



**Information and Privacy  
Commissioner/Ontario**

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

# **ORDER MO-1471**

**Appeal MA-010088-1**

**Town of Ajax**



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## **BACKGROUND**

The Town of Ajax (the Town) participated in a regional co-operative tender for garbage collection services. The tender called for a single contract price that included both basic and additional services. After the bids were received, the Town realized that the contract prices exceeded its budget allocation. As a result, the Town withdrew from the regional tender. Subsequently the Town put out its own tender for garbage collection. Its tender document separated the price for basic services from the price for additional services. Part 1 described basic services, and Part 2 listed additional services. This allowed the Town to determine the cost of basic services and then calculate which additional services it could afford.

## **NATURE OF THE APPEAL:**

This appeal arises from a request made to the Town under the *Municipal Freedom of Information and Protection of Privacy Act* (the *Act*) for copies of the tender bids submitted by the two lowest bidders in the competition described above.

The Town provided the appellant with a blank copy of the contract, the names of the two lowest bidders, and the total bid amount submitted by each of the two lowest bidders. Other than this information, the Town denied access to the bids relying on the exemption in section 10(1) (third party information) of the *Act*.

The appellant appealed the Town's decision.

During the mediation process, the appellant asked the Town to explain the discrepancy between the bid submitted by the lowest bidder of \$494,950, and the final offer of \$617,000 that was accepted by the Town. The Town indicated that the final offer included the cost of both basic services and "additional services", while the bid only included the cost of basic services.

The appellant later agreed to restrict his request to the information submitted by the lowest bidder relating to the additional garbage collection services to be provided as set out in Part Two of the bid. The only information in Part Two is a description of the unit prices for the additional garbage collection services.

I sent a Notice of Inquiry setting out the issues in the appeal to the Town and an affected party. Both provided representations in response. I then provided these representations in their entirety together with the Notice of Inquiry to the appellant who also made submissions.

## **RECORDS:**

The record at issue is Part Two of the Form of Tender that describes the additional garbage collection services to be provided under a contract that was submitted by the lowest bidder in the competition described above.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

Sections 10 (1) (a), (b) and (c) read as follows:

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,

- (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;

#### **Part One: Type of information**

Previous orders of this office have found that commercial information is information related solely to the buying, selling or exchange of merchandise or services (Order P-493), and that financial information is information relating to money and its use or distribution and must contain or refer to specific data.

The affected party submits that:

.. the information set forth in Part II of [our] tender bid i.e. the cost of additional services is commercial and financial information ...

...

... Part 2 of the tender contains unit pricing relating solely to the selling of services. It is specific data revealing pricing practices.

I am satisfied that the unit prices set out in Part 2 of the tender contain information that relates to the buying and selling of services and that relates to the operation of the commercial business of the affected party. I find that the unit prices also constitute “financial information”, as that term is used in section 10(1) of the *Act*.

Therefore I find that the first part of the test has been met.

## **Part Two: Supplied in confidence**

In order to meet the second part of the test, the Town and/or the affected party must establish that the affected party supplied the information at issue to the Town in confidence, either explicitly or implicitly. To establish that a record was supplied in confidence, it must be demonstrated that an expectation of confidentiality existed and that the expectation must have been reasonable and have an objective basis (Order M-169).

The Town submits that:

It has always been the policy and practice of the Town of Ajax to treat the unit pricing of quotations/tenders as well as information supplied by the bidders as confidential (See By-law 95-2000, section 11 as attached).

When RFP's (sic) are distributed, potential bidders are required to submit their bids in a sealed envelope, supplied by the Town, addressed to the Clerk. The submissions are recorded and kept sealed until the stated opening date and time. In a public tender opening, only the name of the company and the total bid amount is released (read out) to those present. The successful and unsuccessful bidders are notified afterwards with only the total contract amount being released. The only exception to the release of unit pricing is when the RFP involves a single unit or multiple purchases of the same item, such as a vehicle, where it is not possible to keep the unit pricing confidential.

The tender at issue was handled in the manner noted above. **Access to the unit pricing** of the submissions was limited to the staff present at the tender opening as well as the staff involved with evaluating the tenders. This information **is never released to the public** and only the total amount of the contract is put forth for approval at Council Meetings (emphasis added).

This process allows the bidder to supply the information in confidence and ensures that the information is kept confidential.

The affected party in its representations states:

[The affected party] is an active participant in Municipal tenders for garbage collection. It is well aware of the tendering process which involves submission of bids in a sealed envelope and in the public tender openings in which only the name of the company, and total bid amount is released. [The affected party]'s bid in the tender form to the Town of Ajax in this manner relied on the confidentiality of the bidding process which is practised by the Town of Ajax. The unit pricing component of the bid which is formulated in house (sic) would not be available from any source to which the public has access. Since only the total bid amount is to be revealed by the Town, [the affected party] relied on the fact that the unit pricing component would not be communicated. There are also confidentiality

provisions in the Corporation of the Town of Ajax's by-law 95-2000 providing protection where there is total bid amounts involved.

The appellant did not provide submissions on this part of the test.

Based on the evidence provided by the Town and the affected party, I accept the position of the affected party that it would have a reasonable expectation that the Town would hold the unit prices for additional services in confidence. I therefore find that the second part of the section 10 test has been established.

### **Part three: Reasonable expectation of harm**

To discharge the burden of proof under the third part of the test, the party opposing disclosure 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 evidence to establish this must be detailed and convincing.

The requirement that the disclosure of information "could reasonably be expected to" result in probable harm has been interpreted by Senior Adjudicator David Goodis in Order PO-1747 as follows:

The words "could reasonably be expected to" appear in the preamble of section 14(1), as well as in several other exemptions under the *Act* dealing with a wide variety of anticipated "harms". In the case of most of these exemptions, in order to establish that the particular harm in question "could reasonably be expected" to result from disclosure of a record, the party with the burden of proof must provide "detailed and convincing" evidence to establish a "reasonable expectation of probable harm" [see Order P-373, two court decisions on judicial review of that order in *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 at 40 (Div. Ct.), and *Ontario (Minister of Labour) v. Big Canoe*, [1999] O.J. No. 4560 (C.A.), affirming (June 2, 1998), Toronto Doc. 28/98 (Div. Ct.)].

Applying this reasoning, the Town must provide detailed and convincing evidence sufficient to establish a reasonable expectation of probable harm as described in these sections as a result of disclosure of the record.

Previous orders have addressed the issue of harm under section 10(1) in the context of records containing specific bid information. Adjudicator Big Canoe in Order PO-1696 comments:

In past orders a reasonable expectation of prejudice to competitive position has been found in cases where information relating to pricing, material variations, bid break downs, etc. was contained in the records (Orders P-166, P-610 and M-250). Past orders have also upheld the application of section 17(1)(a) [the municipal

equivalent of section 10(1)(a)] where the information in the records would enable a competitor to gain an advantage on the third party by adjusting their bid and underbid in future business contracts (Orders P-408, M-288 and M-511).

The Town submits:

With this knowledge [of unit prices], a competitor could under bid (sic) with certainty, resulting in the affected companies (sic) loss of future contracts. With the market for garbage collection being as competitive as it is, it is not unreasonable to expect that this practice might occur.

The affected party supports the Town's submission and further adds:

The disclosure of the unit prices would harm [the affected party] by prejudicing their competitive position in the tendering of future bids particularly in the call for "all required and desired services" bids.

In response, the appellant states that neither the Town nor the affected party has provided "detailed and convincing" reasons to support the harm that will result if the information at issue is disclosed. The appellant further submits:

The major costs to all bidders are fuel and labour. These costs should be somewhat similar for all bidders. Each bidder has to make certain assumptions relating to productivity and provide for the recovery of fixed costs in some manner. The disclosure of the detailed bid pricing will not enable competitors to ascertain with any certainty how these allocations and assumptions were arrived at. If anything by disclosing this information the bidding process will become more competitive and beneficial to the Town as unsuccessful bidders will look more carefully at the productivity assumptions and cost allocations they made to try and craft future bids so that they will be successful.

In its response, the appellant implies that the key to a bidder's competitive advantage is the assumptions about productivity that it makes in calculating its prices. The appellant then concludes that since disclosure of unit prices will not reveal these assumptions, disclosure will not undermine a bidder's competitive advantage. In my opinion, productivity assumptions are embedded in the unit price. That is, a bidder first makes assumptions on productivity (eg. how many houses can be serviced per hour). Based on these assumptions, the bidder calculates a unit price to cover costs and provide a profit. Even if I accept the appellant's conclusion that the key to competitive advantage lies in the productivity assumptions made, the disclosure of unit prices can in some measure reveal what assumptions have been made about productivity.

I agree with both the Town and the affected party that the unit pricing structure underlies a bidder's competitive advantage and that disclosure of unit prices in these circumstances will allow competitors to underbid and prejudice that bidder's competitive position.

As a result, I find that the third and final requirement for exemption under section 10(1)(a) has been established. Accordingly, I find that the information in Part 2 of the tender bid qualifies for exemption under section 10(1) of the *Act*.

## **PUBLIC INTEREST IN DISCLOSURE**

The appellant submits that there is a “public policy objective” in “ensuring that the public and resident (sic) of the Town in particular have confidence and faith that the process [of public tenders] is being administered fairly and in their best interests”. He further submits that:

By having structured the Tender document in the manner it did, and given the circumstances relating to the withdrawal from the regional tender and the awarding of the current tender, the Town has to a certain extent brought the entire bidding process into suspicion. Thus even if there was a general principle that detailed submissions should not be made public [,] given the very unusual circumstances surrounding this tender [,] they should be.

Section 16 of the *Act* 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).

For section 16 to apply, two requirements must be met. First, there must exist a compelling public interest in the disclosure of the records. Second, this interest must clearly outweigh the purpose of the exemption [Order P-1398, upheld on judicial review in *Ontario (Ministry of Finance) v. Ontario (Information and Privacy Commissioner)* (1999), 118 O.A.C. 108 (C.A.), leave to appeal refused [1999] S. C. C. A. No. 134 (note)].

A compelling public interest has been found, for example, in situations questioning the propriety of the disposal of billions of dollars of public property (Order PO-1804), the safety and reliability of the operations of Ontario’s nuclear power plants (PO-1805), and in situations that raised allegations of improper conduct on the part of elected officials (M-710).

The appellant in this appeal questions the propriety of the Town’s bidding process in a single tender. While there is a public interest in scrutinizing records relating to tender bids, the Town has gone some way in meeting its obligation through its disclosure of the total bid amounts of the two lowest bidders and its subsequent explanation of the discrepancy between the bid amount submitted by the lowest bidder and the final offer that was accepted. In these circumstances, it cannot be said that the public interest in disclosure of the unit prices is compelling. Accordingly, since the first requirement of section 16 has not been satisfied, I find that the section 16 exception does not apply.

**ORDER:**

1. I uphold the Town's decision.

Original signed by: \_\_\_\_\_  
Dawn Maruno  
Adjudicator

\_\_\_\_\_ October 11, 2001