



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-009

June 4, 2013

Memorial University of Newfoundland

Summary:

The Applicant requested records from Memorial University pertaining to Memorial University Tender TFS-009-11, specifically 2 lists of items (one list for contract items and one list for non-contract items) purchased from a Third Party for the period from July 1, 2011 to June 30, 2012 to include the product number, item description, quantity purchased, unit of measure, price charged, and total extended value per item. Memorial denied access to the information on the basis of section 27(1)(c) (business interests of a third party). The Commissioner found that the burden of proof under section 64(1) had not been met by Memorial and recommended release of the information.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. 2002, c. A-1.1, as amended, s. 27(1)(c), s.64.

Authorities Cited:

Newfoundland and Labrador OIPC Report A-2013-008; Saskatchewan OIPC Report 2005-003.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated August 29, 2012 to Memorial University of Newfoundland (“Memorial” or the “University”). The request sought disclosure of records pertaining to Memorial University Tender TFS-009-11, specifically:

...a list of contract items purchased from [Third Party] for the period from 1 July 2011 to 30 June 2012 to include the product number, item description, quantity purchased, unit of measure, price charged, and total extended value per item.

...a list of non contract office supply items purchased from [Third Party] for the period from 1 July 2011 to 30 June 2012 to include the product number, item description, quantity purchased, unit of measure, price charged, and total extended value per item.

- [2] On November 5, 2012, Memorial informed the Applicant that it was refusing access to all records under section 27(1)(c) of the *ATIPPA* and notified the Applicant of his right to seek a review by the Information and Privacy Commissioner of this refusal of access. In a Request for Review received at this Office on November 7, 2012, the Applicant asked that this Office review Memorial’s decision.

- [3] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated January 23, 2012, the Applicant, Memorial and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* (“*ATIPPA*”). As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

II PUBLIC BODY’S SUBMISSION

- [4] Memorial notified this Office on February 6, 2013 that it did not intend to provide a submission on this matter.

III APPLICANT'S SUBMISSION

[5] The Applicant provided a lengthy and detailed submission, which first addressed the principle of accountability, which is one of the underlying purposes of the *ATIPPA*. The Applicant believes that Memorial should be made accountable for the administration of the office supplies contract awarded to the Third Party. The Applicant has concerns about the purchases made by Memorial from the Third Party as a result of information he has concerning fiscal year 2010. From that information, he found over 70 instances where identical products with identical product numbers were purchased at a price that was more (and in many cases, several times more) than the contract price. Further, the information also revealed over 50 instances where equivalent items were charged at “drastically higher prices” (for example, the Third Party’s own brand of rubber bands was on contract for around \$0.33, but many packages of a national brand were actually purchased by Memorial at a cost of \$1.93 – the products are “virtually identical”).

[6] The Applicant, who is also involved in the office supplies industry, states that based on his familiarity with the products at issue, the Third Party’s tendered prices were substantially below cost and would represent losses of \$100,000.00 on contract items. The Applicant advised that the Third Party (including its predecessor companies) has had Memorial’s business uninterrupted for almost 30 years, and that the practice at Memorial has always been to purchase all non-contract items from the Third Party who has the contract. The Applicant submits that for the Third Party to offer such low prices on tendered items, one or a combination of the factors below are at play:

- the list of items tendered does not accurately reflect the anticipated purchases for the period of the contract
- not all of the contract items will be supplied at the contract price
- contract items will be substituted with equivalent items at higher prices
- non-contract items will be charged at prices that will offset losses on the contract items.

[7] The Applicant sets this out as part of his argument that Memorial needs to be held accountable for its expenditure of public funds. The Applicant notes that the manner in which the award of the tender was announced on Memorial’s website was changed. Previously, Memorial employees were just notified of the successful bidder. Now, the announcement specifies that Memorial is only obligated to purchase contract items from the successful bidder and that for items not on the

contract, they should seek competitive bids from three named acceptable bidders. However, when the Applicant contacted Financial and Administrative Services at Memorial, he says he was advised that Memorial could not provide a list of people authorized to purchase office supplies, and when he contacted individual departments, he discovered that departments were not notified who won the tender and were not notified that competitive quotes were encouraged for non-contract items (staff were expected to check the website). Further, he says he was told that departments were not supplied with a list of the contract items and therefore could not determine which items were not on contract in order to solicit competitive quotes, and that despite their solicitations, the Applicant's company had yet to receive a single request for competitive pricing as directed by the website posting. As the Applicant points out, the *Public Tender Act* requires government funded bodies to obtain three quotes from suppliers or establish a fair and reasonable price by reference to catalogues, price lists or another manner that the body thinks is advisable.

[8] The Applicant then went on to argue that in any event, the incumbent supplier has a competitive advantage in that it knows exactly what items and how many of each (contract and non-contract) are supplied. He argues that if harm is equated with reduction in the competitive advantage by sharing this information with competitors then the legislation is flawed. He further submits that even with the knowledge of non-contract purchases the Third Party will still have a significant competitive advantage as follows:

- 1.) *As the incumbent supplier [Third Party] will have precise knowledge of the pattern of MUN's purchase of contract items. It may be that large one time purchases of items that are not likely to be repeated could influence a very low price where it is expected that future purchases are likely to be lower. There could also be a pattern of growth where future purchases will likely be higher than the tender quantity influencing a very high price. It is noteworthy that despite [Third Party's] predatory bid process they were not the lowest bid on 142 of the 495 items.*
- 2.) *Units of measure are also an issue where an incumbent has an advantage. An example from the last tender would be rubber bands where the quantity was listed as combined quantity of 1048 for 3 types. The unit of measure was listed as a carton of 40 packages. The list of 2010 purchases revealed that MUN purchased approximately 1000 packages rather than cartons of 40. [Third Party] was the only bidder that could know that. Similarly with 3x5 yellow post-it notes the tender quantity was 139 packages of 12. The 2010 purchase list revealed that MUN purchased 135 individual pads and 4 packages of 12 for a total of less than 12 packages of 12 rather than 139. It is noteworthy that [Third Party's] current contract price for the package of 12 is \$2.52. We bid \$14.50 and [another company] bid \$12.96. [Third Party] bid with the knowledge that MUN would not likely be purchasing the quantity requested. It is also noteworthy that [Third Party's] current catalogue price is \$8.99 per pad or \$107.88 for a package of 12 pads.*

- 3.) *As the supplier of MUN's office supplies uninterrupted for almost 30 years [Third Party] also are aware of MUN's internal processes such as controls that are in place to ensure that the proper contract prices are charged and that substitutions are permitted. Appendix 1 & 2 attached are examples of what occurred in 2010. [These appendices show that some contract items were supplied at a price many times higher than the contract price for that item, resulting in apparent overcharges of \$8636.87 and that in some cases an item was supplied at a higher price when there was an equivalent item available at a lower price, which cost the University \$9971.41]*
- 4.) *Should someone other than [Third Party] be awarded the contract there is the risk that not all of the non-contract items will be purchased from the successful bidder, the current award encourages competitive quotes and with the long history of dealing with MUN [Third Party] may be more successful in getting opportunities to quote on non-contract items. The opportunity to make up losses on the contract with 100% of the non-contract is less certain for a new supplier giving [Third Party] another competitive advantage.*

It is obvious to us that the playing field will never be leveled and the information we are requesting will not cause harm to [Third Party] in subsequent bids. In any event our primary interest in the information is not to assist us in subsequent bids but rather to make MUN accountable for its expenditures of public funds and improve its procurement practices for non-contract items for the benefit of MUN and the public.

[9] In summary, the Applicant indicated that in meetings his company has had with Memorial, they

...sensed an attitude of indifference and unwillingness to make changes. Office products are not considered important in terms of the overall budget of the university. The tender is undertaken reluctantly and not carefully planned. The term of three years with an option for another two is unheard of in other public body tenders and means that MUN will not have to undergo this process for potentially another five years.

The information we have requested will allow us to evaluate the administration of the office supplies contract to continue to make representations to MUN administration for changes in current practices for the overall benefit of MUN and the public. We strongly believe that accountability far outweighs any perceived third party harm.

IV THIRD PARTY'S SUBMISSION

[10] The Third Party, in its submission, argues that releasing all the pricing information for all items sold to Memorial would harm them because this information would allow a competitor to understand their exact price point on a substantial number of the products they sell. This would allow the competitor to create a database of the Third Party's pricing and then lower its prices just

enough to undercut the Third Party as opposed to offering its best price. The Third Party argues that competitors would use the information to deter business away from the Third Party with respect to existing customers and would be given an unfair advantage in competitions to win future business.

[11] The Third Party further states that if a competitor were to obtain the discount pricing offered to Memorial University, it would be at risk of losing approximately \$917,240.00 worth of business, taking into consideration both their non-contract sales to Memorial and the government in general. The Third Party states that Memorial does not have centralized purchasing and is not bound to purchase its non-contract products from the Third Party, so if a competitor received their pricing data, they could call upon the various purchasing offices within the university and take away the Third Party's business. With respect to the Third Party's non-contract sales to the government, as the government is required to obtain three quotes and then choose the lowest quote, it argues that again a competitor could use that information to undercut the Third Party.

[12] The Third Party also submits that there is harm to its competitive position as they argue that there a danger that if a competitor acquires its pricing information that it will gain an unfair advantage when responding to an upcoming bid request from another public body, estimated at \$120,000 annually. The Third Party also states that it has invested resources to develop the Newfoundland market by hiring sales representatives, and building a new 50,000 square foot distribution center. The Third Party is concerned that these investments will be jeopardized by the disclosure of information that will be used to harm its competitive position.

[13] Finally, the Third Party argued that the information could be used to its detriment outside the Newfoundland market, as competitors are often part of supplier networks and as such, the information disclosed in this case could be shared throughout Canada.

VI DISCUSSION

[14] In this case, the requested information has been withheld under section 27(1)(c) which reads as follows:

27. (1) *The head of a public body shall refuse to disclose to an applicant information that would reveal*

[...]

- (c) *commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
 - (i) *harm the competitive position of a third party or interfere 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 significant 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.*

[15] As most recently canvassed in Report A-2013-008, in order to satisfy the burden of proof when claiming section 27(1)(c) to withhold information, there must be a reasonable expectation that the consequence alleged will occur. Detailed and convincing evidence is required in order to prove this reasonable expectation. This means that when there is a claim of section 27(1)(c)(i), the evidence must establish a reasonable expectation of probable harm, which requires a risk of harm that is beyond merely possible or speculative. Further, following the test used in Saskatchewan in Report 2005-003, there must be a clear cause and effect relationship between the disclosure and the alleged harm, the harm must be more than trivial or inconsequential, and the likelihood of harm must be genuine and conceivable. Similarly, if a claim of s.27(1)(c)(ii), (iii) or (iv) were made, there would also need to be detailed and convincing evidence that shows that results contemplated by these subsections is more than merely possible or speculative.

[16] Memorial made no formal submission to this Office. The burden of proving that section 27 is applicable to the information at issue is Memorial's. As I stated in Report A-2013-008:

[27] When a public body receives a request for information and believes that section 27 might be applicable and notifies the third party of the request, if the third party does not want the information released, it should be able to present a convincing argument to the public body. Because it bears the burden of proof under section 64, the public body needs information and evidence on which to base its claim of section 27. If such convincing evidence is not provided, then the public body should not claim section 27, and instead notify the third party that it intends to release the information. Then, if the third party still objects to the release of the information, then the third party can submit a Request for Review to this Office objecting to the decision of the public body to release the information. Until such review is concluded, the public body cannot release the information, and the burden of proof is

then transferred to the third party, who, in reality, is in the best position to make the argument and provide the required detailed and convincing evidence.

[17] As Memorial submitted no evidence, it has failed to meet the burden of proof, and as such, no further discussion is actually required in order to dispose of the matter. However, the Third Party did provide a submission on this Review and I must consider whether any of the arguments or evidence presented by the Third Party would support Memorial's decision to refuse access, thus meeting the burden of proof on Memorial's behalf.

[18] The Third Party's submission focused on s. 27(1)(c)(i) and (iii), and made no mention (express or implied) of reliance on any other subsection of s.27. Further, it is not apparent on its face that these other subsections apply and as such, I will not consider subsections (ii) and (iv).

[19] The Third Party expressed concerns that disclosure of this information could be used outside the province to cause harm to the Third Party. Aside from this bare assertion, the Third Party offered no evidence to support this claim. Undoubtedly, each market, and indeed each entity that calls for tenders, is unique in its needs, and its purchasing power and habits (just to name a few relevant factors), such that knowing the prices charged to Memorial by the Third Party would likely be of little use to a competitor operating in that completely different market. The prices charged here would certainly not translate equally to another market and the Third Party has failed to show how knowing the prices charged to Memorial could be used in a different market by a competitor to reasonably guess what the Third Party might bid in that market.

[20] The Third Party also stated its concern that investments it has made in the Newfoundland market will be jeopardized, as they feel disclosure of the information will lead to a loss of contracts in the future. This concern appears speculative at best as I am not convinced that disclosure of the information would lead to a loss of the contract in a future bid. I also have no information before me with respect to how heavily this particular contract weighed in the Third Party's decision to make these investments (presumably the Third Party does business with many other public and private entities in Newfoundland which would also factor into a decision to make investments in the Newfoundland market). Nor was I given any information about the Third Party's reliance in general on public sector contracts. All of this information would be necessary in order to properly evaluate such a claim.

[21] As one of its main purposes, access to information legislation is meant to promote accountability and transparency. The information submitted by the Applicant goes to the heart of this matter. Public bodies are spending public funds and the public should be able to know how those funds are being spent. The public should be able to “check up on” a public body to ensure public funds are spent in a fiscally responsible manner. This is how public bodies are made accountable. If the information is available and someone asks for it and finds something questionable, then the leadership of the public body has to account for that. If the information is not available, there is no transparency and there is also no accountability for the spending. Publication of the overall bid amount is fine, and does go some way in ensuring accountability and transparency (by ensuring that the lowest bid is the winning bid) but if the actual prices that are being paid by the public body are not in line with prices set out in a bid then there is a problem – one which may never come to light if the actual purchases of a public body are shielded from disclosure by section 27.

[22] The Legislature recently amended section 27 through Bill 29 with a view to further protecting third party business interests, including financial interests, and my role is to ensure that legislation is complied with. Pricing information is clearly financial information and the Third Party’s main argument is that the information requested might allow a competitor to gain some insight into the exact pricing strategies of the Third Party. If this information was collected over a period of years, then a competitor may start to see trends in the purchasing patterns, allowing them to tailor their bid in the same way that they allege the Third Party does now (i.e., offer an extremely low price on items that are not purchased in great quantities, thus helping to keep the bid low but minimizing financial loss and then making up losses on non-contract or big ticket items, which may be purchased at predictable intervals). Absent access to the requested information, this is knowledge that only an incumbent supplier would have. This information would, in theory, allow a competitor to match almost exactly the pricing of the incumbent, and undercut the Third Party the next time a tender is called. This is not a hard argument for the Third Party to make; on its face, it is fairly self-evident, and would seem to fall squarely within the exception set out in section 27(1)(c)(i). In turn, if the Third Party is undercut on a future tender, it stands to lose a lucrative contract, resulting in the loss (or gain, in terms of someone else winning the contract) contemplated by section 27(1)(c)(iii).

[23] However, the analysis does not end here. There are several other relevant factors which must be considered. The first is the length of the contract. This contract was just awarded this year and is for

three years, with an option to renew for two more. As the Applicant points out, it may be five years before Memorial has to go through this process again and five years before there could be any potential harm to the Third Party with respect to contract items. Any number of factors (i.e. market changes, changes internal to the Third Party and other competitors or changes within Memorial that may affect its purchasing) could change in that period of time to make this information inapplicable or unhelpful when it comes time to submit a new bid. Further, the factors that play a role in determining the price a company can realistically bid on any given contract are also unique to each company and changeable over time, and the prices that are ultimately bid reveal nothing about these factors. All of these variables certainly affect the clarity of any alleged cause and effect relationship as well as the likelihood of harm or significant loss (or gain to someone else) being genuine or conceivable.

[24] Secondly, it is my understanding that with respect to non-contract items (which arguably, because Memorial is not bound by contract to purchase these from the Third Party, are more “at risk” in terms of competition) the price is based on current list prices. The Third Party, in its bid, offered one discount for list prices and a different discount for market/net priced items. The Applicant is aware of the amount of these discounts, so if he wanted to know the prices the Third Party was charging for these items, he could easily figure it out, as the current Third Party catalogue is available online. I realize that this option may be unique to the Applicant due to his prior knowledge, but the Applicant has also presented evidence that his company’s prices, at the discount they offered to Memorial, are already lower than those of the Third Party (for at least some products). This is evidence that the release of this information will not harm the competitive position of the Third Party, as there are lower prices already available to Memorial with respect to these non-contract items which the Applicant says Memorial is not availing of. This certainly alters the cause and effect relationship between the disclosure and the harm or loss and reduces and perhaps even nullifies any notion that the likelihood of harm or loss is genuine and conceivable. Further, the Applicant states that despite his lower prices and despite his solicitations to Memorial his company has not been asked for a single quote on non-contract items. This further weakens the reasonable expectation of probable harm to the Third Party’s competitive position (s.27(1)(c)(i)), and also the likelihood of the Third Party incurring significant financial loss or someone else accruing significant financial gain (s. 27(1)(c)(iii)).

[25] Last, but certainly not least, we cannot lose sight of the purpose of the *ATIPPA* in general and the purpose of section 27 in particular. The accountability of public bodies is one of the core purposes of the *ATIPPA*. Section 27, which recognizes the need, in some cases, to protect certain third party information, must balance the notion of accountability with the principle that third parties should not be harmed. Section 27 should not be interpreted in such a way that it acts as a shield against competitive bidding, nor should it be used by a third party to maintain an unfair advantage over other bidders. I interpret “harm to competitive position” to mean actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process which is transparent to the public and supports the accountability function that underlies the purpose of the *ATIPPA*. Contracts with public bodies require greater transparency than those with private sector entities, this is simply a “cost of doing business” with public sector entities.

[26] Asking a public body to disclose how much it pays for the goods and services purchased from a third party simply fulfills the accountability purpose of the *ATIPPA*. Prior to Bill 29, this type of information was available and it should still be available post Bill 29. Asking a third party to disclose, for example, how much it pays to obtain the goods they sell, how they decide what price(s) to bid or how it produces or manufacture its products would be unfair. These are some types of third party information that I believe section 27 is intended to protect, not the prices paid by a public body to procure goods and services.

VII CONCLUSION

[27] Memorial did not submit any evidence to establish a reasonable expectation of probable harm or significant financial loss (or gain to someone else) should the information at issue be disclosed. As such, it has failed to meet the burden of proof as set out in section 64(1). The submission filed by the Third Party also failed to establish that the requested information must be withheld under section 27(1)(c). Therefore, I find that section 27(1)(c) is not applicable to the requested information, and it should be released to the Applicant.

[28] If Memorial was not prepared to make the argument that section 27(1)(c) was applicable or did not have the necessary evidence to make the argument, its decision should have been to release the information and notify the Third Party of this decision. Then, if the Third Party objected to disclosure, it could have submitted a request for review to this Office and the burden of proving the exception applies would have shifted to the Third Party under section 64(2).

VIII RECOMMENDATIONS

[29] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Memorial release to the Applicant the information that was withheld under section 27.

[30] Under the authority of section 50 of the *ATIPPA*, I direct the head of Memorial to write to this Office, the Applicant and the Third Party within 15 days after receiving this Report to indicate the final decision of Memorial with respect to this Report.

[31] Please note that within 30 days of receiving the decision of Memorial under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of June 2013.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador