



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-016

September 1, 2020

Department of Transportation and Works

Summary:

The Department of Transportation and Works, now called Transportation and Infrastructure, (the “Department”) received an access request for the completed RFP financial submission forms (A1 to A10) as well as the Energy Adjustment Model of the successful proposal for the Gander and Grand Falls-Windsor Care Homes Project. The Department initially determined the records in question were subject to sections 35 (disclosure harmful to the financial or economic interests of a public body) and 39 (disclosure harmful to the business interests of a third party) of *ATIPPA, 2015* and therefore must be withheld from release. The Applicant made a complaint to this Office for review of the Department’s application of the *Act*. As part of the informal resolution process, the Department reconsidered its initial position and determined forms A1, 2, 3 and 5 could be released as these did not meet the section 39 test. The Department determined it was necessary to notify the Third Party of its decision to release these records (A1, 2, 3 and 5) pursuant to section 19(5) (third party notification). The Third Party objected to the disclosure and filed a complaint with this Office, submitting that section 39 required the records to be withheld. The Commissioner determined the Third Party failed to identify the records as possibly exempt from disclosure under section 39 pursuant to the *Public Procurement Regulations* when the Third Party submitted the records per the RFP. The Commissioner found the Third Party therefore 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, sections 19 and 39.

Authorities Relied On:

NL OIPC Reports [A-2020-004](#), [A-2019-029](#), [A-2019-027](#), [A-2019-026](#), [A-2019-001](#), [A-2018-015](#), [A-2018-014](#), [A-2017-014](#), [A-2017-007](#), [A-2016-007](#). [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#). [OIPC Guidance The Public Procurement Act and ATIPPA, 2015 \(Section 39\)](#).

I BACKGROUND

- [1] The Department of Transportation and Works, now called Transportation and Infrastructure, (the “Department”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*, seeking:

In relation to the Gander and Grand Falls-Windsor Care Homes Project, we would like to obtain the completed RFP financial submission forms (A1 to A10) as well as the Energy Adjustment Model of the successful proposal.

- [2] Following receipt of the request, the Department initially determined the records in question were subject to sections 35 and 39 of *ATIPPA, 2015* and therefore must be withheld. The Applicant made a complaint to this Office for review of the Department’s application of the Act. As part of the informal resolution process, the Department reconsidered its initial position and determined forms A1, 2, 3 and 5 could be released as neither section 35 nor 39 were applicable to these records.
- [3] The Department determined it was necessary to notify the Third Party of its decision to release these records (A1, 2, 3 and 5) pursuant to section 19(5). The Third Party then filed a complaint with this Office opposing the Department’s decision.
- [4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The Department acknowledged these four forms fail the “supplied versus negotiated” test under section 39(1)(b), and as a result do not meet the requirements for section 39.
- [6] The Department determined it was necessary to give the Third Party notice, pursuant to section 19(5) of *ATIPPA, 2015*, of its intention to release forms A1, 2, 3 and 5. When the Third Party filed a complaint with this Office, the Department offered no additional submissions regarding the applicability of section 39. Instead it reconfirmed its position from the

Applicant's previous complaint's informal resolution that section 39 was not applicable to forms A1, 2, 3 and 5, and therefore those forms ought to be released to the Applicant.

III COMPLAINANT'S POSITION

[7] The Third Party submitted it strongly objects to the disclosure of forms A1, 2, 3 and 5, noting that all, "comprise financial and technical information that was supplied...in confidence in accordance with the terms of the RFP." It argued that the RFP documents indicate that all information, documents or records received by the Authority from a proponent through participation in the RFP were to be considered, "confidential and will not be disclosed, subject to the *ATIPPA* and other applicable legislation." It further alleged that, because "it is clearly written that all information submitted is considered confidential, [Third Party] could expect such protection," and that, "even if this protection is subject to legislation, the documents are nevertheless confidential at the time of their submission." Additionally, the Third Party submitted it had consistently protected the records in question as confidential information.

[8] The Third Party additionally alleged that disclosure of the records in question would, "significantly harm its competitive position, and could reasonably be expected to result in undue financial loss" to it, "and undue financial gain," to its competitors. It noted that the records in question, "disclose commercial information comprised through [Third Party's] internal confidential bid process and commercial relationships," that if released to competitors and other market participants, "could reasonably be expected to compromise the commercial relationships [it] depends on to maintain...competitive position in the market, and undermine...competitive position for future commercial endeavors." It went on to note that disclosure, "would create a real and unjustified advantage to our competitors in future procurement processes," and therefore harm its business interests significantly.

[9] In particular, it offered specific commentary on 3 of the 4 forms in question, noting:

- *Form A1 and A2 contain Services Payment (unindexed and indexed) of the lifecycle of the Project. From this information a competitor can easily determine the total cost of the Project and our net profit margin on the Project with a financial model.*

- *Form A3 contains specific information on our cost breakdown, including certain of [Third Party's] fixed costs and allocated contingencies. With the Construction Contingency, Design Contingency, Architect and Construction Insurance costs disclosed in this form, a competitor can:*
 - *Easily determine certain of our consultants', suppliers' and subcontractors' negotiated costs that were achieved through confidential negotiations; and*
 - *Quantify the value of the contingency we allocate to certain project risks based upon our confidential bid development processes.*

[10] The Third Party went on to note in reference to A3 that, “in the construction industry, relationships with subcontractors are very important and take years to build,” with many resulting in competitive pricing as it deals with the same local subcontractors on projects. Given this, it argued that, “it would be unfair to disclose these prices to our competitors who could go back to our subcontractors with our prices.”

[11] The Third Party acknowledged that this Office does not interpret heightened competition as harm and has repeatedly considered that prices contained in bids, proposals and contracts are not exempt from disclosure pursuant to section 39. However, it relied on Report A-2013-009, to argue this Office had, “established that certain pricing information does fall under the exception.” It went on to note, “that release of the financial information contained in forms A1, A2, A3 and A5 would provide our competitors with far more information than the price paid by the Authority for the Project.” It argued instead that the forms contain information on its net profit margin and cost breakdown, therefore disclosure would allow competitors the ability to determine how it decides what prices to bid and how much it pays its subcontractors, and as a result, therefore should be protected by section 39. It contended it most resembles the facts of *Culver v. Canada (Minister of Public Works and Government Services), 1999 CanLII 8959 (FC)*, and therefore can be distinguished from the case examined by this Office in Report A-2013-008.

IV ISSUES

[12] Whether forms A1, 2, 3 and 5 of the Gander and Grand Falls-Windsor Long Term Care Project RFP should be withheld under section 39 of *ATIPPA, 2015*.

V DECISION

Section 39 Application

[13] Section 39(1) of *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.*

[14] Section 39 is a mandatory exception to the right of access under *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third party complainants bear the burden of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[15] The records at issue contain information regarding the costs, pricing and fees of the Third Party, and this Office is satisfied that they would reveal commercial or financial information of the Third Party, and therefore meet the criteria of section 39(1)(a).

[16] The second part of the three-part test states that the information must have been “supplied, implicitly or explicitly, in confidence.” The Third Party reasoned the records in question meet this portion of the test as it is stated clearly in the RFP that the information is to be kept confidential.

- [17] However, the RFP outlined the terms of agreement highlighting a provision regarding the expectations of confidentiality that itself acknowledges its limits, specifically acknowledging information may be subject to *ATIPPA, 2015*:

10.5 Confidentiality of Information

All Information pertaining to the Project received by any Proponent or Proponent Team member through participation in this RFP is confidential and may not be disclosed without written authorization from the Contact Person, and in no event will a Proponent discuss the Project with any member of the public or the media without the prior written approval of the Authority. Except as expressly stated in this RFP, and subject to ATIPPA or other applicable legislation, all documents and other records submitted in response to this RFP will be considered confidential. [Emphasis added]

- [18] In addition to the above-noted section, the issue of confidentiality is again addressed later in section 10 of the RFP:

10.9 OWNERSHIP OF PROPOSALS

All Proposals submitted to the Authority become the property of the Authority and will be received and held in confidence by the Authority, subject to the provisions of ATIPPA and this RFP. [Emphasis added]

- [19] Both provisions of the RFP make clear that confidentiality of submissions is subject to *ATIPPA, 2015*. This Office has previously found in Reports A-2018-014 and A-2018-015 that submissions made in response to RFPs with similar wording, noting the submissions would be subject to *ATIPPA, 2015*, cannot be said to have been made with the expectation of confidentiality.

- [20] Regarding “supplied”, previous reports from this Office (A-2020-004, A-2019-029, A-2019-001, A-2016-007), have found that contracts or agreements between third parties and public bodies are generally considered to be negotiated, not supplied.

- [21] Moreover, in addition to sections 10.5 and 10.9, there is another section of the RFP that more directly addresses the application of *ATIPPA, 2015*:

10.3 ACCESS TO INFORMATION AND PROTECTION OF PRIVACY ACT, 2015

The Authority is subject to the Newfoundland and Labrador Access to Information and Protection of Privacy Act, 2015 (“ATIPPA”), which gives people a right of access to records in the custody or control of the Authority, with certain exceptions.

Once a Proposal is submitted to the Authority, it is subject to ATIPPA.

The ATIPPA can be accessed as follows: <http://www.atipp.gov.nl.ca/>

By submitting a Proposal, the Proponent represents and warrants to the Authority that the Proponent has complied with applicable laws, including by obtaining from each person any required consents and authorizations to the collection of information relating to such individual and to the submission of such information to the Authority and the use, distribution and disclosure of such information as part of the Proposal for the purposes of, or in connection with, this RFP and the Competitive Selection Process.

Each Proponent must identify in its Proposal any information that may qualify for an exemption from disclosure under subsection 39(1) of ATIPPA.

[22] Sections 8(1)(g) and 8(2) of the *Public Procurement Regulations* (the “*Regulations*”) state:

8.(1) An open call for bids shall contain the following:

(g) a statement that the procurement process is subject to the Access to Information and Protection of Privacy Act, 2015

(2) A bid received in response to an open call for bids shall identify any information in the bid that may qualify for an exemption from disclosure under subsection 39(1) of the Access to Information and Protection of Privacy Act, 2015

[23] Section 8(2) of the *Regulations* imposes a mandatory requirement on third parties to identify the contents, if any, of a bid that may be exempt from disclosure under section 39. Section 10.3 of the RFP explicitly made this clear to the Third Party and offered it an opportunity to identify portions of its submissions, including the records in question, it believed should be protected from disclosure by section 39. The Third Party did not identify any portion of its response to the RFP as potentially exempt from disclosure. Designating content as potentially subject to section 39 enables third parties to highlight for public bodies the information that they believe should be withheld in the event of an access to information request. Reading the *Regulations* and *ATIPPA, 2015* together, sections 8(1)(g) and 8(2)

impact the ability of a Third Party to claim information was supplied to a Public Body implicitly in confidence. The *Regulations* require expectations of confidence to be stated explicitly and specifically, both of which the Third Party failed to do.

[24] It is clear from section 10.3 of the RFP that the Third Party was provided the opportunity when its response to the RFP was submitted to identify any information in its proposal it believed may qualify for an exemption from disclosure under section 39(1). While the Third Party submitted it took all measures to protect the confidence of the records in question, it cannot rely on this argument as proof of an expectation of confidence, while failing its most basic protection of confidentiality obligation: to indicate to the Department it believed the records should be exempt from disclosure under section 39(1), which is in fact a regulatory requirement of the *PPA*. This Office notes that it was the Third Party itself that highlighted section 10 of the RFP in its submissions to this Office, confirming it was well aware of its obligations set out in this portion of the RFP.

[25] This Office finds that the effect of sections 10.3, 10.5 and 10.9, along with the *Public Procurement Regulations* and their interplay with *ATIPPA, 2015*, is that the Third Party's failure to indicate a claim of section 39 in its bid submission resulted in a failure to meet the second part of the test in section 39. Therefore, this Office is satisfied that the information in the records in question was not supplied in confidence by the Third Party.

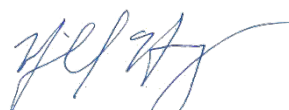
[26] As the Third Party has not satisfied the second part of the three-part test under section 39(1) of *ATIPPA, 2015*, this Office finds that section 39 does not apply to the information at issue and the records cannot be withheld from disclosure. The Third Party failed the second part of the test, and therefore we do not need to assess the third part.

VI CONCLUSIONS

[27] Given the above, this Office concludes that section 39(1) does not apply to forms A1, 2, 3 and 5, and the access to information applicant is entitled to these records.

VII RECOMMENDATIONS

- [28] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department release records A1, A2, A3 and A5 to the Applicant.
- [29] As set out in section 49(1)(b) of *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 within 10 business days of receiving this Report.
- [30] Records should be disclosed 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 1st day of September, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador