OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-022

September 5, 2017

Department of Municipal Affairs and Environment

Summary: The Department of Municipal Affairs and Environment received a request for all bids for a construction contract. The Department notified nine bidders under section 19 (third party notification) that it intended to disclose the information. Three bidders complained to this Office that the information ought to be withheld under 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 Parties and recommended that the information be disclosed. The Commissioner also found that there were no bases for notifying the third parties and that the Department had misapplied section 19 in doing so.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c.A1.2, sections 19, 39.

Authorities Cited: NL OIPC Reports A-2012-002; A-2014-008; A-2016-016; A-2017-017.
BC OIPC Order 03-02 (University of British Columbia, January 28, 2003);

ON OIPC Order MO-3058-F; Order PO-3479; *Provincial Airlines Limited v. Canada (Attorney-General)*, 2010 FC 302 (CanLII);
Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, 2014 NLTD(G)107;

Société Gamma Inc. v. Canada (Department of Secretary of State), [1994] F.C.J. No. 589 (T.D.);

Canada Post Corp. v. Canada (Minister of Public Works and Government Services), 2004 FC 270 (CanLII);
Merck Frosst Canada Ltd. v. Canada (Health), [2012] 1 SCR 23, 2012 SCC 3 (CanLII);
Toronto-Dominion Bank v. Ryerson University, 2017 ONSC 1507 (CanLII);
London Health Sciences Centre) (Re), 2015 CanLII 21235 (ON IPC).

File#'s: 0005-115-17-003 and 005

I BACKGROUND

[1] The Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*" or the "*Act*") to the Department of Municipal Affairs and Environment ("the Department") for all tenders submitted for reconstruction of Neary's Pond Road, Portugal Cove - St. Philip's. Nine bids were submitted in response to this tender call. The Department notified the nine bidders of the access request pursuant to section 19 of the *ATIPPA, 2015*. Of nine bidders, the successful bidder and two others filed complaints with this Office, arguing that their information ought to be withheld pursuant to section 39 of the *Act*. One of the unsuccessful bidders subsequently withdrew its complaint. The Department has disclosed to the Applicant the records relating to all but the two bidders whose information is the subject of this Report.

[2] As the remaining Third Parties' complaints could not be resolved informally they were referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Submissions were received from each of them.

II DECISION

Section 39

[3] This Office has dealt with numerous complaints from third parties under section 39 of the *ATIPPA, 2015*. In most of these complaints, third parties have argued that disclosure of contract documents, bids in response to tender calls or responses to requests for proposals would harm their business interests as set out in section 39. Many of those have resulted in Commissioner's Reports, some of which were appealed to the Supreme Court, Trial Division and the Court of Appeal. It is time to distill some of that experience for the benefit of third parties and the public bodies that accept bids from or enter into contracts with them.

[4] The application of section 39 is straightforward. It is a three-part test that places the burden on the third parties to meet all parts of the test if they receive notice of and oppose the release of their information by public bodies. Generally, third parties must present clear

and convincing evidence that the information is their commercial or financial information under section 39(1)(a), that it was supplied to the public body in confidence under section 39(1)(b) and that there is a reasonable expectation of 'significant' harm or 'undue gain or loss' under section 39(1)(c) if the information is disclosed. Mere assertions or speculation as to harm are insufficient.

[5] Third parties should understand, and it is the responsibility of public bodies to explain to them, that it is now generally settled law that a contract for the purchase of goods or services by a public body is considered to be negotiated, not supplied, and therefore the test in section 39(1)(b) cannot be met. The *ATIPPA, 2015* presumes the right of access to information, subject only to its specific exceptions.

[6] Clear and convincing evidence of particular circumstances may, on occasion, result in a conclusion that the disclosure of some information contained in a contract document would meet the section 39 test, therefore justifying its redaction. Examples include the inferred disclosure and immutability exceptions, described in Ontario Report PO-3598 at paragraph 19:

> *There are two exceptions to this general rule which are described as the "inferred disclosure" and "immutability" exceptions. The "inferred disclosure" exception applies where disclosure of the information in a contract would permit the making of accurate inferences with respect to underlying non-negotiated confidential information supplied by the third party to the institution. The "immutability" exception applies where a contract contains information supplied by a third party that is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.*

[7] In this case the access request sought all of the bids submitted for a unit price contract for a road reconstruction project. The Department called for tenders on the project, with bids submitted on standard Government of Newfoundland and Labrador tender forms, obtained from the Department, which included a schedule of unit quantities and prices. Each bidder completed the unit price information and returned the document to the Department. All bids were therefore identical except for the pricing information provided by the bidders.

[8] In the present case, the Third Parties submit that their bids were supplied in confidence. I cannot agree. This issue has been canvassed in a number of previous reports from this Office as well as cases from other jurisdictions. As an example, in *Canada Post Corp. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 270 (CanLII) at para. 40, the Court observed that bidders for government contracts should know there is no expectation that documents submitted on a bid will be insulated from the government's obligation to disclose as part of its accountability for spending public funds.

[9] BC Order 03-02 (University of British Columbia) reviews at length jurisprudence on the "supplied in confidence" aspect of BC's third party business interests exception, which is identical to section 39 of the *ATIPPA, 2015*. The following passage is particularly relevant:

> *[74] In Société Gamma Inc. v. Canada (Department of Secretary of State), [1994] F.C.J. No. 589 (T.D.), Strayer J. (as he then was) dealt with a request for access to proposals for translation services that had been submitted to a federal government department in response to a request for proposals. He concluded the request for proposals was effectively a call for tenders, i.e., an invitation for offers to contract with the relevant department. Although Société Gamma Inc. did not deal with a request for access to contracts resulting from the process, the following comments, at para. 8, usefully underscore the purposes of access to information legislation as they relate to third-party commercial interests under provisions such as s. 20(1)(b):*
>
> > *… 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, <u>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</u> as part of its accountability. …* [emphasis added]

[10] OIPC Report A-2016-016 (Government Purchasing Agency) involved a tender for office supplies. As there were no compliant bids the tender call was re-issued. The access request sought all bids submitted for both the initial tender and the re-tender. The third party, an unsuccessful bidder, objected to disclosure. In assessing the term "supplied" the Report

states: "The fact that no contract has been signed is not determinative of the issue," citing *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski,* (2014, NLTD) at paragraph 35.

[11] OIPC Report A-2017-017 (Government Purchasing Agency) assessed a request for all six bid proposals for the supply of managed print services. The Report states that "…there is ample authority that unsuccessful tenders and bids are supplied, including (*London Health Sciences Centre) (Re)*, 2015 CanLII 21235 (ON IPC)." The Report goes on to assess whether the bids were supplied "in confidence" and adopts the reasoning of the Trial Division decision in *Corporate Express* in concluding that while bidders expect that their proposals are to be kept confidential during the evaluation process, they have no reasonable expectation of confidence once an award has been made, and therefore the second part of the test had not been met.

[12] The *London Health Sciences Centre* decision dealt with a proposal that was not a final agreement, but a bid which contained the contractual terms previously submitted by one proponent, on which it was prepared to enter into an agreement.

[13] Reviewing the jurisprudence relating to the treatment of bids submitted in response to tender calls leads to the following conclusions:

- In the absence of exceptional circumstances, all bids should be considered to have been "supplied" to the public body in response to tender calls.

- To protect the integrity of the process, all bids should be considered to be confidential ("supplied in confidence") until the bidding and evaluation process is complete.

- Once the bidding and evaluation process is complete, there generally should no longer be any expectation of confidence attached to any bids, successful or unsuccessful, as they are all submitted with the expectation that if successful, the terms would become part of a contract that generally has to be publicly disclosed.

- Therefore bids should normally be withheld from disclosure under section 39 until the bidding process is complete. Thereafter, it should not matter whether they are successful or unsuccessful bids - in the absence of exceptional circumstances, bids should be disclosed in their entirety.

[14] It is of course still the case that where a successful bid becomes incorporated into, or by acceptance simply becomes the contract document governing the relationship between the parties, then it is considered to have been negotiated, not supplied, and for that reason generally cannot meet the test in section 39. Further, even where no bid is selected as successful, or where the parties negotiate further terms or make amendments to the terms proposed before entering into a contract, it will be difficult for any of the original bid documents, successful or unsuccessful, to meet the second part of the test, simply because although they were supplied by the bidders, they were not supplied in confidence.

[15] As with any procurement record, it is always possible that a third party may be able to demonstrate that the disclosure of some specific information in a bid document meets the test in section 39, justifying its redaction. However, that will not ordinarily justify withholding tender documents as a whole.

[16] The responsive records in the present case fall within the category of record referred to above: bids in response to a call for tenders. They clearly meet the first part of the test, in that they contain the commercial information of the bidders. At the time of the access request, the successful bid had been chosen, but a contract to perform the work had not been entered into. All nine bids are assessed as having been supplied to the Department. However, any expectation of confidentiality attached to any of them ceased to exist once the award was made, so the second part of the test has not been met. The submissions of the Third Parties have not discharged the burden of satisfying the test in section 39. The records must therefore be disclosed.

Section 19

[17] In too many cases public bodies are unnecessarily providing notice whenever an access request involves third party business information, even though their assessment of the records reveals an inability to satisfy one or more elements of the test in section 39. As I noted in several recent Reports, superfluous notification undermines timely disclosure, one of the essential purposes of the *Act*.

[18] In its submission in the present case the Department stated that it notified the third parties under section 19 because it "could not argue with complete certainty" that no harm would come to the businesses should the information be released. Complete certainty that harm will **not** result is not the test. The key words in section 39 that pertain to the harm requirement are: *could reasonably be expected*, *harm significantly*, *interfere significantly* and *undue financial loss or gain*. From this we know that harm that is less than significant will not suffice. A loss or gain that is not undue will not suffice. Harm that meets the requirements of the section must be shown to be more than merely possible, it must be shown to be a probable result of disclosing the third party's information.

[19] An obvious question is by what standard does one assess proof of the probability of future events? The balance of probabilities test is the measure, recognizing as the Supreme Court of Canada did in *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 94 that:

> *… a third party must establish that the statutory exemption applies on the balance of probabilities. However, what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case.*

[20] Public bodies should ensure at the outset of the procurement process that third parties are aware of the potential for disclosure of all information they submit in pursuit of business with government. Section 39 should be highlighted in all tender calls. One suggestion that might also save considerable work for all involved would be to require third parties to specify in an appendix the portions of their tenders that they consider to fall within section 39 of the *ATIPPA, 2015*.

[21] Having reviewed the records in the present case, it is clear that the information in question, while supplied by the Third Parties, cannot be considered to have been supplied "in confidence." As there was no doubt or grey area regarding this element of the test, I conclude that the Department misapplied section 19 of the *Act*.

III RECOMMENDATIONS

[22] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Municipal Affairs and Environment disclose the responsive records to the Applicant.

[23] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department of Municipal Affairs and Environment 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 (in this case, to both Third Party Complainants) within 10 business days of receiving this Report.

[24] Please note that within 10 business days of receiving the decision of the Department of Municipal Affairs and Environment under section 49, either of the Third Party Complainants 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 Complainants provide the Department with a copy of their notices of appeal prior to that time.**

[25] Dated at St. John's in the Province of Newfoundland and Labrador, this 5th day of September, 2017.

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