



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-018

September 15, 2020

City of Mount Pearl

Summary:

The City of Mount Pearl (the “City”) received a request for information for the Third Party’s response to a Request for Proposal. The City notified the Third Party of its intention to release the responsive records to the Applicant. The Third Party objected to the disclosure of records and filed a complaint with this Office, arguing the information proposed for release meets the three-part test under section 39 of *ATIPPA, 2015* (disclosure harmful to business interests of a third party), and therefore should not be disclosed. The Commissioner determined 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, sections 19 and 39.

Authorities Relied On:

NL OIPC Reports [A-2020-016](#), [A-2020-004](#), [A-2019-029](#), [A-2019-001](#), [A-2018-015](#), [A-2018-014](#) and [A-2016-007](#); [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#).

I BACKGROUND

- [1] The City of Mount Pearl (the “City”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* on January 9, 2020, seeking the Third Party’s Request for Proposal (“RFP”) response.
- [2] Following receipt of the request, the City believed section 39 was not applicable but determined it was necessary to notify the Third Party, in accordance with section 19(5) of *ATIPPA, 2015*, of its decision to release the requested records. The Third Party filed a complaint with this Office opposing the City’s decision.
- [3] 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

- [4] The Public Body reviewed the records and believed the information did not meet the three-part test as outlined under section 39(1). While it agreed that the records are of a commercial nature (section 39(1)(a)), and believed them to have been provided in confidence, “as per the confidentiality statement included in the package” (section 39(1)(b)), it concluded the records did not meet the test in section 39(1)(c).
- [5] The City submitted that it did not believe the information contained within the records would cause significant harm to the Third Party’s competitive advantage, or result in undue gain or loss to any party, highlighting this Office’s previous findings on this portion of the test requiring the likelihood of harm to be, “more than speculative” and that, “heightened competition should not be interpreted as significant harm.” Therefore it concluded that the information did not meet the criteria to be withheld under section 39(1) of *ATIPPA, 2015*. It did determine section 40 was applicable to some personal information contained in the records which would be withheld, and had conveyed this to the Third Party.

[6] While the City did not conclude that disclosure of the information within the records would result in significant harm to the Third Party, it acknowledged there are no subject-matter experts at the City. The City therefore decided to notify the Third Party pursuant to section 19(5) of the Act.

III COMPLAINANT'S POSITION

[7] The Third Party argued that disclosure of the information expressly supplied to the public body in confidence would cause it significant harm, and/or result in undue financial loss or gain and therefore portions of the records must be withheld pursuant to section 39(1) of *ATIPPA, 2015*. In making its submissions, the Third Party restricted its proposed redactions, “to only those portions of the RFP,” which it believes, “contain confidential information capable of causing material harm.”

[8] The Third Party outlined the contents of its RFP response and suggested that while it recognizes it must establish a reasonable expectation of probable harm, and that heightened competition should not be interpreted on its own as being significant harm, it also emphasized that it, “need not show that harm will, in fact, occur, but rather only that the risk is ‘considerably above a mere possibility,’” which it believes is the case here. The Third Party argued that, if disclosed, its existing and potential competitors could use, “this commercially sensitive, proprietary and confidentially held information when formulating their bids,” for future tender proposals at the provincial and federal level. It suggested disclosure would enable competitors to formulate similar or replica proposals, or alter their services and rates, enhancing their chances to pull contracts away from the Third Party to its detriment and their own benefit:

The disclosure of this information would provide our competitors vying for future similar government contracts with a competitive edge as they could reasonably be expected to replicate [Third Party's] offerings and then attempt to undercut [Third Party's] pricing. Such a disclosure would further interfere significantly with [Third Party's] negotiating position with public bodies in the future. Any harm resulting from the disclosure of protected information would entail serious financial repercussions for [Third Party].

[9] Additionally it argued that the release of the proposal could set unrealistic expectations in the industry and therefore, “clearly has the potential to cause significant harm.”

IV DECISION

[10] 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.

[11] 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.

[12] 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).

[13] The second part of the three-part test states that the information must have been “supplied, implicitly or explicitly, in confidence.” Section 15 of the RFP outlines that the awarded contract will incorporate the terms of the RFP. The Third Party is the successful bidder in this RFP, and therefore its proposal forms part of its contract with the City. Regarding

“supplied”, previous reports from this Office (A-2020-016, 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.

[14] The Third Party argued that the RFP indicates responses are to be kept confidential, and noted it additionally included a statement of confidentiality and marked each page as “confidential and proprietary” within its proposal as well. However, this Office has previously found in Reports A-2019-029 and A-2018-014 that merely labeling a submission confidential is not sufficient to meet the “in confidence” portion of part (b) of the section 39(1) test.

[15] Additionally, while the RFP outlines at section 10.15, that proposals will be held in confidence, it makes clear they remain subject to *ATIPPA, 2015*:

The documentation submitted in response to this Request for Proposal as well as any correspondence or additional information provided to the City by Proponents, in connection with the Request for Proposal, shall become the City record, and thus will be deemed subject to the Access to Information and Protection of Privacy Act. Section 27 of the Act excludes the disclosure of information that would be harmful to the business interests of a third party and any disclosure by the City would be subject to that provision.

[16] While current operative law is *ATIPPA, 2015*, of which the Act referred above is the precursor, section 27 of the previous *ATIPPA* is in all material respects equivalent to section 39 of *ATIPPA, 2015*. While the City should ensure that future RFP’s are up to date and referencing currently operative law, the Third Party is a corporate entity with previous experience with both pieces of legislation, and therefore well aware of the meaning of this clause. This provision highlights that confidentiality of submissions is subject to access to information legislation. This Office has previously found in Reports A-2020-016, 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.

[17] Additionally, the RFP notes in section 10.16, that the evaluation of the proposal and award for contract will be completed in accordance with the *Public Procurement Act*, Public

Procurement Policy, amendments to the Act, and all associated regulations. That Act and Regulations direct third parties to identify, in advance, portions of any proposals pursuant to RFPs that they believe are subject to section 39 of *ATIPPA, 2015*. The Third Party did not do that in this case. While the City did not draw specific attention to this obligation as was done in the RFP discussed in Report A-2020-016 (where clause 10.3 of the RFP stated “Each Proponent must identify in its Proposal any information that may qualify for an exemption from disclosure under subsection 39(1) of *ATIPPA*”), this does not relieve the Third Party’s responsibility to comply with the *Public Procurement Regulations* as this RFP specifically states that it is subject to those regulations.

[18] 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*

[19] This Office has previously held in Report A-2020-016 that 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 after the fact if the Third Party fails to identify sensitive information during the bid process. The *Regulations* require expectations of confidence to be stated explicitly and specifically, the latter of which the Third Party failed to do. 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. For all of the above reasons, this Office is satisfied that the information in the records in question was not supplied in confidence by the Third Party.

[20] 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.

[21] It is worth highlighting that public bodies assessing the application of section 39(1) of *ATIPPA, 2015* to records during the request for information process should ensure they are examining each of the three parts of the test as outlined above. In this case, if a proper assessment of section 39(1)(b) had been conducted, the City could have concluded the records in question do not meet that portion of the test and an assessment of harm requiring subject matter expertise would not have been necessary to conclusively determine the records fail the application of section 39. Had that occurred, there would not have been need to notify the Third Party and the records could have been released to the Applicant in a more timely manner.

V CONCLUSIONS

[22] Given the above, this Office concludes that section 39(1) does not apply to the Third Party's response to an RFP with the City, and the access to information applicant is therefore entitled to these records.

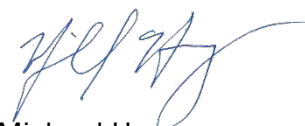
VI RECOMMENDATIONS

[23] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the City release the records in question to the Applicant.

[24] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of City 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.

[25] 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.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of September, 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador