representations on the application of section 10(1)(a) of the Act which 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, if the disclosure could reasonably be expected to,

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

For a record to qualify for exemption under section 10(1), the Township and/or the affected person 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 section 10(1)(a) will occur.

[Orders 36, M-10 and M-183]

Failure to satisfy the requirements of any part of the test will render the section 10(1) claim invalid (Orders 36 and M-10).

### Part One

The information withheld from Record 1 outlines the terms and conditions of the banking agreement between the affected person and the bank, the name, address and fax numbers of the bank, the name and address of a financial institution, the affected person's credit number and the signatures of two bank officers.

The unit prices bid by the affected person on five different types of garbage collection were withheld from Record 2. The same information, in handwritten form, was withheld from Record 4.

The name of the insurance company and the amount of insurance provided to the affected person for liability coverage were withheld from Record 3.

The severed portion of Record 5 describes a financial arrangement between the Township and the affected person.

In my view, the portions of the records at issue contain financial and/or commercial information. Therefore, the requirements of part one of the test have been met.

## **Part Two**

With respect to part two of the test, two requirements must be met by the parties resisting disclosure. They must prove that the information was **supplied** to the Township and that it was supplied **in confidence**.

In addition, information can be said to have been **supplied** to the Township, if disclosure of the records would permit the drawing of accurate inferences about the financial and/or commercial information actually supplied by the affected person to the Township (Orders 203, P-218 and P-246).

Record 5 is a letter from the Township's solicitor to the affected person, and describes the terms and conditions to be met before garbage collection can commence. In my view, neither the record, nor most of the information in the record was supplied to the Township by the affected person. I find that, with the exception of the first sentence in paragraph 2, the information at issue in paragraphs 2 and 3 of Record 5 does not meet the "supplied" aspect of part two of the section 10(1) test. However, disclosure of the first sentence of paragraph 2 would, in my view, reveal financial information that was actually supplied by the affected person to the Township.

I find that all the information at issue contained in the tender documents, Records 1, 2, 3 and 4, was supplied to the Township by the affected person.

With regard to the issue of whether the information was supplied in confidence, part two of the section 10(1) test requires the demonstration of a reasonable expectation of confidentiality at the time the information was supplied.

The appellant submits:

There was nothing in the tender notice, tender documentation, or any written documentation I have received from the Township that states, or even suggests that information supplied as part of a tender is done either "implicitly, or explicitly" in confidence ...

The Township indicates that it does not have a written policy regarding the confidentiality of information in the tender documents. I have been provided with no evidence that the information was supplied to the Township **explicitly** in confidence.

However, I must also consider whether the information was supplied **implicitly** in confidence. In its representations, the Township states:

The bidders were advised that the tenders would be opened at an open meeting of council on December 15, 1992.

The name of each contractor and their total dollar bid prices were announced by the clerk. The successful and unsuccessful bidders were notified the next day and only the total contract amount was released.

...

It has always been the policy and practice of the municipality to treat unit price quotations as confidential. Performance bonds/letters of credit have always been received by the Township in the strictest confidence as these documents can contain a great deal of third party financial information.

I have carefully considered the representations of the parties, and I am satisfied that the information at issue withheld from Records 1, 2, 3 and 4 was supplied implicitly in confidence to the Township and that disclosure of the first sentence of the second paragraph of Record 5 would reveal information supplied implicitly in confidence to the Township. I, therefore, find that part two of the section 10(1) test has been satisfied with respect to this information.

### **Part Three**

To satisfy part three of the test, the Township and/or the affected person must present evidence that is detailed and convincing, and which describes a set of facts and circumstances which would lead to a reasonable expectation that one or more of the harms described in section 10(1)(a) would occur if the information was disclosed (Order 36).

With respect to the unit pricing information contained in Records 2 and 4, the Township submits that:

... disclosure of the unit prices would prejudice significantly the competitive position of [the successful bidder]. With this knowledge, a competitor could under bid with certainty, resulting in the affected person's loss of future contracts. With the market for recycling services being as competitive as it is, it is not unreasonable to expect that this practice might occur.

The affected person supports this position and also notes that:

... the unit pricing for door to door blue box recycling pickup in the Township of Kitley ... was requested by the Township but in fact the work was never awarded by the Township, hence this should not be public information until the work is awarded.

I am satisfied that I have been presented with sufficient evidence to conclude that disclosure of the unit pricing information could prejudice significantly the competitive position of or interfere significantly with the contractual negotiations of the affected party.

