OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-007

April 12, 2018

Department of Natural Resources

Summary: An Applicant requested from the Department of Natural Resources all correspondence between the Department and a Third Party related to a complaint brought by the Applicant. The Department provided responsive records, but redacted several passages relying upon section 39 of the *ATIPPA, 2015*. The Commissioner found that the Department properly applied section 39, in particular section 39(1)(c)(ii), and that the information was properly withheld from the Complainant.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, ss. 9, 39.

Authorities: OIPCNL Report A-2017-009; *Air Atonabee Ltd. v. Minister of Transport* (1989), 27 F.T.R. 194 (T.D.); *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23.

Other Resources: Voisey's Bay Development Agreement; OIPCNL Guidance Document: Business Interests of a Third Party (Section 39).

File#: 0005-082-18-021

I BACKGROUND

[1] The Department of Natural Resources is a party to an agreement with Vale Canada Limited ("Vale") regarding the development of the Voisey's Bay Mine and the construction and operation of the Long Harbour Nickel Processing Plant (the "Voisey's Bay Development Agreement" or "VBDA"). The VBDA includes, as a schedule, a further agreement regarding maximizing the benefits of these developments for Newfoundland and Labrador businesses and workers (the "Industrial and Employment Benefits Agreement" or "IEBA").

[2] On or about April 18, 2016, the Applicant was invited to submit a bid to a request for proposals issued by Vale (the "RFP"). The RFP closed May 6 and the Applicant was unsuccessful. The Applicant, through the Canadian Federation of Independent Business (the "CFIB") later made a complaint to the Department alleging that Vale was in breach of its obligations under the VBDA and IEBA.

[3] The Department investigated the allegations in early 2017 and obtained information from Vale regarding its operations, the RFP and the awarding of the contract. The Department concluded that Vale was not in breach of the IEBA. The Minister advised the Applicant of the Department's findings on May 10, 2017.

[4] The Applicant subsequently made an access to information request to the Department on or about December 6, 2017 as follows:

> *On 10 May 2017 the Honourable Minister Coady sent a letter to Vaughan Hammond of the Canadian Federation of Independent Business regarding the failure of Vale to award a contract for anode bags to [named company]. In that letter Minister Coady says, at paragraph 3, that NR had discussions with Vale and that Vale had provided NL officials with details of the procurement process for the supply of anode bags. I request a copy of all correspondences (including but not limited to texts, messages, letters, faxes and emails, with attachments) between NR, Vale, the "NL officials" referenced by Minister Coady, and any other party, as well as any file notes (paper and/or digital), concerning the aforementioned discussions between Vale, NR and the NL officials. We also seek to know the identity of the aforementioned "NL Officials" Minister Coady was referring to. In paragraph 4 of the 10 May 2017 letter Minister Coady states that "Vale has provided information regarding what they identified as a "one-off" PO[.] I request a copy of all documents that pertain to that*

> *"information" (hard copy and/or digital), copies of all correspondences (including but not limited to texts, messages, letters, faxes and emails, with attachments) regarding that "information" provided by Vale, as well as any file notes (paper and/or digital), concerning the "information" provided by Vale. In paragraphs of the 10 May 2017 letter Minister Coady states that "NR advised Vale that it is our expectation that the provisions in the IESA be adhered to…" I request a copy of any documents (paper and/or digital) pertaining to NR advising Vale that it is its expectation that the provisions in the IEBA be adhered to.*

[5] In response to the request, the Department provided the Applicant with 26 pages of records on January 5, 2018, consisting of various correspondence between the Department and Vale and the Department and the CFIB. One document – an email dated March 20, 2017 from Vale to the Department describing details of the RFP and bids received as well as Vale's operation of the Long Harbour Nickel Processing Plant – was partially redacted pursuant to section 39 of the *ATIPPA, 2015*.

[6] The Applicant filed a complaint with this Office and an investigation was conducted. Informal resolution could not be reached and the complaint proceeded to formal investigation in accordance with section 44 of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[7] The Department submits that in conducting its business it relies on information from various provincial, national and international businesses in the oil and gas, mining and energy fields. In many cases, the Department does not have the authority to compel the production of this information. Where such power does not exist pursuant to agreement or legislation, the Department benefits from having access to additional information beyond the minimum it can compel. The Department takes the position that Vale's reporting obligations are set out in the VBDA and IEBA and that the information redacted in the within matter is additional information Vale is not required to provide, and access to similar information may be circumscribed in the future if it were to be released.

III THE COMPLAINANT'S POSITION

[8] The Complainant objects to the Department's application of section 39, stating that the Department has not met the three-part test for refusing to disclose information.

[9] The Complainant also argues that the contract between the successful party and Vale constitutes a "major contract" under the VBDA and the IEBA, thereby imposing additional reporting requirements on Vale that negate the claim that disclosure would jeopardize future access.

[10] Finally, the Complainant submits that as the intent of the IEBA is to benefit Newfoundland and Labrador businesses, the public has an interest in knowing the contents of any discussions between Vale and the Department, especially when it is alleged that Vale is not complying with the agreement.

IV DECISION

[11] The only issue to be determined in this Report is whether the information redacted from the March 20, 2017 email meets the three-part test set out at section 39 of the *ATIPPA, 2015*. While the Complaint raised public interest grounds, section 9 of the *ATIPPA, 2015* does not allow for disclosure of information subject to section 39, a mandatory exception to disclosure.

[12] Section 39(1)(c)(ii) requires public bodies to consider the public interest but only in the context of whether similar information would continue to be supplied by third parties to public bodies. As access to the kind of information supplied by Vale and other businesses allows the Department to assess compliance with the VBDA and the IEBA, the Department determined that it is in the public interest that access to such information continue. For the reasons that follow we accept that determination.

[13] Section 39 is the subject of many of our Reports, generally in the context of the awarding of contracts by public bodies to third parties. The present matter differs in that it involves the awarding of a contract by a private firm (Vale) to another private firm. There is no associated expenditure of public funds.

[14] The provision of section 39 at issue in this Report is whether the Department has made a case that the disclosure of the requested information could reasonably be expected to result in similar information no longer being supplied in the future. It is not necessary for the Department to meet the more stringent requirements of sections 39(1)(c)(i) or (iii) which are more frequently the subject of section 39 complaints investigated by this Office. In those provisions, a third party must establish that the disclosure would "harm significantly" its competitive position or result in "undue financial loss or gain".

[15] We most recently commented on section 39(1)(c)(ii) in Report A-2017-009 at paragraph 20:

> *. . . The Department has not raised this as a concern. In addition, as this information was requested by the Department to confirm that ambulance operators had in fact spent the wage subsidy funds as intended, the Department could compel cooperation with such audits by withholding future funding until ambulance operators were in compliance. Therefore, the notion that the Department will be unable to obtain this information in the future is not compelling.*

Based on the above, applying section 39(1)(c)(ii) requires assessing whether the information at issue was compellable by the Department or whether it was additional information voluntarily supplied by the third party. If the information is truly additional to what the Department was entitled to receive, then there may exist the potential for Vale not supplying similar information in the future.

Three-Part Test

[16] As this is a decision of a public body to refuse access to a record or part of a record, the burden is on the Department to prove that the Complainant has no right of access to the record and to satisfy all three parts of the test.

[17] First, it must be established that the information consists of trade secrets of a third party (39(1)(a)(i)) or commercial, financial, labour relations, scientific or technical information of a third party (39(1)(a)(ii)).

[18] The information that the Department proposes to withhold consists of:

- the details of bids received by Vale to the RFP, including prices submitted by prospective suppliers;
- the details of previous requests for proposals and purchase orders issued for similar supplies and prices paid by Vale;
- details of Vale's relationship with past and potential suppliers; and
- technical information related to the operation of the Long Harbour Nickel Processing Plant and Vale's operations generally.

[19] Based on a review of the information redacted from the March 20, 2017 email, I find that the information consists of a combination of Vale's commercial, financial and technical information. The information therefore satisfies the first part of the test.

[20] Second, it must be established that the information had been supplied, implicitly or explicitly, in confidence. This requires an assessment of both whether the information was "supplied" solely by the third party rather than the result of negotiations or collaboration between the third party and the public body as well as whether the parties intended to treat the information confidentially.

[21] All of the information was received by the Department directly from Vale and the Department had no input on its creation, through negotiation or otherwise. The Department was not aware of the information prior to its delivery by Vale. We therefore accept that the information was "supplied" within the meaning of that term in section 39.

[22] Regarding the confidentiality of the information, that assessment is informed by the criteria articulated by the Federal Court in *Air Atonabee Ltd v. Canada (Minister of Transport)* 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.*

[23] Following a review of Vale's press releases and public reports, and the Department's own press releases and media coverage, it is apparent that the information contained in the record is information not available from other sources accessible by the public or that could be obtained by observation or independent study. Vale's correspondence with the Department indicates an expectation of confidentiality at the time it communicated the information. The information in question meets the second part of the test.

[24] Finally, it must be established that one of four enumerated outcomes referenced in section 39(1)(c) could reasonably be expected to occur. Only section 39(1)(c)(ii) is at issue:

> *39. (1) The head of a public body shall refuse to disclose to an applicant information*
>
> *. . .*
>
> *(c) the disclosure of which could reasonably be expected to*
>
> *. . .*
>
> *(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,*

[25] The threshold the Department must meet is that disclosure "could reasonably be expected to" result in "similar information no longer being supplied to the public body" and that "it is in the public interest that similar information continue to be supplied". To establish a reasonable expectation of such consequences, a party must provide detailed and

convincing evidence that logically explains why and how the disclosure could lead to a particular identifiable outcome or harm. The Supreme Court of Canada in *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23 states that a party "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."

[26] The Department provided this Office with an overview of its interactions with various businesses via negotiations, licensing and regulation. The Department notes that in order to conduct its business effectively, it frequently benefits from receiving information that goes beyond the bare minimum that businesses are required to disclose pursuant to legislation or agreements. To continue this access, the Department submits that it is in its interest, and therefore in the broader public interest, to ensure that businesses continues to supply such "additional" information.

Vale's Reporting Obligations

[27] To assess the likelihood of a loss of future access to similar information, it is necessary to first review the present mechanisms for compelling information from the Department's various business partners. Where information is required to be provided by statute or agreement, the danger of losing access is minimal as a public body generally has adequate legal tools to ensure continued receipt of information a third party is obligated to provide.

[28] Vale's development of the Voisey's Bay Mine and the Long Harbour Nickel Processing Plant are subject to the VBDA and IEBA, agreements that Vale entered into with the Government of Newfoundland and Labrador. The matter that led to this complaint was an allegation that Vale did not comply with its obligations under the IEBA when it failed to award a contract to the Complainant, a local Newfoundland and Labrador business. Vale's reporting requirements under the IEBA are listed at article 11 (Reporting, Communications and Monitoring Requirements). By way of paraphrasing, those requirements are:

- quarterly reporting of total value of goods and services purchased, broken down by industry (e.g. transportation, fuel, equipment) and location of suppliers (Labrador, Island of Newfoundland, or other);
- quarterly reporting of direct and indirect employment broken down by job category, location, gender and aboriginal status; and
- if required by the Government of Newfoundland and Labrador, monthly reporting of expenditures and employment.

[29] These requirements to provide aggregate data do not capture the information that Vale provided to the Department in response to the Department's inquiries. As such, the information at issue in the present matter is "additional" to what the Department can expect to receive via article 11 of the IEBA.

[30] As noted by the Complainant, the IEBA also contains provisions for "major contracts" which require Vale to provide the Department with the estimated value of a particular contract, the list of bidders, and notice of the award of the contract. The Department countered that the major contracts provisions of the IEBA could still not grant it access to the withheld information as these provisions only take effect when the Department has expressed an interest in a particular contract and designated it as a major contract. The additional reporting, as stated in the IEBA is "at the request of the Department acting reasonably". The Department did not take an interest in the contract in question or designate it as a major contract. Further, the information at issue is distinct from the information that could be obtained in the case of a major contract as follows:

- the Department would not have access to the bid amounts for a major contract;
- the Department would not have additional information about the details of previous requests for proposals and purchase orders issued for similar supplies and prices paid by Vale;
- the Department would not receive the details of Vale's relationship with past and potential suppliers; and

- the Department would not be notified of technical information related to the operation of the Long Harbour Nickel Processing Plant and Vale's operations generally.

The information at issue is above and beyond what Vale is obliged to provide and, as such, there is a potential for Vale to no longer supply similar information to the Department in the future.

Reasonable Expectation of Similar Information No Longer Being Supplied

[31] The potential that similar information will not be provided in future is not sufficient on its own. The Department must establish that this expectation is reasonable.

[32] The Department argues that it regularly interacts and maintains business relationships with a wide variety of companies active in the production of the Province's mineral and petroleum resources. The Department relies on open and transparent relations with these business partners, and the amount of information provided by Vale in response to its inquiries regarding the Complainant's complaint under the IEBA is indicative of the openness it has fostered. By maintaining positive relationships, the Department and the people of Newfoundland and Labrador benefit from the transparency of Vale and others.

[33] The Department advises that its business partners have become increasingly wary of the potential for information submitted to the Department to be released via the *ATIPPA, 2015* process. The Department provided this Office with details of communications with several businesses over the past few months which expressed a reluctance to provide information beyond the minimal requirements in order to limit their exposure to disclosure. At least one business expressed an intention to only provide information verbally and requested that representatives of the Department not create records reflecting the information. The Department cannot accede to such requests as such practices preclude effective management of the Province's resources and adherence to its obligations to accountability and transparency.

[34] Section 39(1)(c)(ii) requires that the Department establish a reasonable expectation that it will not receive similar information in the future. The Department's submissions demonstrate that in this case Vale voluntarily provided it with significant information that facilitated the Department's thorough investigation of the Complainant's allegations that Vale was in breach of the IEBA. The IEBA is intended in part to maximize the benefits of these developments for Newfoundland and Labrador businesses and workers. As maximizing those benefits is in the public interest, protecting that interest is facilitated by the Department's access to information beyond what it can compel Vale to provide. The Department clearly benefits from access to additional information from Vale and other businesses. The Department established that disclosure of the redacted information could reasonably be expected to result in similar information no longer being supplied to it and that it is in the public interest that similar information continue to be supplied in the future.

V RECOMMENDATIONS

[35] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Natural Resources continue to withhold the information redacted from the records provided to the Complainant on January 5, 2018.

[36] 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 these recommendations to the Commissioner and any person who was sent a copy of this Report (in this case the Complainant) within 10 business days of receiving this Report.

[37] Please note that within 10 business days of receiving the decision of the Department under section 49, the Complainant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 54 of the *ATIPPA, 2015.*

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of April, 2018.

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