OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-030

December 19, 2016

Department of Health and Community Services

Summary: The Applicant requested detailed information regarding all consultants used by the Department of Health and Community Services (the "Department") between December 2015 and August 2016. The requested information included the name of the consultant, the amount of the contract, the schedule of payments and the scope of the 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, ss. 19, 42, 39 and 43(3).

Authorities Relied On: *Aventis Pasteur Ltd. V. Canada (Attorney General)* 2004FC 1371. OIPC NL Reports A-2011-007, A-2014-008, A-2016-002, A-2016-008, A-2016-026; OIPC Alberta Order F2015-12.

File #0005-074-16-039

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 Health and Community Services (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 timeframes.*

[2] Subsequently, the Department confirmed with the Applicant a refinement of the request, which excluded any third party business/proprietary information contained within the contracts. In an e-mail to the Applicant, the Department stated its understanding of the clarified request as follows:

> *You're interested in the name of the consultant, the amount of the contract, the schedule of payments and the scope of the work/description of the work to be completed.*

[3] 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 of its decision, including the Third Party who filed the present complaint opposing release of the records in question.

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

II PUBLIC BODY'S POSITION

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

III THIRD PARTY'S POSITION

[6] In its submission, the Third Party quoted Order F2015-12 from the Office of the Information and Privacy Commissioner of Alberta, establishing that commercial information is, "....information belonging to a third party about its buying, selling or exchange of merchandise or services." It indicates that the pages proposed for disclosure contain information describing the fixed price for services rendered. It argues that, "structured rate information belongs to the Third Party and is the basis upon which it sells or exchanges professional services with the HCS [Department]."

[7] The Third Party argues that that the information at issue is consistently treated by the Third Party and its customers as confidential. The Third Party indicates that it originally provided the information at issue to the Department in confidence as commercial information in response to a Request for Proposals. It states, "our understanding is that it was a term of the original RFP in respect of which (the Third Party)'s proposal was the winning submission years ago, that all of the fixed fees it proposed to charge for services provided was confidential and would not be disclosed."

[8] It quotes one article from the Agreement between the Department and the Third Party that states, in part:

> *...any information disclosed by one Party (Disclosing Party) to the other (Receiving Party) that the Disclosing Party designates as being confidential or which under the circumstances surrounding the disclosure ought to be treated as confidential. In addition, it is understood that the contents of this Agreement are confidential and that the information and subject matter hereunder is provided and supplied explicitly in confidence. The subject matter of this Agreement is understood to be proprietary to the Disclosing Party and may contain trade secrets or, commercial, financial, or technical information pertaining to that party....*

[9] The Third Party also alleges that the portions of the contract that are proposed for disclosure contain information, "that is objectively confidential given that it details (the Third Party)'s specific costing of resources, which, if disclosed, would reveal (the Third Party)'s confidential commercial information, and reveal to our competitors how we do business."

[10] The Third Party's submission also identifies harms referenced in section 39(1)(c)(i), (ii) and/or (iii) that it alleges will result from the disclosure. Specifically, the Third Party indicated that disclosure will cause significant harm to its future competitive position in similar RFPs, that it will result in financial loss, that it will result in financial gain to competitors and that it will create a disincentive to supply similar information in future RFPs. The Third Party states:

> *…the disclosure of this information could reasonably be expected to place a chill on future participants in RFP processes and at the same time undermine the overall competitiveness of future bids, particularly if assurances of confidentiality such as were made in the underlying RFP process in this case are shown to be so readily violated.*

[11] In its submission, the Third Party also argued that the records identified were not responsive to the Applicant's request, focusing on the definition of the term "consultant".

IV DECISION

[12] At issue is the disclosure of approximately four pages of responsive records. The records include components of the Service Agreement between the Third Party and the Department. This agreement dates back to 2006 and was amended in April 2016; a news release naming the Third Party and providing details and value of the contract was issued when the result of the Request for Proposals was announced. The majority of the record provides details of the scope of work. The only financial information is contained in the amended agreement and establishes the cumulative total the Department will pay to the Third Party for the work described, along with the monthly payments for two fiscal years.

[13] The Third Party's submission argues that the record at issue is not responsive to the Applicant's request; it is my finding that the Public Body appropriately designated the records as responsive.

[14] 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.*

[15] 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.

[16] 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.

[17] With respect to section 39(1)(a), I find there is some commercial and financial information included in the requested records, so this element of the test has been established.

[18] Section 39 (1)(b) has two aspects, the information must be "supplied" and it must be "supplied in confidence".

[19] Report A-2014-008 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 information requested does not appear to be immutable, and is not proprietary information." With regard to the fact that the information was supplied, the Third Party states that the information was "supplied" pursuant to the RFP and the Third Party has submitted that the inclusion of a confidentiality clause in the contract supports that the information in question was meant to be held in confidence by the Department. It also suggests that the wording of the original RFP indicated that responses would be held in confidence, although no text from the RFP was included with its submission.

[20] While I acknowledge the existence of such a clause, it is important to note that 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 the Agreement is subject to the provisions of the *ATIPPA*. As recently stated in Reports A-2016-026, 027 and 028, simply accepting all information provided to a public body as confidential merely because the party providing it has endorsed it as such would lead down a slippery slope towards frustrating the purpose and intent of the *Act*.

[21] It is also difficult to argue that information was supplied in confidence when a news release regarding the awarding of the RFP was issued by the Department. The release identified the Third Party as the successful bidder, provided details of the work the Third Party would be conducting and stated an approximate budget allocation for the work.

[22] 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.

[23] A claim under section 39(1)(c) requires detailed and convincing evidence and, as noted 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."

[24] With regard to section 39(1)(c)(i), the Third Party claimed that the release of the information could reasonably be expected to harm significantly its competitive position on future RFPs. Nothing beyond mere statements to this effect was provided in support of this claim. The Third Party provided no clear evidence that disclosure of the information requested would harm its competitive position. As such, I find that the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position under section 39(1)(c)(i).

[25] With respect to section 39(c)(1)(ii), the Third Party submits that disclosure will act as a disincentive to supply similar information to the Public Body in future RFPs. It suggests that disclosure will "chill" future RFP participants and undermine the competitiveness of future bids. This again amounts to nothing more than speculation that parties will forgo business opportunities due to the potential for disclosure. In addition, RFPs state the information that must be provided; parties that do not provide the information will be screened out from the competition. In the absence of evidence, I find that the Third Party has failed to demonstrate that disclosure of the information will prevent similar information from being supplied to the Public Body in the future and that this will be contrary to public interest.

[26] With respect to section 39(1)(c)(iii), the Third Party submits that disclosure of the records in question could reasonably be expected to lead to financial loss to the Third Party or provide financial gains to competitors. It alleges that others could use the information to mirror pricing and cost estimates when formulating their own bids. It also indicates that the disclosure of the information will impact its future negotiating position.

[27] The meaning of harm is discussed 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."*

[28] The Third Party's arguments on this point are entirely speculative. Without evidence of undue financial loss or gain to any person, I cannot find that disclosure of the requested information will lead to that conclusion.

[29] As the Third Party has failed to meet 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

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

[31] 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.

[32] 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 provided the Department with a copy of its notice of appeal prior to that time.

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of December 2016.

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