



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-001

February 22, 2016

Office of the Chief Information Officer

Summary:

The Applicant requested from the Office of the Chief Information Officer (“OCIO”) all documents resulting from a request for proposals. The OCIO released some information initially and was prepared to release the remaining information, however, a Third Party objected to the remaining information being disclosed and filed a complaint with this Office. The Third Party claimed that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). With respect to section 39, the Commissioner found that the burden of proof 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, 2015,
S.N.L. 2015, c. A-1.2, s.39.

Authorities Relied On:

Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner), 2002 BCSC 603; *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52; *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107. Nova Scotia OIPC Review Reports FI-13-28 and 16-01; Saskatchewan OIPC Review Report 195-2015 & 196-2015; Newfoundland and Labrador OIPC Reports A-2015-005, A-2015-002, A-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, A-2009-006 and Report 2006-005.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to the Office of the Chief Information Officer (“OCIO”) seeking disclosure as follows:

All documents, briefing notes, proposals and contracts resulting from Request for Proposal OCIO.1011.006 Data Network Service Provider RFP release date October 12, 2010.

- [2] Following receipt of the request, the OCIO provided the Applicant with some information initially and informed the Applicant that it intended to provide access to the remaining information, but in accordance with section 19 of the *ATIPPA, 2015*, the OCIO was required to notify the affected third parties. Upon notification, the Third Party which was the successful party to the Request for Proposal OCIO.1011.006, filed a complaint with this Office opposing the release of the information.
- [3] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] The OCIO relied on the position that the requested information did not meet the three-part test outlined in section 39 of the *ATIPPA, 2015*, and that it was prepared to release the information to the Applicant.

III THIRD PARTY’S POSITION

- [5] The documents the Third Party is arguing should be withheld based on section 39 of the *ATIPPA, 2015* are the Data Network Service Provider Response to RFP OCIO.1011.006 (the “Third Party’s Response”), a “Schedule B: Pricing”, and two letters regarding the extension of the contract between the OCIO and the Third Party. The OCIO provided the Applicant with

some information in the two letters initially but withheld the proposed cost information for the extension of the contract as well as the attachments detailing rate card information until the Third Party's complaint was concluded.

[6] The Third Party's argument focuses primarily on part two and part three of the test under section 39. Specifically, it is the Third Party's position that the information is confidential as the information is known only to a small number of individuals, that it was explicitly provided in confidence to the OCIO in response to the RFP and that the information is objectively confidential given that it details the Third Party's specific pricing, network design, scope of work, descriptions of products and services and costing of resources. The Third Party argues that disclosure of this information would reveal the Third Party's confidential commercial information and reveal to their competitors how it does business. The Third Party stated that the information was "supplied" by the Third Party to the OCIO in confidence pursuant to the RFP and remains subject to continuing confidential treatment pursuant to the service agreement.

[7] The Third Party argues that disclosure of the information can reasonably be expected to prejudice the Third Party's competitive position in bidding for work through similar IT RFPs in the future. The Third Party also argues that disclosure of this information would undermine its ability to continue to price competitively for this particular work in future RFPs. The Third Party states that disclosure of the information would result in undue gain to third parties as it would allow them to mirror the Third Party's pricing and cost estimates in formulating their bids.

IV DECISION

[8] Section 39(1) of the *ATIPPA, 2015* states:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

- (ii) *commercial, financial, labour relations, scientific or technical information of a third party;*
- (b) *that is supplied, implicitly or explicitly, in confidence; and*
- (c) *the disclosure of which could reasonably be expected to*
 - (i) *harm significantly the competitive position or interfere significantly 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 undue financial loss or gain to any person, 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 39 is a mandatory exception to disclosure under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be met and failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information.

[10] With respect to section 39(1)(a), I am satisfied that the information at issue would reveal commercial or financial information of the Third Party and I conclude that this part of the test has been established.

[11] With respect to section 39(1)(b), both the “Third Party’s Response” and the “Schedule B: Pricing” are specifically incorporated into the Data Network Services Agreement between the OCIO and the Third Party. Clause 12 in the contract states that the “Third Party’s Response” forms part of the contract by “attachment and incorporation by reference”. The charges payable for the performance of services in the contract are detailed in the “Schedule B: Pricing” which is attached at the end of the contract. I have stated in earlier reports that contracts with public bodies for the supply of goods or services are not considered to be information that is “supplied”. Reports A-2009-006 and 2006-005 discussed the issue of “supplied”, both citing the well established case, *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603. By incorporating the “Third Party’s Response” and “Schedule B: Pricing” into the contract this

information becomes negotiated, not supplied, and consequently fails part two of the test under section 39.

[12] With respect to the two letters regarding the extension of the contract between the OCIO and the Third Party, the only information at issue in these letters is the costs and rate card information as the OCIO disclosed the remainder of the letters to the Applicant initially. It is my opinion that the costs and rate card information in these letters are considered to be negotiated and not supplied. Furthermore there is no evidence that these letters were provided or received with an expectation of confidentiality, therefore, I find that these letters were not supplied in confidence for the purpose of section 39(1)(b).

[13] The Office of the Saskatchewan Information and Privacy Commissioner's recent Review Report 195-2015 & 196-2015 directly addresses rate information in the RFP process. Paragraphs 34-36 are as follows:

[34] Central Services is not bound to accept the hourly rates. If Central Services judges the rate to be unacceptable, it has the option of not entering into the agreement with the third party. In my view, this is part of the negotiation process. The acceptance or rejection of a third party's bid in response to an RFP is a form of negotiation. Even if a party feels compelled to accept a term, and does not believe it is in a position to argue in favour of a different term, the term is negotiated. A simple proposal and a response remains a negotiation, as mutual agreement is required for the term to become binding on the parties.

[35] Public access to information contained in government contracts is essential to government accountability for expenditure of public funds. There is a distinction that needs to be made here between the initial procurement phase, when proposals may be submitted on a confidential basis and the final stage when the contract is issued and public accountability considerations come to the forefront.

[36] Based on this reasoning, I find that the hourly rates do not qualify as having been supplied but are negotiated terms of the contract that both parties agreed to. Therefore, the second part of the test is not met.

[14] Given that the second part of the test in section 39 has not been met, I need not proceed in my analysis, however, I have examined section 39(1)(c) and concluded that even if the second part of the test was established, the third part would not be satisfied.

[15] As established in Report A-2011-007, claims under section 39(1)(c) require detailed and convincing evidence that the assertion of harm is more than speculative; it should establish a reasonable expectation of probable harm.

[16] The information which the Third Party presented to this Office does not establish a reasonable expectation of probable harm. The Third Party argued primarily that should the information be disclosed, then the Third Party's competitive position would be harmed. This Office has discussed competitive advantage in previous reports and concluded that heightened competition should not be interpreted as harm, as it helps ensure that public bodies are making the best possible use of public resources. This view has also been referenced in the recent Supreme Court of Newfoundland and Labrador Court of Appeal decision 2015 NLCA 52 at paragraph 43 as follows:

[...] More specifically, disclosure of MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. [...]

[17] The Office of the Saskatchewan Information and Privacy Commissioner has expressed a similar sentiment in its recent Review Report 195-2015 & 196-2015 at paragraph 45 as follows:

[45] Therefore, selection is not based on price alone. So, I fail to see the harm in other bidders undercutting the hourly rates proposed by the third parties in this case. The RFP process is inherently competitive. Arguably, informed bidders are the best way to assure competitiveness in the RFP bid process. Keeping these rates from the public, including other future bidders, could jeopardize a competitive bidding process.

[18] It is my opinion that the Third Party has not presented detailed and convincing evidence of a reasonable expectation of probable harm and therefore I find that the third part of the test in section 39 has not been met.

[19] As the Third Party has failed to meet part two and part three of the three-part test under section 39 of the *ATIPPA, 2015*, it is my finding that section 39 does not apply to the information at issue and the Third Party cannot rely on section 39 to withhold the information.

V RECOMMENDATIONS

[20] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the OCIO release the records to the Applicant.

[21] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the OCIO must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (the Third Party) within 10 business days of receiving this Report.

[22] Please note that within 10 days of receiving the decision of the OCIO under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[23] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of February 2016.

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