



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-002

February 23, 2016

Eastern Health

Summary:

The Applicant requested from Eastern Health details of a contract which resulted from a request for proposals. Eastern Health was prepared to release the information requested, however a Third Party objected 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). The Commissioner found that the burden of proof under subsection 43(3) 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, ss.39, and 114(1)(a)

Authorities Relied On:

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, Saskatchewan IPC Review Report 195-2015 & 196-2015. Office of the Information and Privacy Commissioner for Nova Scotia Review Reports FI-13-28 and 16-01. Newfoundland and Labrador OIPC Reports A-2016-001, A-2015-006, A-2015-005, A-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, 2008-002 and 2007-003.

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 Eastern Health seeking the details of a contract which resulted from an RFP regarding data centre space and managed services.
- [2] Eastern Health advised the Applicant that a separate contract was not created in relation to this RFP. Instead, Eastern Health explained that the work was awarded via letter, based on the proposals and its accompanying documents. As a result, the RFP, the award letter, the successful proposal and its accompanying documents became the legal, binding agreement between the parties. These documents contained the essential terms of the agreement: the parties, the offer, and the acceptance of the offer all of which may be clearly and objectively identified and, therefore, it is the entirety of these documents which formed the contract between Eastern Health and the Third Party. The Applicant agreed that these were the records which were being sought.
- [3] Following receipt of the request, Eastern Health informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* Eastern Health notified the affected Third Party. Upon notification, the Third Party filed a complaint with this Office opposing the release of the information.
- [4] 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*. The Public Body’s position remained unchanged; the requested information did not meet the three-part test outlined in section 39 and it was prepared to release the information to the Applicant. The Third Party’s arguments have been integrated into my discussion below.

II DECISION

[5] 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 [...]

[6] This is a three-part test. Failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information.

[7] The Third Party has submitted that the information is commercial, financial, technical and proprietary information. I accept that the information is likely commercial, financial and technical information; however proprietary information is not a category of information protected by section 39(1)(a). Regardless, it is my opinion that the first part of the test has been established.

[8] In respect of section 39(1)(b), the Third Party argues that the information was “supplied” to Eastern Health based on the wording of the RFP which included the word “supplied.” The Third Party also argues the information is not part of a contract with Eastern Health.

[9] I note that the RFP refers to itself as a contract and that proposals must be accepted by Eastern Health. The Standard Terms and Conditions document attached to the RFP states that nothing in the proposal would be binding until a contractual agreement was negotiated and agreed upon. Additionally, the award letter discusses the need for finalization of the contract.

- [10] As to whether a contract existed between Eastern Health and the Third Party, I recently found in Report A-2016-001 proposals in response to an RFP are negotiated. This is especially evident in the present circumstance where no further contractual documents were prepared; rather, as discussed above, the entirety of the documents - the RFP, the award letter, the successful proposal and its accompanying documents - comprised the agreement between the parties.
- [11] The Third Party also argues, on the issue of confidentiality, that this information was developed uniquely by the Third Party for this specific RFP, was consistently treated and marked as confidential, and is known only to a small number of individuals within the Third Party. The Third Party states that if the information is not kept confidential competitors would be able to incorporate same into their own future bids. Furthermore, the release of the information could present a significant risk to security, infrastructure, public safety and also, possibly, to Eastern Health.
- [12] I have been presented with no evidence of such security and safety risks. In relation to the safety and security of Eastern Health, Eastern Health has indicated that it does not find any security risk in the release of the information.
- [13] Regardless of the issue of confidentiality, it is my opinion that the information was negotiated and not supplied and the second part of the test has not been established. Consequently, section 39 cannot be applied to protect the information from disclosure. However, I will elaborate on section 39(1)(c) as it is also my finding that none of the aspects of section 39(1)(c) can be satisfied.
- [14] The Third Party presented overlapping arguments for each of section 39(1)(c)(i), (ii) and (iii), although it appears to focus its argument on harm to the Third Party in accordance with section 39(1)(c)(i). Generally, the Third Party claimed that the release of the information could reasonably be expected to cause material loss to the Third Party, prejudice the Third Party's competitive position and interfere with its negotiations. The Third Party has indicated that the information will give other companies an advantage on future bids, enabling

competitors to formulate more targeted offers, likely mirroring the Third Parties, and eroding competition.

[15] A claim of harm under section 39(1)(c)(i) requires more than mere speculation, it necessitates detailed and convincing evidence establishing a reasonable expectation of probable harm.

[16] In Report A-2013-009 I stated:

[...] I interpret “harm to competitive position” to mean actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process [...] Contracts with public bodies require greater transparency than those with private sector entities, this is simply a “cost of doing business” with public sector entities.

[17] Similarly in the recent Court of Appeal decision in *Corporate Express Canada Inc. v Memorial University of Newfoundland* the Court stated:

[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. [...] While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples’ competitive position would be harmed or that Staples would suffer significant financial loss as a result.[...] 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. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples’ bidding strategy, without more, is not evidence from which harm to Staples’ competitive position and significant financial loss to it can be reasonably inferred.

[18] The arguments of the Third Party in relation to harm center on the ability of competitors to mirror the Third Party’s information in future bids. No detailed evidence of such harm has

been presented and, as I noted in Report A-2013-009, if this was to occur it would simply level the playing field. Furthermore, certain information requested by the Third Party to be withheld comes from the wording of the RFP. Additionally, some of the information proposed for severing does not appear to be unique or unknown to the Third Party's competitors. In fact, certain information in the records refers to tools and products that are widely-available and used. Finally, some of the information relates to the past experience of the Third Party and I find it hard to ascertain what harm could come from the disclosure of its past successes.

[19] The Third Party also argues that research, development and innovation would be stymied by virtue of the information being released and a chill could be placed on RFP processes. It should be noted that access legislation such as the *ATIPPA, 2015* has existed across Canada for approximately 30 years and has allowed for the disclosure of information in contracts to supply goods and services to public bodies. Parties contracting with public bodies must simply be mindful of the type and amount of information which they submit in these circumstances.

[20] The Third Party claimed that the possible use of the Third Party's information by its competitors would affect the ability of public bodies to obtain a range of competitive proposals and to differentiate between competitors. Carrying this argument further, the Third Party has argued that the specific evaluation criteria of this RFP could be used in the future and, as a result, the disclosure of the information would lead to significant harm to the Third Party.

[21] This issue was also addressed in my most recent Report where I quoted from the Saskatchewan Information and Privacy Commissioner in Review Report 195-2015 & 196-2015:

[44] Bids are evaluated based on a number of criteria. [...] Further, proposals were also evaluated utilizing the following criteria:

- *Resource qualifications, past performance, experience and suitability pertaining to the work requirement(s);*
- *Availability date of the submitted resource(s);*
- *Hourly and daily rate(s); and*

- *Additional criteria requested in the Request for Resources document.*

[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.

[22] The evaluation criteria of an RFP are simply indicative of how the selection process will be carried out. Regardless of whether similar criteria are used in the future, the decision of a public body to apply more or less importance to any one factor does not correlate with any specific loss, gain or interference to a third party. If a public body chooses to place priority on any particular element and the relevant information relating to each competitor is available, then, as noted above, what will result is a more robust competitive process.

[23] 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.

III RECOMMENDATIONS

[24] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Eastern Health release the requested information to the Applicant.

[25] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Eastern Health must give written notice of his or her decision with respect to this recommendation to the Commissioner and the Third Party within 10 business days of receiving this Report.

[26] Please note that within 10 business days of receiving the decision of Eastern Health 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.

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

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

