



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2012-002

January 18, 2011

City of Corner Brook

Summary:

The Applicant applied to the City of Corner Brook (the “City”) under the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) for access to information related to a development proposal. The City withheld the responsive records pursuant to section 27 (disclosure harmful to business interests of a third party) of the *ATIPPA*, but did, however, respond to certain questions posed by the Applicant in his access to information request. The Commissioner found that in instances where Third Parties had consented to the release of their information section 27 was inapplicable and the information should be released. In instances where Third Parties did not consent to the release of their information the Commissioner found that the City had improperly claimed section 27 and the information should be released. Finally, the Commissioner found that information contained in certain responsive records was unresponsive to the Applicant’s request and, consequently, could be severed from those records. The Commissioner recommended that all responsive records be released, except for the specified unresponsive information but urged the City to use its discretion in this regard.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A – 1.1, s. 27, as amended.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-003, A-2011-007; *Provincial Airlines Limited v. Canada (Attorney General)* 2010 FC 302 (CanLII).

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated November 22, 2010 to the City of Corner Brook (the “City”). The request sought disclosure of records as follows:

For development proposal for land on Grenfell Ave Corner Brook.

1. *A list of and copy of ALL proposals submitted on or about May 11, 2010.*
2. *The list of, prices submitted and copies of all proposals submitted on or about June 21, 2010.*
3. *The names of proponents whom the City had discussions and the dates of the meetings and names of all attendees.*
4. *Has a final decision on the sale of the land been made?*
5. *Who was the successful proponent and details of purchase.*

[2] On December 14, 2010 the City responded to the Applicant’s access to information request and denied access to the first three categories of records set out in the Applicant’s request pursuant to the section 27 of the *ATIPPA*. In respect of the latter two categories the City provided a written response without referencing any responsive records.

[3] On January 10, 2011 this Office received a Request for Review from the Applicant asking the Commissioner to review the decision of the City.

[4] On March 7, 2011, an analyst from this Office informed the City that, generally, a blanket application of an exception to disclosure under the *ATIPPA* is unjustified. The analyst further explained that arguments and evidence would be necessary to support a claim of section 27. Consequently, the analyst asked the City to i) perform a line-by-line review of the records and sever where appropriate for the claimed exception of section 27; ii) provide arguments and evidence in support of those claims, and iii) notify the relevant Third Parties that consent to the disclosure or evidence in support of a refusal to consent could be provided. Notification to the Third Parties was not required at that stage as the City did not intend to release the information. However, this Office suggested that the City provide notification to the Third Parties in any event in order to assist the City in assessing the validity and strength of its claim and to possibly resolve the issue should any of the Third Parties be willing to consent.

- [5] By letters dated in error for March 9, 2010, as opposed to 2011, the City notified seven Third Parties of the Applicant's access to information request and asked them to either consent to the release of their information or provide reasons why the information should not be released. It should be noted that the Applicant was one of the Third Parties notified. It should also be noted that, unfortunately, the City advised the Third Parties only of the fact that an applicant had made a request for the first two categories of records. No reference was made to the latter categories. Consequently, any consent provided by the Third Parties in response to this notification relates specifically to the first two categories of records. I will address this issue later in this Report.
- [6] On March 21, 2011, the City advised this Office that three Third Parties, including the Applicant, had consented to the release of their information. One Third Party requested that the relevant information be withheld. The City relied on earlier documentation submitted by another Third Party to hold that the Third Party would refuse its consent. No response was received from the remaining two Third Parties.
- [7] In the same letter, the City proposed two scenarios for how it would be willing to respond to the Applicant's request. In the first alternative, the City indicated that it would withhold the entirety of the records, including those for which consent was provided, pursuant to a blanket claim of section 27 and, additionally, section 24. In the second alternative, the City indicated that should this Office not accept a blanket claim of section 27, it would sever only the information indicated on a copy of the records which the City had attached. In this alternative, the City agreed to release all information from the records for which consent had been obtained.
- [8] Also at this time, the City indicated that information in respect of the third category of records did exist. Up to this point, there had been no clear indication of this, nor was such information initially provided to this Office.
- [9] On April 7, 2011 this Office was advised that one of the Third Parties who did not initially respond to the City's notification had since provided its consent to release its information.
- [10] Attempts to resolve this Request for Review by informal means were not successful and by letters dated April 8, 2011 the Applicant, the City and all Third Parties were advised that the Request

for Review had been referred to formal investigation pursuant to section 46(2) of the *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47. In these letters, to ensure that the Third Parties were fully informed, an analyst from this Office reiterated the entirety of the Applicant's access to information request, not simply the first two categories as had been done by the City when it initially sought the consent of the Third Parties.

[11] Formal submissions were received from the Applicant and the City. The four Third Parties who provided their consent to the release of their information made no further submissions and did not retract their consent. No response was received from two of the remaining Third Parties and the final Third Party indicated that a submission would be made, but nothing was received by this Office.

II PUBLIC BODY'S SUBMISSION

[12] The City's formal submission relies on earlier correspondence from the City as well as making new and additional arguments.

[13] The earlier correspondence from the City indicates that the City does not

...feel that there is an overriding public interest to know who responded to the City's request for a Proposal Call for the purchase of the said City property, nor the details of their proposal. [The City] fully agree that once the City finalizes an agreement with a proponent that the details of this agreement should be made available to the public. Details of the unsuccessful bid submission should be exempt from disclosure in accordance with section 27(1) [...] based upon the following conditions:

- *The proposals contain financial details pertaining to the individual proposed development along with proprietary information on their development proposal*
- *It is our position that all the responses to the proposal call was implicitly submitted in confidence and it was not our intention to publically [sic] release the proposals. As stated above the final agreement with a proponent would be available for public disclosure.*

- *Releasing details of the individual proposal could potentially result in a gain to the applicant in the event the City re-issues a proposal call for the sale of the Grenfell Drive land, as he will be privy to details of the other potential bidders. In turn, this could harm other potential bidders.*

[14] The City's earlier correspondence focused on the lack of finality surrounding the information being sought. The City believes all proposals should be withheld until a final decision is reached. Furthermore, the City believes that the release of this information could potentially harm or hinder future negotiations in respect of the relevant development.

[15] Finally, as noted above the City provided information in respect of the third category of records. Up to this point, it had not been clear that this information existed, nor was such information initially provided to this Office. Further into the formal investigation, the City confirmed that records relating to the third category of records existed and provided same to this Office; however, the records also contained information which was unresponsive to the Applicant's request.

[16] The City's formal submission drew attention to a decision of the Information Commissioner of Ireland which found:

- *that public bodies are obligated to treat all tenders as confidential at least until the time that the contract is awarded. (In our case the contract has not been awarded).*
- *tender prices may be treated as trade secrets during the currency of a tender competition [...]*
- *tender prices generally qualify as commercially sensitive information for the purposes of competition*
- *successful tender information which is commercially sensitive may remain confidential*
- *unsuccessful tender information which is commercially sensitive generally remains confidential after the award of a contract.*

[17] The City provided this Office with a copy of this decision, along with another decision of the Information Commissioner of Ireland and drew attention to and commented on a number of paragraphs.

[18] The City acknowledged that:

The individuals and organizations who submitted the bid proposals would be the best proponent(s) to provide evidence of whether the content of their bid submission contain commercially sensitive information, or if they provided a preferential bid to the City in responding to our proposal call.

However, the City then goes on to suggest that those who provided preferential bids would not want this information disclosed. The City does not provide any evidence from themselves or the relevant parties to support this position.

[19] The City further explained its rationale for withholding certain information, explaining that the Third Parties were told that the bids would be opened privately, which the City submits implies confidentiality.

[20] The City submits that it used section 27 to withhold information which, if released, could result in a “competitive disadvantage” to the previous bidders or which would lead to an influx of information requests for this type of information. The City suggests that these possibilities could “result in a less competitive tendering process”.

[21] Finally, in its formal submission, the City revoked its claim of section 24.

III APPLICANT’S SUBMISSION

[22] The Applicant’s submission provided some background information regarding the records and submits:

There are no secrets that could or would be divulged, financial, trade or otherwise, and the information submitted was not to be held in confidence. This is a public asset that has been sold, and, in our opinion there is no injury that could be inflicted on any bidder or the city.

[23] In respect of the latter two categories of records the Applicant states that this information “would be public knowledge in the registry of deeds” and questions why this information cannot, therefore, be disclosed.

[24] The Applicant acknowledges that corporate financial information could potentially be confidential information; however, the Applicant goes on to submit that the information he is

seeking is simply the bidding information (i.e. the names of the bidders, the amounts of the bids, etc.)

[25] It is the opinion of the Applicant that the withholding of this information “raises the issues of collusion with the bidders and/or where certain submissions made by a bidder were shared with other bidders by city officials.”

[26] Finally, the Applicant indicates that he is seeking the information to confirm that the bidding process was carried on in an “open, fair and transparent” manner.

IV DISCUSSION

[27] In this Review, the Applicant has asked this Office to examine whether the City is entitled to withhold any of the information pursuant to section 27.

[28] Section 27 of the *ATIPPA* states as follows:

27. (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 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.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

[29] Section 27 has been discussed on many occasions by this Office. Most recently in Report A-2011-007, I repeated the three-part harms test set out by my predecessor in Report 2005-003 that must be met in order for the exception set out in section 27 to be applicable. The three parts of the test may be stated as follows:

- (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
- (b) the information was supplied to the public body in confidence, either implicitly or explicitly; and
- (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in 27(1)(c).

[30] Before I turn my attention to whether the three parts of this test have been met, I must first deal with the information related to the four Third Parties who have provided their consent.

[31] Subsection 27(3) makes it clear that where a third party provides its consent, subsections 27(1) and (2) do not apply. Consequently, subsection 27(1) is inapplicable to the information for which consent has been provided and the City cannot use this provision to withhold this information. This is not a matter of discretion to disclose; rather subsection 27(1) has no bearing on any information

for which consent to release has been provided. Consequently, all records for which four of the Third Parties provided their consent must be disclosed.

[32] As for the first two categories of records relating to the remaining three Third Parties who did not provide their consent and did not provide any written submissions, in order for the City to deny access to information pursuant to subsection 27(1) all three parts of the above test must be met. If a record fails to meet even one of the three parts, the public body is not entitled to rely on section 27(1) to sever information in the responsive record.

[33] In respect of the first element of the test, it is clear to me by the nature of these records that the records would reveal commercial or financial information of the three remaining Third Parties. The first element of the test is met.

[34] As to the second element of the test the City has indicated that the proposal call specified that the bids would be opened privately which, the City submits, implies confidentiality. However, in *Provincial Airlines Limited v. Canada (Attorney General)* at paragraph 32 the Federal Court found that:

[32] In Canada Post Corp. v. Canada (Minister of Public Works and Government Services), 2004 FC 270 at para. 40 the Court observed bidders for government contracts should know there is no expectation that documents submitted on a bid will be insulated from the government's obligations to disclose as part of its accountability for spending public funds.

While this statement was made in relation the federal government, I believe it has equal application in this matter.

[35] Consequently, I am not fully convinced that the second element of the test has been satisfied. However, I will, nevertheless, turn my attention to the criteria set out in subsection 27(1)(c) for if this element is not met, whether the second element is satisfied becomes irrelevant. In order for this part of the test to be met, there must be a reasonable expectation that the disclosure of the information would cause one of the four injuries listed therein.

[36] As I stated in paragraphs 30 and 31 of Report 2011-007 in respect of this element of the three-part test:

Section 64 of the ATIPPA clearly puts the burden of proof on the party asserting an exception. Without evidence to back up an argument, the burden of proof cannot be met, and in order to discharge its burden, the public body or third party must provide convincing and detailed evidence as to the harm that would occur should the information at issue be disclosed. The assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.

Any decision of this Office must be based on the information that is put before it. There is often much research done during the investigation of a Request for Review, however, independent research cannot always uncover information about the inner workings of a particular industry. This Office cannot reasonably be expected to become expert in, or to do significant independent research into, a particular industry every time section 27 is claimed. Public bodies and third parties ultimately bear the burden of proving their right to rely on section 27, which includes not only argument on the specific issue at hand, but where necessary, the relevant context and particulars of a given industry or business so that we can make informed decisions based on solid evidence

[37] The City has advanced numerous arguments about the harm which might occur if the information is released including: a benefit to the Applicant if the City re-issues a proposal call for the sale of the Grenfell Drive land; the lack of a final decision; harm to future negotiations; an influx of information requests for this type of information and a less competitive tendering process. However, the City has failed to provide evidence that any of these kinds of harms will be likely to result. Instead the City has indicated that it is the Third Parties who are best suited to provide the necessary evidence.

[38] The City's reliance on the decisions of the Information Commissioner of Ireland, while noted, is not sufficient evidence of the specific harms which may occur. Furthermore, the relevant Irish legislation and regime is different from those from which I must take my guidance. For future reference, it should be noted that section 27 of the *ATIPPA* is very similar and, in some cases, identical to similar provisions in access to information legislation from other Canadian jurisdictions. I would encourage public bodies who wish to support their claims of exceptions by researching laws and cases from other jurisdictions to focus on the abundant case law available from within Canada before casting their net more broadly

[39] None of the Third Parties who have, implicitly or explicitly, refused their consent provided formal submissions. Consequently, while arguments have been made that harm may occur if the information is released, no actual evidence of harm has been presented. I believe, however, that the consent provided by the other Third Parties may be a good indication that the assumed harms are not as likely as has been suggested by the City.

[40] Without such evidence, the third part of the test fails and a claim of section 27 cannot be supported. Consequently, in respect of the three Third Parties who did not provide consent, all records relating to the first two categories of records must be released in their totality.

[41] In respect of the third category of records and all of the Third Parties, consenting and non-consenting, these records are clearly, on their face, not records which should be given any consideration under section 27. By this I mean that these records, by their nature, are unsuitable and inappropriate for a claim of section 27. Therefore, the fact that the Third Parties were not specifically asked to provide their consent to the release of this information is inconsequential. No analysis of the three-part test is necessary in respect of this information and given that the City did not claim any other provision of the *ATIPPA* in respect of this information, all records relating to the third category of records must be released to the Applicant, less any unresponsive information (i.e. any information other than the dates of the meetings and the names of the proponents and attendees). However, if there is no harm in releasing this non-responsive information and if its release is not prohibited by a mandatory provision of the *ATIPPA*, I would suggest that the City considering releasing this information as well.

[42] I would also like to address two arguments made by the City. The first argument centered on the finality of the matter at hand. Whether the information or records relate to a matter which has been finalized is not a relevant consideration under section 27, unless a public body can relate, with evidence, the lack of finality to a harm set out in subsection 27(1)(c).

[43] Additionally, the City has argued that the release of the information may have two repercussions: first, an unfair advantage will be bestowed upon the Applicant by virtue of his obtaining information which others do not have and second, an influx of access to information requests from others so as to prevent the Applicant from having this advantage. Again, neither of these factors is relevant to a

section 27 analysis. Furthermore, a public body should not attempt to withhold information in an attempt to stifle future access to information requests.

V CONCLUSION

[44] Given the foregoing, I find that in respect of the first two categories of records and the four Third Parties who provided their consent, section 27(1) does not apply to this information and the records should be released in their entirety. In respect of the first two categories of records and the remaining three Third Parties, I find that the three-part test necessary for a successful claim of section 27(1) has not been met and these records should be released in their entirety. In respect of the third category of records, section 27 is entirely inapplicable and the information must be released; however any unresponsive information (i.e. any information other than the dates of the meetings and the names of the proponents and attendees) may be severed from these records.

[45] Additionally, should the information initially provided to the Applicant in respect of the final two categories of records have changed since the commencement of the Review by this Office, the City should provide the Applicant with the additional, updated information and records.

VI RECOMMENDATIONS

[46] Having found that the City has improperly applied section 27(1), under the authority of section 49(1) of the *ATIPPA*, I recommend that the City:

- (i) release to the Applicant the first two categories of records in their entirety;
- (ii) release to the Applicant the third category of records in their entirety with the exception of unresponsive information (i.e. any information other than the dates of the meetings and the names of the proponents and attendees);

- (iii) release to the Applicant any additional, updated information and records in respect to the final two categories of records should this information have changed since the commencement of the Review by this Office;
- (iv) in future access requests involving a section 27 claim, be more diligent when notifying third parties and seeking their consent to ensure that third parties are fully informed about what information they are consenting to release and all information over which section 27 is being claimed; and
- (v) ensure that, when dealing with a Request for Review from this Office, all responsive records are provided at the outset of the Request.

[47] Under authority of section 50(1) I direct the head of the City to write to this Office and to the Applicant and to the Third Parties within 15 days after receiving this Report to indicate the final decision of the City with respect to this Report.

[48] Please note that within 30 days of receiving a decision of the City under section 50, the Applicant or any Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*. **Consequently, no record can be disclosed to the Applicant by the City until the expiration of the 30-day appeal period.**

[49] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of January, 2012.

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