NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2005-003

Department of Health and Community Services

Summary: A Third Party received written notice from the Department of Health and Community Services ("the Department") as per section 28 of the *Access to Information and Protection of Privacy Act* (*ATIPPA*) advising the Third Party that a request had been received from an Applicant for access to records which, if disclosed, might affect the Third Party's business interests as described in section 27 of the *ATIPPA*. The record in question is a successful bid submitted by the Third Party for the supply of services to a particular group of persons in the general public. The Third Party initially advised the Department that it did not wish any part of the records to be released, but later agreed to release a portion of the record. The Public Body severed material which it believed should be withheld under the *ATIPPA*, and advised the Third Party that it intended to release the remainder. The Third Party then filed a Request for Review with the Commissioner. In its formal written submission, the Third Party agreed to the release of some additional portions of the record, with the exception of eight items. The Commissioner found that the Department had severed the record appropriately.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, Sections 2, 3, 7, 27, 30, 64. *Freedom of Information and Protection of Privacy Act, Nova Scotia*, Section 21. *Freedom of Information and Protection of Privacy Act, Saskatchewan,* Section 19.

Authorities Cited: *Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, Re, 1997 CarswellNS 236, 48 Admin. L.R. (2d) 184, (sub nom. Atlantic Highways Corp. v. Nova Scotia) 162 N.S.R. (2d) 27, (sub nom. Atlantic Highways Corp. v. Nova Scotia) 485 A.P.R. 27 (N.S. S.C.). Saskatchewan IPC Report No. 2005 – 003.

I BACKGROUND

[1] The Third Party received written notice on 2 February 2005 from the Department of Health and Community Services ("the Department") as per section 28 of the *Access to Information and Protection of Privacy Act* (*ATIPPA*) advising the Third Party that a request had been received from another party for access to records which, if disclosed, might affect the Third Party's business interests as described in section 27 of the *Act*. The record in question is a successful bid submitted by the Third Party for the supply of services to a particular group of persons in the general public.

[2] In a letter dated 7 February 2005, the Third Party initially advised the Department that it did not wish any part of the records to be released. On 21 February 2005, following discussions between the Third Party and the Department, the Third Party sent further correspondence to the Department agreeing to release a portion of the record, but maintaining its objection to the release of other sections and/or page numbers. In doing so, the Third Party relied on section 27(1)(a)(ii), (b), and (c)(i).

[3] The Department severed material which it believed should be withheld under sections 27 and 30, and on 23 February 2005 advised the Third Party that it intended to release the remainder. In this correspondence, the Department stated that some of the material that it intended to release had been specifically requested by the Third Party to be exempt from disclosure. Regarding the material which it intended to release, the Department advised the Third Party that:

> *The applicant is being denied access to parts of the record in accordance with:*
>
> *a) section 27 of the Access to Information and Protection of Privacy Act (ATIPP) whereby the information is of a commercial nature, was provided to government in confidence and it can reasonably asserted [sic] that the release of the information would harm the competitive position of [Third Party], and*
>
> *b) section 30 of ATIPP whereby personal information cannot be disclosed.*

[4] On 18 March 2005 the Third Party filed a Request for Review with this office under section 43(2) of the *ATIPPA*, in which it requested that "… the information be withheld based on the fact that the information combined in the format supplied in the tender will give others unfair

information." The information referred to is that portion of the record which the Department intended to release which the Third Party wished to have severed.

[5] The Department was notified of this Request for Review in correspondence dated 21 March 2005, and was asked to provide my office with the appropriate documentation and a complete copy of the responsive records for review. The requested documentation and records were received at this office on 23 March 2005.

[6] Attempts to resolve this Request for Review by informal means were unsuccessful. On 12 April 2005 the Third Party and the Department were notified that the file had been referred to the formal investigation process. In response, both parties provided written submissions in support of their respective positions.

II DEPARTMENT OF HEALTH AND COMMUNITY SERVICES' SUBMISSION

[7] In its written submission dated 20 April 2005, the Department makes several comments in support of its position on this matter. The Department says that this request was considered from the perspective that:

> *Section 3 of the Access to Information and Protection of Privacy Act provides the overriding purpose of the legislation to allow access to records held in the custody or control of a public body, subject to limited and specific exceptions.*

[8] Furthermore, the Department points out that it has identified "a number of passages in the tender document that should not be disclosed to the requester." Two types of information are described as not being appropriate for disclosure under the *ATIPPA*, one being personal information, as per section 30, and the second being information which, if released, could reasonably be expected to harm the competitive position of a third party, as per section 27.

[9] The Department quotes from section 2(o) of the *ATIPPA* which defines personal information as "recorded information about an identifiable individual…" The Department further states that "pursuant to section 30 of ATIPP, personal resume information, passages identifying individual professional credentials/work experience and client listings were severed from the document."

[10] The Department also explained its position on the other portions of the record which it believes should be severed. The Department notes that section 27(1) of the *ATIPPA* provides a three part "harms test" which should be used to determine whether the disclosure of a record could reasonably be expected to harm a third party.

[11] In determining that some of the material should in fact be severed from the record, the Department explains that:

> *The tender document in question formed the basis for awarding a contract to the third party, which will expire later this year, although it can be renewed for a further two years. Given the potential for tenders to be again called later this year, it was determined that the financial information and internal proprietary policies and procedures contained in the tender document, if disclosed, could harm the competitive position of the third party. As such, all financial data and internal proprietary policy or procedural information was severed.*

[12] The Department states that the Third Party did not object to the items to be severed, but the Department also notes that the Third Party wishes further items to be severed as well. The Department specifically notes the continued area of disagreement, and states that:

> *We do not believe that the substance of the information noted above will in any measurable way cause harm to the competitive position of the third party if disclosed to the requester nor will it result in undue financial loss or gain to any person. We contend that the information listed is so general in nature that it could not be considered proprietary.*

[13] Finally, the Department acknowledges the concern expressed by the Third Party that even though much of the information which remains in dispute is within the public domain, "the format of the document will give unfair advantage to others who are competing for contracts and that the disclosure would be contrary to ATIPP." The Department disagrees and requests that "the severed document, as presented to your office on 23 March 2005, should be disclosed to the requester at the earliest opportunity."

III THIRD PARTY'S SUBMISSION

[14] On 22 April 2005 the Third Party forwarded its submission to this office, in which the number of items it wished to have severed was significantly reduced, leaving eight outstanding records.

The Third Party takes the position that "the amount of information to be released goes beyond the intent of the Freedom [sic] of Information and Protection of Privacy Act." Essentially, the argument presented by the Third Party acknowledges that much of the information intended for release by the Department is available to the public through various sources, but "we continue to feel that the information combined in the format supplied in the tender will give others unfair advantage in competing for contracts …" The Third Party therefore requests that the information to be released "be more limited due to the negative impact such a release would have on our organization's operations."

[15] The Third Party states in its letter of 22 April 2005 that they have further reviewed the document, and have outlined a number of sections and/or page numbers which they feel could be disclosed, as well as some which they do not wish to be disclosed, accompanied by their rationale for each. In previous correspondence to this office dated 15 March 2005, the Third Party contends that the items it does not wish disclosed should be withheld under section 27(1)(a)(ii) and (c)(i). The Third Party also argued that releasing the names of individuals serving on its board of directors would constitute a disclosure of personal information. Personal information is defined in section 2 of the *ATIPPA* and exceptions are outlined in section 30 as indicated below.

IV DISCUSSION

[16] Section 2(o)(i) of the *ATIPPA* comprises part of the definition of personal information:

> *2. In this Act*
>
> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number*

[17] Section 3 of the *ATIPPA* sets forth the purposes of the *Act*:

> *3.(1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*

> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*

[18] Section 7 establishes a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions:

> *7.(1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[19] Section 27(1) is a mandatory exception which establishes a reasonable expectation of harm to the business interests of a third party. If a record is deemed to fall within this exception, a public body is required to withhold the relevant record or sever it from a document to be released:

> *27.(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 organization, 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.*

[20] Section 30(1) establishes a mandatory exception to disclosure of personal information, but sets out exceptions where this does not apply, including 30(2)(d):

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*
>
> *(2) Subsection 1 does not apply where*
>
> *(d) an Act or regulation of the province or Canada authorizes the disclosure*

[21] In accordance with section 64(2) the burden of proof rests with the third party:

> *64. (2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

[22] As indicated above, when a Third Party files a Request for Review under the *ATIPPA* claiming that an Applicant has no right to a record or part of a record, the burden of proof lies with the Third Party. This Review, then, will determine whether the exceptions claimed by the Third Party are applicable in the case of the eight records in question. If the Third Party is able to prove its case for any of the eight records, I will find that its case is well-founded, and recommend that the Department reconsider its position on those particular records. Otherwise, I will advise the parties that the case of the Third Party is not well-founded and I will recommend that the Department release the records as it had planned to do.

[23] I will now examine the records in light of the exceptions claimed by the Third Party. The records at issue are part of the successful bid submitted to the Department by the Third Party, including schedules and appendices. A number of sections and pages were severed by the

Department, but the Third Party believes that additional severances are warranted. The items which remain are listed and discussed below:

- *Records 1 & 2 : Lists of the names of the Third Party's Board of Directors and the names of the community organization with which they are each affiliated.*

[24] The Third Party believes this information should not be released. The Department points out that as a legally incorporated body, the names of the Board of Directors are already publicly available.

[25] Section 2(o) defines personal information, and this definition includes "an individual's name." Some access legislation, such as Nova Scotia's *Freedom of Information and Protection of Privacy Act*, uses a "harms test" to determine whether disclosure of personal information, (a person's name, for example), would be an unreasonable invasion of the third party's privacy. Instead of taking this route, the *ATIPPA* contains specific exceptions, and only these exceptions can be used to justify the release of personal information. The Department has confirmed that it believes that Section 30(2)(d) would apply in this case, because the Third Party is a legally incorporated entity, and under the *Corporations Act*, the names of Boards of Directors are to be publicly disclosed. I am satisfied therefore that the names of the Board of Directors of the Third Party are already publicly available as authorized by the above-noted *Act* and should not therefore be severed.

[26] In this list, each board member is listed along with their affiliation to a particular organization. Under most similar circumstances, I would consider the name of the organization to be "information about an identifiable individual" as defined by Section 2(o), but not in the case of this particular Third Party. According to the Articles of Association which forms part of the document in question and is intended for release by the Department, the membership of the Board of Directors of the Third Party is comprised of "one member appointed or elected from each active member association." So, in fact, the organizations listed are not simply personal volunteer commitments of the individual members, but the organizations themselves are part of the Board of the Third Party, and as such, these organizations, in effect, collectively submitted the successful bid which contains the records at issue. In this case, therefore, the names of the organizations are not the personal information of the Board members.

- *Record 3: Lists the professional and educational qualifications of persons who are available to provide services on behalf of the Third Party as described in the document.*

[27] No names are given, nor are specific graduating class years or schools mentioned in this particular item. The Third Party, however, feels that such a list of qualifications, even without reference to specific people, will, within the small community served by the Third Party and Applicant, allow the Applicant to determine the names of those individuals whose qualifications are listed. Although educational status is considered to be part of a person's personal information, in order for it to apply to this circumstance, it must refer to "an identifiable individual." With no names attached to the educational status, there is no reasonable basis to assume that people will be able to correctly determine the names of people from looking at a list of professional and educational qualifications of persons who are available to provide services on behalf of the Third Party. The type of qualifications listed would be typical of individuals engaged to provide the type of services in question, and, other than the general assertion that the names could be deduced from the list of qualifications due to the small number of persons in the community served by the Third Party, no specific evidence was submitted by the Third Party to prove that the name of an individual can definitively be identified through this method.

- *Record 4: A list of community organizations with which the Third Party says it has "links."*

[28] The Third Party says divulging this list of organizations, even though they are publicly known, will give the Applicant an unfair advantage, because this may help them decide to build such contacts themselves, which the Third Party feels will assist the Applicant in competing with the Third Party.

[29] I am inclined to agree with the Department that Record 4 is quite general, and no evidence was presented by the Third Party as to what was meant by "links." Presumably, any non-profit or public agency would be available to members of the general public or particular groups for advice and input. What relationship this would have to any harm to the Third Party has not been established. The particular community organizations named in the list are all widely known, and perhaps more so among the community served by the Third Party, leading me to conclude that the disclosure of this list does not involve any significant harm to the Third Party.

- *Record 5: An eight-point description of how the Third Party will determine whether a consumer is eligible to receive its services.*

[30] The Third Party states that this section details "in a very clear way how our organization operates the service. By supplying this information, you are giving a potential competitor unfair advantage in the process."

[31] Any organization providing a service of the type offered by the Third Party must have some method of determining who is eligible to receive the service and who is not. This is a fairly straightforward process. It is also worth noting that if the Third Party is providing a service to members of the public who require it, I think it is reasonable to suggest that a member of the public should be able to contact the Third Party to inquire as to how their application for service would be assessed. This appears to be information which a consumer would be able to obtain directly from the Third Party, and in any case, it is not a particularly complex or unusual approach to assessing eligibility for such service. I see no likelihood of significant harm in the release of this information.

- *Record 6: A short section stating how the Third Party intends to advise the public of the availability of its services, and that individuals contracted by it to perform these services will be available to be contacted through a variety of means.*

[32] The Third Party simply states that this is internal information and does not wish it to be released.

