



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-005

October 21, 2015

Office of the Chief Information Officer

Summary:

The Applicant requested from the Office of the Chief Information Officer (“OCIO”) invoices relating to the work or expenses of a named contractor for the period of his employment with the OCIO since its formation in 2005. The OCIO provided partial access to the records but withheld some of the information in the records relying on section 39 (disclosure harmful to business interests of a third party) of the *Access to Information and Protection of Privacy Act, 2015*. The Applicant was not satisfied with the OCIO’s response and filed a complaint with this Office. During the investigation of the complaint the Third Party was consulted and objected to the disclosure of the information based on section 39. With respect to section 39, the Commissioner found that the burden of proof had not been met and recommended that the information be released.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, s.39.

Authorities Relied On:

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-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2009-006, and 2006-001.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to the Office of the Chief Information Officer (“OCIO”) seeking disclosure as follows:

All invoices relating to the work or expenses of [named contractor] for the entire period of his employment in any position or positions within the Office of the Chief Information Officer since its formation in 2005.

- [2] Following receipt of the request, the OCIO informed the Applicant that it had decided to provide partial access to the records but withheld information that could reveal the rate card used by the Third Party to calculate total payment owing on each invoice relying on section 39(1)(a)(ii), (b) and (c)(i) of the *ATIPPA, 2015*. The Applicant was not satisfied with the OCIO’s response and filed a complaint with this Office.
- [3] During the informal resolution process, we determined that the Third Party should be given an opportunity to provide a written representation regarding the use of section 39 to withhold the information in question. The Third Party objected to the disclosure of the information in question.
- [4] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*. Our Office provided formal notification to all parties, including the Third Party, to ensure that it would have the right to receive a copy of this Report, to receive notice under section 49 of the *ATIPPA, 2015* of the OCIO’s decision in response to this Report, and to appeal that decision under section 54 of the *ATIPPA, 2015* if it chooses to do so.

II PUBLIC BODY’S POSITION

- [5] The OCIO argued that the information withheld met the three-part test outlined in section 39 of the *ATIPPA, 2015*. Specifically, it is the OCIO’s position that the information withheld is commercial information of the Third Party, as it included professional services rates for an employee of the Third Party that was assigned to work as a contractor with the OCIO. The OCIO stated that the professional services rates were submitted in confidence as commercial information by the Third

Party in response to the OCIO's Request for Proposal ("RFP") for Managed Information Technology and Information Management Professional Services. The OCIO further relied on the fact that it treats all proposals in response to RFP's as confidential, as well as the fact that the Third Party explicitly stated that its proposal was being supplied in confidence. The OCIO stated that disclosure of the Third Party's rate information would reveal an aspect of the Third Party's competitive strategy when bidding on work, as revealing the rate would allow competing vendors to undercut the Third Party when responding to future work offers, thereby resulting in a significant loss of the Third Party's competitive position.

III APPLICANT'S POSITION

- [6] The Applicant did not provide a written submission.

IV THIRD PARTY'S POSITION

- [7] The Third Party also argued that the information withheld met the three-part test outlined in section 39 of the *ATIPPA, 2015*. It is the Third Party's position that the information withheld is both financial and commercial information, as it described the hours worked by the Third Party contractors as well as the applicable hourly rates that were billed. The Third Party asserts that the rates for professional services were originally provided explicitly in confidence and it was the Third Party's understanding that confidentiality was a term of the original RFP. It is the Third Party's opinion that the disclosure of the information would provide existing and future competitors for future Government of Newfoundland and Labrador IT work detailed information about the Third Party's rates and resource allotments. This information could lead the competitors to adjust their pricing and other related cost estimates pertaining to their competing bids. The Third Party stated that the information in question is highly competitive information which could reasonably be expected to impair its ability to successfully bid for work.

V DECISION

- [8] Section 39(1) of the *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.*

[9] This is a three-part test and failure to meet any part of the test will result in the inapplicability of section 39 of the *ATIPPA, 2015* to the relevant information and therefore the release of the information.

[10] The Complaint was filed by the Applicant following the OCIO's refusal to disclose the complete set of records, therefore, as outlined in section 43 of the *ATIPPA, 2015* the burden is on the OCIO to prove that the exception applies. However, as a submission was sought from the Third Party, I have also considered the Third Party's argument regarding the use of section 39 to withhold the information in question.

[11] With respect to section 39(1)(a) of the *ATIPPA, 2015*, I am satisfied that the severed information would reveal commercial or financial information of the Third Party and I conclude that this part of the test has been established.

[12] With respect to section 39(1)(b), the rate information in this matter was provided by the Third Party in response to the OCIO's RFP for Managed Information Technology and Information Management Professional Services. Both the OCIO and the Third Party stated that the rate information was supplied in confidence and that there was an expectation that this information be kept confidential. The OCIO relied on the Third Party's original response to the RFP, which included the Standard Terms and Conditions document, to demonstrate that the proposal was

supplied in confidence since it stated that the content of the proposal was confidential. After reviewing earlier decisions and current case law on this point, I find that generally, information which is the result of contractual negotiations, including tender bids, cannot be said to have been “supplied”. I find that the rate information in this case would be similar to a tender bid in the sense that it is the amount proposed for goods or services. The Standard Terms and Conditions document attached to the RFP even stated that nothing in the proposal would be binding until a contractual agreement was negotiated and agreed upon between the parties. As with tender bids, the rate information must be accepted and agreed upon and then included in a contractual agreement.

[13] Neither the OCIO nor the Third Party specifically addressed how the hours worked by the Third Party contractors met the three-part test under section 39 of the *ATIPPA, 2015*. Regarding this information, I am unable to conclude that it was supplied in confidence as it was provided for invoicing purposes and there is no evidence it was to be kept confidential. Consequently, the elements of section 39(1)(b) have not been established and section 39 cannot be applied to protect the information from disclosure.

[14] As the second part of the test in section 39 has not been met, I need not proceed in my analysis, however, I have examined section 39(1)(c) and concluded that even if the second part of the test was established, the third part would not be satisfied.

[15] The OCIO relied on section 39(1)(c)(i) and claims under this section require detailed and convincing evidence that the assertion of harm is more than speculative; it should establish a reasonable expectation of probable harm.

[16] The information which the OCIO and the Third Party presented to this Office does not establish a reasonable expectation of probable harm. The OCIO and the Third Party have stated that, should the rate information be disclosed, then competitors may gain an advantage when bidding on similar work in the future. This Office has discussed competitive advantage previously and concluded that heightened competition should not be interpreted as harm, and it helps ensure that public bodies are making the best possible use of public resources.

[17] Neither the OCIO nor the Third Party have presented detailed and convincing evidence of a reasonable expectation of probable harm and therefore I find that the third part of the test in section 39 of the *ATIPPA, 2015* has not been met.

VI RECOMMENDATIONS

[18] It is my finding that section 39 does not apply to the requested information and under the authority of section 47 of the *ATIPPA, 2015* I recommend that the OCIO release the severed information to the Applicant.

[19] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the OCIO must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (the Applicant and the Third Party) within 10 business days of receiving this Report.

[20] Please note that within 10 days of receiving the decision of the OCIO under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 21st day of October 2015.

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