The affected person takes the position that disclosure of the information at issue in Record 1, the letter of credit, would enable his competitors to gain some information about its financial position. He makes the same argument with respect to the information contained in Record 5. In the circumstances of this appeal, I am satisfied that the affected person has provided detailed and convincing evidence of the harm to his competitive position should the information contained in the letter of credit and the first sentence of paragraph 2 of Record 5 be disclosed.

The information in the severed portion of the Statement Governing Tender Requirements, Record 3, identifies the insurance company and the amount of insurance provided to the affected person for liability coverage. I have received no representations from either the Township or the affected person as to why disclosure of this information could reasonably be expected to result in one of the types of harms specified in section 10(1)(a) of the Act. Having carefully reviewed this record, I find that part three of the test has not been satisfied with respect to this information.

In summary, I find that the mandatory exemption provided by section 10(1)(a) applies to the information contained in Records 1, 2, 4 and the first sentence of paragraph 2 of Record 5.

**ISSUE B: If the answer to Issue A is yes, whether there is a compelling public interest in the disclosure of the records that outweighs the purpose of the section 10(1) exemption.**

Under Issue A, I found that section 10(1)(a) of the Act applies to the information contained in Records 1, 2, 4 and the first sentence of Record 5. The appellant submits that there is a public interest in the disclosure of this information. Accordingly, I will consider the application of section 16 of the Act which states:

An exemption from disclosure of a record under sections 7, 9, **10**, 11, 13 and 14 does not apply if a compelling public interest in the disclosure of the record clearly outweighs the purpose of the exemption. [emphasis added]

The Act is silent as to who bears the burden of proof in respect of section 16. Where the application of

section 16 has been raised by an appellant, it is my view that the burden of proof cannot rest wholly on the appellant, where he or she has not had the benefit of reviewing the record before making submissions in support of their contention that section 16 applies. To do otherwise would be to impose an onus which could seldom, if ever, be met by the appellant.

Section 16 has two requirements which must be satisfied in order to invoke the application of the so-called "public interest override": there must be a **compelling** public interest in disclosure, and this compelling public interest must **clearly** outweigh the **purpose** of the exemption, as distinct from the value of disclosure of the particular record in question.

With respect to Record 1, the letter of credit, the appellant submits that "Due to the importance of this document, ... there is an overriding public interest in its full disclosure". He further submits that:

This document was issued by an unknown financial institution and is intended to protect the residents of Kitley Township against financial loss in the event of [the successful bidder's] failure to carry out their contractual obligations. With the severances made in this document it is impossible for any member of the public to determine for themselves if the document was even issued by a bona fide financial institution, let alone anything else.

The affected person submits that "... we have provided proof that a letter of credit is in place to meet the contractual obligations of this tender, as required". In my view, the disclosure afforded to the appellant substantiates that a letter of credit was provided by the affected person to the Township. Legal counsel for the Township was satisfied that, for the purposes of the tender, the letter of credit was acceptable in lieu of a performance bond.

This is confirmed in the portion of Record 5 already disclosed to the appellant. I do not believe that, given these circumstances, there is any public interest to be served in disclosure of the balance of Record 1.

With respect to the unit pricing information contained in Records 1 and 4, the appellant submits:

It is in the public interest of the taxpayers of Kitley Township that municipal tenders be awarded to the lowest qualified bidder. Such action can only be ensured by keeping the tendering process open to the public with full disclosure of bids etc. Secrecy effectively prevents public scrutiny of the actions of Council.

In considering the appellant's representations, I am mindful that the names of **all** contractors and the total amounts of **all** bids were disclosed, and that the lowest bidder is known to the appellant.

In order for section 16 of the Act to apply, there must be a compelling public interest in disclosure. In my view, the appellant has not demonstrated that there is a public interest in disclosure of the information in Records 2 and 4, nor that it is a compelling interest. In addition, it has not been demonstrated that there is a



public interest that clearly outweighs the purpose of the section 10(1) exemption.

I therefore find that section 16 of the Act does not apply to the information at issue in this appeal.

**ORDER:**

1. I order the Township to disclose to the appellant paragraph 3 on page one of Record 3 in its entirety, and the second sentence of paragraph 2 and paragraph 3 of Record 5 in its entirety.
2. In order to verify compliance with this order, I order the Township to provide me with copies of the records disclosed to the appellant pursuant to Provision 1 of this order, **only** upon request.

Original signed by: \_\_\_\_\_

Anita Fineberg  
Inquiry Officer

\_\_\_\_\_ March 14, 1994