



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-016

July 25, 2016

Government Purchasing Agency

Summary:

The Government Purchasing Agency (“GPA”) received access requests seeking disclosure of tender bids. The GPA was prepared to release the information, however, a Third Party objected to the information being disclosed and filed complaints with this Office. The Third Party questioned the GPA’s use of section 19(5) and also claimed that the information must be withheld on the basis of section 39 (disclosure harmful to business interests of a third party). With respect to section 19(5), the Commissioner found that the GPA had provided adequate reasons. With respect to section 39, the Commissioner found that the burden of proof 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, s.19 and s.39.

Authorities Relied On:

Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52; *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-2016-007, A-2016-004, A-2015-002, A-2014-013, A-2014-002, A-2013-012, A-2013-009, and Report A-2013-008.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) the Government Purchasing Agency (“GPA”) received three different access requests seeking disclosure of tender bids.

[2] The three requests were submitted by different Applicants at different times and are as follows:

Copy of all submitted bids (with the exception of [named company's] Bid) in response to Tender TP115009429 Office Supplies.

Copy of all submitted bids (with the exception of [named company's] Bid) in response to Tender TP115009429A Office Supplies.

Complete details of tender #TP115009429 and TP115009429A.

[3] For ease of reference I will refer to tender TP115009429 as the “Initial Tender” and tender TP115009429A as the “Re-Tender”. Following receipt of the three requests, the GPA informed the Applicants that it intended to provide access to the information, but in accordance with section 19 of the *ATIPPA, 2015*, the GPA determined it was necessary to notify the affected third parties. Upon notification, a Third Party filed complaints with this Office opposing the release of its tender bid information. The Third Party filed one complaint in relation to each access request, for a total of three complaints from the Third Party.

[4] Attempts to resolve the complaints by informal resolution were not successful, and the complaints were referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*. Given that the Third Party and the public body are the same for all three complaints and that the records requested are similar, I have combined these files so that they may all be dealt with in this Report.

II PUBLIC BODY'S POSITION

[5] The GPA advised that a call for tender submissions for office supplies, the Initial Tender, was issued and that bid submissions were received. It was determined during the analysis and evaluation of the submissions that there were no compliant bids and a re-tender was required. The Re-Tender occurred shortly after the Initial Tender and an award was made. Overall, the GPA has relied on the position that the requested information does not meet the three-part test outlined in section 39 of the *ATIPPA, 2015*, and that it was prepared to release the information. Specifically, it is the GPA's opinion that the requested information does not meet part two or part three of the three-part test under section 39(1) of the *ATIPPA, 2015*. The GPA advised that any concerns it had regarding protecting the integrity of the tendering process were mitigated by the fact that the call for bids under the Re-Tender would have closed before the third party notification process was completed. The GPA believed that any expectation of confidence would have passed and that any adverse impact on a party would have passed since the re-tender bids had closed and an award had been made under the Re-Tender.

III THIRD PARTY'S POSITION

[6] The Third Party raised a concern that the GPA did not provide reasons under section 19(5) of the *ATIPPA, 2015* and argued that the statement from the GPA that "this information does not meet the three-part test outlined in section 39 of the act" was the decision reached by the GPA. The Third Party asserted it was entitled to know the basis upon which the GPA had reached its conclusion. It is the Third Party's opinion that the information falls within the exemption set forth in section 39 of the *ATIPPA, 2015* and should not be released. The Third Party further argued that the information should not be released as there was no contract between it and the Government of Newfoundland and Labrador. As there was no contract, there was no expenditure of funds, therefore releasing the information is not relevant to the purpose of accountability and transparency of the *ATIPPA, 2015*. The Third party also believed that the *ATIPPA, 2015* was being used by a competitor to attempt to achieve a competitive and financial advantage and that release of the

requested information would clearly harm the Third Party's competitive and negotiating position and would result in significant financial harm.

IV DECISION

Section 19(5) – Reasons

[7] The relevant portion of section 19 of the *ATIPPA, 2015* reads as follows:

19. (5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing

- (a) of the reasons for the decision and the provision of this Act on which the decision is based;*
- (b) of the content of the record or part of the record for which access is to be given;*
- (c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 ; and*
- (d) how to file a complaint or pursue an appeal.*

[8] The issue of reasons under section 19(5) was recently discussed in Report A-2016-007. In that case the conclusion was as follows:

[13] In the present case the subsection 19(5) notification letter from Eastern Health to the Third Party stated as follows:

Please be advised that after careful consideration, Eastern Health has decided that this information does not meet the three-part test outlined in section 39 and has decided to grant access to the information as attached.

[14] Section 19 simply requires that a public body give the third party notice of “the reasons for the decision and the provision of the Act on which the decision is based.” In the present case, Eastern Health has done both. In some cases, especially if the public body’s decision involves the application of several different provisions of the Act or a complex fact situation, it might be

better to give more detailed reasons. However, in the present case there is only one legal test at issue, that of section 39. The OIPC (or Trial Division in the event of an appeal) applies that test in a fresh review of the record, not simply a review of the reasons given by the public body. The third party has the burden of proving that the section 39 test applies, but has ample opportunity to make submissions in support of its position prior to any records being disclosed. I have concluded that the Third Party has not been prejudiced by the brevity of Eastern Health's reasons for its decision in the present case.

- [9] In the present case, while the GPA did not provide detailed reasons, it did provide the basis on which its decision was reached. The GPA decided to grant access to the information and the basis for that decision was that the information did not meet the three-part test outlined in section 39 of the *ATIPPA, 2015*. As in Report A-2016-007, I conclude here that the Third Party has not been prejudiced by the brevity of the GPA's reasons. This Office applies the test under section 39 in a *de novo* capacity and the process is far from a simple review of the reasons given by the public body. It is still important to note that the Third Party has the burden of proving that the section 39 test applies.

Section 39 – Business Interests of a Third Party

- [10] Turning now to section 39 of the *ATIPPA, 2015*, there are two sets of records requested which the Third Party objects to being released on the basis of section 39. The first set of records are the Third Party's tender bid records with respect to the Initial Tender where the bids of all parties were determined to be non-compliant, and therefore no award was made. The second set are the Third Party's tender bid records with respect to the Re-Tender where an award was made and the Third Party was not the successful party.
- [11] 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.

[12] Section 39 is a mandatory exception to disclosure under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be met and failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information.

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

[14] With respect to section 39(1)(b), the information requested must meet two criteria. The information must be “supplied” and the information must be supplied “implicitly or explicitly in confidence”. Previous reports from this Office have concluded that contracts with public bodies for the supply of goods or services are not considered to be information that is “supplied”. Rather once a contract has been entered into, the information is considered to have been negotiated. The Third Party in the present case correctly points out that there is no contract between it and the Government of Newfoundland and Labrador with respect to the Initial Tender, as all bids were determined to be non-compliant, or with respect to the Re-Tender, as the Third Party was unsuccessful. The fact that no contract has been signed is not determinative of the issue. As the Third Party has failed to prove that the information meets the other two parts of the test under section 39, I do not need to make a determination on the “supplied” issue in this case.

[15] Even if I determined that the information was supplied, it still must be supplied “implicitly or explicitly in confidence”. The Third Party has provided minimal information on this issue, however, in its written submission the GPA considered the issue of confidentiality and relied on the decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107 at paragraph 35 as follows:

*[35] Also, see the comments of Strayer J. in his earlier decision of **Société Gamma Inc. v. Canada (Department of Secretary of State)** (1994), 47 A.C.W.S. (3d) 898, 56 C.P.R. (3d) 58. In that case, when considering whether information supplied in the course of public procurement was confidential in the context of subsection 20(1) of the Access to Information Act (the “Federal Act”) being equivalent to subsection 27(1) of ATIPPA, Strayer J. wrote:*

One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract, he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability. The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature.

[16] The GPA further stated in its submission as follows:

While it might be said that there is expectation of confidence by bidders during the evaluation period (or even between processes in the case of a re-tender), the GPA would take the position that once bids had closed and an award made (i.e. on the second process) that this expectation would have passed. The expectation of confidence, in this case, would align with maintaining the integrity of the bidding process while evaluations are ongoing.

[17] The tender submission forms also incorporated a “Disclosure of Information” section which states:

The bidder agrees that any information provided in this bid, even if it is identified as being supplied in confidence, may be disclosed where required by law or if required by order of a court or tribunal. The bidder consents to the disclosure, on a confidential basis, of this bid by Central Purchasing Authority to the Province's advisers retained for the purpose of evaluating or participating in the evaluation of this bid process.

[18] Under section 43(3) of the *ATIPPA, 2015* the burden of proof is on the Third Party to prove that the Applicants have no right of access to the records. The Third Party has not provided a submission or comments regarding the confidentiality of its tender bid information. The only reference regarding confidentiality from the Third Party is a statement on the Third Party's covering page for each section (i.e. table of contents, Appendix A, Appendix B, Bid Security and Evaluation of Product Specifications) advising "Confidential and Proprietary – Not to be Copied or Distributed Without Permission".

[19] I find it difficult to conclude that the information was supplied implicitly or explicitly in confidence with only a bald statement indicating that the information is confidential. Simply stating something is confidential does not necessarily make it so, as outlined in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107 at paragraph 32-34 as follows:

[32] The Applicant argues that specifically referenced on the bottom of each page of the tender proposal was "Confidential and Proprietary - Not to be copied or distributed without permission". Also, following the Request and on preparation of the Usage Reports, the Applicant endorsed on each page "Propriety of Staples Advantage, Confidential". It is argued by the Applicant that the information provided in the proposal and the Usage Reports therefore clearly falls within the exemption set out in s. 27(1)(b) because of these endorsements. This position merely begs the question if indeed the information would reveal confidential commercial, financial or technical information harmful to the business interests of the Applicant.

[33] The "Supplied in Confidence" type endorsement on certain information has received extensive consideration in the jurisprudence where contractors are responding to a public body's or government's call for tenders or request for proposals.

[34] If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate

the intent of the Act by adding such an endorsement to the information supplied. This point was recognized by Strayer J.) in the case of **Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sport)**, [1989] F.C.J. No. 7, where he stated at page 4:

I am satisfied that when individuals, associations, or corporations approach the government for special action in their favour, it is not enough to state that their submission is confidential in order to make it so in an objective sense. Such a principle would surely undermine much of the purpose of this Act which in part is to make available to the public the information upon which government action is taken or refused. Nor would it be consistent with that purpose if a Minister or his officials were able to exempt information from disclosure simply by agreeing when it is submitted that it would be treated as confidential.

[20] It is my opinion that the Third Party has failed to prove that the tender bid information was supplied “implicitly or explicitly in confidence”, therefore, I find that the second part of the test in section 39 has not been met. Given this finding, 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.

[21] As established in Report A-2011-007, claims under part three of the test require detailed and convincing evidence that the assertion of harm is more than speculative; it should establish a reasonable expectation of probable harm. This fact was recently addressed in *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52 at paragraphs 42 and 44 as follows:

[42] Justice Cromwell addressed the issue of harm to a resisting party’s competitive position in Merck Frosst, saying that “[a] third party claiming [exemption under this kind of provision] must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur” (at paragraph 199.) The test has also been stated to require “a clear cause and effect relationship between the disclosure and the alleged harm, that the harm must be more than trivial or inconsequential, that the likelihood of harm must be genuine and conceivable, and that detailed and convincing evidence that shows that results ... [are] more than merely possible or speculative”. (Commissioner’s Report, Appellant’s Appeal Book, Part I, Tab 3 at para. 15 citing Saskatchewan Report 2005-003.)

[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that

Staples' competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.

[22] The Third Party has provided statements advising that release of the information will harm its competitive and negotiating position and will result in financial harm. Simple assertions of harm do not establish a reasonable expectation of probable harm. That is especially so in this case where the re-tender process has been completed and an award made. I do not find that the Third Party has provided detailed and convincing evidence of a reasonable expectation of probable harm. I therefore find that the third part of the test in section 39 has not been met.

[23] As the Third Party has failed to meet part two and part three of the three-part test under section 39 of the *ATIPPA, 2015*, it is my finding that section 39 does not apply to the information at issue and the Third Party cannot rely on section 39 to require that the information be withheld.

V RECOMMENDATIONS

[24] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the GPA release the Third Party's tender bid records with respect to the Initial Tender and the Re-Tender, to the Applicants.

[25] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the GPA 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 within 10 business days of receiving this Report.

[26] Please note that within 10 business days of receiving the decision of the GPA 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 Applicants until the expiration of the prescribed time for an appeal.**

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25th day of July, 2016.

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

