



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2017-020

August 10, 2017

Government Purchasing Agency

Summary:

The Government Purchasing Agency (“GPA”) received an access request seeking disclosure of the tender submission of the winning vendor along with all related contracts between the winning vendor and the Government of Newfoundland and Labrador in relation to a request for proposals for Managed Print Services. The GPA was prepared to release the information, however, the Third Party objected to the information being disclosed and filed a complaint with this Office. The Third Party claimed that some of the information must be withheld on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof was not 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.

I BACKGROUND

- [1] The Government Purchasing Agency (“GPA”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) seeking disclosure of the following:

Requesting the tender submission of the winning vendor along with all related contracts between the winning vendor and the government of Newfoundland and Labrador.

RFP NO SPPFA-01, Managed print services.

- [2] Following receipt of the request, the GPA informed the Applicant that it intended to provide access to the information, but in accordance with section 19 of the *ATIPPA, 2015*, the GPA determined it was necessary to notify the affected Third Party. Upon notification, the Third Party filed a complaint with this Office.
- [3] During the informal resolution phase, the Third Party agreed that the majority of the information in the responsive records could be released to the Applicant and that the Third Party was only contesting the disclosure of certain pages of the records.
- [4] As the issue regarding the pages in dispute was not resolved informally, the complaint was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The GPA advised that it issued a Request for Proposals (the “RFP”) seeking a service provider for Managed Print Services. The Third Party was the successful bidder and a Master Standing Offer Agreement was issued to the Third Party.
- [6] The GPA’s position is that the requested information does not meet part two of the three-part test outlined in section 39 of the *ATIPPA, 2015*, and that the information should be released.

[7] It is the GPA's opinion that once an award is made, any expectation of confidence bidders have during the evaluation period ends. The GPA also submitted that any adverse impact on a party from disclosure of information is reduced after the process has closed.

[8] The GPA explained that it decided to notify the Third Party based on the principle of procedural fairness as there had been amendments to the *ATIPPA* legislation between the time the information was originally submitted by the proponents and the time the request for information was received.

III THIRD PARTY'S POSITION

[9] The Third Party argues that certain pages of the responsive records should be withheld based on section 39 of the *ATIPPA, 2015*. These pages include contract amendments, pricing information and client references.

[10] The Third Party argues that part of its success in winning RFPs depends on its unique ability to price services and products in a creative manner based on numerous factors, such as predictability of volumes, acceleration of deployment, predicted savings, user trends etc. The Third Party wants to keep its information out of the hands of its competition in an extremely competitive industry. The Third Party fears that if a competitor accesses the Third Party's pricing and offer it will use it to its advantage and the Third Party's detriment in future bids. The Third Party states that this will undercut its ability to compete.

IV DECISION

[11] Our Report A-2017-017 dealt with the same Public Body and RFP. While the Third Party in that matter was an unsuccessful bidder, many of the same principles apply.

[12] 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.*

[13] Section 39 is a mandatory exception to the right of access under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be met and third parties bear the onus of proof. Failure to meet any part of the test will result in disclosure of the requested records.

[14] 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.

[15] With respect to section 39(1)(b), as the majority of the disputed pages form part of the contract they generally are considered to be negotiated, not supplied. The contract signed by the Third Party and Service NL includes Clause 1.1 which states that the Third Party shall provide the "... Products and Services to the Minister as outlined in Schedule "A" attached hereto". All but four of the disputed pages are in Schedule "A".

[16] Contracts with public bodies for the supply of goods or services are generally not considered to be information that is "supplied". As an attachment to a negotiated contract, all of the information in Schedule "A" forms part of the contract and is therefore negotiated, not supplied. The Third Party has not met the onus in part two of the test with regard to the disputed pages in Schedule "A".

- [17] With respect to the remaining four pages (390, 407, 413 and 417), the GPA advised that they form part of the RFP review process. These pages are included in the additional questions from the Government for the Third Party as well as a bid defense presentation that the top scorers on the RFP were asked to present as part of the decision making process prior to the awarding of the contract. These pages were not incorporated into the contract, and I find that they were supplied by the Third Party as part of the RFP process.
- [18] The confidentiality provision in the RFP only mentions “Proposals”. Pages 390, 407, 413 and 417 are not part of the Third Party’s Proposal, however, there is no evidence that these pages were provided or received with an expectation of confidentiality. While these pages were supplied, I am unable to conclude they were supplied “in confidence” as the Third Party has not met the onus in part two of the test with regard to these four pages.
- [19] Given that the second part of the test in section 39 has not been met, I need not continue, however, as I have examined section 39(1)(c), my conclusions follow.
- [20] Claims under section 39(1)(c) require detailed and convincing evidence that the likelihood of harm is more than speculative; it should establish a reasonable expectation of probable harm.
- [21] The evidence the Third Party presented does not establish a reasonable expectation of probable harm. The Third Party argued primarily that should the information be disclosed, its competitive position would be harmed. This Office has discussed competitive advantage in previous reports and concluded that heightened competition should not be interpreted as significant harm. Absent a reasonable likelihood of significant harm to a third party’s competitive position or an undue financial gain or loss to any person, competition is not unfair and ensures that public bodies are making the best possible use of public resources. The Third Party has not met the onus in part three of the test.
- [22] As the Third Party has failed to meet parts two and three of the three-part test under section 39 of the *ATIPPA, 2015*, section 39 does not apply to the information at issue and it must be disclosed to the Applicant.

V RECOMMENDATIONS

- [23] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the GPA release pages 16-43, 158, 159, 178-182, 249-250, 258-263, 298-305, 390, 407, 413 and 417 of the responsive records to the Applicant.
- [24] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the GPA 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 within 10 business days of receiving this Report.
- [25] Please note that within 10 business days of receiving the decision of the GPA 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*. **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has provided the GPA with a copy of its notice of appeal prior to that time.**
- [26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of August, 2017.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador