



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-002

February 5, 2014

Eastern Health

Summary:

The Applicant requested from Eastern Health the results of submitted bids regarding a contract for service Eastern Health had with a Third Party. Eastern Health was prepared to release the information requested, however the Third Party objected and filed a Request for Review with this Office. With respect to section 27, the Commissioner found that the burden of proof under subsection 64(2) had not been met by the Third Party and recommended that the information be released.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s.27 and s.64(2). *Public Tender Act*, S.N.L. 1990, c. P-45, as amended, s.11.

Authorities Cited:

Newfoundland and Labrador OIPC Reports A-2013-017, A-2013-008 and 2006-005.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request on July 25, 2013 to Eastern Health. The Applicant sought disclosure of records as follows:

Results of submitted bid for REOI #21012-3361. Relocation of long term care facilities. Results have not been posted on the website as per page 14 of the REOI document.

- [2] On August 6, 2013 Eastern Health notified the Third Party of the information it intended to release in response to this access request. On August 15, 2013 the Third Party replied, asserting that the information would fall within the exception in section 27 of the *ATIPPA*.
- [3] On August 19, 2013 Eastern Health advised the Third Party that it had reviewed their position and had reached a decision to release the information in spite of the Third Party’s objection unless the Third Party filed a Request for Review with this Office. The Third Party Request for Review was filed on September 3, 2013.
- [4] The informal resolution process was not successful and by letters dated January 20, 2014, the Applicant and Eastern Health were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, these parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *ATIPPA*. The Third Party notified this Office by an email on January 17, 2014 that they would not be providing a formal submission, but that this Office could rely on submissions made during the informal resolution process.

II PUBLIC BODY’S SUBMISSION

- [5] Eastern Health provided this Office with a brief formal written submission on January 21, 2014. In its submission, Eastern Health states that its position is that the “information does not qualify for exemption under Section 27.”

III APPLICANT'S SUBMISSION

[6] The party that submitted the access request to Eastern Health on July 25, 2013 (the "Applicant") submitted:

1. *The REOI was published in the normal course of business – not unlike any other tender request from Eastern Health or the Government of Newfoundland and Labrador.*
2. *Under the terms and conditions of the REOI, at the REOI opening "the names of the companies submitting proposals, and the overall proposal price(s) will be read out"; and, after the REOI opening "after award, only the name and proposal price of the successful company will be released"; and, under the standard terms and conditions "the successful company name(s) and price(s) will be posted on the website when the REOI is awarded".*
3. *Eastern Health did not advise the individuals or companies who had picked up the REOI documents of any change in the terms and conditions of the REOI regarding the release of pricing information.*
4. *When Eastern Health decided to change the terms and conditions of the REOI, it should have done so before the tender closing and advised all interested parties.*
5. *When Eastern Health decided to change the terms and conditions of the REOI after the closing date they should have obtained consent from the tendering parties for the changes. If unanimous consent could not be obtained Eastern Health should have retracted the original REOI and published a new REOI with the changes.*
6. *It is our position that all persons or companies submitting a proposal under this REOI were doing so under the same terms and conditions and with the understanding that the pricing would be released.*
7. *The release of the requested information is in keeping with the openness and transparency policy of the Government of Newfoundland and Labrador.*

IV THIRD PARTY'S SUBMISSION

[7] The Third Party set out its evidence in a letter to this Office dated November 15, 2013. Its position was that it would be reasonable to expect that disclosure of this information could significantly harm their competitive position or interfere with their negotiating position:

We are a small company, operating in a fairly narrow market. We confine our...services to the healthcare sector. To our knowledge, there is no other business in North America that has such a narrow focus. As a result, our main competitors are local and national [contracted services companies] who are constantly trying to understand what we do and what we charge to do it. Knowing our pricing information allows those competitors to anticipate our pricing on future projects and attempt to under-bid us, with a view to freezing us out of the market. To me, disclosure clearly fits within the language of section 27(1)(c)(i) – i.e. disclosure could reasonably be expected to harm our competitive position and interfere with our negotiating position for future work. While we

understand we are dealing here with public funds and a bias towards disclosure of pricing information, we also need to use any avenues available to us to prevent broader dissemination of our pricing information in order to protect our business.

In addition, as you pointed out in your letter, the following language appeared in the Request for Expressions of Interest for this project:

At REOI Opening:

- 1. The names of companies submitting proposals, and overall proposal price(s) will be read out.*
- 2. Where the overall proposal price(s) cannot be readily determined, no pricing will be released.*

After REOI Opening:

- 1. Further information will not be released until after the contract is awarded.*
- 2. After award, only the name and proposal price of the successful company will be released.*
- 3. Award information will be made available for 90 days after the award date only.”*

Our clear expectation was that our pricing information would be available for only 90 days after the award date. The access request came significantly later than 90 days after award, so disclosure now could also be seen as a contractual issue.

V DISCUSSION

[8] Section 27, as amended by Bill 29, reads as follows:

27. (1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*
- (a) trade secrets of a third party;*
 - (b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or*
 - (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
 - (i) harm the competitive position of a third party or interfere with the negotiating position of the third party,*
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
 - (iii) result in significant financial loss or gain to any person or organization, or*
 - (iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[9] Section 64 of the *ATIPPA* states as follows:

64 (2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.

[10] I have recently dealt with the application of the amended version of section 27 in Reports A-2013-011 and A-2013-008. In Report A-2013-011 I relied on my conclusions in Report A-2013-008 and will do so again now:

[12] Given that one of the main purposes of the ATIPPA is to promote accountability by, among other things, giving individuals a right of access to records in the custody or control of a public body subject to limited and specified exceptions, it is my opinion that the standard of proof under the amended section 27 still requires detailed and convincing evidence to establish a reasonable expectation of probable harm. This is the same standard that existed under the old section 27.

[11] Further, in Report 2006-005, my predecessor stated as follows:

[41] The necessity for “detailed and convincing” evidence is well established in the case law. The decision of the Ontario Court of Appeal in Ontario (Worker’s Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) 1998 CarswellOnt 3445 simply states, “if the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.”

[42] Third Party 3 addresses the issue of harm briefly in its submission, stating that the Department is not authorized to disclose the information at issue because “this information, in the hands of a competitor, could be used to set wholesale prices for compatible pharmaceutical products which could reasonably be expected to undercut [Third Party 3’s] prices and displace the Products on the Formulary.” Additionally, in the brief notation accompanying each appendix of the record of which it objects to disclosure, Third Party 3 says that such disclosure “could reasonably be expected to be harmful to its business interests, specifically the competitive pricing of the Products relative to its competitors.” As noted above, the Department presented no evidence in relation to harm, and the case put forward by Third Party 3 is neither detailed nor convincing regarding the nature or severity of the harm which it anticipates from the release of this information...

[12] In this case the evidence presented by the Third Party was not sufficient. The mere assertion that it would harm or interfere does not meet the requirement for “detailed and convincing” evidence. Furthermore, as stated in Report A-2013-008:

[29] Given the importance of the principle of accountability, it is also my opinion that heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources.

[13] Further, when bidding on a job with a public body, funded by public funds, the bidding process is subject to the *Public Tender Act*. Section 11 of that Act states that:

Tenders for public works, goods or services and leases called under this Act shall be opened in public at the prescribed time and place.

Bid information then is assumed to not be confidential, as it is “public”.

[14] Also, in this case, page 14 of the REOI document indicates that upon opening, the names of the companies and overall prices would be read out and that the name and proposal price of the successful company would be publicly available for up to 90 days after the contract is awarded.

[15] The Third Party has argued that the 90 day limitation in the contract (REOI) weighs in favor of withholding the information, however, the obligations set out in the *ATIPPA* are legislatively mandated obligations and one cannot contract out of legislation.

VI CONCLUSION

[16] Given the standard of evidence required to show harm as established by the case law, it is my conclusion that the Third Party has not met the burden of proof to show there is a reasonable expectation of probable harm in this case. Further, there is not enough evidence to support a claim of interference with their negotiating position. The evidence presented was neither detailed nor convincing. Thus, it is my determination that section 27 is not applicable in the present case and the requested information should be released to the Applicant.

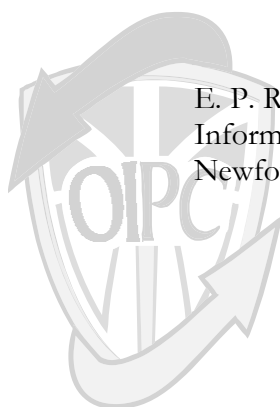
VII RECOMMENDATIONS

[17] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Eastern Health release to the Applicant the information that was requested under section 27.

[18] Under the authority of section 50 of the *ATIPPA*, I direct the head of Eastern Health to write to this Office, the Applicant and the Third Party within 15 days after receiving this Report to indicate their final decision with respect to this Report.

[19] Please note that within 30 days of receiving the decision of the Eastern Health under section 50, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of February, 2014.



E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador