



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-035

September 2, 2021

Department of Fisheries, Forestry and Agriculture

Summary:

The Complainant submitted an access to information request to the Department of Fisheries, Forestry and Agriculture under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015”) seeking access to records regarding its solicitation of expressions of interest from new and existing aquaculture companies for a salmon farming development on the south coast of the province. The Department withheld the records under section 35(1)(d) (disclosure harmful to the financial or economic interests of a public body). The Complainant argued that the Department had not provided sufficient reasons for its application of this exception, and sought review of whether the section could be applied broadly. The Commissioner concluded that the section had been properly applied, but noted that the Department could have provided more clarity regarding its application in its final response to the Complainant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 17(1)(c)(i), and 35(1)(d).

Authorities Relied On:

NL OIPC Reports [A-2019-002](#), [A-2017-015](#).

I BACKGROUND

- [1] The Complainant made an access to information request to the Department of Fisheries, Forestry and Agriculture (the “Department”) under the *Access to Information and Protection of Privacy Act, 2015* (“ATIPPA, 2015” or the “Act”) for:

all responses received by the Department of Fisheries, Forestry and Agriculture (the “Department”) regarding its solicitation for Expression of Interest from new and existing aquaculture companies for the development of the “Bays West” area (west of Bay de Vieux) of the south coast of Newfoundland and Labrador.

- [2] The Department applied section 35(1)(d) to withhold the entirety of the responsive records.
- [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 Department submitted that the release of the names and responses of interested parties at this time would be premature and could result in harm to the financial interests of the province and, “interfere with the integrity of the procurement process.”
- [5] The Department noted that this request for expressions of interest was only the first part of a three-phase procurement process, which will subsequently involve a request for qualifications and a request for proposals. It argued that the release of this information at this stage may potentially lead to harm, as the process is still active until the final proponent is selected. Releasing such information at this time may lead to the parties involved in the process having access to information that could provide them with an unfair advantage when preparing for future phases of this process. It went on to note that, “the release of such information may lead to indirect influence on the review process that may jeopardize the project’s integrity,” and highlighted the strict controls in place to protect the confidentiality of the project and submissions, including a requirement that the parties only discuss the project

with the Department's project lead and non-disclosure agreements for project team members to protect the identity of the parties. The Department submitted that disclosure of the responses to the solicitation for expressions of interest at this time would be premature and could obstruct its ability to maintain confidentiality and to protect the project from undue influence.

[6] The Department also noted that were it to release the information in question at this stage of the selection process, it may offer insight to the competing parties on their competition and their competitors' proposals that may influence their own submissions. The Department gave as an example that another company could take proprietary information from the responses of other parties and include it in its own proposal, giving it an advantage.

[7] Finally, the Department noted that when it applied the exception to access, it had considered section 9 (public interest) and whether the public interest in the information outweighed the harm of its disclosure. Through its review, the Department concluded that upon awarding a contract to the successful party, that party would then need to apply for an aquaculture license before commencing work. Part of the license application process is a requirement for public consultations and, therefore, there would be an opportunity for the public to receive information about the project and to provide comments and raise concerns. Given this, the Department argued that in this instance section 9 did not outweigh section 35.

III COMPLAINANT'S POSITION

[8] The Complainant submitted that the Department had failed to provide any explanation of its decision to withhold pursuant to section 35(1)(d) of *ATIPPA, 2015* and, as a result, there was no basis on which to conclude it had properly applied the exception.

[9] The Complainant additionally queried whether section 35(1)(d) can be applied so broadly as to except even the names of the responding parties, the fact that they have actually submitted responses, and the number of responses that have been submitted.

IV DECISION

[10] The exception at issue is section 35(1)(d), which states as follows:

35. (1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose

....

(d) information, the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in significant loss or gain to a third party;

[11] This exception addresses premature disclosure or significant loss or gain to a third party and, therefore, a public body only has to demonstrate that one or the other applies. In this case, the Department only needs to establish that the information satisfies the first part of the sentence under subsection 35(1)(d). That is, that the information in question, if disclosed, “could reasonably be expected to result in the premature disclosure of a proposal or project.”

[12] The information sought here is on its face about an ongoing project. Disclosure would reveal the parties who have made submissions, the contents of their submissions, and the particulars of the project as outlined by the Department. Previous reports of this Office have noted that where the information in question is about an ongoing project or matter, the early release of such information could reasonably be expected to result in the premature disclosure of a proposal or project – see, for example, A-2019-002 and A-2017-015 – and we find the same here. As such early disclosure of information about this selection process could harm the integrity of the process, disclosure at this time can be properly described as ‘premature’.

[13] As noted above, the Department submits that it had considered the application of the interest override at section 9 and concluded that the exception still applies because the successful party will be required to conduct public consultations as part of their licensing application. This Office is satisfied that these public consultations would satisfy public interest concerns before any license is granted.

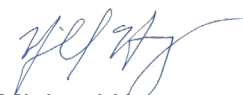
[14] Finally, the Complainant raised that the Department did not provide sufficient explanation regarding section 35(1)(d) in its final response to his access request. Section 17(1)(c)(i) of *ATIPPA, 2015* (content of final response for access) requires that public bodies not just cite the exception being applied, but also the reasons for the refusal of access. This Office agrees that the Department could, and should, have provided further details in its final response to the Complainant to better explain its application of section 35(1)(d). In future, the Department is encouraged to ensure that its final responses to access requests comply with section 17.

V RECOMMENDATIONS

[15] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Fisheries, Forestry and Agriculture continue to withhold the records in question in accordance with section 35(1)(d) of the Act.

[16] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Fisheries, Forestry and Agriculture 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.

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of September 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador