



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2014-013

December 12, 2014

Memorial University of Newfoundland

Summary:

The Applicant requested from Memorial University copies of all submitted bids with respect to tender TFS-020-14. Memorial was prepared to release the information requested, however a Third Party objected and filed a Request for Review with this Office. With respect to section 27, the Commissioner found that the burden of proof under subsection 64(2) had not been met by the Third Party and recommended that the information be released.

Statutes Cited:

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

Authorities Cited:

Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, 2014 NLTD(G)107. Newfoundland and Labrador OIPC Reports A-2013-008, A-2014-008.

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 June 13, 2014 to Memorial University of Newfoundland (“Memorial” or the “University”). The request sought disclosure of records pertaining to Memorial University Tender TSF-020-14, specifically:

Re Memorial’s tender TFS-020-14 for Office supplies we would like a copy of all the submitted bids (with the exception of [named company’s] bid). We want the copies to include all of the items bid with unit prices of each item. We would like Schedule B of the submitted bids to be in Excel spreadsheet format.

- [2] On August 4, 2014, Memorial informed the Applicant that it had decided to disclose the records to the Applicant, but in accordance with section 28 of the *ATIPPA*, Memorial had notified the affected third parties (the other companies that submitted bids). One of the companies consented to the release of its bid, and that information was provided to the Applicant. The other Third party did not consent and it filed a Request for Review with this Office on August 21, 2014 asking that this Office review Memorial’s decision to disclose the information to the Applicant.
- [3] Attempts to resolve this Request for Review by informal resolution were not successful, and by letters dated October 27, 2014 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) *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 provided a detailed submission wherein the relevant case law and previous decisions from this Office were relied on in support of their position that the Third Party had not met the burden of proof (required under section 64 of the *ATIPPA*) with respect to the applicability of section 27(1)(b) and (c) and thus, the requested information should be disclosed.

[5] With respect to section 27(1)(b), Memorial stated:

In this case, the requested information, being the submitted bids, forms part of the negotiated agreements, and therefore falls outside the section 27(1)(b) exemption. Further, neither the content, purpose nor circumstance in which the information was compiled or communicated would support the argument that the information was confidential in nature.

[6] Regarding section 27(1)(c), Memorial states:

It has been well canvassed by the relevant jurisprudence that the burden of proof of probable harm is on the party resisting disclosure. To satisfy the evidentiary requirement, there must be convincing evidence that release of the requested information will cause probable harm. The evidence of [Third Party] is vague and speculative, and insufficient to establish on a balance of probabilities, that reasonable expectation of probable harm to the competitive position of [Third Party] or significant financial loss would result from the release of the requested information, resulting therefore in damage to business interests of [Third Party].

III APPLICANT'S SUBMISSION

[7] The Applicant did not make a lengthy submission but instead referred me to its submission in connection with the Commissioners Report A-2013-008 (the Applicant's detailed submission was fully outlined in that Report).

IV THIRD PARTY'S SUBMISSION

[8] The Third Party advised this Office that it is relying on representations and reasons contained in e-mail correspondence sent to Memorial on July 29, 2014 to support its position that the requested information not be disclosed. In that email correspondence the Third Party stated that it "reiterates all argument and supporting documentation it presented in [a previous court case]..." This case was heard in the Supreme Court of Newfoundland on June 17-18, 2014, and a decision was rendered by Justice Whelan on September 19, 2014. This case is cited as *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107.

V DISCUSSION

[9] The Third party argues that the requested information should be withheld under section 27(1)(b) and (c) which reads as follows:

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

[...]

- (b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or*
- (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.*

[10] With respect to section 27(1)(b), one must consider whether the information was “supplied in confidence”. The meaning of “supplied” was considered at length most recently in Report A-2014-008. Essentially, contracts with public bodies for the supply of goods are not considered to be information that is “supplied”. Rather, they are negotiated agreements, even where there has been little or even no change between the bid and the accepted contract. In that Report, the request was also for tender documents, and it was my finding that the tender documents could not be said to have been “supplied”. I make the same finding here and thus, it is my conclusion that section 27(1)(b) is not applicable to the information in issue.

[11] With respect to section 27(1)(c), as most recently fully canvassed in Reports A-2013-008 and A-2014-008, 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 section 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.

[12] Since those reports, we now also have the benefit of Justice Whelan's decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107. Justice Whelan also made some findings with respect to the burden of proof, which I would like to set out at length:

[46] The burden of proof of probable harm is on the party resisting disclosure. To satisfy this evidentiary requirement, there must be convincing evidence that release of the Usage Reports will cause probable harm. The evidence of the Applicant is vague and speculative and insufficient in my view to establish on a balance of probabilities, that reasonable expectation of probable harm to the competitive position of the Applicant or significant financial loss would result from the release of the Usage Report, resulting therefore in damage to business interests of the Applicant.

[47] The Applicant refers the Court to paragraphs 16 – 20 of the Cretot affidavit as specific facts supporting this position. However, I find Mr. Cretot's evidence couched in generalities. All I can glean from these paragraphs is the bald statements by Mr. Cretot that the information, if disclosed, could identify its bidding strategy and thus provide the competitors with an unfair advantage in bidding future contracts. No evidence or facts are detailed that can be said to clearly, convincingly and cogently underpin this proposition.

[48] It may well be that the now release of the Usage Reports, pieced together with the other information already available, may disclose, in part, the bidding strategy of the Applicant, but that does not go far enough. Without evidence, the Court is invited to conclude that knowledge by the Second Intervenor and others of the Usage Reports would "harm" the competitive position of the Applicant or result in significant financial loss in the local and national markets. I find this position exaggerated and based on conjecture, and insufficient to ground the exemptions claimed.

[49] It must first be recognized that the fundamental purpose of the Act is to make public bodies accountable, that a person who makes a request for a record has a right of access and the burden is on the party claiming protection under one of the exemptions to satisfy the Court why the information should not be disclosed.

[50] The Applicant argued that the Usage Reports would allow their competitors to understand their exact price point on products sold. It would be my view that this information with regard to the contract items would be readily available from within the already disclosed bid information and various published catalogues of the Applicant combined with the Second Intervenor's knowledge of

the usage reports of 2010. Having reviewed the Requested Information, I am not convinced that the actual list of contract items purchased during the first year of the subject contract period, the “product number, description (of product purchased), unit of measure, quantity, price (per item) and total sales”, provides any further information that would allow the Applicant’s competitors to understand their bidding strategy.

[51] When consideration is given to the evidentiary standard set out in the jurisprudence, I find the Applicant’s evidence not sufficiently detailed or convincing to substantiate either that its competitive position will be harmed or that the release of Requested Information will cause it significant financial loss. The Applicant’s evidence falls more into the category of mere possibility and speculation. The Applicant clearly wishes to protect the turf that it has enjoyed for 30 years and it continues to enjoy the benefits of having the contract to provide office supplies to MUN.

[13] The Third Party is relying on the same arguments with respect to the potential for harm to its business interests in this case as it did in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*. The arguments are no more detailed or convincing now than they were then, and I find that they again fall short of meeting the required standard of proof.

[14] Again, I must state that 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. Disclosure by a public body of the cost of the goods and services purchased from a third party simply fulfills the accountability purpose of the *ATIPPA*. Asking a third party to disclose, for example, how much it pays to obtain the goods it sells, how it decides what price(s) to bid or how it produces or manufactures 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.

[15] I would like to restate these comments from Report A-2013-008, which also dealt with a request for bid information:

[29] Furthermore, given the importance of the principle of accountability, it is also my opinion that heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources; this is not possible if bid details are protected from disclosure by section 27 in the absence of detailed and convincing evidence. Knowing the bid details of the successful bid does not ensure that a competitor will be successful in

the next tender. In fact, the Applicant, who has been involved in the bidding process with respect to tenders for office supply products has stated that he is unaware of any harm to third parties from the release of bid details and that there has been no harm to his company as a result of release of their bid details to others when they were the successful bidder.

[30] As the Applicant points out in his submission, many factors go into the determination of a bid. Admittedly, having pricing information is useful, as knowing what the successful competitor bid in the past is a good starting point, in that it provides knowledge of the “ballpark” one must be in to be competitive. However, according to the evidence before me, pricing is influenced by several factors, which may vary from company to company. Further, these factors are not static and can change from year to year. As a result, and applying the Saskatchewan test, I do not see a clear cause and effect relationship between the disclosure and the harm which is alleged, nor do I perceive the likelihood of harm to be genuine and conceivable.

VI CONCLUSION

[16] Given the standard of evidence required to show harm as established by the case law, it is my opinion that the Third Party has not met the burden of proof to show there is a reasonable likelihood of probable harm in this case. The evidence was neither detailed nor convincing. Therefore, I find that section 27(1)(c) is not applicable to the requested information, and it should be released to the Applicant.

VII RECOMMENDATIONS

[17] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Memorial release to the Applicant the requested information.

[18] 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.

[19] 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*.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 12th day of December 2014.

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

