OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-027

December 8, 2016

Department of Natural Resources

Summary: The Applicant requested detailed information regarding all consultants used by the Department of Natural Resources (the "Department") between December 2015 and August 2016, including agreements, contracts, amounts paid, and scope of and timeframe of work. The Department was prepared to release the information requested, however, a Third Party filed a complaint with this Office, claiming that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof under subsection 43(3) had not been met by the Third Party and recommended that the information be released.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, s. 39.

Authorities Relied On: Ontario OIPC Order PO-1998 and Order PO-2987.

OIPC Reports A-2016-026, A-2016-008, A-2016-007, A-2016-006, A-2016-002, A-2015-005, A-2015-002, A-2014-012, A-2014-008, A-2013-014 and A-2011-007 at http://oipc.nl.ca/.

File #: 0005-082-16-014

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*") the Applicant submitted an access to information request to the Department of Natural Resources (the "Department") seeking disclosure of the following:

> *"Request detailed breakdown of all consultants used by the department between December 1, 2015 to August 11, 2016. Please include agreements/contracts, amount paid to date as well as scope of work and associated time frames."*

[2] The Department informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* the Department notified affected third parties, including the Third Party who filed the present complaint opposing release of the records in question

[3] Attempts to resolve the complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] The Department relied on its position that the requested information did not clearly meet the three-part test outlined in section 39, and that it was therefore prepared to release the information to the Applicant.

III THIRD PARTY'S POSITION

[5] The Third Party argued that this process goes against "the rules of natural justice" taking issue with the public body not providing the Third Party with the identity of the Applicant and suggesting the complaint process, "put the third party to unrecoverable expenses for the Applicant's future benefit." The Third Party went on to submit that its contract with the

Department should be protected by section 39 of the *ATIPPA, 2015*. It asserted both section 39(1)(a)(i) and (ii) to be applicable, noting its contract and deliverables:

> *"...were based upon 'trade secrets' in terms of our analysis and report formatting and the hourly rates stated in the contract are commercially sensitive to [the Third Party] and if revealed would benefit a competitor and undercut/harm [the Third Party] in its business dealings in this very specialized service line."*

The Third Party also relied upon the inclusion of a confidentiality clause in the contract to support the applicability of section 39(1)(b), and furthermore expressed concern regarding its competitive position and potential financial loss in the course of arguing that section 39(1)(c) of the *Act* applies.

[6] The Third Party later submitted additional representations regarding sections 39(1)(b) and (c). With respect to section 39(1)(b) it noted that it submitted a tender bid which was incorporated into its contract and "this was not a negotiated RFP process." In the alternative, its rates were "supplied...to be held in confidence for the purpose of evaluating our total bid." The Third Party went on to say with respect to section 39(1)(c), that disclosure of its rates:

> *"...could reasonably be expected to:*
>
> *(i) Harm significantly the competitive position of [the Third Party] as the Applicant could be a competitor of [the Third Party] and knowledge of our rates would do us harm and undermine the whole concept of a true competitive process...*
>
> *(ii) Revealing our rates could be reasonably expected to result in undue financial loss (to the Third Party]) or gain (to the Applicant) and their respective persons/employees.*
>
> *If [the Third Party's] rates are revealed to a competitor they would under-cut our pricing, on similar jobs and cause [the Third Party] to lay-off employees resulting in financial loss to persons/employees."*

IV DECISION

[7] Section 39(1) of the *ATIPPA, 2015* states:

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *(a) that would reveal*
>
> *(i) trade secrets of a third party, or*
> *(ii) commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,*
>
> *(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,*
>
> *(iii) result in undue financial loss or gain to any person, or*
>
> *(iv) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.*

[8] This is a three-part test; failure to meet any part of the test will result in section 39 not applying. If it does not apply, a public body must disclose records to applicants, regardless of the objections of third parties.

[9] Before examining the applicability of section 39, I wish to first comment on the Third Party's concerns regarding the process generally and its belief that this goes against "the rules of natural justice." I find no merit in this claim, as this process is set out in law with its purpose to hold public bodies accountable regarding their use of public funds. All third parties doing business with public bodies and receiving public funds are therefore subject to having information they provided in securing that business disclosed unless it falls within an exception in the *ATIPPA, 2015*. Furthermore, the third party notification and complaint process provide third parties the opportunity object to the release of their information and to have their complaints considered by the Information and Privacy Commissioner.

[10] With respect to the anonymity of the Applicant, Report A-2013-014 noted this as a well-established principle of the access to information process, stating "the name of an individual who makes a request for information is made available to only those persons who need to know the name in order to process the access to information request." This now has statutory recognition under section 12 in the *ATIPPA, 2015*. The need for anonymity is also discussed in Ontario's OIPC Order PO-1998 at page 7:

> *. . . Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the Act is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put. . . . Ministry employees responsible for receiving access requests under the Act must ensure that the identity of a requester is disclosed to others only on a "need to know" basis during the processing of the request. Except in unusual circumstances, there is no need for requesters to be identified because their identity is irrelevant.*

[11] The Department provided no specific details in its notice to the Third Party as to why it believed section 39 is not applicable to the requested information. Section 19(5)(a) of the *ATIPPA, 2015* requires that public bodies provide some details that address how they arrived at this conclusion when sending third parties notice. While this better facilitates a third party's understanding of the process and its purpose, the burden of proof under section 39 lies with the third party, as it is in the best position to demonstrate with evidence the application of the three-part harms test to its own information.

[12] With respect to section 39(1)(a), I find there is commercial and financial information included in the requested records, so I accept that this element of the test has been established. I do not agree with the Third Party's position that the requested information would reveal trade secrets of the Third Party, however, as it did not provide any evidence to support this claim.

[13] With respect to section 39(1)(b), the Third Party has submitted that the inclusion of a confidentiality clause in the contract shows that the information in question was meant to be held in confidence by the Department. While I acknowledge the existence of such a

clause, a public body cannot contract out of its obligations under the *ATIPPA, 2015*. In addition, the confidentiality clause referred to by the Third Party includes a section expressly noting that, "confidential information … is subject to privacy legislation in various jurisdictions," including the predecessor to the current *ATIPPA, 2015* (which was the law at the time the contract commenced) as one such piece of legislation. A public body cannot avoid its statutory responsibilities simply by incorporating a statement of confidentiality, and in any event the contract in question acknowledges that. As recently stated in Report A-2016-026, "simply accepting all information provided to a public body as confidential merely because the party providing it has endorsed it as such would lead to a slippery slope towards frustrating the purpose and intent of the *Act*."

[14] Furthermore, even if I were to find that the information in question was provided in confidence, it cannot be said to have been "supplied." In Report A-2014-008 this Office addressed the meaning of "supplied" noting that, "the requested information formed part of a contract, which is deemed in most cases to be "negotiated" information. The Third Party acknowledges that its contract was formed from its tendered bid; therefore the information provided is properly seen as negotiated due to the fact that the other party, the Department, agreed to it.

[15] Consequently, the elements of section 39(1)(b) have not been established. As a result, section 39 cannot be applied to except the information from disclosure. While unnecessary, I will comment on section 39(1)(c) as I find that even if the second element of the test was established, the third element could not be satisfied.

[16] A claim under section 39(1)(c) requires detailed and convincing evidence and, as established in Report A-2011-007, "[t]he assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm."

[17] In its submissions, the Third Party claimed that the release of the information could reasonably be expected to harm significantly its competitive position in its field of work. However, nothing other than speculative statements that disclosure of the Third Party's rates would allow competitors a competitive advantage and put the Third Party at a

competitive disadvantage was provided. The Third Party provided no clear evidence that disclosure of the information requested would harm its competitive position. Further, many of the rates in question date back several years, making it is difficult to assess how release of those now would offer any competitive advantage.

[18] As noted in Report A-2016-002:

> *"I interpret 'harm to competitive position' to mean actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process … Contracts with public bodies require greater transparency than those with private sector entities, this is simply a 'cost of doing business' with public sector entities."*

Without detailed and convincing evidence to support the argument of real (and not merely speculative) harm or establishing a reasonable expectation of probable harm, the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position under section 39(1)(c)(i).

[19] With respect to section 39(1)(c)(iii), the Third Party submits that disclosure of the records in question could reasonably be expected to result in financial loss to the Third Party or persons it employs and financial gain to the Applicant. Again, the simple statement of such does not make it so. The Third Party's argument on this point is purely speculative, and is accompanied by no supporting evidence. Without sufficient evidence of undue financial loss or gain to any person, I cannot agree that disclosure of the requested information will lead to that result.

[20] As the Third Party has failed to meet its onus under parts two and three of the three-part test under section 39 of the *ATIPPA, 2015*, I find that section 39 does not apply to the information in question and the Third Party cannot rely on section 39 to require that the information be withheld from the Applicant.

V RECOMMENDATIONS

[21] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department release the requested information to the Applicant.

[22] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report (in this case the Third Party) within 10 business days of receiving this Report.

[23] Please note that within 10 business days of receiving the decision of the Department under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has served the Department with notice of an appeal prior to that time.**

[24] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of December 2016.

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