OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-005

February 8, 2017

Department of Business, Tourism, Culture and Rural Development

Summary: The Applicant made a request to the Department of Business, Tourism, Culture and Rural Development (the "Department") for copies of correspondence regarding payments to a Third Party for government use of their facilities or services, and subsidies to a Third Party for rural DSL development, including correspondence regarding the selection of the Third Party. The Department was prepared to release most of the information requested, however, the Third Party filed a complaint with this Office, claiming that some of 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.39 (1).

Authorities Relied On: *Canadian Pacific Railway* v. *British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603, *Corporate Express Canada Inc.* v. *The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107; OIPC NL Reports A-2011-007, A-2014-008, A-2016-002, A-2016-026, A-2016-027, A-2016-028, A-2016-030; OIPC Alberta Order F2015-12.

Other Resources: OIPC Guidance Document Business Interests of a Third Party (Section 39)

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 Finance seeking disclosure of the following:

> *Copies of and any correspondence surrounding any subsidies or payments to [Third Party] for both government use of their facilities or services and for rural DSL development subsidized by the provincial government, including correspondence if any exists on why [Third Party] was chosen versus alternatives ([named company], [named company], etc.)*

[2] Subsequently, a portion of the request regarding the Government's Rural Broadband Initiative was transferred to the Department of Business, Tourism, Culture and Rural Development (the "Department"). The Department worked with the Applicant to narrow the scope of the request to 11 proposals and seven reports.

[3] The Department informed the Applicant that it had decided to provide partial access to the records, but notified the Third Party in accordance with section 19 of the *ATIPPA, 2015* as it was unsure whether disclosure of some of the remaining information might fall within section 39. The Third Party filed the present complaint opposing release of some of the records in question. At issue is the disclosure of approximately 28 pages of responsive records, contained in five responses to Requests for Proposals (RFP), two milestone reports and two final implementation reports.

[4] During the informal resolution process, the Department determined that two of the records contested by the Third Party were not included in the records being considered for disclosure by the Department and are therefore not part of this review. In addition, the Third Party raised concerns that personal information was included in the records. This Office highlighted this feedback to the Department and reminded it of its obligations to ensure that personal information is protected in accordance with the *ATIPPA, 2015*. The Department provided assurances that it had conducted a further review and redacted any personal information excepted from disclosure under section 40. This Office considers these issues resolved during the informal resolution process.

[5] As attempts to informally resolve the outstanding issues were not successful, the matter was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[6] The Department took the position that the majority of the requested information did not meet the three-part test outlined in section 39, and it was prepared to release the information to the Applicant. It should be noted that the Department applied other exceptions to the records and these are not at issue in this Report; this Report only examines the portion of the records that the Department plans to release and to which the Third Party argues that section 39 applies.

III THIRD PARTY'S POSITION

[7] In its submission, the Third Party identified portions of the responsive records, approximately 28 pages, to which it asserts that section 39 should be applied. The Third Party argues that the records contain specific confidential information.

[8] Its submission quoted from Order F2015-12 from the Office of the Information and Privacy Commissioner of Alberta, which established that commercial information is, "….information belonging to a third party about its buying, selling or exchange of merchandise or services." The Third Party indicates that, "the documents proposed for disclosure, which we have identified for redaction, all contain information describing [Third Party's] costing structure, as well as detailed network and architecture and designs." It argues that, "structured rate information belongs to the [Third Party] and is the basis upon which it sells or exchanges professional services with BTCRD [Department]."

[9] The Third Party argues that the information at issue is consistently treated by the Third Party and the Third Party's customers as confidential. The Third Party indicates that the

information was explicitly provided in confidence pursuant to the terms of a Request for Proposals.

[10] 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 unique costing methodology, which, if disclosed, would reveal (the Third Party)'s confidential commercial information, and reveal to our competitors how we do business." The submission also cites the definition of "supply" from the Oxford Online Dictionary, stating "to make available to someone" or "provide with something needed or wanted." The Third Party argues that the information is needed and wanted and indicates that it continues to supply the information in confidence pursuant to the service agreement.

[11] The Third Party's submission also identifies harm that it alleges will result from the disclosure, specifically section 39(1)(c)(i), (ii) and/or (iii). 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 or gain to the Third Party and/or its 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.*

IV DECISION

[12] At issue is the disclosure of approximately 28 pages of responsive records. The information is located in three types of records: responses to RFPs, milestone reports and final implementation reports. Some of the same information appears in a number of the responsive records.

[13] 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.

[14] 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 the requested information to an applicant.

[15] 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 revised subsequent to this matter, our current Guidance Document on this subject discusses this obligation:

Section 19(5) lists the mandatory contents of this notice, including the reasons for the decision and the provision of the Act upon which the decision was based. Simply stating that it was determined that section 39 did not apply is inadequate. Sufficient detail **must** *be provided to allow the Third Party to understand the reasoning behind that determination. At a minimum, the reasons should summarize what the Public Body's submissions to the Office of the Information and Privacy Commissioner will be if a complaint is made by the Third Party.*

While this better facilitates a third party's understanding of the process and its purpose, the burden of proof lies with the third party in accordance with section 43(3), so it must demonstrate with evidence the application of the three–part harms test.

[16] With respect to section 39(1)(a), I am satisfied that the information at issue would reveal commercial, financial or technical information of the Third Party, so the first element of the test has been established.

[17] Section 39(1)(b) has two aspects, the information must be "supplied" and it must be supplied "in confidence". The Third Party states that, "the information was 'supplied' by [the Third Party] to BTCRD [the Department] in confidence pursuant to the RFPs under which it was needed and wanted." In order to determine if the records were supplied, I will first examine the RFP submissions and then the reports (both the milestone and final implementation reports).

[18] Some of the contested information is contained in five records submitted to the Department by the Third Party in response to a call for proposals. The RFP submissions are the basis of the contract between the parties. The Department has confirmed that the Third Party was the successful bidder on all five proposals. 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." A contract is generally not considered to have been "supplied" by one party or the other even if it has been preceded by little or no actual negotiation between the parties. While the Third Party states that the RFP responses were "supplied" pursuant to the RFP, I am unable to conclude that the information contained in the RFP submissions was supplied.

[19] That brings me to both the milestone and final implementation reports. The RFP issued by the Department identified specific information, such as network plans, network details, network technical characteristics, oversubscription ratios and network availability that the successful proponent would be required to provide. In addition, interim and final reports were required. The Third Party agreed to provide this information in its RFP response. In *Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University*

of Newfoundland, Gary Kachanoski, the Court described similar information as, "…secondary information flowing from the successful tender, but cannot be characterized as forming part of the negotiated information appearing in the contract." Information from a Third Party that is not subject to negotiation is generally considered to be supplied (see also *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)).* As such, I find that the milestone reports and the final implementation reports were supplied by the Third Party.

[20] The Third Party submits that the inclusion of a confidentiality clause in the contract supports its position that the information in question was meant to be held in confidence by the Department. No evidence of such a contractual provision was provided to this Office. The Third Party also suggests that the wording of the original RFP indicated that responses would be held in confidence, although no specific text from the RFP was included with its submission. I was not provided with evidence of statements in any of the responses to the RFP or the milestone reports that communicate that information was provided in confidence, nor that they have been consistently treated as confidential. The Third Party was provided with feedback on its efforts to discharge the burden of proof and was given an opportunity to provide additional argument and evidence to this Office regarding same; no further response was provided.

[21] Even if such evidence had been provided, it is important to note, as recently stated in Reports A-2016-026, 027, 028, and 030, that a public body cannot contract out of its obligations under the *ATIPPA, 2015*. The Department's submission to this Office included letters informing the Third Party that it was the successful bidder in relation to various proposals. The letters all included the following paragraph:

> *The Minister of IBRD [Department] reserves the right to make public, information regarding this project including but not limited to, project applicant, project location, funding amount and a brief project description.*

Some of the information the Third Party is seeking to redact under section 39(1) is information about funding amounts and project locations. In addition, some of the requested redactions involve information already publicly released via news releases from

the Third Party itself. As this information is publicly available, there is no requirement to analyze this information under section 39.

[22] The contested content in the milestone reports and the final implementation reports is information first identified in the RFP. For example, section 8 of the RFP addresses the technology requirements for the project and the details expected from successful bidders. The RFP responses from the Third Party did not contain any statements noting that information it provided or intended to provide would be considered confidential. The milestone reports, when provided by the Third Party, did not contain any note regarding the fact that the Third Party considered the information contained within the report to be of a confidential nature. The two final implementation reports do contain confidentiality statements that specifically address some of the requested redactions. The documents state, in the second paragraph of the introduction:

> *…the information identified in this report and the accompanying Network Diagrams are all considered to be of a confidential nature as it contains information relating to how [Third Party] constructs its network, the specific equipment used and customer information that is competitively sensitive. Understanding that all government contracts are open to scrutiny associated with the Freedom of Information Act, [Third Party] will require that any requests for disclosure of this information are identified to our legal department and appropriate measures are taken to protect our competitive information.*

[23] The issue of confidentiality has been addressed by the courts and various reports issued by this Office. In *Corporate Express Canada Inc.* v. *The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107, Justice Whalen stated:

> *[34] If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate the intent of the Act by adding such an endorsement to the information supplied. This point was recognized by Strayer J.) in the case of Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sport), [1989] F.C.J. No. 7, where he stated at page 4:*
>
> > *I am satisfied that when individuals, associations, or corporations approach the government for special action in their favour, it is not enough to state that their submission is*

> *confidential in order to make it so in an objective sense. Such a principle would surely undermine much of the purpose of this Act which in part is to make available to the public the information upon which government action is taken or refused. Nor would it be consistent with that purpose if a Minister or his officials were able to exempt information from disclosure simply by agreeing when it is submitted that it would be treated as confidential.*

[24] In this case, the Third Party identified specific information, Network Diagrams, as confidential at the time it was provided to the Department and is requesting that the same specific information be excepted from disclosure. However, no statements were made regarding the confidentiality of the information in its RFP submission and no evidence is provided to suggest that the Department agreed to keep the information confidential. As such, I conclude that the information has not been consistently treated as confidential by the Third Party.

[25] To summarize, the elements of section 39(1)(b) have not been established by the Third Party. With regard to the responses to the RFP, I am unable to conclude, based on the evidence provided, that they were supplied. While the milestone and final implementation reports were supplied, I am unable to conclude, based on the evidence provided, that they were supplied implicitly or explicitly in confidence. As a result, section 39 cannot be applied to except the information in those records 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. I reiterate that no specific information regarding the harms for each of the requested redactions was provided, therefore I will examine the harms presented as one.

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

[27] 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. The Third Party asserts that network design and the location of specific hardware and bandwidth capabilities is highly competitive and sensitive information. It argues that its disclosure would allow competitors to infer future costs to build networks and provide facilities in response to government service tenders. As well, it asserts that the release of confidential rates and resource allotments could lead to competitors adjusting the pricing and other related costs in their own competing bids. It concludes by noting, "the disclosure of this information could objectively be expected to undermine significantly our ability to continue to price competitively for this work in future RFPs."

[28] However, beyond statements to this effect suggesting that disclosure of the information would allow competitors a competitive advantage and put the Third Party at a competitive disadvantage, 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).

[29] With respect to section 39(1)(c)(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. RFPs state the information that must be provided and parties that do not provide the information will be screened out from the competition. Again, this is simply speculation that parties will forgo significant business opportunities because of the potential for disclosure. Further, the Department determined that section 39 did not apply to the information involved, and the Department has expressed no concern that information requested in an RFP will not be provided in future. 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 despite a public interest that it be supplied.

[30] 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 affect its future negotiating position.

[31] Report A-2016-002 noted:

> *"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."*

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

[33] 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 any of 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

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

[35] 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.

[36] 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.**

[37] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of February 2017.

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