NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 14-130
File: 14-131-4
October 9, 2014

BACKGROUND

The Applicant in this case made a request for information from the Department of Public Works and Services for information. His request sought:

- Records of lease payments made for the first three floors of the Yellowknife courthouse building for the last four fiscal years;
- Records of lease payments made for Justice Department space in the rest of the building for the last four fiscal years

The department granted access to the base rent portion of the lease payments, but denied access to records containing costs in addition to base rent, citing Section 24(1) of the *Access to Information and Protection of Privacy Act*. The public body took the position that the additional information was the financial and commercial information of a third party which was obtained in confidence from that third party.

The Applicant argued that the public body had not provided any evidence that there was any agreement, either implicit or explicit, between the Government of the Northwest Territories and the third parties that this information was confidential. Further, he notes that the GNWT routinely publishes the full amounts of all competitive contracts over $5,000 awarded by it as well as the names of the third party companies to whom the contracts are awarded.

The Applicant, a member of the press, also urges me to consider the public interest at stake, noting that the information being requested is about a building being used to provide and administer public services which are paid for by the public.

THE DEPARTMENT'S SUBMISSIONS

In its response, the public body relied on section 24(1)(b)(i) of the Act as justification for its refusal to disclose certain of the responsive records. Section 24(1)(b)(i) prohibits public bodies from disclosing information to an applicant which consists of financial, commercial, scientific, technical or labour relations information obtained in confidence, explicitly or implicitly from a third party. They take the position that information about costs other than base rent are financial or commercial in nature and are received by them in confidence and rely on the decision of Justice J.Z. Vertes in *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)* 1999, N.W.T.J. No. 117. The department argues that the information being requested in this case is substantially similar to the information which was being requested in the CBC case. In both instances, lease information was being requested. As a result, third party statements about what does and does not fall under the mandatory exemptions of Section 24 of the Act must be considered by the department in its decision to release or withhold any portions of a record.

The public body also relies on section 23 of the Act which prohibits the disclosure of personal information about third parties where that disclosure would result in an unreasonable invasion of the privacy of the third party. Section 23(2)(b) provides instances in which the disclosure of personal information is presumed, under the Act, to constitute an unreasonable invasion of privacy, including where the personal information relates to employment, occupational or educational history. The department, in its review of the records, determined that the disclosure of telephone and fax numbers and one third party individual's name within email correspondence was personal information as defined in by the Act. They argue that the third party personal information deleted from the records provided to the Applicant could identify individuals within the third party who were not party to the original contract and the phone and fax number exempted were not accessible to the public through normal channels of discovery and are likely to identify individuals within the third party who were not party to the original contract as well.

The Submissions of the Third Party

Because this request involved information about a third party company that might be subject to a Section 24 exemption, I asked the third party to provide any comments or concerns they might have. The company, NPR Commercial Property, did provide their concerns. They request that access to information regarding the term of the lease not be disclosed. This information, they argue, is not readily available to the public and has the potential to adversely affect their competitive advantage in the Yellowknife marketplace. The exposure of the term of the lease could allow other landlords in the market to "position them at or before the time of renewal to make ready real estate or construct new real estate on speculation of a tenant relocating".

Further, they argue that

> O&M costs are established through negotiated contracts with suppliers and internal multilayered cost formulas to attribute employees' wages, materials and service contracts to each specific building and tenant. We negotiate contracts with suppliers and service companies that may include volume discounts for the amount of the contract on an annual or multi year basis.

The Applicant's Response to the Submissions of the Public and the Third Party

After having reviewed the submissions of both the public body and the third party, the Applicant suggested a solution to the matter. He indicated that his purpose in requesting the information was to inform the public how much it is paying for the courthouse space and the rest of the building. He suggested simply bundling all of the information together and providing a total cost, per year, for the years requested. He indicated that he did not need a break-down of O & M, or how much was a lease payment and how much was for other costs incurred by the public. Nor was he interested in any third party personal information.

He does argue, however, that there is no reason not to disclose the term of the lease. He notes that the Act does not prohibit the release of any and all information that could reduce a contractor's competitive advantage when bidding for future government contracts. He argues that what NPR is asking for is to maintain the advantage it has as the leaseholder and while that may be in NPR's interests, it is not in the public interest. The public interest is best served by bidding competitions where there is a level playing field.

The Public Body's Response to the Applicant's Proposal

The public body responded positively to the suggestion in the Applicant's letter to disclose the total cost of the lease for the years in question, without detailing how those numbers were arrived at. They felt however, that the Applicant's original request for information did not include a request, specifically, for information about the term of the lease and they were concerned to ensure that the third party was aware of the potential that this information might be disclosed before proceeding further.

The Third Party's Response to the Applicant's Proposal

The Third Party was provided with the proposal made by the Applicant in this matter and asked for their position. They argued that should the total cost per year for the contracts be disclosed for the years in question, data could be extrapolated to reveal the annual operating costs. Though they did not say so directly, I took this to mean that they were opposed to the disclosure.

They reiterated, as well, their concern about the disclosure of the term of the lease. They argue that this information is "not readily available to the public and has the potential to adversely affect our competitive advantage in the Yellowknife market place."

Discussion

As always, one must begin any analysis of an access to information matter with the stated purposes of the Act uppermost in mind. Section 1 of the Act states that the purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by, among other things, giving the public a **right** of access to records held by public bodies, subject to a limited and specified list of exceptions. Many courts throughout the country, including the Supreme Court of Canada, have determined that, with respect to access to information legislation, disclosure is the rule and only if information can be fit within an exemption, narrowly defined, should it be withheld.

Also of importance in this case is section 33 of the Act which provides as follows:

> 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.
>
> ...
>
> (3) On a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,...
>
> (b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

I note section 33(3) in this case because it would appear that the public body is prepared to disclose aggregate total amounts paid to the landlord in each of the years indicated, without providing details or specifics with respect to the “additional” payments over and above base lease payments. The landlord still opposes this disclosure. The onus, therefore, is on the landlord to establish that the information, in aggregate form, falls within one or more specific exemptions to disclosure set out in the Act.

The exemption relied on by the public body and the third party in this case is section 24 of the *Access to Information and Protection of Privacy Act*. Section 24 is a mandatory exemption which means that, if the information in question falls within the definition of the exemption, public bodies are prohibited from disclosing the information. It is, therefore, important to look at the specific wording of the section, the relevant provisions of which are as follows:

> 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant ...
>
> (b) financial, commercial, scientific, technical or labour relations information
>
> (i) obtained in confidence, explicitly or implicitly, from a third party, or...
>
> (c) information the disclosure of which could reasonably be expected to ...
>
> (ii) prejudice the competitive position of a third party,

This review is made much more simple by the fact that the Applicant is prepared to accept an aggregate compilation of the total cost to the Government of the Northwest Territories for the years in question for the spaces in question, rather than requiring copies of all the responsive records which contain that information.

The case referred to by the Department in its submissions, *Canadian Broadcasting Corp. v. Northwest Territories (Commissioner)* [1999] N.W.T.J. No. 117 (QL) contains a thoughtful and useful review of how section 24 of the Act should be interpreted but, in the end, is quite distinguishable from the case at hand. In that case the Applicant sought copies of lease agreements between the GNWT and various landlords of residential housing throughout the Northwest Territories. The leases in issue contained “proprietary information” supplied to the GNWT by the third party businesses in their proposals which were inserted into the leases - information which outlined specifically how much the GNWT, as tenant, would pay for each kwh of electricity, for each litre of fuel, for repairs necessary and as well as other specific O&M costs. This proprietary

information included specific numbers related to specific operating and maintenance costs which were to be reimbursed and at what rate.

In the CBC case, Justice Vertes noted:

> Whether information is confidential will depend upon its content, its purposes, and the circumstances in which it was compiled. It seems to me that the same test applies when, as here, the respondents contend that information has been supplied and obtained in a situation of implicit confidentiality. Merely saying it is confidential does not make it so.

He goes on to quote, with approval, the decision of the Federal Court in *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 in which MacKay J. outlined the "indicators" of confidentiality:

a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.

Having reviewed the records and heard the arguments of all the parties, including the third parties involved, Justice Vertes held:

> I am satisfied, in reference to the criteria outlined above, that information supplied as part of a proposal meets the test for confidentiality. Information as to maintenance and operating costs (including insurance or mortgage costs) is not readily available to outsiders from other sources.

The difference between that case and this one is that the Applicant is not seeking the specific proprietary information which was in issue in the CBC case. Here, what is now being requested is an aggregate of the total cost of the lease for the space in question. While the Applicant will be able to determine, from that information, how much the GNWT paid for the space over and above the base rent, he will not be able to determine the specific amounts paid for utilities or maintenance or insurance or, for that matter, what kinds of additional costs over and above the base rent are payable pursuant to the lease. All that the Applicant will receive is a total amount spent, per year, for the use of the space in question. Furthermore, this number is not a number that was "obtained" from the third party, as required by section 24. The total amount paid for these items is not proprietary information. In my view, the information in aggregate form is very different from the specific rates and costs which were in issue in the CBC case. While the information in aggregate form is commercial information it was not "obtained" from the third party. It was calculated in accordance to a formula outlined in the lease agreement. The third party in this case is a large company that has had contracts with the Government of the Northwest Territories for many years. They know, or certainly ought to know, that the money that the GNWT spends on contracts with third party suppliers is and will be public information. There is nothing before me from which I could conclude that this information was ever intended to be "confidential" information, even if it could be said that it was "obtained" from the third party (which it was not).

I recommend that these aggregate numbers be disclosed as requested by the Applicant. For greater certainty, as I understand the Applicant's new proposal, no further "records" are being requested. Just the numbers collated from those records.

With respect to the “term” of the lease agreement, it seems to me that if that information has already been disclosed with those records already provided to the Applicant, the question is moot. Furthermore, because the Applicant is not seeking any further “records”, if he has not already received information with respect to the term of the lease as part of the initial response, he will not be receiving that information as part of his compromise proposal, in which he is looking to obtain only a compilation of total amounts spent for leasing various parts of the Court House building for specific years. The “term” of the lease is well outside of the parameters of this proposed compromise. I do not, therefore, propose to discuss that issue further except to say that the onus of establishing that the Applicant has no right of access to this information would lie with the third party trying to prevent the disclosure. I do not believe that the submissions of the third party in this review satisfy that onus.

CONCLUSIONS AND RECOMMENDATION

As noted above, I recommend that the Department prepare a statement showing

a) the base rent paid;
b) the total amount of other amounts paid, without any breakdown or specifics; and
c) the total amount of rent and other amounts paid

for the space in the Court House building, as set out in the Applicant’s Request for Information for the years in question.

As an aside, I note that it is unusual for me to be dealing with “information” as opposed to “records”, which is what the Act applies to. While normally I would be dealing with the records containing the requested information on a page by page basis and suggesting appropriate edits such that the aggregate amounts could be determined by the Applicant from the records without compromising information that might be protected from disclosure pursuant to section 24, that step is avoided because the Applicant has indicated he would be satisfied with “information” only and does not require the

“records”. This saves everyone a lot of time and energy. This said, if the Applicant were to say that he still wanted access to the “records”, while much more work and analysis would be necessary, I am satisfied that in the end this review would result in much the same information being given to the Applicant as is being recommended here.

Elaine Keenan Bengts
Information and Privacy Commissioner