OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2018-014

June 18, 2018

Government Purchasing Agency

Summary: The Government Purchasing Agency ("GPA") received an access request seeking disclosure of bid responses to a Request for Proposals. The GPA was prepared to release the information, however a Third Party objected to the disclosure and filed a complaint with this Office. The Third Party submitted that section 39 (disclosure harmful to business interests of a third party) required the records to be withheld. The Commissioner found that the Third Party did not meet the burden of proof and recommended release of the records.

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

Authorities Relied On: OIPC NL Reports A-2017-022; A-2017-017; and A-2017-020. BC IPC Order 01-39 (upheld on judicial review at Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner) et al., [2002] B.C.J. No. 848).

I BACKGROUND

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

> *Please provide the following information:*
> 1. *Copy of RFP # GPA.01.2017*
> 2. *Bid Responses submitted by* [*third parties, including the Third Party*] *or any other bidders*
> 3. *Assessment criteria used in awarding RFP*
> 4. *Evaluation/Selection Committee names and designation*
> 5. *What mechanism will Government be using in the development of future Intra-Provincial Travel RFPs and is there a semi-annual review of the process*

[2] Following receipt of the request, the GPA provided the Applicant with immediate disclosure of items 1, 3, 4 and 5, and indicated that it intended to provide access to the information responsive to item 2, but in accordance with section 19 of the *ATIPPA, 2015*, the GPA determined it was necessary to notify the affected third parties. Upon notification, the Third Party filed a complaint with this Office.

[3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] The GPA advised that it issued a Request for Proposals (the "RFP") seeking a service provider for Intra Provincial Air Travel Services. The Third Party was the successful bidder and signed a Standing Offer Agreement.

[5] The GPA's position is that the requested information does not meet parts two and three of the three-part test outlined in section 39 of the *ATIPPA, 2015*, and that therefore it is required to release the records to the Applicant.

[6] The GPA decided to notify the Third Party due to its concerns about the possibility of immutability, as discussed in this Office's Report A-2017-022.

III THIRD PARTY'S POSITION

[7] The Third Party provided a detailed submission and its position is that its bid falls within the exemption set forth in section 39(1) of the *ATIPPA, 2015* and not subject to disclosure.

[8] In particular, the Third Party submitted that disclosure of its bid would reveal its trade secrets and commercial, financial, labor relations and technical information pursuant to section 39(1)(a).

[9] The Third Party acknowledged that information contained in a contract "is generally understood as being 'negotiated,'" but argued that the information contained in its bid was supplied, as it was "marketing and advertorial in nature" and should therefore be "generally classified as immutable information (as it is not capable of change/negotiation)". As such, despite the information's incorporation by reference into the Standing Offer Agreement it argued that the bid should be deemed as having been supplied "implicitly or explicitly in confidence" given it was:

> *(i) provided in good faith and for confidential marketing purposes to make the case it should be the successful proponent of the RFP,*
> *(ii) has an immutable nature and therefore should always be deemed as "supplied" rather than "negotiated,"*
> *(iii) contains a significant number of trade secrets and confidential information that have been consistently treated as confidential information and are of "considerable importance to its business and overall competitive position and sustainability," and*
> *(iv) "contains express confidentiality notifications/restrictions."*

For these reasons, the Third Party argued that its bid met the criteria of section 39(1)(b) and therefore should not be released.

[10] The Third Party further submitted that it is "engaged in a highly competitive industry with a small number of competitors that have significant resources at their disposal." Given this, it argued that the disclosure of the bid:

> *…could reasonably be expected to: (i) harm significantly the competitive position or interfere significantly with the negotiating position of [Third Party], going forward; and (ii) result in undue financial loss to [Third Party] and result in undue financial gain to [Third Party's] competitors.*

[11] It went on to note that disclosure of its bid would provide its competitors with a "blueprint for how to successfully obtain air travel contracts with the Government of Newfoundland and Labrador in the future." This, it maintains, could reasonably be expected to harm its competitive or negotiating position and result in undue financial harm while providing competitors with undue financial gain. It also submitted that the disclosure of trade secrets and confidential information would erase its competitive advantages "in an already competitive industry." Finally, the Third Party expressed concern that the disclosure of its bid carries the possibility that the information it contains could be "used or publicized out of context or in a deliberately misleading manner," which would negatively impact it.

IV DECISION

[12] 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.*

[13] Section 39 is a mandatory exception to the right of access under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third parties bear the onus of proof. Failure to meet any part of the test will result in disclosure of the requested records.

[14] With respect to section 39(1)(a), I find that the requested records are commercial and financial information, so this element of the test has been established.

[15] With respect to section 39(1)(b), as the material in question, including the bid (and all price schedules/variations) form part of the contract, it is generally considered to be negotiated, not supplied. The contract signed by the Third Party and Service NL includes Clause 1.1 which states that the Third Party shall provide the "…Products and Services to the Minister as outlined in Schedule "A" of this Agreement attached hereto." The responsive records in question are contained in Schedule "A." Clause 21.1 further adds that:

> *The Request for Proposals identified as GPA.01.2017 – Intra Provincial Air Travel Services and all of its provisions therein (including any addenda there to) and the Vendor's Proposal dated December 4, 2017, form part of this Agreement by attachment and incorporation by reference.*

[16] As previously discussed in our Report A-2017-020, contracts with public bodies for the supply of goods and services are "generally not considered to be information that is 'supplied'." As an attachment to a negotiated contract, the information provided in Schedule "A" forms part of the contract and is considered negotiated and not supplied.

[17] While the Third Party made submissions that the content of its bid included "immutable" information and therefore should be held as supplied and not negotiated, it did not provide persuasive clear and convincing evidence to support such claims.

[18] In British Columbia Order 01-39, (upheld on judicial review at Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner et al., [2002] B.C.J. No. 848), the adjudicator commented on the interpretation of the word "supplied" with particular reference to immutability:

> *Information that might otherwise be considered negotiated nonetheless may be supplied in at least two circumstances. First, the information will be found to be supplied if it is relatively "immutable" or not susceptible of change. For example, if a third party has certain fixed costs (such as overhead or labour costs already set out in a collective agreement) that determine a floor for a financial term in the contract, the information setting out the overhead cost may be found to be "supplied" within the meaning of s. 21(1)(b). To take another example, if a third party produces its financial statements to the public body in the course of its contractual negotiations, that information may be found to be "supplied." It is important to consider the context within which the disputed information is exchanged between the parties. A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.*
>
> *In other words, information may originate from a single party and may not change significantly – or at all – when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s. 21(1)(b) is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible of change but, fortuitously, was not changed. In Order 01-20, Commissioner Loukidelis rejected an argument that contractual information furnished or provided by a third party and accepted without significant change by the public body is necessarily "supplied" within the meaning of s. 21(1) (at para. 93).*
>
> > *…In my view, it does not follow from the fact that information initially provided by one party was eventually accepted without significant modification by the other and put into their contract that the information is "supplied" information. If so, the disclosure or non-disclosure of a contractual term would turn on the fortuitous brevity or finessing of negotiations. Rather, the relative lack of change in a contractual term, along with the relative immutability and discreteness of the information it contains are all relevant to determining whether the information is "supplied" rather than negotiated. Evidence that a contractual term initially provided or delivered by the third party was not changed in the final contract is not sufficient in itself to establish that the information it contains was "supplied."*

[19] Given the above interpretation, the information in this contract was not "supplied". As set out below, the information concerning the bidder's history, qualifications, expertise and experience, strategic partnerships, competitive advantages, service methods and capacity to perform the services, were all capacities their firm brought to the task and the reasons why they felt they should be the successful bidder.

[20] The Third Party has not provided clear and convincing evidence of the immutability of the information. The disputed information formed part of a contract, which is deemed in most cases to be "negotiated" information. The information does not appear to be immutable. Therefore, it is my finding that section 39(1)(b) does not apply in this case, with one exception.

[21] Included in the Proposal were alternate pricing schedules, alternates that were not accepted by the Public Body that could have been arguably supplied, in spite of being incorporated by reference into the Contract. Therefore, for this element, we must consider whether they were supplied "in confidence".

[22] In our Report 2017-017 this Office held:

> *[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:*
> >
> > > *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.*
>
> *[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] We again find these comments persuasive and find that even though the bidder included a general confidentiality clause, the unsuccessful options were not supplied implicitly or explicitly "in confidence". The RFP wording itself hinders a finding of implicit confidence because disclosure under the *Act* is clearly contemplated. Clause 5.6 of the RFP and Clause 5.3 of the contract acknowledge that bids submitted to GPA would only be held confidential "except as otherwise required by law," and once attached to the Standing Offer Agreement it further elaborated that the Minister "is subject to and has obligations under the *ATIPPA, 2015*." As noted in the *Corporate Express* decision cited above, a blanket endorsement of confidence over an entire bid document is insufficient to claim that information was supplied explicitly in confidence. Furthermore, the Third Party has failed to present evidence of how such an explicit claim might apply to specific information in the bid, and has not provided convincing evidence that such information was supplied in confidence in any event.

[24] The Third Party has therefore not met the onus in part two of the section 39(1)(b) test of "supplied in confidence" for the alternate pricing schedules.

[25] Given that the second part of the test in section 39 has not been met, I need not continue, however, as I have examined section 39(1)(c), my conclusions follow.

[26] Claims under section 39(1)(c) require detailed and convincing evidence that the likelihood of significant harm is more than merely speculative. Rather, third parties must establish a reasonable expectation of probable harm.

[27] The evidence the Third Party presented does not establish a reasonable expectation of probable harm. The Third Party argued primarily that disclosure of the information in question could harm its competitive position. This Office has discussed competitive advantage in previous reports and concluded that heightened competition falling short of unfairness does not constitute significant harm. Absent a reasonable likelihood of significant harm to a third party's competitive position or an undue financial gain or loss to any person, competition is not unfair and ensures that public bodies are making the best possible use of public resources. Therefore, the Third Party has not met the onus for part three of the section 39(1) test.

[28] As the Third Party has failed to meet part two and three of the three-part test under section 39(1) of the *ATIPPA, 2015*, section 39 does not apply to the information at issue and it must be disclosed to the Applicant.

V RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the GPA release the Third Party's bid to the Applicant.

[30] 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 these recommendations 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.

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of June 2018.

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