



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

# **ORDER MO-1185**

**Appeal MA-980261-1**

**The Corporation of the Township of Osgoode**



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/Télé: 416-325-9195  
TTY: 416-325-7539  
<http://www.ipc.on.ca>

## **BACKGROUND:**

The Corporation of the Township of Osgoode (the Township) received a request under the Municipal Freedom of Information and Protection of Privacy Act (the Act). The request was for access to:

[t]he most recent quarterly report submitted by [a named environmental management company] on activities and financial figures arising from the management of the Township dump ...

The Township located information which was responsive to the request and denied access to portions of it, claiming the application of the “third party information” exemption in section 10(1) of the Act. The record consists of the undisclosed portions of a quarterly report prepared by the named environmental management company (the affected party) for the Township pursuant to the requirements of a contract between the parties for the management and operation of a landfill site owned by the Township.

The requester, now the appellant, appealed the Township’s decision. In his appeal letter, the appellant also referred to the possible application of the “public interest override” in section 16 of the Act.

During the mediation of the appeal, the appellant agreed to limit the scope of the appeal to include only information relating to the figures contained in the third quarter report for 1998. Accordingly, the record consists of the information contained in the record other than that listed in the columns titled “Revenues”, “Total Expenses” and “Income (loss) before adjustments”, which were disclosed to the appellant.

A Notice of Inquiry was provided to the appellant, the Township and the affected party. Representations were submitted by all three parties.

## **DISCUSSION:**

### **THIRD PARTY INFORMATION**

For a record to qualify for exemption under sections 10(1)(a), (b) or (c), the Township and/or the affected 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 Township 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.

[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 reflected on the approach taken by the Commissioner's office with respect to the interpretation of the third party information exemption and made the following comments:

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) (1995), 23 O.R. (3d) 31 (Div. Ct.); reversed on appeal, unreported decision, dated September 3, 1998 (Ont. C.A.)]

### **Part One - Types of Information**

The affected party and the Township submit that the information contained in the record qualifies as "commercial" or "financial" information within the meaning of section 10(1).

#### **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 Township indicates that the information in several of the columns which were not disclosed relates to the affected party's sales figures, volume data, unit pricing and pricing structure and that information of this sort has been found to qualify as "commercial information" within the meaning of section 10(1) in Orders P-166, P-531, P-905 and P-1303.

The affected party submits that, upon analysis, the disclosure of the severed information would permit the reader to make certain inferences in respect to labour rates, sales volumes, purchases, inventory, other overhead charges, remaining landfill capacity and several other important components of its business structure. It argues that this information is commercial and financial information for the purposes of section 10(1).

### **Financial Information**

The term refers to information relating to money and its use or distribution and must contain or refer to specific data. For example, 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 Township states that much of the information which is contained in the record relates to the distribution of its expenses by the affected party, as well as the operating costs related to the generation of revenue at the dump site. For this reason, it submits that the information qualifies as "financial information" for the purposes of section 10(1).

The information contained in the undisclosed portions of the record relates to the commercial activities of the affected party and the expenses incurred in generating revenue from the dump site's operation. It describes in detail, the volume of waste material received at the site and the allocation of expenses which were incurred in the operation of the site. I have reviewed the severed information and find that it qualifies as commercial and financial information for the purposes of section 10(1). The first part of the test has, accordingly, been satisfied.

### **Part Two - Supplied in Confidence**

The affected party and the Township state that the affected party supplied the record to the Township directly and that it remains in the same form as originally submitted. Based on my review of the record and the submissions of the parties, I conclude that the information was "supplied" to the Township by the affected party within the meaning of section 10(1).

The Township points out that a previous report of the same nature as the record under consideration in this appeal has an express statement attached to it indicating that the information was exempt under section 10(1) in the event of a request under the Act. I note, however, that no such disclaimer accompanied the present record. The Township indicates that as a result of this earlier correspondence, it agreed that similar information received from the affected party would be treated with confidence, and that it has consistently done so. In support of this contention, the Township points out that when these reports are received from the affected party, they are stamped by the Director of Roads and Environmental Services (the Director) as "Confidential". It further indicates that these reports are shared only with those staff of the Township who require them for the performance of their duties, specifically, the Director and the Chief Administrative Officer.

The Township further indicates that the record was required to be viewed by Township Council members and that its policy relating to the treatment of confidential documents was implemented to insure that the confidentiality of this information was maintained. In addition, the Township states that the information contained in the record is not replicated in its financial statements or in any other Township documents, apart from a reference to the "end line profit figures" which were disclosed to the appellant.

The Township notes that the affected party vigorously opposed the disclosure of similar information to one of its competitors following a request under the Act in 1998.

The affected party indicates that it provided the requested information to the Township as required by a contract between them. It submits that because accurate inferences may be drawn about its business from the information in the record, that information was implicitly supplied in confidence to the Township.

The appellant submits that the contract governing the relationship between the Township and the affected party with respect to the operation of the dump site does not include a confidentiality provision. He argues that in the absence of such a provision protecting the secrecy of the quarterly reports, they should be treated as public documents and be made available to the public.

The record contains information which the affected party and the Township treat as confidential. The information is only shared with the Township Council and those staff who require it in the performance of their duties. In my view, the absence of a confidentiality provision in the contract is not determinative of whether there existed a reasonably-held expectation on the part of the affected party that the information would be treated in a confidential manner by the Township. While other information relating to the operation of the dump site by the affected party, such as the contract between it and the Township, is publicly available, I am satisfied that information of the type at issue has consistently been treated as confidential by the affected party and the Township.

Further, I find that it is reasonable for the affected party to expect that this type of information would be treated in a confidential manner by the Township. The information goes to the root of its business activities

and is closely guarded by the affected party. Its expectation of confidentiality is, therefore, a reasonable one.

Accordingly, I find that the information at issue was supplied by the affected party to the Township with a reasonably-held expectation that it would be treated as confidential. The second part of the section 10(1) test has, therefore, been met.

### **Part Three - Harms**

The Township submits that the waste management business in the Ottawa-Carleton area is very competitive and the fight for market share between the participants in this industry has resulted in the economic reality that any competitive edge will be used to advantage. It argues that the competitive position of the affected party will be adversely affected should any of the severed information contained in the record be disclosed. It submits that the record contains accurate, current information about the affected party's overhead costs, which would be very valuable to its competitors in the waste management business and would be used to undercut the affected party in its construction and demolition waste disposal business.

The affected party submits that it is involved in ongoing negotiations with other firms for the provision of waste management services and that the disclosure of this information to its competitors would result in competitive marketing activities targeted at its customers, which would be harmful to its negotiating position, as contemplated by section 10(1)(a). The affected party submits that it is reasonable to expect that information relating to its cost structure and volumes may give rise to predatory pricing efforts by its rivals in the industry. It argues that revealing this information may, in the future, cause undue loss to both itself and the Township, as its partner in the operation of the landfill site, within the meaning of section 10(1)(c).

The appellant submits that the affected party will not be prejudiced by the disclosure of the information in the record because it is not in competition with any other firms in the management of the dump site. In my view, the affected party's concerns about its competitive position must be examined from the perspective of its overall business operations, not only those relating to the operation of the Township's landfill site.

As noted above, I must be provided with evidence of harm which is "detailed and convincing" in order to make a finding that there exists a reasonable expectation that the harm alleged by the Township and the affected party would result from the disclosure of the information contained in the record. In my view, the affected party and the Township have provided me with sufficient evidence that the expectation of harm to the affected party's competitive interest is a reasonable one. The evidence submitted to me by the affected party and the Township describes in a detailed and convincing manner the harm which would reasonably be likely to result from the disclosure of the information at issue.

The affected party operates in a highly-competitive industry and I find that it is reasonably likely that its competitors would make use of the information in the record to undermine the affected party's competitive

position. Knowledge of its costs and pricing strategies, which could be inferred from the information in the record, would allow a competitor to gain an unfair advantage over the affected party in the marketplace in which it operates. Accordingly, I find that the third part of the section 10(1) test has been satisfied and the undisclosed information contained in the record is properly exempt from disclosure under the third party information exemption in section 10(1).

## **PUBLIC INTEREST IN DISCLOSURE**

In Order M-956, Adjudicator Laurel Cropley made the following statement with respect to the underlying purposes behind the Act:

One of the principal purposes of the Act is to open a window into government. The Act is intended to enable an informed public to better participate in the decision-making process of government and ensure the accountability of those who govern ... Accordingly, ..., there is a basic public interest in knowing more about the operations of government.

Previous orders of the Commissioner have established that in order to satisfy the requirement of section 16, there must be a **compelling** public interest in disclosure and this compelling public interest must **clearly** outweigh the **purpose** of the exemption (Orders P-512 and P-607).

I agree with the interpretation outlined above and adopt it for the purposes of deciding this appeal.

The appellant has made lengthy submissions on the application of section 16 of the Act to the information contained in the record, providing me with background information on the past operation of the Township's dump site and the involvement of the affected party since 1997. He argues that, in order for the public to protect its interests in maintaining the safety of the landfill site and ensuring that its useful life is not shortened due to the activities of the affected party, all information about the site should be made publicly available.

The appellant acknowledges that the disclosure of the information in the record will not answer all of the questions which he has raised respecting the affected party's use of the landfill site. He maintains, however, that the disclosure of this information is in the public interest:

... in that the health of the public, property values over a wide area, the future of a public asset (the landfill site) and public liabilities potentially in the millions of dollars are at stake; there has already been much public attention drawn to any matter affecting the landfill site; the information in the document requested will help inform the public about the activities of their government and its contractor; and will add to the information the public has to make effective use of expressing public opinion and to make political choices.

The appellant goes on to submit that in situations where a private company:

undertakes to manage a public resource, the rules of access to information must accommodate the public interest ... not the private commercial interests alone. In the present times, there have and will be more and more cases of private management of public assets. If the Commission rules in favour of [the affected party] and the Township, and denies a public interest in access to information about the management of this landfill site, it may be setting a precedent that may have repercussions in many future cases.

The Township suggests that section 16 has no application in the present appeal. It argues that there does not exist an compelling public interest in the disclosure of those parts of the record which were withheld that clearly outweighs the purpose of the exemption in section 10, which is to protect sensitive third party financial and commercial information. The Township acknowledges that there exists a public interest in the operation of the landfill site because it is owned by the Township, which also shares in the revenue generated through the activities of the affected party. The Township submits that it has balanced the public interest and the rights of the affected party to retain the private information which is sensitive to it by disclosing to the appellant a number of documents, including the contract for the operation of the landfill and portions of the record at issue.

The Township states that if there is a concern as to the expenses charged by the affected party in the operation of the landfill site, the contract between the parties defines allowable charges in some detail. It submits that the appellant was provided with the information in the record which corresponds to these charges during the mediation stage of this appeal. It suggests that by providing the appellant with the categories of charges which are included in the record, if not the actual dollar figures, the public's right to know that only allowable charges are being deducted from revenue has been satisfied.

The Township concludes by arguing that in light of the partial access granted to the record and the other materials which have been made available to the appellant, there has been sufficient disclosure to satisfy the public's interest in this regard and that the private, commercially valuable information of the affected party ought not to be disclosed under section 16.

The affected party submits that the disclosure of this information would not be in the public interest as any harm to its competitive position would impact on the share of revenue which it remits to the Township. The affected party states that the public interest is adequately protected by the scrutiny of the Auditors mandated by section 5.04 of the contract and the elected officials of the Township and the "myriad of legal requirements set down in the prevailing Environmental Legislation and the Certificate of Approval for the landfill." It argues that:

there is no compelling public interest in the release of this detailed information which would in any way outweigh the purposes of the exemptions provided in the Act.



As a result of this request and appeal under the Act, as well as other disclosure made to the appellant earlier, he has been provided with a great deal of information concerning the arrangements made between the affected party and the Township for the operation of its landfill site. In my view, the only pertinent information not yet disclosed is the severed information contained in the record at issue, which I have found above to be exempt under section 10(1). I find that the concerns expressed by the appellant relate to the manner in which the affected party is operating the landfill site itself, as opposed to concerns about the affected party's compliance with its financial obligation under the contract with the Township. This is the information which would be made public should the record be disclosed, as opposed to information about the manner in which the affected party is operating the landfill site, which appears to be the issue of most concern to the appellant.

In my view, any concerns respecting the affected party's compliance with its financial obligations under the contract will be addressed by the Township's elected officials and Auditors. I have not been provided with sufficient evidence to persuade me that the public interest raised by the appellant is directed at the activities of the Township's officials, or that their involvement in the negotiation of this contract has been the subject of public debate. The public debate has focussed instead on questions surrounding the expansion and use of the landfill site. In my view, there has not been the requisite degree of public interest in the disclosure of the information contained in this record to satisfy the definition of "compelling" described above.

I further find that the disclosure of this information will not assist in informing the public about the activities of their government, adding in some way to the information the public has, to make effective use of the means of expressing public opinion or to make political choices. In my view, any public interest which may exist in the disclosure of this information does not clearly outweigh the purpose behind the third party information exemption. In this case, the harm to the affected party's commercial interests which would reasonably be expected to result from the disclosure of the record outweighs any public interest which may be served by disclosing this information.

Accordingly, I find that the undisclosed information contained in the record is not subject to the override provision in section 16.

**ORDER:**

I uphold the decision of the Township.

Original signed by: \_\_\_\_\_  
Donald Hale  
Adjudicator

\_\_\_\_\_  
January 27, 1999