

Report A-2015-002

August 27, 2015

Eastern Health

Summary:

The Applicant requested from Eastern Health a copy of the winning bid for Eastern Health Tender 2015-3858. Eastern Health was prepared to release the information requested, however a Third Party objected and filed a Request for Review with this Office. The Third Party claimed that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). With respect to section 39, 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, 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-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, 2008-002 and 2007-003.

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 Eastern Health seeking disclosure of the winning bid for Eastern Health Tender 2015-3858.
- [2] Following receipt of the request, Eastern Health informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the ATIPPA, 2015 Eastern Health was required to notify the affected Third Party. Upon notification, the Third Party, which was the successful bidder, filed a complaint with this Office, opposing the release of the information.
- [3] Attempts to resolve this Request for Review 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] Eastern Health relied on its position that the requested information did not meet the three-part test outlined in section 39, and that it was prepared to release the information to the Applicant.

III THIRD PARTY'S POSITION

- [5] The Third Party did not provide a further submission to this Office, despite being provided with an opportunity to do so. As a result, I must rely on the information provided during informal resolution. The Third Party has submitted that this tender required an itemized breakdown of pricing and the release of this information would provide a competitor with the Third Party's pricing on a particular type of work; information which should only be obtained through years of bidding and market pricing.
- [6] It is the position of the Third Party that the release of this information will result in the loss of future bids as it will have nowhere else to go price-wise and a competitor will now be able to match the Third Party's prices. The Third Party argues that this is akin to the Public Body simply taking the Third Party's prices and asking a competitor to do better.



IV DECISION

- [7] 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.
- [8] This is a three-part test; failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information and the release of same.
- [9] In respect of section 39(1)(a), the information in this matter is not a trade secret; however, I accept that it is commercial and financial information. It is my opinion that this element of test has been established.
- [10] In respect of section 39(1)(b), the information in this matter was submitted in accordance with tender specifications created by Eastern Health which included a confidentiality disclaimer stating that bids may be subject to disclosure in accordance with the ATIPPA and confidentiality could not be guaranteed.
- [11] I accept that in certain instances this type of disclaimer will not automatically result in the release of information. Examining section 39(1)(b) further and reviewing earlier decisions on this issue, I find that contracts with public bodies for the supply of goods, including tender bids, are not



considered to be information that is "supplied". Consequently, the elements of section 39(1)(b) have not been established and section 39 cannot be applied to protect the information from disclosure.

- [12] Given that I have found that the second element of section 39 has not been established I need not go any further in my analysis, however, I will elaborate on section 39(1)(c) as it is my finding that even if the second element of the test was established, I do not believe the third element would be satisfied.
- [13] A claim under section 39(1)(c) requires detailed and convincing evidence and, as established 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] The information which the Third Party presented to this Office does not establish a reasonable expectation of probable harm. This Office has dealt with the issue of the disclosure of tender documents on many occasions and has repeatedly found that this type of information does not amount to information protected from disclosure by section 39. In fact, in Report 2013-009 I stated:

[...] 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.

VI RECOMMENDATIONS

[15] The Third Party has not met the burden of proof with respect to section 39. The information was not supplied, nor was the evidence in respect of section 39(1)(c) detailed or convincing. Therefore, 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 Eastern Health release the requested information to the Applicant.



- [16] As set out in section 49(1)(b) of the ATIPPA, 2015, the head of Eastern Health must give written notice of his or her decision with respect to this recommendation to the Commissioner and the Third Party within 10 business days of receiving this Report.
- [17] Please note that within 10 days of receiving the decision of Eastern Health 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.
- [18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 27th day of August 2015.

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

