NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 15-132
File: 14-171-4
January 6, 2015

BACKGROUND

The Applicant asked the NWT Power Corporation (NTPC) for copies of:

> Any and all communications from Chairman Brendan Bell in regards to connecting NWT mining operations to the power grid, whether it be through current infrastructure, proposed infrastructure, or infrastructure under bids, from April 1, 2013 to present.

NTPC determined that some of the responsive records affected third parties and undertook a consultation with those third parties pursuant to section 26 of the *Access to Information and Protection of Privacy Act*. In consulting with the third parties, NTPC provided them with copies of the responsive records with proposed edits. The third parties consented to the disclosure of the records as edited. The edits were minimal, but no explanation was given to the Applicant outlining the reasons for the refusal to disclose those portions of the records which were edited, as required by section 9 of the Act.

The Applicant requested that this office review the response received. He notes that the documents provided in response to the request have all been edited so as to remove, among other things, the names of third party interests and their respective operators. He points out that taxpayer dollars are being used to build infrastructure or proposed infrastructure and that residents of the Northwest Territories therefore have the right to know where it is being spent. He notes, as well, that:

Mr. Bell, in addition to his position with NTPC, is the president of Dominion Diamond Holdings Ltd. which owns ownership stakes in two mines in the Northwest Territories that could serve to benefit from access to the NWT power grid.

THE PUBLIC BODY'S POSITION

When asked by my office to provide an explanation with respect to the edited portions of the records, NTPC provided the following comments:

a) what NTPC did not disclose in the response to the request for information were the names of particular mining companies with whom Chair Bell has had e-mail correspondence, or other information which could be used to identify those companies;

b) the three e-mails in question involved three projects or potential projects in the NWT. Each of the owners of these projects is publicly traded. Releasing any information with respect to the availability, or non-availability of access to the power grid for any of these projects, or potential projects, could reasonably be expected to have an effect, perhaps a dramatic effect, either positive or negative, on the share price of each of these companies. It could also reasonably be expected to affect each company's position in dealing with others around the development of that company's project;

c) the disclosure of this information could reasonably be expected to result in an undue financial gain or loss for these third parties;

d) the disclosure of this information could also reasonably be expected to prejudice the competitive position of that third party.

NTCP's submission refers to section 24(c) of the *Access to Information and Protection of Privacy Act* (by which I assume is meant section 24(1)(c)) as justification for the refusal to disclose those edited portions of the records in question.

THE APPLICANT'S SUBMISSIONS

The Applicant was provided with a copy of NTCP's submissions and invited to provide further submissions but no further submissions were received.

THE RELEVANT PROVISIONS OF THE ACT

As noted in Section 1 of the Act, one of the purposes of the Act is to make public bodies more accountable to the public by giving the public the right of access to records held by public bodies, subject to specified limited exceptions to that right. As always, therefore, access is the rule and exceptions are to be limited and narrowly applied.

In this case, the onus of establishing that an exemption applies falls on the public body. Section 33 provides that, on a review of a decision to refuse an applicant access to all or part of a record, the onus is on the party seeking to deny access - in this case therefore NTPC has the onus of establishing that the exemption applies.

The section of the Act relied on by the public body for refusing to disclose certain portions of the records in question is section 24(1)(c). This section provides as follows:

> 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
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> (c) information the disclosure of which could reasonably be expected to
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> (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;

Based on its submissions to me, I am assuming that the specific exemptions being relied on are 24(1)(c)(i) and 24(1)(c)(ii).

This is a mandatory exception to disclosure. If the information meets the criteria, it must not be disclosed.

DISCUSSION

As a first comment, I would point out that NTCP did not comply with section 9 of the *Access to Information and Protection of Privacy Act* in providing its response to the Applicant in this case. That section requires that when access to a record or part of a record is being refused, the Applicant must be provided with the reasons for the refusal and the provision of the Act upon which the refusal is based. NTCP's response letter to the Applicant contains neither of these things. This is a simple step which ensures that the public body has actually considered the relevant provisions of the Act and makes them accountable for their decisions.

The records in question in this matter involve four email chains, each comprised of three pages of communications, one of which has been disclosed in full. The other three records have all been edited before being disclosed. I will not comment on the fully disclosed records here.

NTCP relies on section 24(1)(c)(i) and/or (ii) for all of the edits made to each of the remaining three records. As a preliminary comment, I note that for this section to apply the harm or benefit which is reasonably to be expected from disclosure must be

“undue”. The Oxford Dictionary defines the word “undue” as “unwarranted or inappropriate because excessive or disproportionate”. In other words, the harm or benefit anticipated by the disclosure of the information in question must be significant.

In previous review recommendations, I have adopted the “harm test” established by the Alberta Information and Privacy Commissioner’s Office in their Order 96-003. In order to qualify for the exception, the evidence must demonstrate a probability of harm (or benefit) from disclosure and not just a well intentioned but unjustifiably cautious approach to the avoidance of any risk whatsoever because of the sensitivity of the matters at issue. In that Order it was also stated that the Public Body must provide evidence of the following:

(i) that there is a connection between disclosure of the specific information and the harm (or benefit) that is alleged;
(ii) how the harm constitutes "damage" or "detriment" to the matter, or in the case of an benefit, what the anticipated benefit will be;
(iii) whether there is a reasonable expectation that the harm or benefit will occur.

The evidence provided by the public body is that the emails in question involve three projects or potential projects in the Northwest Territories, each owned by publicly traded companies. They argue that “releasing any information with respect to the availability, or non-availability of access to the power grid for any of these projects, or potential projects, could reasonably be expected to have an effect, perhaps a dramatic effect, either positive or negative, on the share price of each of these companies” and, additionally, that this information could “reasonably be expected to affect each company’s position in dealing with others around the development of that company’s project”.

The general topic of discussion in these emails is the availability of the power grid in the Northwest Territories to actual and potential development sites in the Territories and the

possibilities surrounding how this might affect current, anticipated and potential development projects in the area.

Record #2 (as identified by the public body in its submissions)

In the first of the three edited records, the name of the specific mining project has been edited in six instances in the first two pages of the record. The third page of the record has more significant edits, but all are intended to protect the identity of the third party company. The record consists of discussions around a response to an inquiry from an MLA about the project and NTCP's dealings with the company. It contains no technical information or specifics about the company's operations or anything other than a statement that power was available to the project through NTPC. I am not convinced that this information is the kind of information that would unduly affect the share price of the company involved. Any company looking to undertake any kind of development in the Northwest Territories will have to have some source of power. It would not be unusual for a company looking to develop a project to approach the power company in the area to determine whether the public power grid is available to them. I have nothing before me to substantiate how, in this instance, with this company, the information contained in the record might either positively or negatively affect the share price, the project's advancement or any other aspect of the company's well-being. Furthermore, I am not convinced that the information in this record is anything that is not within public knowledge. I suspect that anyone in the industry sector who knows anything about this project will have some knowledge about the information outlined in this record. In those circumstances, section 24 would not apply.

Record #3 (as identified by the public body in its submissions)

This record involves communications between a third party, NTPC and the Government of the Northwest Territories. Once again, the edited portions of the record appear to be edited for the purpose of keeping the name of the third party confidential. Unlike the last record, this record appears to involve the beginning of a discussion between the third

party and NTPC about the way in which power might be delivered to the third party's project. Clearly the discussion is in a very preliminary stage. I can far more easily conclude, simply from the content of the record, that the disclosure of this information could reasonably be expected to significantly affect the negotiations between the third party and NTPC and/or the Government of the Northwest Territories. I am satisfied that, with respect to this record, the public body properly withheld information which might have identified the third party pursuant to section 24(1)(c)(iii). While NTPC did not rely on this subsection, section 24 is a mandatory exception to disclosure and should, therefore, be applied.

Record #4 (as identified by the public body in its submissions)

In this record, NTCP has once again edited all references to the project being discussed. In addition, it has masked certain information about the number of jobs and estimates with respect to the economic impact of the project on the economy of the Northwest Territories. None of the information that has been masked appears to be proprietary information of the third party. Furthermore, I believe the masked information is pretty much publicly available information. I am not at all convinced that the disclosure of the content of this email could, in any way, result in undue harm or benefit to the third party involved. The discussion in this email is about the finalization of a slide presentation being developed by NTCP, presumably for presentation to the Government of the Northwest Territories with respect to the power grid. The details edited from the correspondence really relate to the business case that NTCP was trying to communicate through the slide presentation. The record, however, does not contain any detail about any entity that might be confidential or not already within public knowledge. Furthermore, it is dated. The email correspondence is, at this point, more than a year old. I have trouble accepting that information this old could possibly have any affect, either positive or negative, on the third party company, or cause it any undue financial loss or gain or prejudice the third party's competitive position.

CONCLUSIONS AND RECOMMENDATION

In light of the above, I make the following recommendations:

1. That NTCP review its process and procedure with respect to responding to requests made pursuant to the *Access to Information and Protection of Privacy Act* to ensure that all necessary steps are taken and all necessary information is included in responses to such requests.

2. That Record #2 and Record #4 be disclosed to the Applicant without any edits. Before this is done, however, notice should be given to the two third parties concerned pursuant to section 26(2) of the *Access to Information and Protection of Privacy Act*, along with the information required pursuant to section 26(3).

Elaine Keenan Bengts
Information and Privacy Commissioner