OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-008

May 17, 2013

Government Purchasing Agency

Summary: The Applicant requested from the Government Purchasing Agency a copy of a bid submitted by a third party business in response to a particular tender for office supplies. The Government Purchasing Agency severed some information under sections 27(1)(c) (harm to the business interests of a third party) and 30 (personal information). The Applicant took no issue with the application of section 30 and it was not an issue for this Report. With respect to section 27, the Commissioner found that the burden of proof under section 64(1) had not been met by the Public Body and recommended that the information be released.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, ss. 12, 27; *Freedom of Information and Protection of Privacy Act*, S.S. 1990-91, c. F-22.01, as amended, s.19, *Access to Information Act*, R.S.C., 1985, c. A-1**,** as amended, s. 20(1)(c) and (d).

Authorities Cited: *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 S.C.R. 23; *Culver v. Canada (Minister of Public Works and Government Services)*, 1999 CanLII 8959 (FC), Newfoundland and Labrador OIPC Reports 2005-002, 2006-005, A-2008-012; Saskatchewan OIPC Report 2005-003; Ontario OIPC Order PO-2195

Other Sources: Investigators Guide to Interpreting the Access to Information Act, Office of the Information Commissioner of Canada, http://www.oic-ci.gc.ca/eng/inv_inv-gui-ati_gui-inv-ati_section_20%281%29%28c%29%28d%29.aspx

File #: 0010-080-12-001

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on September 6, 2012 to the Government Purchasing Agency ("GPA"). The request sought disclosure of records as follows:

> *Copy of the bid submitted by* [named Third Party] *in response to Tender no. TP111032459 – Office Supplies*

[2] On October 18, 2012, the GPA informed the Applicant that access to the records was granted in part. Information contained in the record had been severed under sections 27 (harm to business interests of a third party) and section 30 (personal information). In a Request for Review received at this Office on October 22, 2012, the Applicant asked that this Office review the GPA's decision.

[3] As per the usual process, upon receipt of the Request for Review, an Analyst from this Office undertook informal resolution efforts but was unable to resolve the file informally. By letters dated December 11, 2012 and December 19, 2012, the Applicant, the GPA and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* ("*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.

II PUBLIC BODY'S SUBMISSION

[4] The GPA provided this Office with a formal written submission dated December 19, 2012, and received by this Office on December 31, 2012. In its submission, the GPA states that when preparing bids, "vendors must take into consideration not only the tender requirements but a variety of business factors in order to submit the best competitive pricing to achieve success". It further states that:

> W*here contracts are awarded in total, the confidentiality of itemized pricing is crucial in maintaining a fair competitive process.*

> *Itemized pricing information is supplied in this context implicitly in confidence to the tendering authority. The competitive advantage of a bidder would be eroded if the tendering authority did not maintain the confidence of the process under which itemized pricing is sought. Public disclosure of the overall contract award then ensures transparency while maintaining the balance of confidentiality necessary to preserve the integrity of the process.*
> *…the release of … pricing information would allow competitor's* [sic] *to undercut its exact price point which could be used to their advantage in securing contracts which might otherwise have been [the Third Party's] if the information had not been made available.*
> *The disclosure of pricing information then could reasonably be expected to harm the competitive position of a third party…in this manner and result in lost opportunities which may have significant financial implications for the third party and the entity improperly benefitting from the disclosure of the third party's confidential information.*

III APPLICANT'S SUBMISSION

[5] The Applicant provided a lengthy and detailed submission which will be reproduced in large part below. The Applicant first took issue with the fact that the GPA's response did not explain the reasons for withholding information under section 27 beyond merely stating that the information was being withheld under section 27.

[6] With respect to the applicability of section 27, the Applicant first provided the following background information:

> *The tender was called to select the lowest qualified bidder following which GPA would enter into a standing offer agreement to acquire items at the tender prices. There is no obligation for the public bodies to purchase the quantities on the tender.*
>
> *Office supply tenders require careful analysis to ensure that all bidders are evaluated fairly. It is common for companies to offer alternative products provided it meets the specifications requested. It is not always clear nor is it always agreed that certain items are suitable alternatives. As well there are always unit of measure issues that need to be considered when evaluating competing bids. For example some items may have ten in a package while other equivalent items may have twelve.*
>
> *It has generally been the practice in the past to provide all competing bidders with copies of each others' bid details. With that information each of the bidders could carry out an analysis of each others' bid and make representations to the public body should certain items bid not meet specification or not be an equivalent item. Bidders could also point out unit of measure differences. Companies in the office products industry are knowledgeable in office products and could assist GPA staff in evaluating competing bids. This was the practice followed in the past. Without a copy of competing bids GPA cannot be made accountable that a proper evaluation of the tender was carried out as required by section 3(1)(a) of the A TIPPA…*

> *… It is well recognized in our industry that office product tenders for public bodies are priced very aggressively and are often quoted at less than cost depending on the public body's practices for procurement of non-contract items. It is also well recognized in the industry that spending on non-contract items will far exceed the spending on contract items. The last contract awarded to [Third Party] by [another Public Body] was substantially below its cost(42% below the next lowest bidder) because of [another Public Body's] practice of buying all non-contract items from [Third Party] without competing bids. In 2010 [another public body] spent three times as much on non-contract items as they did for contract items. The contract awarded to Third Party] by this tender was just 4.4% below the next lowest bidder. The reason is that most (not all) of the public bodies involved with this tender will solicit competing bids for non-contract items.*
>
> *When competing for public body office products tenders there are a number of considerations taken into account.*
>
> *1.) The size and value of the tender.*
> *2.) The number of items on the tender -The longer the list the lesser opportunity for non-contract items.*
> *3.) The practice of the public body for the purchase of non-tendered items. Ie.[named public body's] practice vs other public body practices.*
> *4.) The cost of freight, the number of shipping locations and distance from our distribution centre.*
> *5.) An assessment of the accuracy of the estimated quantities. Industry trends indicate that certain items are growing at a fast rate whereas many others are declining.*

[7] With respect to the issue of harm, the Applicant states:

> *There is no benefit of knowing what individual bid prices were on a previous tender when deciding how to respond to a tender. We know the total bid amount and can use that information to decide how to bid. The information we request is to determine that the bids were properly evaluated and to make the public body accountable for its contract award.*
>
> *I also believe that the issue of potential harm can be considered in terms of the past practice of disclosure of competing bids. I am unaware of any harm to third parties from the release of competing bid details to us. I am very much aware that there has been no harm caused to us by the release of our bid details to others when we were the successful bidder. For a claim of harm from the disclosure of bid details to be more than just speculation a third party must demonstrate from past practices how harm was incurred from the release of competing bid details.*
>
> *… In summary I will state that we are not breaking new ground by our request for these records in that the practice in the past was to provide details of all competing bidders. For [third Party] to claim there is potential harm they must have clear and convincing evidence of harm caused by the release of bid details in the past. I believe there is an overriding public interest to make the public body accountable.*

[8] The Applicant also addressed some case law that an Analyst from this Office had considered during the informal resolution process and distinguished it from the case at hand. Along with his submission, the Applicant also included in his submission the Investigators Guide to Interpreting

the Access to Information Act ("ATIA") for section 20(1)(c) & (d) from the Office of the Information Commissioner of Canada. These sections deal with the disclosure of third party information and will be referred to in the Discussion section below, as will the case law set out therein.

IV THIRD PARTY'S SUBMISSION

[9] The Third Party did not provide any submission as part of the formal investigation, however, agreed that their initial submission to the GPA could be used as part of the formal investigation. In that submission, the Third Party stated as follows:

> *[The Third Party] provided pricing for a list of office products items, and was awarded the business in large part based on the pricing that was provided. Releasing [the Third Party's] pricing information would allow our competitors to understanding [sic] our exact price point on the products we sell. Competitors could create a database of [the Third Party's] pricing, and then lower their prices just enough to undercut [the Third Party] (as opposed to offering their best price). Competitors would use this information to their advantage to bid on future contracts and would be given an unfair advantage to win future business. In particular, competitors could use this information to undercut pricing provided to the Government of Newfoundland and Labrador resulting in a loss of sales to [the Third Party].*

V DISCUSSION

[10] I would first like to address the applicant's concern that no reasons for the refusal to disclose information were given. This issue was dealt with in Report A-2008-012 and my comments therein bear repeating:

> *It is not enough, furthermore, to simply sever some information and release the rest. Every refusal - or partial refusal - must be accompanied by an explanation to the applicant. This explanation is necessary so that an applicant may be able to understand the decision to withhold some information, and have confidence that it has been done in accordance with the law. It is also necessary so that there can be a basis on which the applicant may eventually appeal the decision or ask for a review by the Commissioner. As section 12 of the Act clearly states:*
>
> *12. (1) In a response under section 11, the head of a public body shall inform the applicant*
>
> *(a) whether access to the record or part of the record is granted or refused;*

> *(b) if access to the record or part of the record is granted, where, when and how access will be given; and*
>
> *(c) if access to the record or part of the record is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> […]

As clause (i) above provides, the public body, in addition to stating the provision of the Act on which the refusal is based, must give reasons for the refusal. This can only mean an explanation of what kind of material has been severed, together with an explanation of why the severing is legitimate. It is simply not enough to just cite a provision or state the applicable section of the Act. A cursory review of the exception provisions of the Act shows that many sections are lengthy and complex, with different types of exceptions contained in different subsections or paragraphs. If only the section number is cited in a particular case, the applicant is left to guess which of the specific provisions is meant to apply. This would obviously be unsatisfactory.

[11] Turning now to the issue of the applicability of section 27, this section reads as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal*
>
> *(a) trade secrets of a third party;*
> *(b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or*
> *(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
>
> *(i) harm the competitive position of a third party or interfere 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 significant 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.*

[12] This is the first Report I have issued with respect to the "new" section 27 (since the amendments contained in Bill 29). Previously, section 27 contained a 3 part test, all three parts of which had to be met in order for section 27 to apply. The old version of section 27 also required the

harm to the competitive position and the interference with the negotiating position to be significant. The changes in the wording of section 27 now means that section can be applied to withhold information when only one of (a), (b) or (c) above are applicable. Further, the harm or the interference no longer needs to be "significant". However, the amended section 27 still uses the words "disclosure of which could reasonably be expected to", which, as more fully set out below, requires a specific standard of proof.

[13] Access to information legislation in Saskatchewan, Manitoba and New Brunswick all have provisions dealing with third party business interests that are similar to the amended section 27 in the *ATIPPA*. In Saskatchewan, for example, the equivalent provision is section 19 of the *Freedom of Information and Protection of Privacy Act* which states:

> *19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:*
>
> *(a) trade secrets of a third party;*
> *(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;*
> *(c) information, the disclosure of which could reasonably be expected to:*
>
> *(i) result in financial loss or gain to;*
> *(ii) prejudice the competitive position of; or*
> *(iii) interfere with the contractual or other negotiations of a third party;*
>
> *(d) a statement of a financial account relating to a third party with respect to the provision of routine services from a government institution;*
> *(e) a statement of financial assistance provided to a third party by a prescribed Crown corporation that is a government institution; or*
> *(f) information supplied by a third party to support an application for financial assistance mentioned in clause (e).*

[14] In Report 2005-003, the Saskatchewan Commissioner stated as follows:

> *Since section 19(1)(c)(ii) of Saskatchewan's Act does not expressly require the disclosure to "harm significantly the competitive position" [emphasis added], a modification of the 3 part test is required. The three part test that should be applied in Saskatchewan consists of the following elements: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must be more than trivial or inconsequential; and (c) the likelihood of harm must be genuine and conceivable.*

[15] In that same report, the Saskatchewan Commissioner applied the standard set out in Ontario Order PO-2195 which provides the following:

> *Under part 3, the Ministry and/or OPG must demonstrate that disclosing the information "could reasonably be expected to" lead to a specified result. To meet this test, the parties resisting disclosure must provide "detailed and convincing" evidence to establish a "reasonable expectation of harm". Evidence amounting to speculation of possible harm is not sufficient. [see Order P-373, two court decisions on judicial review of that order in Ontario (Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner) (1998), 41O.R. (3d) 464 at 476 (C.A.)].*

[16] Given that one of the main purposes of the *ATIPPA* is to promote accountability by, among other things, giving individuals a right of access to records in the custody or control of a public body subject to limited and specified exceptions, it is my opinion that the standard of proof under the amended section 27 still requires detailed and convincing evidence to establish a reasonable expectation of probable harm. This is the same standard that existed under the old section 27.

[17] This standard has been widely applied by Information and Privacy Commissioners across the country, and has been set out in numerous reports from this Office as well. As this is the first Report with respect to the amended section 27, for clarity, I would like to set out the research in detail. In Report 2005-002, my predecessor was considering the required standard of proof under sections 23 (disclosure harmful to intergovernmental relations or negotiations) and 24 (disclosure harmful to the financial or economic interest of a public body). In both of these sections, like the new section 27, the requirement is merely harm, not significant harm, and so I find these comments to be instructive in determining the appropriate standard under the new section 27. I would like to set them out in detail as follows:

> *[21]…The Federal Court of Appeal in Canada Packers Inc. v. Canada (Minister of Agriculture), (1988) 53 D.L.R. (4th) 246, 1988 CarswellNat 667 (F.C.A) (eC) at paragraphs 19 and 20, has said*:
>
> > *19 What governs, I believe, in each of the three alternatives in paras. (c) and (d) is not the final verb ("result in", "prejudice" or "interfere with") but the initial verb, which is the same in each case, viz.* ***"could reasonably be expected to."*** *This implies no distinction of direct and indirect causality but only of what is reasonably to be expected and what is not. It is tempting to analogize this phrasing to the reasonable foreseeability test in tort, although of course its application is not premised on the existence of a tort.*

> *20 However, I believe the temptation to carry through the tort analogy should be resisted, particularly if Wagon Mound (No. 2), supra, is thought of as opening the door to liability for the mere possibility of foreseeable damage, as opposed to its probability. The words-in-total-context approach to statutory interpretation which this Court has followed in Lor-Wes Contracting Ltd. v. R. (1985), [1986] 1 F.C. 346, 85 D.T.C. 5310, [1985] 2 C.T.C. 79, (sub nom. Lor-Wes Contracting Ltd. v. Minister of National Revenue) 60 N.R. 321, and Cashin v. Cdn. Broadcasting Corp. (1988), 86 N.R. 24, 88 C.L.L.C. 17, 019 (Fed. C.A.) requires that we view the statutory language in these paragraphs in their total context, which must here mean particularly in light of the purpose of the Act as set out in section 2.* ***Subsection 2(1) provides a clear statement that the Act should be interpreted in the light of the principle that government information should be available to the public and that exceptions to the public's right of access should be "limited and specific." With such a mandate, I believe one must interpret the exceptions to access in paras. (c) and (d) to require a reasonable expectation of probable harm.***
>
> (Emphasis added)

[22] In considering a request for public opinion polls on the subject of national unity and constitutional reform, Rothstein, J. of the Federal Court considered similar issues in Canada (Information Commissioner) v. Canada (Prime Minister), (1993) 1 F.C. 427, 1992 CarswellNat 185 (eC). Rothstein, J. at paragraphs 119 and 121 stated:

> *119 The jurisprudence indicates that the Government or party seeking to maintain confidentiality must demonstrate its case clearly and directly. The Act itself, in subs. 2(1), states that exemptions from disclosure must be limited and specific. By inference I think it is clear that a general approach to justifying confidentiality is not envisaged.*
>
> *121 In order to distinguish between confidentiality justified by the Act and that resulting from an overly cautious approach, specific detailed evidence is required.*

[23] Rothstein, J. goes on to state at paragraphs 122 and 128:

> *122 Descriptions of possible harm, even in substantial detail, are insufficient in themselves. At the least, there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. The court must be given an explanation of how or why the harm alleged would result from disclosure of specific information.*
>
> *128 …the evidence must demonstrate a probability of harm from disclosure and not just a well-intentioned but unjustifiable cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue.*

[24] More recently, the Nova Scotia Court of Appeal in Chesal v. Nova Scotia (Attorney General), (2003) NSCA 124, 2003 CarswellNS 396 (eC) at paragraph 38, said that "…the legislators, in requiring 'a reasonable expectation of harm', must have intended that there be more than a possibility of harm to warrant refusal to disclose a record."

> *[25]* […] *By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it. Furthermore, the legislation places the burden squarely on the head of a public body to prove that any information that is withheld is done so appropriately and in accordance with the legislation. The jurisprudence cited above clearly supports this concept. In dealing specifically with the issue of harm, Courts have set the bar higher than a mere possibility of harm.*

[18] In Report 2006-005, my predecessor further stated as follows:

> *[41] The necessity for "detailed and convincing" evidence is well established in the case law. The decision of the Ontario Court of Appeal in Ontario (Worker's Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) 1998 CarswellOnt 3445 simply states, "if the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed."*
>
> *[42] Third Party 3 addresses the issue of harm briefly in its submission, stating that the Department is not authorized to disclose the information at issue because "this information, in the hands of a competitor, could be used to set wholesale prices for compatible pharmaceutical products which could reasonably be expected to undercut [Third Party 3's] prices and displace the Products on the Formulary." Additionally, in the brief notation accompanying each appendix of the record of which it objects to disclosure, Third Party 3 says that such disclosure "could reasonably be expected to be harmful to its business interests, specifically the competitive pricing of the Products relative to its competitors." As noted above, the Department presented no evidence in relation to harm, and the case put forward by Third Party 3 is neither detailed nor convincing regarding the nature or severity of the harm which it anticipates from the release of this information…*

[19] As noted above, the applicant included the *Investigators Guide to Interpreting the Access to Information Act* ("ATIA") for section 20(1)(c) & (d) from the Office of the Information Commissioner of Canada in his submission. These sections read as follows:

> *20(1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains...*
>
> *(c) information the disclosure of which could reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or*
> *(d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.*

[20] The Investigator's Guide goes on to outline some guidelines and relevant case law for interpreting these sections. While the wording of section 20 in the *ATIA* is a little different than section 27 of the *ATIPPA,* I believe the comments contained therein are still of some guidance,

especially with respect to the phrase "could reasonably be expected to" (these guidelines can be found at http://www.oic-ci.gc.ca/eng/inv_inv-gui-ati_gui-inv-ati_section_20%281%29%28c%29%28d%29.aspx):

> *Case Law:*
>
> *1) Where disclosure could reasonably be expected to:*
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> *In Air Atonabee v. Canada (Minister of Transport) (1989), 27 F.T.R. 194 (T.D.), the Court held that the test is whether, assuming use of the information, its disclosure would give rise to a reasonable expectation of probable harm. The burden of proof is on the party resisting disclosure, and that to satisfy the requirement of this exemption, there must be evidence as to the way in which the information will cause harm and the degree of harm it will cause.*
>
> *The evidence of harm must be detailed, convincing and describe a direct causation between disclosure and harm. However, one must clearly distinguish between 'direct causation' and 'direct causality' the former being the test to be applied under injury exemptions and the latter being explicitly rejected by the Court of Appeal in Canada Packers Inc. v. Minister of Agriculture et al. (1988), [1989] 1 F.e. 47 (C.A.). 'Direct causation' requires a direct causal link -the person resisting disclosure must bring specific evidence which would show that there is a link arising from the disclosure which would result in the harm. To put it another way, there must be some logical explanation to show why disclosure could lead to a particular identifiable harm. However, the person resisting disclosure does not have to prove a 'direct causality' (i.e., that the disclosure of the requested information would, by itself, causes the specific harm). In other words, it is not necessary to prove that disclosure could result directly in producing the specific harm.*
>
> *In Information Commissioner v. Immigration and Refugee Board (1997), 140 F.T.R. 140 the Federal Court Trial Division characterized the injury test in paragraph 16(1)(c) of the Act as a "confident belief", as follows:*
>
> > *The reasonable expectation of probable harm implies a confident belief. There must be a clear and direct link between the disclosure of specific information and the harm alleged. The Court must be given an explanation as to how or why the harm alleged would result from the disclosure of specific information. The more specific and substantiated the evidence, the stronger the case for confidentiality. It cannot refer to future investigations generally.*
> >
> > *Where the harm foreseen by release of the records sought is one about which there can only be mere speculation or mere possibility of harm, the standard is not met. It must have an impact on a particular investigation, where it has been undertaken or is about to be undertaken. One cannot refuse to disclose information under paragraph 16(1)(c) of the Access to Information Act or paragraph 22(1)(b) of the Privacy Act on the basis that to disclose would have a chilling effect on possible future investigation. (at paras. 40-45).*
>
> *A high standard of proof is necessary to establish an exemption from disclosure on grounds of financial harm or contract interference. To prove harm, one must be able to trace, track, illustrate, and show how disclosure of specific information could lead to the harm alleged.*

Under the Act, the test is one of reasonably expected financial or competitive harm, regardless of whether the information disclosed is confidential per se (i.e., inherently). However, if the information is, in fact, confidential -this could increase the likelihood that it might be able to meet the test. The standard of proof for substantial competitive harm is evidence of substantial injury. Evidence that harm might result is pure speculation and is not good enough. The expectation of harm must be likely, but it need not be a certainty.

Description of possible harm, even in substantial detail, is often insufficient in itself. At a minimum, there must be a clear linkage between the disclosure of specific information and the harm alleged. We must be given an explanation of how and why the harm alleged would result from disclosure of specific information. However, if it is self-evident that as a result of disclosure of the record:

- *harm will be done;*
- *how (and when) it will be done; and*
- *why it will be done, little explanation need to be given.*

What you want is a clear, logical believable explanation of the harm that could be expected if the information is disclosed and the connection between the disclosure and the harm -ie., the logical link.

Where inferences must be drawn, or the answers to these questions are not clear, then further explanation would be required. The more specific and substantiated the evidence, the stronger the case for the exemption. The more general the evidence or the less plausible (believable) the result, the more difficult it would be to be satisfied as to the linkage between disclosure of particular documents and the harm alleged –ie., the more difficult it will be to conclude that the test has been met.

The context surrounding the disclosure of the information is also relevant. The jurisprudence has established certain specific conditions that could be taken into consideration when determining whether a reasonable expectation of harm would result from disclosure:

- *Use of the information: You must assume that the information would be used in assessing whether its disclosure would give rise to a reasonable expectation of harm. For example, what use would likely be made of the information by a competitor is a relevant factor to be considered. In what way would this use likely lead to harm? For example, what use would likely be made by the requestor? These are relevant factors in determining how use could lead to the specific harm.*
- *Availability of the information: It is relevant to consider if the information sought to be kept confidential is already available from sources otherwise available to the public, and whether it could be obtained by observation or independent study by a member of the public acting on their own. For example, where the information requested is already available elsewhere to the public, there may be need for exemption under this exemption. The party (i.e., even if it's us) alleging that the information is publicly available has the burden of proof. Not only must the party prove that the withheld information is otherwise publicly available but, if it is government information, that the information was released from an official source.*

- *Press coverage: Press coverage of a confidential record is relevant to the issue of expectation of probable harm from its disclosure. When the same or similar information has already been disclosed and received press coverage, no additional harm could be expected from the release of the requested information. Note, however, that a third party cannot claim that media would misinterpret the requested information and would cause prejudice to the third party. This argument has been found purely speculative.*

- *Time: Evidence of the period of time between the date of the confidential record and its disclosure is relevant. In some cases, the older the record, the less likely an injury could occur.*

- *Other relevant documents: Each document must be considered on its own merit and in the context of all the documents requested for release since the total contents of the release may have a considerable bearing on the reasonable consequences of its disclosure. On the other hand, a single record may cause harm when disclosed but disclosure may result in no harm when disclosed in full context or with an explanation. It is the probable consequences of disclosure which are most significant in determining whether a document or a portion thereof may be exempted under this section, not the nature of the document or the nature of the information contained in the document.*

[…]

3) Prejudice to the competitive position of a third party:

The Federal Court of Canada interpreted this part of the test in such a way that in order to be covered by this exemption; the third party must have a defined market or business which would be adversely affected by the disclosure14. However, this injury does not have to be translatable into monetary value. Unlike the other test under this exemption, the prejudice is not qualified-i.e., the Act does not say materially prejudice. Therefore, the only requirement is that the disclosure of the requested information would likely cause harm to the competitive position of a third party.

There could be some situations where, for example, it is possible to perceive a prejudice but it is not possible to translate it into monetary value. (E.g. the expertise of the employees of a third party, the quality of products/services used, etc.). Such information is also covered by 20(1)(c).

The prejudice under this exemption could apply to any third party, not just the third party that supplied the information.

In Culver v. Canada (Minister of Public Works and Government Services), (F.CT.D., October 27, 1999, unreported), the Federal Court Trial Division accepted evidence that disclosure of contract prices would allow competitors to work backwards and discover other confidential information about the third party and to develop pricing strategies to undercut the third party. The Court found that the information should thereby be exempt under paragraph 20(1)(c) on the basis that disclosure could reasonably be expected to prejudice the competitive position of the third party.

[…]

> *4) Interference with contractual or other negotiations:*
>
> *Paragraph 20(1)(d) also applies when any third party could reasonably be expected to be prejudiced by the disclosure. This exemption must be distinguished from the prejudice to the competitive position dealt with in paragraph 20(1)(c). As such, the Federal Court in Societe Gamma Inc. v. Canada (Department of the Secretary of State), (April 27, 1994), T -1587-93, T-1588-93 (F.CT.D.), interpreted this provision as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the third party which might flow from disclosure".*
>
> [Endnotes omitted]

[21] Most recently, the Supreme Court of Canada also considered the application of section 20 of the federal *Access to Information Act* in *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 S.C.R. 23. I would like to quote from this decision at length:

> *[193] Merck proposes that this line of jurisprudence should be abandoned and that the word "probable" should be omitted. Merck submits that the proper test was articulated by the Nova Scotia Court of Appeal in Chesal v. Nova Scotia (Attorney General), 2003 NSCA 124 (CanLII), 2003 NSCA 124, 219 N.S.R. (2d) 139, where the court held that the introduction of "probable" into the language of the test was incorrect. Hence, all that is required is a "reasonable expectation of harm" (para. 37). Merck's proposed test would therefore require the third party to show a "reasonable expectation of harm" resulting from disclosure.*
>
> *[194] Health Canada maintains that the well-established standard applied by the Federal Court of Appeal in this case should be maintained. As the case law clearly indicates that a mere possibility is insufficient, the proper test is a reasonable expectation of probable harm. Any test in between cannot be conceptualized.*
>
> *195] I am not persuaded that we should change the way this test has been expressed by the Federal Courts for such an extended period of time.* […] *In addition, as the respondent points out, the "reasonable expectation of probable harm" test has been followed with respect to a number of similarly worded provincial access to information statutes. Accordingly, the legislative interpretation of this expression is of importance both to the application of many exemptions in the federal Act and to similarly worded provisions in various provincial statutes.*
>
> *[196] It may be questioned what the word "probable" adds to the test. At first reading, the "reasonable expectation of probable harm" test is perhaps somewhat opaque because it compounds levels of uncertainty. Something that is "probable" is more likely than not to occur. A "reasonable expectation" is something that is at least foreseen and perhaps likely to occur, but not necessarily probable. When the two expressions are used in combination — "a reasonable expectation of probable harm" — the resulting standard is perhaps not immediately apparent. However, I conclude that this long-accepted formulation is intended to capture an important point:* ***while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless***

do more than show that such harm is simply possible. *Understood in that way, I see no reason to reformulate the way the test has been expressed.*

[197] I note that in Lavigne v. Canada (Office of the Commissioner of Official Languages), 2002 SCC 53 (CanLII), 2002 SCC 53, [2002] 2 S.C.R. 773, at para. 58, the Court referred with apparent approval to the "reasonable expectation of probable harm" formulation and to the statement by Richard J. (as he then was) in Information Commissioner (Can.) v. Immigration and Refugee Board (Can.) 1997 CanLII 5922 (FC), (1997), 140 F.T.R. 140 (T.D.), that this standard implies a "confident belief" (para. 43). In applying the standard, the Court concluded that the evidence did not "provide a reasonable basis for concluding that disclosure . . . could reasonably be expected to be injurious" so as to result in the harm alleged (para. 61). This comment, while not requiring proof that harm will occur on the balance of probabilities, nonetheless underlines the point that something well beyond a mere possibility of harm must be shown. As for the causal link between disclosure and harm, the Court indicated that there need not be a causal relationship as in tort law, but that there must be proof of a "clear and direct connection between the disclosure of specific information and the injury that is alleged" (Lavigne, at para. 58; see also Canada Packers, at pp. 58-59).

[198] The Court also recently interpreted a similar phrase which occurs in another statutory context. In Hilewitz v. Canada (Minister of Citizenship and Immigration), 2005 SCC 57 (CanLII), 2005 SCC 57, [2005] 2 S.C.R. 706, the majority referred, at para. 60, to language specifying that a foreign national is inadmissible under s. 38(1)(c) of the Immigration and Refugee Protection Act, S.C. 2001, c. 27, if that individual's health condition "might reasonably be expected to cause excessive demand on health or social services". Abella J. noted that the wording establishes a requirement that "any anticipated burdens on the public purse be tethered to the realities, not the possibilities, of [the] applicants' circumstances" (para. 60 (emphasis added)).

[199] ***I would affirm the Canada Packers formulation. A third party claiming an exemption under s. 20(1)(c) of the Act must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur. This approach, in my view, is faithful to the text of the provision as well as to its purpose.***

[200] As with any question of statutory interpretation, the court must interpret the words of this statute in their entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament.

[201] I begin with the English text of the provision. The words "could reasonably be expected to result" seem to avoid either the standard of mere possibility or the standard of probability. We must assume, I think, that both of those standards would clearly have been known to the drafters. This suggests that some middle ground was intended: something cannot reasonably be expected to occur if it is a mere possibility; but something may be reasonably expected even if it is not more likely than not to occur. The word "expected" derives from the verb "to expect", a primary meaning of which is to "regard as likely" (The Canadian Oxford Dictionary (2nd ed. 2004), at p. 523). The word "likely" is more difficult to pin down. While it can mean "probable" it may also mean "such as well might happen" (p. 889). In legal usage, the standard of proof on the balance of probabilities is often expressed by saying that something must be shown to be more likely than not. ***I conclude that the English text of the statute suggests a middle ground between that***

which is probable and that which is merely possible. The intended threshold appears to be considerably higher than a mere possibility of harm, but somewhat lower than harm that is more likely than not to occur.

[202] Turning to the French text of s. 20(1)(c), the phrase "risquerait vraisemblablement de causer" is a challenging one to interpret. The conditional "risquerait de causer" might be rendered into English by either "could" or "would" cause. The drafter here chose the less definite "could". The word "vraisemblablement" is capable of meaning "probably" or "likely": see, e.g., Kwiatkowsky v. Minister of Employment and Immigration, 1982 CanLII 221 (SCC), [1982] 2 S.C.R. 856, at pp. 863-64. However, it is often used in federal statutes as the equivalent of the English words "likely" or "reasonably" or to convey the sense of risk of something happening or not happening. Some examples follow. In the Competition Act, R.S.C. 1985, c. C-34, s. 11(1), "qu'une personne détient ou détient vraisemblablement des renseignements pertinents à l'enquête en question" was drafted in English as "that a person has or is likely to have information that is relevant to the inquiry", and in s. 74.11(4) "s'il est convaincu que le paragraphe (3) ne peut vraisemblablement pas être observé" is drafted in English as "where it is satisfied that subsection (3) cannot reasonably be complied with". In the Criminal Code, R.S.C. 1985, c. C-46, s. 25.1(9), "qui entraînerait vraisemblablement la perte de biens ou des dommages importants à ceux-ci" is drafted in English as "that would be likely to result in loss of or serious damage to property", and in s. 382.1(2) "sachant qu'ils seront vraisemblablement utilisés pour acheter ou vendre, même indirectement, les valeurs mobilières en cause ou qu'elle les communiquera vraisemblablement à d'autres personnes qui pourront en acheter ou en vendre" was drafted in English as "knowing that there is a risk that the person will use the information to buy or sell, directly or indirectly, a security to which the information relates, or that they may convey the information to another person who may buy or sell such a security". In the Insurance Companies Act, S.C. 1991, c. 47, s. 294(6), "provoquerait vraisemblablement une modification sensible du prix des valeurs mobilières de la société" was drafted in English as "might reasonably be expected to materially affect the value of any of the securities of the company".

[203] As noted earlier, the word "likely" is a good fit with the statute's text of "could reasonably be expected to". The shared meaning rule for the interpretation of bilingual legislation dictates that the common meaning between the English and French legislative texts should be accepted: Sullivan, at pp. 99 ff., and M. Bastarache et al., The Law of Bilingual Interpretation (2008), at pp. 32 ff. By resorting to the shared meaning rule, I would interpret "could reasonably be expected to" in the English version and "risquerait vraisemblablement" in the French version as meaning "likely", a standard considerably higher than mere possibility, but somewhat lower than "more likely than not". This sense is captured by the long-standing test enunciated by the Federal Courts: "reasonable expectation of probable harm".

[204] ***This interpretation also serves the purposes of the Act. A balance must be struck between the important goals of disclosure and avoiding harm to third parties resulting from disclosure. The important objective of access to information would be thwarted by a mere possibility of harm standard. Exemption from disclosure should not be granted on the basis of fear of harm that is fanciful, imaginary or contrived. Such fears of harm are not reasonable because they are not based on reason:*** *see Air Atonabee, at p. 277, quoting Re Actors' Equity Assn. of Australia and Australian Broadcasting Tribunal (No 2) (1985), 7 A.L.D. 584 (Admin. App. Trib.), at para. 25. The words "could reasonably be expected" "refer to an*

> *expectation for which real and substantial grounds exist when looked at objectively": Watt v. Forests, [2007] NSWADT 197 (AustLII), at para. 120.* ***On the other hand, what is at issue is risk of future harm that depends on how future uncertain events unfold. Thus, requiring a third party (or, in other provisions, the government) to prove that harm is more likely than not to occur would impose in many cases an impossible standard of proof.***
>
> […]
>
> *[206]* ***To conclude, the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.***
>
> [emphasis added]

[22] Despite the fact that a third party is often in the best position to present evidence as to why disclosure of information would be harmful to them, section 64(1) of the *ATIPPA* states that the burden of proving that the section is applicable rests with the public body in the case where it is the public body's decision to refuse access:

> *64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

If the Public Body had decided to grant access, it would be up to the Third Party to file a Request for Review to this Office and the burden of proof in that case would lie with the Third Party.

[23] With respect to interference with the negotiating position of the third party there was no evidence before me as to how release of the information would obstruct future negotiations (outside of heightened competition, which goes to harm to the competitive position, which is a distinct ground) and of course, there are no negotiations ongoing presently. Therefore I have no basis upon which to conclude that release of the information would interfere with the negotiating position of the Third Party in this case. Likewise, beyond the bare assertion by the GPA that the pricing information is supplied to them in confidence by the Third Party, there was no further evidence given with respect to the confidentiality aspect of section 27. This is not sufficient to meet the burden of proof. My predecessor and I have addressed the concept of "supplied in confidence" in

several previous reports (see for example, Report 2006-001 and Report A-2009-006. The Third Party did not address this aspect of section 27 at all, and only objected to release on the basis of section 27(1)(c) – harm the competitive position of a third party or interfere with the negotiating position of the third party.

[24] Therefore, following established case law as cited above, the evidence must establish a reasonable expectation of probable harm, which requires a risk of harm that is beyond merely possible or speculative. In addition, when considering the level of harm required (given the removal of the word "significant" from section 27) I am adopting the test set out in Saskatchewan Report 2005-003. The test to be applied when considering harm under section 27 is as follows: (a) there must be a clear cause and effect relationship between the disclosure and the harm which is alleged; (b) the harm caused by the disclosure must be more than trivial or inconsequential; and (c) the likelihood of harm must be genuine and conceivable.

[25] In the present case, the GPA's submission was brief, and outlined in very general terms the harm that might occur if the record was disclosed. This does not meet the standard of proof as described above in the *Merck Frosst* case. In *Culver v. Canada,* although the Federal Court accepted that disclosure of contract prices would allow a competitor to develop pricing strategies to undercut the third party, and thus held that the information should not be disclosed, the circumstances were different than in the case at hand. In that case, evidence was presented that:

> […] *if a competitor was to obtain the final selling rates (the disputed information in the case of this Application), the competitor would be able to determine the profit and cost component of Standard Aero* [the third party]. *The reason for this difference is that since the contract now under dispute is sole-sourced and subject to Canadian Government Supply Policy Manual calculations, Standard Aero divulges to [the Department] complete costs for providing the repair and overhaul services on the CF T56 engines. [The Department] then determines the final selling rate by applying their spread sheet profit calculation to these costs which establishes the rates that [the Department] will pay and the acceptable level of profit that Standard Aero will earn on the contract. The Supply Policy Manual containing the profit calculation methodology is available to all contractors to the Canadian Government.*
>
> *I am informed by Mr. Soubry that a subsidiary of the Applicants employer (National Airmotive Corp.) is a Standard Aero competitor and a contractor to the Canadian Government. As a result, this competitor has access to the profit calculation methodology of the Canadian Government. Therefore, if this competitor were to obtain access to the disputed information, by using the [the Department] profit calculation methodology and the disputed information, they would be able to*

> *work back to determine the approximate costs and profit that Standard Aero enjoys and obtains for the contract under dispute…*

[26] In this case there was no evidence that knowing the pricing information in the bid will allow competitors to work backwards and figure out the Third Party's costs and profits.

[27] When a public body receives a request for information and believes that section 27 might be applicable and notifies the third party of the request, if the third party does not want the information released, it should be able to present a convincing argument to the public body. Because it bears the burden of proof under section 64, the public body needs information and evidence on which to base its claim of section 27. If such convincing evidence is not provided, then the public body should not claim section 27, and instead notify the third party that it intends to release the information. Then, if the third party still objects to the release of the information, the third party can submit a Request for Review to this Office objecting to the decision of the public body to release the information. Until such review is concluded, the public body cannot release the information, and the burden of proof is then transferred to the third party, who, in reality, is in the best position to make the argument and provide the required detailed and convincing evidence.

[28] Despite the significant change to section 27, the principle of accountability is one of the main underpinnings of all access to information legislation. In addition to the foregoing case law surrounding the required standard of evidence, my analysis of the applicability of section 27 is heavily influenced by these principles. I am reluctant to interpret 27 so narrowly as to shield from disclosure all business dealings a public body has with a third party, as this would completely undermine one of the main purposes of the *ATIPPA*. The changes to the section may mean that more information can be withheld than was previously the case, but it does not change the nature or the quality of evidence required to prove that harm would result from disclosure.

[29] Furthermore, given the importance of the principle of accountability, it is also my opinion that heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources; this is not possible if bid details are protected from disclosure by section 27 in the absence of detailed and convincing evidence. Knowing the bid details of the successful bid does not ensure that a competitor will be successful in

the next tender. In fact, the Applicant, who has been involved in the bidding process with respect to tenders for office supply products has stated that he is unaware of any harm to third parties from the release of bid details and that there has been no harm to his company as a result of release of their bid details to others when they were the successful bidder.

[30] As the Applicant points out in his submission, many factors go into the determination of a bid. Admittedly, having pricing information is useful, as knowing what the successful competitor bid in the past is a good starting point, in that it provides knowledge of the "ballpark" one must be in to be competitive. However, according to the evidence before me, pricing is influenced by several factors, which may vary from company to company. Further, these factors are not static and can change from year to year. As a result, and applying the Saskatchewan test, I do not see a clear cause and effect relationship between the disclosure and the harm which is alleged, nor do I perceive the likelihood of harm to be genuine and conceivable.

VI CONCLUSION

[31] I find that the GPA, in not giving reasons for the refusal, and merely citing which provision of the *ATIPPA* it was relying on to withhold information, breached section 12 of the *ATIPPA*. Public bodies should explain to applicants what type of information is being withheld (if it is not clear) and why it is being withheld. Merely citing the exception being claimed is not enough. If, as in this case, the public body is of the opinion that releasing the information would cause harm, then some general explanation of the harm alleged should be provided to the applicant. When reasons for the refusal are given, an applicant has some basis upon which to assess, for him or herself, the legitimacy of the exception claimed.

[32] Given the standard of evidence required to show harm as established by the case law, it is my opinion that the GPA has not met the burden of proof to show there is a reasonable likelihood of probable harm in this case. The evidence was neither detailed nor convincing. This is in contrast to the Applicant's submission, which provided detail about the industry and the factors that go into submitting a bid. Thus, it is my conclusion that section 27 is not applicable in the present case and the requested information should be released to the Applicant.

VII RECOMMENDATIONS

[33] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the GPA release to the Applicant the information that was withheld under section 27. Further, I recommend that in the future, in addition to quoting the section under which information is being withheld, that the GPA also provide reasons to the Applicant as required by section 12 of the *ATIPPA*.

[34] Under the authority of section 50 of the *ATIPPA*, I direct the head of the GPA to write to this Office, the Applicant and the Third Party within 15 days after receiving this Report to indicate the final decision of the GPA with respect to this Report.

[35] Please note that within 30 days of receiving the decision of the GPA under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of May, 2013.

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