

NORTHWEST TERRITORIES INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-101
10-142-4
December 20, 2011

BACKGROUND

I received a request from a corporation to review the response which they had received to their request for information. The company was asking for information with respect to a particular Request for Proposals issued by the Government of the Northwest Territories. In particular, they were seeking:

- a) the total point scores for each supplier who submitted a tender;
- b) point scores for each criteria on which each supplier was assessed;
- c) proposals (in full) from each successful supplier;
- d) rates offered by each supplier for the term of the standing offer;
- e) annual spending per supplier.

The public body responded to the request, providing only some of the records requested. They provided records in response to parts (a) and (e) and the records in relation to the Applicant's own proposal. The public body relied on section 24(1), and in particular subsections (a),(b), and (c) of that section as justification for their refusal to provide the remaining records requested.

The Relevant Sections:

The Public Body relies on Section 24 of the Act. This section is mandatory in nature, which means that if the records fall within the definitions of records covered by the section, the public body is prohibited from disclosing them. The section reads as follows:

- 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant

- (a) information that would reveal trade secrets of a third party;
- (b) financial, commercial, scientific, technical or labour relations information;
 - (i) obtained in confidence, explicitly or implicitly, from a third party, or
 - (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
- (c) information the disclosure of which could reasonably be expected to
 - (i) result in undue financial loss or gain to any person,
 - (ii) prejudice the competitive position of a third party,
 - (iii) interfere with contractual or other negotiations of a third party, or
 - (iv) result in similar information not being supplied to a public body;

Also relevant are the following provisions:

3.(1) This Act applies to all records in the custody or under the control of a public body, including court administration records

33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

THE PUBLIC BODY'S POSITION

The public body takes the position that the records which have not been disclosed contain information which is the proprietary information of third parties. They felt that the release of the information could cause financial harm to the business of the third parties involved and put them at a disadvantage in future bids for similar contracts. It is their position that if the applicant was granted access to the individual ratings of third parties, it would prejudice the competitive position of the third parties in any future requests for proposals. They also argue

that there was an expectation that detailed ratings and evaluations would be kept confidential as set out on page 15 of the terms of reference of the Request for Proposals which states:

detailed ratings and comments will be kept confidential, however once contracts have been executed a proponent can ask for their own detailed rating and comments and the names and total rating of the other proponents

THE APPLICANT'S POSITION

The Applicant points out that the onus of establishing that an exemption exists lies on the public body. They say the public body has not met that onus. In particular, it is their position that:

- a) the public body has not identified any "trade secrets" that would be contained in the records requested or how access to the records would reveal a trade secret of a third party. They say that, as a proposer themselves, they were unaware of any "trade secrets" that would have been included in the process
- b) the public body has not identified what financial, commercial, scientific or labour relations information is contained in the records being sought, nor have they justified their position that the information was obtained in confidence from third parties. They say that they did not consider any of the information they provided to the public body in the RFP process was confidential. It was their position that the only expectation that they had was that the information they provided would not be disclosed to the other suppliers during the tendering process.
- c) the information sought was not provided in compliance with a lawful requirement
- d) the public body has not explained how the disclosure of the requested records would harm the interests of a third party or result in similar information not being provided in the future

The Applicant relies on the decision of the Nunavut Court of Justice in the case of *Savik Enterprises et al v. GN*, 2004 NUCJ 04. They argue that in that case, a participant in an RFP process sought to obtain access to the details of the proposals of the successful candidate. They quote paragraph 24 of that decision which reads as follows:

While the public policy argument advanced by the Defendant in favor of protecting the integrity of the RFP process remains an important consideration, there is an equally compelling, if not greater public policy argument favouring disclosure where the expenditure of public funds is concerned. Openness and transparency in public administration promotes accountability and fairness in public government. Secrecy breeds suspicion and mistrust. Claims of partiality or discrimination tend to germinate and flourish in a secretive environment. Given the importance of government contracts to the private sector in Nunavut, it is particularly important that those bidding on contracts have confidence in the fairness of the process adopted by government in making its contract awards.

Absolute confidentiality must be maintained during the submission phase of the government procurement process in order to facilitate a fair and honest competition for government contracts. Secrecy at this state is clearly essential to the process itself, and is in the public interest. However, the public interest in maintaining this wall of secrecy diminishes rapidly once a decision on the merits has been reached.

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While every effort must be made to respect the important privacy interests and protect the Cooperative's competitive position in the event a second competition becomes necessary, this Court is of the view that principles of openness and good government in this case ultimately require disclosure of the proposals, subject to necessary redaction by the Court to protect extremely sensitive business data. This is so particularly where the fairness of the procurement process itself is challenged. The Defendant, the general public and all future competitors in Nunavut's government procurement process will benefit from a full and open resolution of the allegations made by the Plaintiffs in this case.

DISCUSSION

I would begin by pointing out that although the Nunavut Court of Justice has wide powers to rule on the disclosure of records for the purpose of ensuring a fair and full review of the facts in a contested court matter, I am bound by the provisions of the *Access to Information and Protection of Privacy Act*. Although the court referred to the Act in the Sanvik case quoted by the Applicant, it specifically noted that its decision was not being made pursuant to that Act. There was, in fact, no review of the provisions of the Act or how they might apply to the disclosure of the kind of information requested by the Applicant in this case or by the Defendant in the Sanvik case. The conclusions reached by the Court in that case, therefore, are not helpful to my review.

I have had the opportunity to review all of the responsive records identified by the public body in this case. There are a total of 143 pages (which I have numbered sequentially). A good number of the records have been given to the Applicant without any editing. My comments will be addressed only to those records which were withheld or provided to the Applicant in edited form.

As a general comment, the purpose of mandatory exceptions to disclosure for the commercial information of third parties in access to information legislation is set out in *Public Government for Private People: The Report of the Commission on Freedom of Information and Individual Privacy* at page 313:

The accepted basis for an exemption relating to commercial activity is that business firms should be allowed to protect their commercially valuable information. The disclosure of business secrets through freedom of information act requests would be contrary to the public interest for two reasons. First, disclosure of information acquired by the business only after a substantial capital investment had been made could discourage other firms from engaging in such investment. Second, the fear of disclosure might substantially reduce the willingness of business firms to comply with reporting requirements or to respond to government requests for information.

Section 24 of our Act requires a public body to refuse to disclose information where:

- a) the information would reveal trade secrets of a third party;
- b) the information would reveal financial, commercial, scientific, technical or labour relations information obtained in confidence from a third party;
- c) the disclosure of the information could reasonably be expected to
 - (i) result in undue financial loss or gain to any person,
 - (ii) prejudice the competitive position of a third party,
 - (iii) interfere with contractual or other negotiations of a third party, or
 - (iv) result in similar information not being supplied to a public body;

Dealing with the pages individually:

Pages 58 and 59 entitled "RFP #PM006909 Ranking".

This record lists six companies in four different "categories" of the proposal. For each category, the points awarded to the proponent and the ranking of each proponent is shown. The other information, which has been redacted, except insofar as it relates to the Applicant, shows what appears to be the hourly rate proposed by each proponent in each of four fiscal years over the course of the contract. The public body argues that this is proprietary information belonging to the Third Parties and that they are prohibited from disclosing the information pursuant to section 24(1)(b) - they feel that this information reveals financial, commercial or labour relations information of the Applicant's third party competitors. Furthermore, they take the position that this is proprietary information which was provided in the expectation that it would remain confidential. I am satisfied that the information which the public body has chosen to redact from these two pages is "commercially valuable" proprietary information of third parties. To disclose the information would provide the Applicant with valuable business information about a competitor's fee structure and pay scales. I am also satisfied that this kind of information provided in the context of an RFP is provided on the implicit understanding that it will not be shared with competitors. I am satisfied that section 24(1)(b) applies to these two pages and the information has been properly masked.

Pages 60 to 68, Pages 71 to 79, Page 82 - Forms Entitled “ Proposal Rating Schedule”

This is a series of similar forms. On the top of each page is the name of one of the proponents. Underneath this, there are four main columns entitled “Rating Criteria”, which lists the element being assessed (for example, “Fees and Expenses” and “Past Relevant Experience”), Assigned Weight, which provides the relative importance of each factor, “Unit Points Awarded” which is blank on many pages but shows points awarded in some cases and, finally, “Total Points” which calculates the total number of points given to each proponent. There is nothing in these pages which could in any way be considered proprietary in nature, nor is there anything of commercial value in the records. There is nothing in any of these pages which would provide a reader with any substantive information about the business practices of a third party. All that these records do is provide a numerical comparison of how each of the proponents fared on each of the rating criteria. There is nothing on any of these pages which would give the reader any specific information about the proposals submitted by the others. I am not satisfied that the disclosure of the information on these pages could reasonably be expected to result in undue financial loss or gain to any person, prejudice the competitive position of a third party, interfere with contractual or other negotiations of a third party, or result in similar information not being supplied to a public body.

I recommend that these pages be disclosed.

Page 83 - Cover Letter from a proponent to the public body

This is a copy of a letter which accompanied a third party’s proposal. I am prepared to accept that the information in the second paragraph describes proposed methodology, which would qualify as either a trade secret or commercial information provided in confidence and that this paragraph should be redacted. The balance of the letter should be disclosed.

Pages 84 to 99 - Third Party Proposal

These pages constitute the proposal received in response to the public body’s RFP from a third party. These pages are filled with information about methodology, pricing, personnel expertise and other information that is clearly commercial, financial, technical and labour relations information about a third party. Furthermore, I am satisfied that the information is proprietary

and was submitted in confidence for the purpose of the proposal process. I am satisfied that the public body has properly refused to disclose these pages.

Pages 100 and 101

These appear to be a fax cover sheet which accompanied one of the proposals, along with a second page which names the proponent and the RFP. There is nothing in either of these pages that qualify them for an exemption pursuant to section 24 of the Act and I therefore recommend that they be disclosed.

Pages 102 to 106

These pages are duplicates of pages 83 to 87 and should be treated accordingly.

Pages 107 to 133

These pages constitute a proposal received in response to the public body's RFP from a third party. Once again, this record is full of information about methodology, pricing, personnel expertise and other information that is clearly commercial, financial, technical and labour relations information about a third party. Furthermore, I am satisfied that the information is proprietary and was submitted in confidence for the purpose of the proposal process. I am satisfied that the public body has properly refused to disclose these pages.

CONCLUSIONS AND RECOMMENDATIONS

As noted, I recommend that the following records be provided to the Applicant:

- a) Pages 60 to 68
- b) Pages 71 to 79
- c) Page 82
- d) Page 83 except for the second paragraph
- e) Pages 100 and 101
- f) Page 102 except for the second paragraph

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner.