OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-017

July 17, 2017

Government Purchasing Agency

Summary: The Government Purchasing Agency ("GPA") received an access request seeking disclosure of bidder's proposals related to a request for proposal for Managed Print Services. The GPA was prepared to release the information, however, a Third Party objected to the information being disclosed and filed a complaint with this Office. The Third Party claimed that some of the information must be withheld on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof 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: *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski,* 2014 NLTD(G)107;

Air Atonabee Ltd. v. Canada (Minister of Transport), (1989) 37 Admin L.R. 245 (F.C.T.D.);

Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52;

London Health Sciences Centre (Re), 2015 CanLII 21235 (ON IPC);

OIPC NL Reports A-2011-007; A-2013-008; A-2017-007; and A-2017-014.

File # 0010-080-17-011

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*") the Government Purchasing Agency ("GPA") received an access request seeking disclosure of the following:

> *I wish to obtain all Bidder's Proposals for Managed Print Services (SPPFA-01) including details as to why each was successful or unsuccessful.*

[2] Following receipt of the request, the GPA informed the Applicant that it intended to provide access to the information, but in accordance with section 19 of the *ATIPPA, 2015*, the GPA determined it was necessary to notify the affected third parties. Upon notification, three of six bidders complained to this Office. One was resolved informally and another withdrawn. The remaining complaint of the Third Party is addressed below.

[3] During the informal resolution phase, the Applicant agreed to the redaction of information relating to biographical information about company executive and staff as well as references from other clients of the company in question. As the Applicant agreed to having this type of information excluded, it was determined that pages 34-39 and pages 66-68 of the Third Party's proposal would not be disclosed.

[4] Informal resolution did not resolve the remainder of the complaint, and it was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[5] The GPA advised that it issued a Request for Proposal (SPPFA-01) (the "RFP") seeking a service provider for Managed Print Services and that there was a successful bidder and a Master Standing Offer Agreement was issued to the successful bidder. The GPA's position is that the requested information does not meet the three-part test outlined in section 39 of the *ATIPPA, 2015*, and that it was prepared to release the information. Specifically, it is the GPA's opinion that the requested information does not meet part two of the three-part test under section 39(1) of the *ATIPPA, 2015*. The GPA relies on *Corporate Express Canada Inc.*

v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, 2014 NLTD(G)107. Furthermore, it is the GPA's opinion that once an award is made any expectation of confidence by bidders during the evaluation period passes. The GPA stated:

> *While it might be said that there is an expectation of confidence by bidders during the evaluation period, GPA would take the position that once an award is made that this expectation would have passed. The expectation of confidence, in this case, would align with maintaining the integrity of the process while evaluations are ongoing.*

[6] The GPA also argued that any adverse impact on a party from disclosure of a proposal is reduced after the process has closed.

[7] With regard to the notification of third parties, the GPA explained as follows:

> *While the GPA is confident in it's* [sic] *assessment of the facts, it decided that Third Party Notifications were warranted in this case given the amendments to the ATIPPA legislation between the time the information was originally submitted by the proponents and the time the request for information was received. Particularly changes to the harms test as set out in the current section 39.*
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> *Section 3.7 of the RFP contains the following confidentiality statement:*
>
> *"…The Evaluation Team will treat all proposals with strict confidentiality and comparative information on proposals will not be divulged except where required under the Access to Information and Protection of Privacy Act."*
>
> *Proponents may have had the expectation that they would have only needed to meet one part of the harms test set out in the ATIPPA legislation in force at the time, and therefore may have formed a different expectation in the level of confidentiality of the records they provided.*
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> *Furthermore, the OIPC was still processing an active Third Party Complaint* [file #] *which involved similar records that would be responsive in this current request and would have dealth* [sic] *with some of the same manners* [sic]*. Given this file had not been concluded, the GPA felt Third Party notifications would be procedurally fair in this case.*

III THIRD PARTY'S POSITION

[8] The Third Party provided a detailed submission and its position is that portions of the proposal fall within the exemption set forth in section 39(1) of the *ATIPPA, 2015* and should not be released.

[9] With regard to section 39, the Third Party argued that the first part of the test is met as, in its opinion, the information that it believes should be withheld meets the definitions of commercial, financial and technical information. The Third Party stated that some of the information relates to the buying and selling of services and therefore qualifies as commercial information. The Third Party stated that some of the information relates to a breakdown of its proposed pricing for specific components of the services, as well as overall proposed pricing and cost breakdown and therefore qualifies as financial information. Finally, the Third Party stated that the information includes proprietary technical information regarding its innovative technical approaches and operation models as well as proprietary technical information developed specifically for the bid proposal and therefore qualifies as technical information.

[10] Regarding part two of the test under section 39, the Third Party argued that the information was supplied. It was an unsuccessful bidder and no contact was entered into, therefore the information cannot be considered negotiated. The Third Party further argued that the information should be withheld because it is considered confidential by the Third Party, that it was treated consistently in a confidential manner by the Third Party and that it was supplied to the GPA solely for the purpose of responding to the request for proposal with the understanding that its proprietary elements would be maintained as confidential. The Third Party further stated that it continues to protect the confidentiality of the information by retaining it only in electronic format, storing it on a secure password-protected laptop as well as on a secure password-protected drive, granting access only to a restricted number of employees on a need-to-know basis and requiring User-ID authentication. The Third Party also stated that the information is not available from other sources accessible to the public.

[11] The Third Party also submitted that the third part of the test under section 39 has been met as it believes that disclosure of the information will allow competitors to undercut the Third Party with respect to future bids and result in material financial loss to the Third Party and a corresponding gain to a competitor, thereby prejudicing the Third Party's competitive position in future tendering processes. The Third Party specifically stated:

> *[…] The information relates to services in an exceptionally competitive industry, which is characterized as having aggressive competitiveness, a small market available, small margins for service providers, and only a few service providers that have the technology, organizational structure, and ability to provide the services. As a result, slight competitive advantages for one service provider can result in successes for one and failures for others.* [Named Third Party] *expects that competitors will imitate the style as well as the substance of the redacted information.*

IV DECISION

[12] The notification of third parties under section 19 when a public body has determined that the responsive records do not meet the three-part test under section 39 has been addressed in previous reports, including Report A-2017-007 and Report 2017-014. Paragraph 28 of Report A-2017-014 made it clear that notice to third parties will comply with *the ATIPPA, 2015* if, and only if, a public body is genuinely uncertain whether the section 39 test applies (the "grey area" scenario). The GPA determined that the Third Party's proposal did not meet the three-part test under section 39 of the *ATIPPA, 2015* yet still notified the Third Party. Once it was determined that the Third Party's proposal did not meet the test to withhold the record, the GPA ought to have disclosed the record to the Applicant.

[13] Even though the GPA explained that it felt it must notify the third parties for procedural fairness reasons due to the change in the *ATIPPA* legislation, the GPA misapplied section 19 of the *ATIPPA, 2015* by notifying the Third Party despite having concluded that section 39 did not apply. When no exceptions apply, superfluous notification undermines timely disclosure, one of the essential purposes of the *Act*.

[14] Turning now to whether portions of the Third Party's proposal should be withheld under section 39(1):

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
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> *(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;*
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> *(b) that is supplied, implicitly or explicitly, in confidence; and*
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> *(c) the disclosure of which could reasonably be expected to*
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> *(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] Section 39 is a mandatory exception to disclosure under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be met and failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information. Third parties have the burden of proof pursuant to section 43(3) of the *Act*.

[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 and I conclude that this part of the test has been established.

[17] With respect to section 39(1)(b), the information requested must meet two criteria. The information must be "supplied" and the information must be supplied "implicitly or explicitly in confidence". Previous reports from this Office have concluded that contracts with public bodies for the supply of goods or services are generally not considered to be information that is "supplied". Rather once a contract has been entered into, the information is considered to have been negotiated. The Third Party correctly points out that there is no contract between it and the Government of Newfoundland and Labrador as the Third Party was an unsuccessful bidder. The fact that no contract has been signed is not determinative

of whether the information was supplied. As the Third Party has not met the confidentiality portion of part two of the test or part three of the test I do not need to make a final determination on the "supplied" issue in this case. If it was required, there is ample authority that unsuccessful tenders and bids are supplied, including *London Health Sciences Centre (Re)*, 2015 CanLII 21235 (ON IPC).

[18] Supplied information must have been supplied "implicitly or explicitly in confidence" to be withheld. The test for assessing confidentiality is an objective one, as noted in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42:

> *[...] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> > *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
> >
> > *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
> >
> > *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication*.

[19] The arguments that the Third Party presented regarding the confidentiality of the proposal focused on how it treated the information contained in its proposal. The Third Party also relied on the wording in section 3.7 of the RFP that states that all proposals will be treated with strict confidentiality. Section 3.7 "Award Phase" of the RFP states:

> *Once the Evaluation Team has reached a decision, the successful Proponent will be notified by the Province. The Evaluation Team will treat all proposals with strict confidentiality and comparative information on proposals will not be divulged except where required under the Access to Information and Protection of Privacy Act.*

[20] While I accept that the Third Party treats the information in the proposal as confidential, I do not accept the Third Party's reliance on the wording in the RFP to support its argument that the proposal was communicated in a reasonable expectation of confidence. Section 3.7 is contained under the proposal evaluation section of the RFP and its wording is specific to the "Evaluation Team" treating the proposals with strict confidentiality.

[21] I accept that bidders expect that their proposals would be kept confidential during any evaluation period. As the GPA stated, this maintains the integrity of the process. However, once an award is made I do not accept that the Third Party had a reasonable expectation of confidence especially given the wording in section 3.7 of the RFP which contemplates potential disclosure under the *Act*.

[22] The Court's comments in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski,* 2014 NLTD(G)107 at paragraph 34 and 35 are relevant to the issue of confidentiality:

> *[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:*
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> > *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.*
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> *[35] Also, see the comments of Strayer J. in his earlier decision of* ***Société Gamma Inc. v. Canada (Department of Secretary of State)*** *(1994), 47 A.C.W.S. (3d) 898, 56 C.P.R. (3d) 58. In that case, when considering whether information supplied in the course of public procurement was confidential in the context of subsection 20(1) of the Access to Information Act (the "Federal Act")being equivalent to subsection 27(1) of ATIPPA, Strayer J. wrote:*

> *One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract, he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature.*

[23] As the Third Party has failed to prove that the proposal was supplied "implicitly or explicitly in confidence" the second part of the test in section 39 has not been met. While unnecessary, I have examined section 39(1)(c) and concluded that even if the second part of the test was established, the third part would not be satisfied.

[24] As noted in Report A-2011-007, claims under part three of the test require evidence that the assertion of harm is more than speculative; it should establish a reasonable expectation of probable harm. This aspect of the test was addressed in *Corporate Express Canada Inc. v. Memorial University of Newfoundland,* 2015 NLCA 52 at paragraphs 42 and 44 as follows:

> *[42] Justice Cromwell addressed the issue of harm to a resisting party's competitive position in Merck Frosst, saying that "[a] third party claiming [exemption under this kind of provision] 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" (at paragraph 199.) The test has also been stated to require "a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results … [are] more than merely possible or speculative". (Commissioner's Report, Appellant's Appeal Book, Part I, Tab 3 at para. 15 citing Saskatchewan Report 2005-003.)*
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> *[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples' competitive position would be harmed or that it would be caused*

> *significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.*

[25] The Third Party argued primarily that should the information be disclosed, its competitive position would be harmed as competitors could use the information to imitate the style and/or the substance of the proposal and will copy pricing structures and proprietary technical approaches to performance management, human resources management and organizational structure. Competitive advantage is addressed in previous reports, including Report A-2013-008, to the effect that heightened competition should not generally be interpreted as unduly harming the competitive position of third parties. Fair competition helps ensure that public bodies are making the best possible use of public resources. The basis on which the Third Party was prepared to contract is relevant to the principle of public accountability.

[26] The Third Party also argued that disclosure of the information in the proposal would result in financial loss to the Third Party and gain to a competitor and that the Third Party's competitive position in future tendering process would be prejudiced. The Third Party asserted that the information in the proposal describes the Third Party's processes, commercial operations and specific solutions developed to meet the needs and reduce costs for Third Party customers. The Third Party believes that the information would give competitors a head start on developing approaches and services and that the competitors would have an unfair advantage and thereby prejudice the Third Party. While the Third Party does not have to prove that competitors *will* obtain an undue financial gain, speculative statements, unaccompanied by evidence as to how the information could *reasonably* be expected to result in *undue* gain (or loss), are insufficient to discharge the burden of proof.

[27] The Third Party's proposal and the information contained therein was developed for a RFP in 2013. As the Third Party points out, the information relates to services in an exceptionally competitive technological industry. While not determinative, given the pace at

which technology is advancing, four year old proposals have far less potential to result in undue advantage (or harm) in responding to future RFP's and tenders.

[28] The Third Party relied on case law and Commissioner's decisions from other jurisdictions where the determination was made that disclosure of a similar type of information would cause harm to a third party's competitive position. While unfair competitive advantage could cause harm, the Third Party has not provided sufficient evidence to demonstrate unfairness in the sense that the disclosure of the records could *reasonably* be expected to *significantly harm* its competitive position. Speculative claims that a competitor could imitate the material to gain an advantage are insufficient to discharge the burden on the Third Party.

[29] Overall, the Third Party has not provided sufficient evidence to establish a reasonable expectation of probable harm. I therefore find that the third part of the test in section 39 has not been met.

[30] As the Third Party has failed to meet part two and part three of the three-part test under section 39 of the *ATIPPA, 2015*, section 39 does not apply to the information at issue and the Third Party cannot rely on section 39 to require that the information be withheld.

V RECOMMENDATIONS

[31] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the GPA release the Third Party's proposal with the exception of pages 34-39 and pages 66-68, to the Applicant.

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

[33] Please note that within 10 business days of receiving the decision of the GPA 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 GPA with a copy of its notice of appeal prior to that time.**

[34] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of July, 2017.

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