



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-028

December 8, 2016

Department of Natural Resources

Summary:

The Applicant requested detailed information regarding all consultants used by the Department of Natural Resources (the “Department”) between December 2015 and August 2016, including agreements, contracts, amounts paid, and scope of and timeframe of work. The Department was prepared to release the information requested, however, a Third Party filed a complaint with this Office, claiming that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof under subsection 43(3) 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, 2015, S.N.L. 2015, c. A-1.2, ss. 39, 43(3).

Authorities Relied On:

Ontario OIPC Order PO-1998 and Order PO-2987.

OIPC Reports [A-2016-026](#), [A-2016-008](#), [A-2016-007](#), [A-2016-006](#), [A-2016-002](#), [A-2015-005](#), [A-2015-002](#), [A-2014-012](#), [A-2014-008](#), [A-2013-014](#) and [A-2011-007](#) at <http://oipc.nl.ca/>.

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 Department of Natural Resources (the “Department”) seeking disclosure of the following:

“Request detailed breakdown of all consultants used by the department between December 1, 2015 to August 11, 2016. Please include agreements/contracts, amount paid to date as well as scope of work and associated time frames.”

- [2] The Department informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* the Department notified affected third parties, including the Third Party who filed the present complaint opposing release of the records in question.
- [3] Attempts to resolve the complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] The Department relied on its position that the requested information did not clearly meet the three-part test outlined in section 39, and that it was therefore prepared to release the information to the Applicant.

III THIRD PARTY’S POSITION

- [5] The Third Party prepared only a brief submission stating that it specializes in oil and gas related geosciences, strategic planning and Federal, Provincial and Territorial regulatory policy advice, with “numerous contracts at various day rates.” It argued that “as a single entity professional corporation” its livelihood is based upon the work it received on a competitive basis, and that disclosure of its hourly rates “may very well compromise the

ability of my corporation to compete for future contract work.” The Third Party also stated that not knowing the identity of the Applicant means that it could be a competitor who the Third Party feared could use this information to its advantage, which the Third Party argued is “clearly unfair, potentially unethical and clearly unprofessional.”

IV DECISION

[6] 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.*

[7] This is a three-part test; failure to meet any part of the test will result in section 39 not applying. If it does not apply, a public body must disclose records to applicants, regardless of the objections of third parties.

[8] Before examining the applicability of section 39, I must first comment on the Third Party’s concerns regarding the anonymity of the Applicant. These concerns are irrelevant as the purpose of this process is to hold public bodies accountable regarding their use of public funds. All third parties doing business with public bodies and receiving public funds are therefore subject to having information they provided in securing that business disclosed

unless it falls within an exception in the *ATIPPA, 2015*. Furthermore, the third party notification and complaint process provide third parties the opportunity object to the release of their information and to have their complaints considered by the Information and Privacy Commissioner.

- [9] With respect to the anonymity of the Applicant, Report A-2013-014 noted this as a well-established principle of the access to information process, stating “the name of an individual who makes a request for information is made available to only those persons who need to know the name in order to process the access to information request.” This now has statutory recognition under section 12 in the *ATIPPA, 2015*. The need for anonymity is also discussed in Ontario’s OIPC Order PO-1998 at page 7:

. . . Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the Act is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put. . . . Ministry employees responsible for receiving access requests under the Act must ensure that the identity of a requester is disclosed to others only on a “need to know” basis during the processing of the request. Except in unusual circumstances, there is no need for requesters to be identified because their identity is irrelevant.

- [10] With respect to section 39(1)(a), I find there is commercial and financial information included in the requested records, so I accept that this element of the test has been established.
- [11] With respect to section 39(1)(b), the Third Party has provided no specific arguments but as the records in question include a contract and attached schedules, they are properly seen as negotiated due to the fact that the other party, the Department, agreed to it. As noted in recent Reports A-2016-026 and A-2016-027, material that forms part of a contract is deemed in most cases to be “negotiated” information, and as the Third Party provided no evidence to the contrary, I find that the information was not supplied in confidence.

[12] Consequently, the elements of section 39(1)(b) have not been established. As a result, section 39 cannot be applied to except the information from disclosure. While unnecessary, I will comment on section 39(1)(c) as I find that even if the second element of the test was established, the third element could not be satisfied.

[13] A claim under section 39(1)(c) requires detailed and convincing evidence and, as stated in Report A-2011-007, “[t]he assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.”

[14] In its submissions, the Third Party claimed that the release of the information could harm its competitive position in its field of work. However, nothing other than speculative statements that disclosure of the Third Party’s rates would allow competitors a competitive advantage and put the Third Party at a competitive disadvantage was offered. The Third Party has provided no clear evidence that disclosure of the information requested would harm its competitive position.

[15] As noted in Report A-2016-002:

“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 ... 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.”

Without detailed and convincing evidence to support the argument of real (and not merely speculative) harm or establishing a reasonable expectation of probable harm, the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position under section 39(1)(c).

[16] As the Third Party has failed to meet parts two and three of the three-part test under section 39 of the *ATIPPA, 2015*, I find that section 39 does not apply to the information in question and the Third Party cannot rely on section 39 to require that the information be withheld from the Applicant.

V RECOMMENDATIONS

- [17] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department release the requested information to the Applicant.
- [18] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report (in this case the Third Party) within 10 business days of receiving this Report.
- [19] Please note that within 10 business days of receiving the decision of the Department 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*. **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has served the Department with notice of an appeal prior to that time.**
- [20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of December 2016.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador