OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-008

July 11, 2014

Department of Transportation and Works

Summary: The Applicant requested from the Department of Transportation and Works information with respect to funds paid out for "removal and trenching of quantities of rock" in relation to a specific project. The Department provided a letter to the Applicant indicating the quantities of rock removed but declined to provide financial information on the basis of section 27(1)(b) and (c). The Commissioner found that the Department had not met the standard of proof under section 27, and thus recommended that the requested information be provided to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, s. 27(1) (b) and (c)

Authorities Cited: *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII); Newfoundland and Labrador OIPC Report A-2013-008; British Columbia Orders 01-39, 02-03, and 08-22.

File #: 0005-090-13-007

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 August 30, 2013 to the Department of Transportation and Works ("the Department"). The request sought disclosure of records as follows:

> *The amount of money paid out for removal and trenching of quantities of rock from project #F9240203.000 Paradise School. Monies would have been paid out to* [Third Party] *and then further payment would of* [sic] *occurred through* [Third Party] *to* [named company] *for work completed. How much was paid out for removal of rock and trench quantities and total quantities as per payout.*

[2] On September 25, 2013, the Department extended the time limit for its response in accordance with section 16(1)(b). On October 28, 2013, the Department notified the Third party of the Request under section 28 of the *ATIPPA*, and informed the Third Party that it had 20 days to consent to the release of the information or provide reasons as to why the information should not be released. The Third Party responded on November 5, 2013, objecting to the release of the information.

[3] On November 18, 2013, the Department responded to the Applicant's request, granting partial access to the requested records. The letter indicated the quantity of trench rock and mass rock removed, but denied access to the financial information on the basis of section 27 (disclosure harmful to the business interests of a third party).

[4] In a Request for Review dated December 2, 2013, and received in this Office on the same day, the Applicant asked for a review of the decision made by the Department. The Applicant indicated in his Request for Review that he wanted "physical records for final quantities paid out with all information harmful to business interests omitted if necessary…physical documents or proof of final quantities paid out for project above". The Applicant was not satisfied with the letter from the Department indicating quantities; he wanted the actual records showing the quantity.

[5] Through informal resolution efforts, the Applicant clarified that he was not interested in financial information, what he really wanted to know was the amount in cubic metres of rock

removed from the site. However, when it was discovered that no such records existed, the Applicant indicated he wished to see the financial records from which the Department drew its response to his initial request. The contract itself indicated the (estimated) amount of mass rock and trench rock to be removed and the cost per cubic metre of removal. Further documents (i.e. contract change order and billing applications) show the actual amounts paid for rock removal. The Department had extrapolated the quantity removed based on the total cost for removal, as indicated by payment records and the cost per cubic metre for removal, as stipulated in the initial contract.

[6] Efforts by an Analyst from this Office to facilitate an informal resolution were unsuccessful and by letters dated February 25, 2014 the parties were advised that the Request for Review had been referred for formal investigation as per section 46(2) of the *ATIPPA*. As part of the formal investigation process and in accordance with section 47 of the *ATIPPA*, both parties were given the opportunity to provide written submissions to this Office. As the business interest of a third party were potentially impacted, the Third Party was also given the opportunity to provide a submission to this Office in accordance with section 47(1)(b).

II PUBLIC BODY'S SUBMISSION

[7] The Department states that it has consistently maintained a policy and practice when dealing with requests pursuant to section 27 of the *ATIPPA* of not revealing information that is commercial and/or financial information of a third party or that could be reasonably expected to harm the competitive position of a third party or interfere with the negotiating position of a third party. The Department also states that the release of this information would prejudice the financial or economic interests of the government, which is a further exception to disclosure set out in section 24(1)(g) of the *ATIPPA*. The formal submission was the first time this exception was mentioned by the Department.

[8] The Department further states:

> *The Department has no issue with revealing the total amount that was paid to its contractor … for the work that it did. Indeed, it is the legal obligation of the Department pursuant to the Public Tender Act and the Financial Administration Act to provide such information. What the Department in this instance objects to is the release of information that was supplied in confidence to*

it by not just this bidder, but any bidder that would reveal the component parts of its bid in respect of a unit price tender and/or resulting contract.

As stated in my previous letter to you of February 14, 2014, the reason for doing so in keeping with the Department's consistent current and past policy and practice on this is so as not to reveal component parts of a bid and resulting contract received in confidence, namely in this instance a contractor's unit prices. The reasons for doing so are:

1. *To prevent the improper release to a third party of information, i.e., in this instance of commercial information of a third party,* [Third Party] *implicitly and explicitly received by past and current practice in keeping with the law in confidence so as not to reveal their commercially sensitive and protected commercial and/or financial information of that company;*

2. *So as not to harm the competitive position of the third party concerned,* [Third Party] *and/or so as not to interfere with its competitive position; and*

3. *So as not to reveal information that could be prejudicial to the financial or economic interests of the province.*

As I stated in my February 14, 2014 letter to you from a pricing perspective and in the context of a particular bid, revealing how a bid is put together could be detrimental to the bidder. Revealing such information could affect the competitive position of bidders such as [Third Party] *in their dealings with their various contractors and other third parties with whom they deal, including in their negotiations with the same on this and other projects. It also would have the effect of revealing the bidding strategy of a contractor and how it put its bid together in response to tender, which is a piece of information confidential to each contractor. Lastly, revealing such information could also prejudice the Department in its dealing with bidders and prospective bidders regarding such tenders and be prejudicial to the economic and financial interests of the Department and Government in its negotiations and discussions with bidders with respect to this and other contracts - as revealing or having to reveal a particular unit price in one context could be prejudicial to the Department's negotiations and discussions in another…*

III APPLICANT'S SUBMISSION

[9] The Applicant made a submission, however it did not deal with the applicability of section 27 to the requested information.

IV THIRD PARTY'S SUBMISSION

[10] The Third Party provided a short submission wherein it argued that the disclosure in this case would reveal its pricing and pricing strategies, which give the Third Party the competitive edge they

currently enjoy in the market. The Third Party states that disclosure of the information would enable a competitor to ascertain its profit margins on projects such as this one, the price it received from a subcontractor (which could reveal whether it enjoys an advantage with regard to a particular subcontractor) and also the manner in which the Third Party manages its billing and project management. Competitors would then be able to use the information to underbid the Third Party, and erase its competitive advantage with certain subcontractors. The Third Party further argues that disclosure would also affect the contractual relationship it has with subcontractors as they too would be aware of the margins being carried by the Third Party. The Third Party thus argues that section 27 is applicable to the requested information.

V DISCUSSION

[11] The Department has relied on section 27(1)(b) and (c) to withhold the requested information. This section states as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal*
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> …
>
> *(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*
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> *(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
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> *(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] With respect to section 27(1)(b), one must consider whether the information was "supplied in confidence". The meaning of "supplied" has been considered by this Office in the past, but I would like to briefly set out the interpretation again here. In British Columbia order 08-22, it was stated:

> *Many decisions have addressed the "supplied" element in s. 21(1)(b). The clear and prevailing consensus—including in the courts—is that the contents of a contract between a public body and a third party will not normally qualify as having been "supplied", even when the contract has been preceded by little or no back-and-forth negotiation. The exceptions to this are information that, although found in a contract between a public body and a third party, is not susceptible of negotiation and is likely of a truly proprietary nature. The rationale is that "supply" is intended to capture immutable third-party business information, "not contract information that—by the finessing of negotiations, sheer happenstance, or mere acceptance of a proposal by a public body—is incorporated in a contract in the same form in which it was delivered by the third-party contractor" or mutually-generated contract terms that the contracting parties themselves have labelled as proprietary.*

[13] In British Columbia Order 01-39, (upheld on judicial review at *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner) et al.*, [2002] B.C.J. No. 848), the adjudicator stated:

> *… By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was "supplied" within the meaning of s. 21(1)(b).*
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> *A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not "supplied" if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).*
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> *Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.*

> *In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).*
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> *…In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is "supplied" information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity or finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is "supplied" rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was "supplied."*

[14] British Columbia Order 02-03 is the leading case on the interpretation of the term "supplied". In that Order, the Commissioner, after reviewing the jurisprudence in British Columbia (including the above order 01-39), reviewed the jurisprudence from other Canadian jurisdictions and concluded that the interpretation above is consistently applied across the country. Order 02-03 can be found at https://www.oipc.bc.ca/rulings/orders.aspx for further details. I too am in agreement with this approach and choose to interpret "supplied" in a manner that is consistent with the decisions thoroughly reviewed by the British Columbia Information and Privacy Commissioner.

[15] It is clear from both the representations of the parties and the language of the contract itself that the information contained in the contract was meant to remain confidential, and most Third Parties, if given an choice, would request that all of their information be kept confidential. However, given the above interpretation, I cannot say that the information was "supplied" to the Department. Neither the Department nor the Third Party provided evidence regarding the supply of the information or addressed the meaning of "supplied". The requested information formed part of a contract, which is deemed in most cases to be "negotiated" information. The information requested does not appear to be immutable, and is not proprietary information. Therefore, it is my finding that section 27(1)(b) does not apply in this case.

[16] With respect to section 27(1)(c), the Department and the Third Party have argued that disclosure of the requested information would reveal the Third Party's pricing, profit margins and pricing strategies, thus compromising the Third Party's competitive edge in the market.

[17] Section 27(1)(c) was considered at length in Report A-2013-008. In that report, I found that standard of proof under section 27 requires **detailed and convincing evidence to establish a reasonable expectation of probable harm.** The jurisprudence set out in that Report need not be repeated here, but I would like to note the additional case below, as it relates directly to the arguments put forth by the parties. In British Columbia Order 08-22, it was stated:

> *The respondents submit that where information can be used by competitors then it results in prejudice to the third parties' competitive position. I accept, as I said before, the general proposition that if information is available then a competitor will undoubtedly try to use that to its advantage. But even if I work from that assumption, that does not mean that I can assume that prejudice is the probable result. That depends on the specific market, the number and type of competitors, the manner in which the government organizes and issues its requests for proposals, and whether one can reasonably conclude that by knowing what rent the government is paying now could realistically assist in devising a rental rate in the future that will be the most competitive. It also ignores the fact that price is merely one factor in the evaluation of proposals.*

[18] In April of this year, The Supreme Court of Canada, in *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner),* 2014 SCC 31 (CanLII), again reiterated the standard of proof with respect to establishing a "reasonable expectation of probable harm":

> *As this Court affirmed in Merck Frosst, [Merck Frosst Canada Ltd. v. Canada (Health)*, 2012 SCC 3 (CanLII)] *the word "probable" in this formulation must be understood in the context of the rest of the phrase: there need be only a "reasonable expectation" of probable harm. The "reasonable expectation of probable harm" formulation simply "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": para. 206.*
>
> *Understood in this way, there is no practical difference in the standard described by the two reformulations of or elaborations on the statutory test. Given that the statutory tests are expressed in identical language in provincial and federal access to information statutes, it is preferable to have only one further elaboration of that language; Merck Frosst, at para. 195:*
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> > 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. Such a change would also affect other provisions because similar language to that in s. 20(1)(*c*) is employed in several other exemptions under the Act, including those

> relating to federal-provincial affairs (s. 14), international affairs and defence (s. 15), law enforcement and investigations (s. 16), safety of individuals (s. 17), and economic interests of Canada (s. 18). 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. [Emphasis added.]

> *This Court in Merck Frosst adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in Merck Frosst emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences": Merck Frosst, at para. 94, citing F.H. v. McDougall, 2008 SCC 53 (CanLII), 2008 SCC 53, [2008] 3 S.C.R. 41, at para. 40.*

[19] In this case, the requested information is five years old. No evidence was presented by the parties with respect to how the construction market has changed in the last five years. Presumably, costs have increased, so I question how useful this information will be to a competitor. Further, even if the cost of rock removal has not changed, disclosure of the requested information will only reveal the pricing of rock removal. None of the other costs were requested and thus, will not be revealed. I fail to see how revealing the cost of this one aspect of the project would enable competitors to underbid the Third Party on future projects. Many other costs and factors combine to determine how a contractor will bid on a given project. This point was also not addressed by the Department nor the Third Party.

[20] While the Department has also mentioned section 24(1)(g) in its formal submission, the application of that section to the information at issue will not be considered herein. The policy of this Office (as set out in a document entitled "Preparing for a Review" which is sent to public bodies with the Request for Review) is as follows:

> *Normally, all exceptions should be claimed at the time a response is issued to the Applicant's access request. Should you wish to invoke any additional discretionary exceptions under the ATIPPA, you must inform the Applicant and this Office of your intention to do so within 14 days of receipt of*

correspondence from this Office notifying you that the Applicant has filed a Request for Review. Any discretionary exceptions received after this period will not be considered by this Office.

VI CONCLUSION

[21] Given the foregoing, it is my finding that the Department has not met the standard of proof required under section 27 and the requested information should be disclosed. The submissions of the Department and the Third Party were very general and did not contain detailed evidence to establish a reasonable expectation of probable harm. General statements and assertions are not sufficient.

[22] Each request for information must be considered on its own merits. Submissions with respect to harm should comment specifically on the harm that disclosure of the requested information would cause. Disclosure of information in one instance does not necessarily mean that similar information will be disclosed again in the future. Releasing information in one particular instance does not necessarily set a precedent for future similar requests. Each request must be considered individually. Changing circumstances (i.e. market conditions, the scope of the contract) may justify withholding similar information under section 27 in the future. However, careful consideration must be still given to the applicability of the section 27, and public bodies must be able to meet the standard of proof in each case.

VII RECOMMENDATIONS

[23] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department release to the Applicant the information responsive to the request that was withheld under section 27. This consists only of information with respect to rock removal, including financial information with respect to rock removal. Any other information with respect to the project specified in the Applicant's Request for Review is not responsive, as it was not requested by the Applicant and thus should be severed from the records provided by the Department.

[24] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department 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 Department with respect to this Report.

[25] Please note that within 30 days of receiving the decision of the Department 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*.**

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of July 2014.

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