OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-001

January 7, 2019

Department of Health & Community Services

Summary: The Department of Health & Community Services ("DHCS") advised a Third Party it was the successful bidder in a Request for Proposals (RFP) issued by the Department. During the ensuing yearlong discussion towards finalizing a draft agreement DHCS canceled the RFP. The Applicant requested access to the Third Party's proposal and communications with DHCS from January 1, 2015 to September 2018. DCHS issued a section 19(5) notice to the Third Party of its intent to release some of the information in question. The Third Party filed a complaint to this Office pursuant to section 39 (disclosure harmful to business interests of a third party). The Commissioner determined that the Third Party did not meet its burden of proof and recommended that DHCS release the information to the Applicant.

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

Authorities Relied On: *Canada Post Corp. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 270 (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.), *London Health Sciences Centre (Re)*, 2015 CanLII 21235 (ON IPC); NL OIPC Reports: A-2017-014, A-2017-017, A-2017-022, A-2016-016, A-2013-008.

File #: 0005-074-18-041

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*") the Department of Health & Community Services ("DHCS") received an access request seeking disclosure of the following:

> *All documents, communications and records including but not limited to all emails, texts, notes and logs regarding the preparation of a Request for Proposals for Sterile Compounding circulated June 8, 2015 closing June 30, 2015*
>
> *All communications between the Department of Health and [Third Party] from January 1, 2015 to the current date*

[2] Following receipt of the request, DHCS consulted with the Third Party regarding its position on the release of records responsive to the request. The Third Party suggested redactions. DHCS subsequently issued a section 19(5) notice advising that it intended to provide access to all of the records, including the portions the Third Party asked to be redacted. The Third Party objected to the proposed release and complained to this Office.

[3] As informal resolution did not resolve the Third Party's complaint it was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[4] DHCS advised that it issued a Request for Proposals (the "RFP") in June of 2015. The Third Party responded to it, but no formal agreement was reached and the RFP was ultimately cancelled.

[5] Upon receipt of the access request, DHCS consulted informally with the Third Party regarding the technical nature of the requested records. However, DHCS disagreed with the Third Party's position regarding the release of the information, which led to the formal Third-Party notification under section 19(5).

III THIRD PARTY'S POSITION

[6] The Third Party's position is that portions of the responsive records fall within the exemption in section 39(1) of the *ATIPPA, 2015* and DCHS must refuse to disclose them.

[7] The Third Party argued that the first part of the test in section 39(1) is met as the information in question meets the definitions of commercial, financial or technical information. The Third Party stated that the information relates to the buying, selling or exchange of merchandise or of services and therefore qualifies as commercial information. It also includes its associations, history, references, bonding and insurance policies as well as pricing structures, market research, business plans and customer records. Financial information includes revenues and expenses, assets and liabilities, profits, losses and solvency situation, financial statements, balance sheets, etc. Technical information included information relating to a particular subject, craft or technique.

[8] The Third Party argued that the second part of the section 39 test is satisfied as the information in question includes information which is of a proprietary nature and not subject to negotiations between a third party and public body. It went on to note that this information is not available from sources otherwise accessible by the public, nor could it be obtained by observance or independent study by a member of the public. In its communication of the information to DHCS, the Third Party maintained that it held a reasonable expectation that it would be kept confidential and not be disclosed. Finally, it noted that the information was given gratuitously in a relationship with DHCS that is not contrary to the public interest, but rather fostered for public benefit by confidential communication. Additionally, the Third Party argued that because they were unable to conclude an agreement or contract, the information in question should be treated as supplied and not negotiated, as noted in our previous Report A-2017-017.

[9] The Third Party further noted that the information in question must be considered as supplied in confidence because the circumstances should be treated as a "special case" as outlined in *Societe Gamma Inc. v. Canada (Department of Secretary of State) (1994), 47 A.C.W.S. (3d) 898* (*Societe Gamma*). The RFP did not result in a contract but DCHS advised

the Third Party in October 2015 that it was the successful bidder. Discussions towards finalizing a draft agreement continued until DHCS notified the Third Party that it cancelled the RFP in a letter dated September 2016. The Third Party argues that while it was notified by DHCS of the cancellation of the RFP, it has a reasonable expectation that DHCS will re-issue a substantially similar RFP in the near future. These circumstances, the Third Party submits, constitute a "special case" such that the information in question ought to remain confidential. The Third Party argued its reasonable expectation that the information supplied would be kept in confidence during the process itself extends to the special circumstances of this case: after the cancellation of the RFP and before the re-issuance of a substantially similar RFP (the expectation of which re-issuance is also reasonably held). The Third Party argued that the terms upon which it prepared to contract ought to continue to be held in confidence until such time as a contract is entered (either with it or some other third party as a result of a substantially similar RFP).

[10] Finally, the Third Party submitted that the third part of the section 39 test is also met, relating to a reasonable expectation of harm arising from disclosure of the information in question. It acknowledged that this reasonable expectation must be of probable harm and not simply the mere possibility, and that there must be clear and convincing evidence of the link between the information disclosed and the probable harm alleged.

[11] The Third Party maintained that it is reasonable for it to expect that its competitive position would be significantly harmed if the information in question were disclosed in advance of a contract being awarded by DHCS. It noted its "lead position" among competitors in the field and argued that were these competitors armed with the contents of its proposal and various supporting documents, as well as the further information supplied to DHCS in connection with the cancelled RFP, these competitors, "would be able to use said information to better compete with [the Third Party] in a re-issued RFP, as well as more generally to close the gap of standards existing between them and [the Third Party]." It went on to note this reasonable expectation of harm is further based on its reasonable expectation of a future reissuance of a substantially similar RFP.

IV DECISION

[12] Section 39 states:

> *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;*
>
> *(b) that is supplied, implicitly or explicitly, in confidence; and*
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> *(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 disclosure under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and failure to meet any part of the test will result in disclosure of the records. Third parties have the burden of proof pursuant to section 43(3) of the *Act*.

[14] With respect to section 39(1)(a), this Office is satisfied that the information at issue is commercial, financial or technical information of the Third Party and concludes that this part of the test is satisfied.

[15] 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".

[16] In Report A-2017-022, this Office considered the application of these two criteria, relying upon the following cases: *Canada Post Corp. v. Canada (Minister of Public Works and Government Services)*, 2004 FC 270 (CanLII) (particularly at para. 40); *Société Gamma Inc. v. Canada (Department of Secretary of State), [1994] F.C.J. No. 589 (T.D.); Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski,* (2014, NLTD) (particularly at paragraph 35); and, *London Health Sciences Centre (Re)*, 2015 CanLII 21235 (ON IPC):

> [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; and*
>
> - *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.*

[17] Additionally, 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.

[18] In the present case, the Third Party correctly points out that there is no contract between it and DHCS owing to cancellation of the RFP. The RFP Response and Draft Service Agreement were supplied to the Public Body. As to the confidential nature of the information, this Office is of the opinion that it should be considered confidential ("supplied in confidence") during the bidding and evaluation process, however, once bidding and evaluation has been completed, the expectation of confidence attached to any bids, successful or unsuccessful, normally ends. The bidding and evaluation process had concluded. As such, no expectation of confidentiality remains, as the records were submitted with the expectation that if successful, the terms would become part of a contract.

[19] Furthermore, and in the alternative, the Third Party continued to communicate with the Public Body after the initial bid process on the understanding that an award had been made and therefore, it could not reasonably have expected the confidentiality to continue. The Third Party operated under the assumption it was the successful bidder working with DHCS towards a draft agreement (that was never concluded), and its communications and submissions during this time were therefore made in the belief it would eventually be captured in a contract with DHCS. The Third Party itself acknowledged in its submissions to this Office that such a contract would mean the information in question would not be considered supplied, but rather negotiated and therefore open to public disclosure.

[20] The Third Party argues that the present situation is a "special case" per Strayer J.'s comments in *Société Gamma Inc. v. Canada (Department of Secretary of State) (1994), 47 A.C.W.S. (3d) 898, 56 C.P.R. (3d) 58:*

> *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.*

[21] This argument is in keeping with this Office's reference to "exceptional circumstances" in Report A-2017-022, as being the only possibility where bids should be treated differently and continue to be held in confidence after the bidding process has come to an end. The Third Party has argued that its circumstances ought to be considered such a "special case". Owing to the passage of a significant amount of time since the initial RFP, we are unable to agree with the Third Party. The cancellation of a tender call or RFP prior to contract is neither peculiar nor unusual, nor is the notion that a Public Body might, at some point in the future, re-issue a substantially similar RFP. There are many such examples of both from the case law generally, as well as this Office's previous Reports (i.e. Report A-2016-016).

[22] As such, this Office does not agree that these circumstances ought to attach an expectation of confidentiality that survives the conclusion of the bidding process and finds that the Third Party has failed to prove that the proposal was supplied "implicitly or explicitly in confidence." Therefore the second part of the test in section 39 is not met. However, even if the above analysis is incorrect, the Third Party failed to satisfy the third part of the test.

[23] As this Office has previously held, the standard under part three of the test requires evidence that the assertion of harm is more than speculative, but rather should establish a reasonable expectation of probable harm as acknowledged by the Third Party in its submission.

[24] The Third Party argued primarily that should the information in question be disclosed, its competitive position would be harmed as competitors could use the contents of its proposal and supporting documents and information subsequently provided to the Public Body to "better compete…in a re-issued RFP, as well as more generally to close the gap of standards." It went on to note that "its reasonable expectation of harm is further based on its reasonable expectation of a future reissuance of a substantially similar RFP."

[25] 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. As this Office has previously noted, 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.

[26] The Third Party developed its proposal and the information contained therein for a RFP in 2015. As the Third Party points out, the information relates to specialized services in the pharmaceutical and medical industry. While not determinative, standards change and advancements are made, a four year old proposal and further three-year old information has less potential to result in undue advantage (or harm) in responding to future RFP's and tenders.

[27] The Third Party has not provided sufficient evidence to demonstrate unfairness to the degree that the disclosure of the records could *reasonably* be expected to *significantly harm* its competitive position.

V CONCLUSIONS

[28] The Third Party failed to discharge its burden of proof in establishing that all three parts of the test under section 39(1) of the *ATTIPA, 2015* apply to the requested information. DHCS must provide the records to the Applicant.

VI RECOMMENDATIONS

[29] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of DHCS 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 within 10 business days of receiving this Report.

[30] DCHS shall disclose the records to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainant provides the Department with a copy of its notice of appeal prior to that time.

[31] Dated at St. John's, in the Province of Newfoundland and Labrador, this 7th day of January 2019.

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