[33] Presumably any party who obtains a contract from the government to provide services has to, in some way, inform the public that it has these services on offer, and also to inform the public who to contact and how to contact them in order to avail of the service. The description at issue is nothing more than a common-sense approach to this task which any organization in the position of the Third Party would have to undertake. I can see no significant harm resulting from the disclosure of this record.

- *Record 7: A list of appendices and schedules to the document.*

[34] No argument is presented by the Third Party as to why this should be severed.

[35] It is unclear why the Third Party finds the release of this list to be objectionable. In its submission to this office of 22 April 2005 the Third Party did not object to the decision of the Department on which appendices and schedules are to be severed and disclosed, so releasing the list itself would really be quite harmless.

- *Record 8: Two sentences which refer to payment of expenses for persons providing services on behalf of the Third Party.*

[36] The Third Party argues that their "method of payment of travel, accommodations and out of pocket expenses is internal to the organization and should not be disclosed to possible competitors." No specific dollar amounts are noted with respect to these above items, therefore no significant harm can be predicted from the release of this record.

[37] Records 1, 2, and 3 are discussed above in relation to "personal information," as defined in the *ATIPPA*. I have determined that none of these three records should be severed under Section 30. Records 4, 5, 6, 7, and 8 cannot be viewed as personal information, so that exception would certainly not apply. I must therefore consider whether the exception outlined in Section 27, as identified by the Third Party, would be relevant.

[38] Section 27(1) and similar sections in other access legislation is considered to be a three-part "harms test," as established in *Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, [1997] N.S.J. No. 238 (N.S. S.C.). In that decision, Kelly, J at paragraph 29 set out this three-part test with regard to Section 21 in Nova Scotia's legislation:

> *(a) that disclosure of the information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;*
>
> *(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and*
>
> *(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).*

[39] Note that all three parts of the test must be met in order to sever a record. It should also be noted that Nova Scotia's 21(1)(c) is identical to Newfoundland and Labrador's 27(1)(c) except the

ATIPPA adds a fourth injury in relation to the release of information in a report which has been completed by a person or body appointed to resolve a labour relations dispute, which in any case is irrelevant to the present matter.

[40] The other "injuries" listed in 27(1)(c) describe a set of conditions where the release of information "*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 organization.…*

[41] By way of further illustration, one of the injuries set out in 27(1)(c) of *ATIPPA* requires the Third Party to clear a higher threshold than the injuries set out in Saskatchewan's legislation. Saskatchewan's *Freedom of Information and Protection of Privacy Act* does not require a disclosure to "harm significantly the competitive position…" of a third party in order to justify severing a record, as the *ATIPPA* does. Instead, the language is: "information, the disclosure of which could reasonably be expected to … prejudice the competitive position of … a third party." Even so, the Saskatchewan Commissioner, in Report 2005 – 003 recently ruled in favour of disclosure in a case with a similar set of facts as the one currently before me.

[42] Again, all three parts, that is, a, b, and c, must be met in order to meet the harms test. If a record fails to meet even one of the three parts, it does not meet the test, and there is no argument to sever the record from disclosure. In my discussion above, I have reviewed the records with a particular view to the notion of a reasonable expectation of harm as outlined in part c of the harms test. In each case, I have found that there is no reasonable expectation of harm in relation to the disclosure of records 4, 5, 6, 7, and 8. I find that there is therefore no reason to consider the other two parts of the harms test, because clearly one of the three parts cannot be met. Once again, as stated above, I also do not feel that items 1, 2 and 3 qualify for exceptions as personal information.

VI RECOMMENDATIONS

[43] Under authority of section 49(1) of the *ATIPPA*, I find that the case of the Third Party is not well founded with respect to the eight records described above and I hereby recommend that the Department of Health and Community Services release to the Applicant the records as it had originally planned provided that no appeal to the Trial Division is filed within the prescribed time period by the Third Party.

[44] Under authority of section 50(1) I direct the head of the Department of Health and Community Services to write to this office and Third Party within 15 days after receiving this report to indicate the Department's final decision with respect to this Report. Section 49(2) provides that the Third Party has a right to appeal the decision of the Department to the Trial Division under section 60 within 30 days of receiving said correspondence from the Department. No records should be released by the Department until the expiry of this time limit. If the Third Party fails to file an appeal within 30 days of receiving the decision of the Department, the Department should then release that portion of the document which it had originally intended to release, including the eight records listed in this report.

[45] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of June 2005.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador