



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER

NEWFOUNDLAND AND LABRADOR

Report A-2020-022

October 5, 2020

Town of Paradise

Summary:

The Town of Paradise received access requests for the tender submissions of the low bidders for several infrastructure construction projects. The Town decided that the records should be disclosed, but also decided that the Third Party winning bidder should be notified under section 19 (third party notification). The Third Party filed a complaint with our Office.

The Commissioner concluded that the Third Party had not met the three-part test under section 39 (disclosures harmful to the business interests of a third party) and recommended that the records be disclosed, except for a small amount of personal information that should be withheld under section 40 (disclosures harmful to personal privacy). The Commissioner also commented on the Town's justification for notifying the Third Party under section 19.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 12, 19, 39 and 40.

Authorities Relied On:

NL OIPC Reports [A-2020-020](#); [A-2020-018](#); [A-2020-016](#), [A-2020-004](#), [A-2019-029](#), [A-2019-026](#), [A-2019-001](#), [A-2018-015](#), and [A-2016-007](#), [A-2013-008](#); [OIPC Guidance: Business Interests of a Third Party \(Section 39\)](#).

I BACKGROUND

- [1] The Town of Paradise (“the Town”) received access requests pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* for the tender submissions of the low bidder for several infrastructure construction projects. The Town concluded that the test for withholding the records in section 39 of *ATIPPA, 2015* could not be met, and decided that the records should be disclosed.
- [2] However, the Town determined it was necessary to notify the Third Party, in accordance with section 19 of *ATIPPA, 2015*, of its decision to release the requested records. The Third Party filed a complaint with this Office opposing the Town’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 Town submits that during its review of the requested records, it determined that the conditions required by section 39 of *ATIPPA, 2015* were not met. While the information may be defined as the Third Party’s financial information, the other following conditions were not met.
- [5] The Town states that section 39(1)(b) was not satisfied as the information included did not appear to be confidential or explicitly provided in confidence. Moreover, key information contained in the records (the name of the successful bidder and the total cost of the successful bid) is publicly available on the Town’s website.
- [6] The Town notes that the *Public Procurement Regulations* require a bidder to identify any information in the bid that may qualify for an exemption from disclosure under subsection 39(1) of the *Act*, but that the Third Party had not done so.

[7] The Town also submitted that the third part of the test in section 39(1)(c) was not met. The Town states that records do not appear to contain any unique or current information that would compromise the business of the Third Party. For example: the total bid submitted to complete work is already publicly available information; unit prices are typically determined by market costs at the time a bid is made; quantities and materials are known as they are required to complete the work; and contingency prices such as transportation and other charges appeared to be inconsequential, not meeting section 39(1)(c) in terms of their release causing “significant” harm.

III THIRD PARTY COMPLAINANT’S POSITION

[8] The Third Party argues that all three parts of the three-part test in section 39 have been met, and therefore the records should be withheld. First, the records constitute tender documents completed by the Third Party and contain the total sums that the Third Party offered to complete the work, including individual unit prices. The Third Party states that this is its financial information under section 39(1)(a).

[9] Second, the Third Party states that under section 39(1)(b) the information must be “supplied”. Information is supplied when it is immutable and not subject to change. In the present case the financial information of the Third Party was not subject to change or finessing through negotiations – it was the specific pricing that the Third Party had only a singular opportunity to present to be awarded the work. The Third Party states that it expected this financial information to be kept confidential.

[10] The Third Party also argues that disclosure of the responsive records could reasonably be expected to harm the Third Party’s competitive position. It is reasonable to expect that revealing its confidential information could result in its competitors’ use of the information to undercut the Third Party’s pricing, thereby harming its competitive position. The Third Party stated that competitors make access to information requests, not for purposes of public accountability, but rather as a method of corporate intelligence gathering to increase their competitiveness in responding to public tendering.

[11] The Third Party also argues that the identity of the party to whom the records are to be disclosed should be made known to the Third Party, to inform its assessment of the harm that might ensue from such disclosure.

[12] Finally, the Third Party argues that section 40 of the *Act* (disclosure harmful to personal privacy) should apply so as to withhold the signatures and contact information of its signing officers and witnesses.

IV ISSUES

[13] The issues to be decided in this Report are:

1. Whether the Third Party has met the burden of proof for all three parts of the three-part test in section 39 of the *Act* required to justify withholding the information requested.
2. Whether some personal information should be withheld under s.40;
3. Whether the Third Party may obtain the identity of the Applicant;
4. Whether the Town was justified in providing a section 19 notification to the Third Party.

V DECISION

[14] 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.

[15] 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.

[16] The responsive records are pre-printed tender forms created by the Department of Municipal Affairs for the use of municipalities, including the appendices to those forms, such as Quantity and Unit Pricing tables. In those tables the quantity information is provided by the Owner (in this case the Town) and the unit and total pricing information is then entered by the Bidder. In the present case the bids are for civil construction work in the Town of Paradise. The pricing tables contain the dollar figures for which the Third Party is offering to complete different components of the work. On review, the records clearly contain the financial information of the Third Party, and so the first part of the section 39 test has been met.

[17] The second part of the test, in section 39(1)(b) requires that the information be “supplied in confidence”. The Third Party has argued that the pricing information was not susceptible to negotiation, and was “immutable.” We do not agree. Unit prices are figures created by the bidder for the purpose of each individual bid. Depending on the strategy of the bidder, a figure may have no relation to actual cost, or to previous experience. In the present case the tender documents themselves require that the unit price tables and other information provided by the bidder are incorporated into the resulting contract. There are also provisions in the contract for changing figures, including unit prices, where necessary after the contract has been signed. Therefore the information is not “immutable”.

[18] The jurisprudence on this issue is developed and clear. Pricing information provided by a bidder in response to a tender is considered to be negotiated, not supplied. (See for example our Reports A-2020-016, A-2020-004, A-2019-001.) The Third Party has not demonstrated

that there is any information in the responsive records, including the pricing information, that might be found to be “supplied.” Therefore the second part of the test has not been met.

[19] Furthermore, to meet the second part of the test, information must also be found to have been supplied “in confidence.” The Third Party has asserted that it expected its information to be kept confidential, but has offered no evidence in support of that claim. The jurisprudence is also clear on that issue: in order to meet the burden of proving that the exception applies, the Third Party must provide at least some evidence for each part of the test. (Reports A-2020-020, A-2019-001.)

[20] It is usually the case that in a tender process, bids are held in confidence until the closing date. After that, there should be no expectation of confidence even for unsuccessful bids. This is particularly important since the passage of the *Public Procurement Regulations* in 2018 requiring bidders to identify any information in the bid that may qualify for an exception from disclosure under *ATIPPA, 2015*. Bidders that do not do so, risk having their information disclosed without notice to them (Report A-2020-016).

[21] In the present case, the Third Party did not identify any information in its bid that might meet the confidentiality test, nor has it provided any evidence to our Office to support the assertion. Therefore neither part of the test in section 39(1)(b) has been met.

[22] The Third Party also argued that disclosure of its financial information would harm its competitive position within the meaning of section 39(1)(c). However, it is also clear in the jurisprudence that if a disclosure has the effect of simply increasing competition among bidders, then that does not constitute harm. Rather, increasing competition is considered to be a public good. (See Reports A-2020-029, A-2013-008.) If other contractors make use of access to information requests as a method of corporate intelligence-gathering to increase their competitiveness, as the Third Party asserts, that will only lead to greater public value and accountability for the expenditure of public funds. Therefore the third part of the test in section 39(1)(c) has not been met.

[23] The Third Party has argued that some other information such as signatures and certain contact information ought to be withheld under section 40 of *ATIPPA, 2015* (disclosures harmful to personal privacy). Normally a third party is only entitled to raise issues about which it has been notified under section 19, and in this case it was not notified of any section 40 personal information issues by the Town. However, personal information protection under section 40 has a unique status within *ATIPPA, 2015* such that our Office is compelled to consider a section 40 issue put before it, regardless of which party has raised it and regardless of where the burden of proof lies under section 43.

[24] Disclosure of the names of officers or others acting on behalf of the corporation, and their business contact information, is not normally considered an unreasonable invasion of privacy under section 40. Therefore that information may be disclosed. As for signatures, they are considered to be the personal information of individuals, but in certain cases, such as where the legal issue is whether a document has been properly signed, disclosure may be mandated, while in other cases disclosure will be prohibited. In the present case there does not appear to be any reason to require that signatures be disclosed. Therefore they should be withheld.

[25] Finally, the Third Party has asserted that it should be entitled to know the name of the applicant to whom its information is to be disclosed, in order to assess the harm that may result from such disclosure. However, the anonymity of applicants is an important principle of *ATIPPA, 2015*, and section 12 explicitly provides that the name and type of applicant is only to be disclosed to the individual who receives the request on behalf of the public body, and to certain others where it is necessary in order to process and respond to the request. Once requested information has been disclosed, it is impossible to regulate what an applicant may do with it, and therefore disclosure to the applicant must be regarded as disclosure to the world. A third party must assume that disclosed information may be known by all of its competitors, and govern itself accordingly.

[26] It is appropriate in the present case to say something about the Town's decision, under section 19 of the *Act*, to notify the Third Party of its intention to disclose the responsive records. Our Office has created detailed guidance on the application of section 19, and it has been dealt with in numerous reports. (See Reports A-2019-029, A-2019-026.) In short, if a

public body concludes that all three parts of section 39 apply, then it must withhold the information, and there is no need for a notification to the Third Party. If it concludes that any one part of the three-part test cannot be met, then it must disclose the information, and in this case as well there is no need for notification. It is only when, after a thorough review, the public body is unable to decide whether the test might be met, that it should notify the Third Party under section 19(5) of its intention to disclose the information.

[27] The submissions of the Town, explaining their decision to notify, make it clear that the Town acted contrary to the Act in doing so. The Town conducted an analysis under section 39, and reached essentially the same conclusions as we have, above, that not just one, but two parts of the test could not be met, and that the records therefore had to be disclosed. Yet the Town decided to notify the Third Party “...in the event that their interpretation differed from ours, or that they were privy to additional information regarding the matter that was not known to the Town.”

[28] In our view, considerations such as these might justify an informal consultation with a third party in the early stages of responding to an access request. However, as our guidance clearly states, “public bodies act contrary to ATIPPA, 2015 when they frustrate an applicant’s right to timely access by providing unnecessary notifications to third parties”. In the present case, the records at issue are tender documents that are routinely disclosed in response to access requests, the Third Party had not identified in its bid any information that it believed might be withheld under ATIPPA, 2015, and the Town had already concluded that two parts of the section 39 test could not be met. There was no justification for notification to the Third Party. The result is that instead of receiving records in response to the request within the statutory period of 20 business days, the Applicant has had to wait several months longer for a resolution of this complaint.

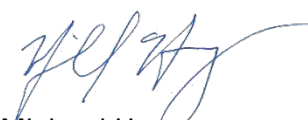
VI CONCLUSIONS

[29] In summary, our conclusion is that as both the second and third parts of the section 39 three-part test have not been met, the responsive records should be disclosed to the

Applicant, except for the signatures of individuals acting on behalf of the Third Party, which should be withheld under section 40.

VII RECOMMENDATIONS

- [30] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town of Paradise disclose to the Applicant the records responsive to the request, except for signatures of individuals acting on behalf of the Third Party.
- [31] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town of Paradise 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.
- [32] 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.
- [33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of October 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador