



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-015

July 3, 2018

City of St. John's

Summary:

The Applicant made a request to the City of St. John's regarding the award of a contract for vending machine services. The Third Party filed a complaint with this Office objecting to the release of its information pursuant to section 39 of the *ATIPPA, 2015* (disclosure harmful to business interests of a third party). The Commissioner determined that section 39 did not apply, and recommended disclosure of the information. The Commissioner also commented upon the City's decision to notify third parties despite having concluded categorically that section 39 did not apply.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c A-1.2, ss. 19 and 39; [Public Procurement Act](#), SNL 2016, c P-41.001; [Public Procurement Regulations](#), NLR 13/18.

Authorities Relied On:

OIPC NL Reports [A-2018-014](#); [A-2017-020](#); [A-2017-017](#); [A-2017-007](#); and [A-2017-014](#); OIPC BC Order [01-39](#).

[Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 NLTD\(G\) 107.](#)

Other Resources:

OIPC NL: [Business Interests of a Third Party \(Section 39\)](#)

I BACKGROUND

- [1] The City of St. John's issued a request for proposals (the "RFP") for the supply of vending machine services to its recreation facilities. Following the awarding of the contract it received a request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "ATIPPA, 2015") seeking:

[Named Company] proposed a bid for vending and snack services for these two recreation facilities earlier this year. We were not successful in obtaining this business and we are looking for some details to give us some further insight as to why we were not successful. Would it be possible to obtain the proposal for the successful candidate?

- [2] The City decided to release the responsive records to the Applicant; however, before doing so it contacted the Third Party Complainant under section 19 to provide notice of its intention to do so.
- [3] On receipt of the section 19 notice, the Third Party filed a complaint with this Office. In the course of our informal resolution efforts, the Third Party consented to the release of some information ("Fiscal Arrangements" and "Product and Pricing"). As the remainder of the complaint could not be resolved, it proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [4] The City's position is that the information contained in the proposal does not meet any part of the three-part test set out in section 39.
- [5] With regard to part two of the test, the City also referenced the recently enacted *Public Procurement Act* which places an onus on bidders to identify information that they believe should not be disclosed.

III APPLICANT'S POSITION

[6] The Third Party submits that it presented a detailed bid to the City that contained considerable details of its business, and this extensive disclosure of its information to the City (and other clients) was a contributing factor to their success. The Third Party fears that if competitors were aware of information such as their service and delivery schedules; refund arrangements; and commitment to energy efficiency and sustainability, then they could replicate the Third Party's business practices. In particular, the Third Party cites the disclosure of its close relationship with its supplier, which it says could endanger the Third Party's position in the market.

IV DECISION

[7] 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.

[8] 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 satisfied, and third parties bear the onus of proof where they complain about the proposed release of their information. Failure to meet any part of the test will result in disclosure of the requested records.

[9] As noted above, the Third Party has already consented to the release of some information. What remains falls into two categories: the vending program proposal and its various appendices. Several of these appendices consist of information provided by the Third Party that was prepared by other entities (such as WorkplaceNL, the Third Party's insurer, vending machine manufacturers and product suppliers). As to the first part of the test, we can accept that the information consists of commercial, financial and technical information of the Third Party.

[10] This matter involves many of the same issues as [A-2018-014](#), including that fact that the contract eventually entered into between the City and the Third Party clearly stated at Article A-2 that the proposal of the Third Party along with its certificate of insurance, WorkplaceNL certificate and other documents form part of the contract.

[11] Through such incorporation by reference, the information to which the Third Party objects to disclosure is part of the contract and contracts with public bodies are “generally not considered to be information that is ‘supplied’” (see Reports [A-2017-020](#) and [A-2018-014](#)).

[12] The majority of the information provided by the Third Party in its proposal relates to its business history, qualifications, expertise, experience, service methods and capacities to perform the services sought in the RFP. The Third Party put forward all of this information in support of its efforts to secure the contract. All of this information is incorporated into the contract and the Third Party is expected to perform the contract in accordance with the information provided in its proposal. As such, this information was not supplied within the

meaning of section 39(1)(b). The information may not have changed, but it is deemed to have been the subject of negotiation with the City and incorporated into the contract with the City.

[13] As discussed in [A-2018-014](#), there are exceptions to the generally held principle that information in a contract is not considered to have been supplied. This applies to information that is immutable – in other words, information in a contract which could not have been altered in the course of a negotiation. This must be distinguished from information which would have been susceptible to being changed but which was, for one reason or another, not changed (BC Order 01-39).

[14] Pursuant to section 43(3), the burden of proof is on the Third Party to establish that the information should be withheld under section 39. The Third Party has not raised immutability to withhold any of the information from disclosure, but I will nonetheless consider the issue.

[15] As noted above, much of the information provided in the appendices came from other sources, such as the manufacturers of equipment and bottlers and snack suppliers. This information is arguably supplied, in spite of having been incorporated by reference into the contract, as it is immutable. The Third Party's certificates from its insurer and WorkplaceNL can also be argued to be immutable. However, in order to meet the second part of the test, it must be shown that they were supplied implicitly or explicitly in confidence.

[16] The Third Party cites Article 11 of the RFP in support of its position that the information was provided, implicitly or explicitly, in confidence. Article 11 states:

11. OWNERSHIP OF SUBMISSIONS

All documents submitted to the City, including responses to this RFP become the property of the City and will not be returned to Respondents. They will be received and held in confidence by the City.

[17] This Article conflicts with the subsequent Article 12:

12. CONFIDENTIALITY, FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY

All submissions shall become the property of the City of St. John's. The City reserves the right to release information to the public about the Request for Proposals, the submissions received and any agreement(s) entered into. As property of the City, the submissions will be considered government records, which are public documents and subject to The Access to Information and Protection of Privacy Act, 2015.

[18] We previously determined in Report [A-2017-017](#), relying on the Supreme Court of Newfoundland and Labrador's decision in *Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 NLTD(G) 107, that while bidders expect that their proposals are to be kept confidential during the evaluation process, they have no reasonable expectation of confidence once an award has been made. Therefore, while there is indeed language in the RFP indicating an intention to hold proposals in confidence, it ceases to have effect after awarding a contract. Further, the City stated in Articles 11 and 12 that the proposals shall be subject to *ATIPPA, 2015* and that it reserves the right to release the information through the *ATIPPA, 2015* or otherwise. As a result, there was no expectation of ongoing confidentiality.

[19] While we have concluded that some of the information in the proposal may have been "supplied", none of the information was supplied implicitly or explicitly in confidence, and therefore the Third Party's complaint must fail. As all parts of the test must be met, we do not need to consider the harm element in the disclosure of the information. We will nevertheless proceed to address the final part of the test.

[20] As has been discussed previously in a number of Reports issued by this Office, claims of harm under section 39(1)(c) require detailed and convincing evidence that the likelihood of significant harm is more than merely speculative. There must be a reasonable expectation of probable harm.

[21] The focus of the Third Party's submissions is on the potential harm to its competitive position. We have previously concluded that heightened competition that does not result in

unfairness does not constitute significant harm. Rather, 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 instead ensures that public bodies are making the best possible use of public resources.

[22] The Third Party also notes the risk of disclosure of its relationship with its main supplier. This relationship is clearly indicated on its website and promotional materials, as are other details of its history and expertise. This undermines the Third Party's position that disclosure of this information would harm this relationship.

[23] Similarly, the equipment and product information is readily available to the public and there is no basis to find that its disclosure would result in harm to the Third Party.

[24] The Third Party has not made any submissions proposing that disclosure of its certificate of insurance or WorkplaceNL clearance certificate would result in harm and it therefore has not met the burden of proof.

[25] We note that the City cited the new *Public Procurement Act*. However, the RFP and the Third Party's proposal both pre-date the *Public Procurement Regulations, NLR 13/18* made under that Act which required bidders to identify information to be protected from disclosure under *ATIPPA, 2015*. As such, these new provisions do not apply to this matter.

SECTION 19

[26] As noted above, in its submissions the City indicated to this Office that it "had advised the third party that the information requested should be disclosed as it did not meet the three-part test outlined in section 39". Given this position, it is necessary to review the City's decision to issue a notice to the Third Party under section 19.

[27] We noted in Reports [A-2017-007](#) and [A-2017-014](#) (among several others) that too many public bodies are issuing notices to third parties when it is unnecessary for them to do so. There is a duty on the public body to assess whether the third party business information

meets the section 39 test and, if it fails to do so, it must release the information to the Applicant without delay. Notice to a third party under section 19(1) only applies when the public body “has reason to believe [the responsive record] contains information that might be excepted from disclosure under section 39 ...”. This has been explained in detail on page 8 of our guidance document on [Business Interests of a Third Party](#).

[28] The City has clearly indicated in its submissions that at no time did it believe the responsive information met the three-part test in section 39. Accordingly, the City had no basis to issue, and should not have issued, a notice under section 19. As we have made clear in past reports, this does not preclude a public body from informally advising a third party that its information is about to be or has been released as part of an access to information request under the *ATIPPA, 2015*.

V CONCLUSIONS

[29] The Third Party has failed to meet the three-part test under section 39 of the *ATIPPA, 2015* and the information at issue must be disclosed to the Applicant.

[30] The City should not have issued a section 19 notice to the Third Party given its original conclusion that the information could not have met the three-part test.

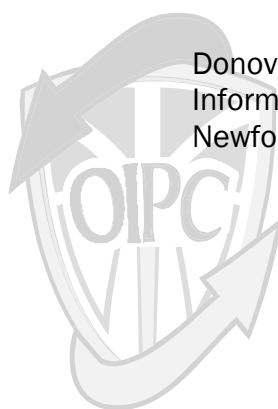
VI RECOMMENDATIONS

[31] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the City of St. John’s disclose the requested information to the Applicant.

[32] I further recommend that the City of St. John’s review its access to information practices and procedures with respect to section 19 of the *ATIPPA, 2015*, with a view to ensuring that all future decisions to provide notification to third parties under section 19 are made in compliance with the Act.

[33] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the City of St. John's must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report. Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainants provide the City with a copy of their notices of appeal prior to that time.

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of July, 2018.



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