NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 04-043
File: 04-167-4
January 7, 2005

BACKGROUND

On April 26th, 2004 I received a request from the Applicant to review a decision made by the Stanton Territorial Health Authority to deny access to certain portions of records which were the subject of a request from the Applicant for information. The Applicant had made a request to the Health Authority for copies of certain documentation regarding the awarding of a contract for the provision of chartered air medevac services. It appears that many of the records requested were disclosed to the Applicant, but there were a number records from which certain information was severed. The Applicant objected to the severance of that information and sought a review.

I requested that the Health Authority provide me with copies of responsive documents, as well as an indication of what portions of those records were severed and a detailed explanation as to why those parts were severed. The Health Authority's response was provided to the Applicant and the Applicant was invited to provide me with any further comment it might like to make with respect to the issues raised. Those comments were received from counsel for the Applicant on July 30th. Final comments were received from the Health Authority on September 3. These comments were also provided to the Applicant.

ISSUE

For most of the information which the Health Authority has severed or refused to disclose, they have relied on section 24 of the *Access to Information and Protection of Privacy Act*. In particular, they rely on section 24(1)(a), 24(1)(b), and 24(1)(c). Section 24 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;

(d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax;

(e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body;

(f) a statement of financial assistance provided to a third party by a prescribed corporation or board; or

(g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).

For some of the records, the public body relies on section 14 of the Act which gives a public body discretion to refuse to disclose records where those records could be reasonably expected to reveal analysis and/or recommendations made to a public body.

The Applicant relies on section 1 of the Act, and argues that the fundamental premise of the *Access to Information and Protection of Privacy Act* is to make for more open and accountable government and that this must be the dominant consideration when interpreting the exception provisions of the Act.

THE PARTIES POSITIONS

The Applicant argues strongly that the "objectives" provisions of the act should be the primary focus and the fundamental premises from which we begin. I agree. However, section 1 of the Act must be read as a whole. It reads:

> **1.** The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
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> (a) giving the public a right of access to records held by public bodies;
>
> (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
>
> (c) **specifying limited exceptions to the rights of access;**
>
> (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
>
> (e) providing for an independent review of decisions made under this Act.
>
> (emphasis added)

Although the purpose of the Act is to make government more accountable to the public, Section 1 also makes it clear that it the Act will also specify limited exceptions to the rights of access. Sections 14 and 24 outline two of those exceptions. Although the right to access is a fundamental objective of the Act, it also recognizes the need of the government, as a business, to protect the business interests of those with whom it does business.

As noted by the Applicant, the nature of the legislation is such that the exceptions to disclosure should be interpreted narrowly. This has been fairly well established through case law, including, as pointed out by the Applicant, in the Northwest Territories in *CBC v. The Commissioner of the Northwest Territories* [1999] N.W.T.J. No. 117 where

Justice Vertes made the following observations about the Act:

> Canadian jurisprudence is consistent in holding that the general philosophy behind this type of legislation is full disclosure of information. Access, not secrecy, is the dominant purpose insofar as it relates to government documents. The provisions of the Act must be given a liberal and purposive construction. **The legislation recognizes that there are legitimate privacy interests that must be respected** but any exceptions to the rule of disclosure must be clearly delineated in the legislation. (Emphasis added)

Clearly, the courts have also recognized that there are legitimate privacy issues that must be respected. Section 24 of the Act is intended to protect the business interests of Third Parties and to ensure that the Government of the Northwest Territories and its agencies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although government needs to be open and accountable, they also need to conduct business and enter into business relationships and in doing so, they must be able to assure their private sector partners that their trade secrets and commercial and financial secrets will not be readily disclosed to competitors and the general public.

DISCUSSION

The first thing that should be noted is that section 24 is a mandatory exclusion section. Should the information in question fall under any of the listed exemptions of section 24, the public body cannot disclose it. There is no discretion in the matter. The question, therefore, simply becomes whether the material severed from the record provided to the Applicant falls under one of the listed exemptions from disclosure.

There appear to be three categories of records at issue here. The first is a contract between the public body and a Third Party. The second record is described as an Executive Report, which the public body says is an evaluation prepared by the Health Authority's evaluation team for reviewing the proposals received in response to a "Request for Proposals". The third group of records are invoices submitted by a third

party business to the public body under the contract in question for 2002 and 2003. The Health Authority has refused to disclose these invoices, but has prepared a record extracting information from the invoices specifically for the purpose of responding to the Applicant's request for information.

1. The Contract

The Health Authority has indicated that it is prepared to disclose parts of the contract to the Applicant. Specifically, they have disclosed (or are prepared to disclose) pages 1 - 11 of the contract and Schedule "B" which is the Request for Proposals for the project in question. They have, however, refused to disclose Schedules "A" and "C" of the contract. They argue that these schedules contain confidential financial, commercial or technical information obtained in confidence from the third party, the disclosure of which could be reasonably expected to result in undue financial loss or prejudice to the competitive position of the Third Party Contractor. Schedule "A" of the contract contains the fee structure that was part of the successful party's proposal. Schedule "C" contains detailed information about the successful contractor's corporate structure, facilities, aircraft, scheduling, rates and fees, other customers, partners and personnel, as well as data involving flight response times, out-sourcing quotes and the Third Party's Operations Manual. I will be dealing only with those parts of the record to which access has been denied. I will assume that the uncontested parts have been or will be disclosed to the Applicant.

In order to be exempt from disclosure under section 24(b) of the Act, certain criteria must be met. Both the Applicant and the public body have suggested that there is a three part test that must be met in order for a record to receive protection from disclosure. I disagree. Although the case of *Air Atonbee Ltd. v. Canada (Minister of Transport)* (1989) F.T.R. 194 adopts a three part test, that test relates to the Federal *Access to Information Act* which is worded somewhat differently than ours. While the federal legislation does, in fact, require a three part test to be met, our Act does not.

Our act requires that either:

a) that the information in question be commercial, financial, scientific, technical or labour relations information that
   i) was supplied in confidence to the Public Body, or
   ii) is of a confidential nature supplied in compliance with a lawful requirement

OR

b) 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 the contractual or other negotiations of a third party; or
   iv) result in similar information not being supplied to a public body

There are, in fact two separate tests. If the information is commercial information that was supplied in confidence, that is all that is necessary to attract protection from disclosure. Alternatively, even if the first test is not met, if the disclosure of the information could reasonably be expected to result in financial loss or to prejudice the competitive position of a third party, that part of the record cannot be disclosed.

In this case, then, the first step is to determine if the information severed from the responsive record is “financial, commercial, scientific, technical or labour relations information”. If so, we must then determine if it was supplied in confidence to the Public Body. If the information meets this test, it is exempt from disclosure. If not, then we must determine whether the disclosure of the information could reasonably be expected to cause one of the results outlined in (b) above. If so, then the information is protected from disclosure.

Having reviewed the records in question, there is no doubt in my mind that the portions of the contract which the public body has refused to disclose do, in fact, constitute

"financial, commercial, scientific, technical or labour relations" information of the third party. The next question, then, is whether the information was provided to the public body either explicitly or implicitly in confidence. The Supreme Court of the Northwest Territories in *Canadian Broadcasting Corporation v. Northwest Territories (Commissioner)* [1999] N.W.T.J. No. 117, has adopted the following test for determining whether information in the custody of a public body has been provided in confidence:

a) is the content of the record 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) did the information originate and was it communicated in a reasonable expectation of confidence that it will not be disclosed; and

c) was the information communicated, whether required by law or supplied gratuitously, in a relationship between the 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 the public benefit by confidential information.

The information in the contract which has been excluded from disclosure is information that is clearly not otherwise accessible by the public from any other source. It is specific commercial information about the third party's fee structures, internal corporate policies and organization which could only come from the third party and which would not be generally available otherwise. The first part of the test has been met.

There is no explicit suggestion that the information has been provided in confidence. However, as noted by Senior Adjudicator Goodis in *Order PO 1805* of the Ontario Information and Privacy Commissioner's Office, in reference to section 17 of their Act, which is similar to our section 24, this provision "is designed to protect the

"informational assets" of businesses or other organizations which provide information to government institutions". Businesses don't generally reveal pricing policies or related information to the general public for good business reasons. In most cases, the disclosure of this kind of information could potentially ruin a company's competitive position. The more competitive the industry, the more important the confidentiality of this kind of information becomes. The context in which this Request for Information has been made suggests to me strongly that the airline industry (and in particular the medevac industry) is very competitive indeed. In these circumstances, despite the fact that there does not appear to be any explicit agreement as to confidentiality, I am satisfied that there was an implicit understanding that the "informational assets" of the third party which were submitted to the public body as part of the third party's proposal, were supplied with the implicit understanding that those assets would remain private and protected from disclosure. The second part of the test has also been met.

Is the business relationship between the Third Party and the public body contrary to the public interest? Clearly, the government must enter into contracts with the public sector in order to accomplish its obligations. To that end, it is important for the government, as a business interest, to be able to maintain the confidentiality of its business associate's information. There is a difference between disclosing its own financial information and accounting for its own spending and disclosing the commercial, technical and financial information of its business partners. In my opinion, it is important for the government to be able to contract with third parties in such a way that the third parties can be confident that their commercial and financial confidentiality will be maintained as far as possible.

In my opinion, having concluded that the third party information was commercial information supplied to the public body by the third party with an implicit expectation of privacy, the public body was correct in refusing to disclose those parts of the contract which contained the successful third party's commercial information.

2. The Executive Report

This record was described by the public body as being an evaluation prepared by the public body's "evaluation team" for the proposals received in response to the public body's Request for Proposals. The Executive Summary includes the same financial, commercial and technical information which was contained in the contract. This information was taken directly from the successful applicant's proposal so that it, too, meets the test for protection from disclosure as outlined above. I agree with the public body that the information in question does not change in character simply by reason of it being transferred from one record to another. It is still information that was provided by the third party in confidence. But that does not mean that the record as a whole is protected from disclosure. The third party financial information could be severed without making the record meaningless. Is there, then, some other exemption that applies to the balance of the Report? It is somewhat unclear to me on review of the materials received whether or not portions of the Executive Report were provided to the Applicant or whether the entire record was refused.

In my opinion, there are certainly sections of the Report which are not exempt. Pages 1 through 4 contain no third party information and no analysis or recommendations. These pages simply describe the methodology used by the evaluation team in evaluating the proposals received. In the copy of the record provided to me, there is some editing which has been done. Most of the editing appears to relate to names and the analysis of the proposals of both the successful proponent and the unsuccessful proponents. Insofar as the edited portions relate to the names of the other third party proponents, I understand this editing was done because the Applicant was seeking information related only to the successful proponent. The Applicant has made no comment about the other third parties and I am proceeding on the assumption that there is no objection to the severance of information relating to unsuccessful third parties.

The public body suggests that those parts of the Report which are not protected from disclosure pursuant to section 24 of the Act are protected pursuant to section 14 (1)(a) of the Act, which reads as follows:

> The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal
>
> a) advice, proposals, recommendations, analysis or policy options developed by or for a public body or member of the Executive Council

Clearly, this report was prepared specifically for the purpose of providing an analysis of the various proposals received in response to the public body's Request for Proposals. After the first four pages, which provide the reader with the methodology of the evaluation, the balance is either a transposition of the confidential third party information discussed above or "analysis" and "recommendations". To the extent that it is "analysis" and "recommendations" only, the public body has a discretion as to whether or not to disclose the record. It is not for me to say whether or not that discretion has been exercised well, or the way I might have exercised the discretion. So long as it is clear that the public body considered its position and weighed the arguments for and against disclosure, that satisfies the provisions of the Act. In this case, the public body's response to me clearly indicates that they considered the pros and cons of disclosure. Being an advocate for openness in government, I might have hoped for a different decision. But whether or not I agree with the decision, so long as the information falls within the parameters of section 14, the discretion lays with the public body to determine whether or not to disclose the record. In these circumstances, the requirements of the Act have been met.

3. Summary of Invoices

The third set of records requested were copies of invoices submitted to the public body under the contract discussed above for the period 2002 to 2003. The public body refused to disclose the invoices themselves, but instead prepared a summary. The

Health Authority takes the position that cannot provide the more detailed invoices themselves because they contain sensitive medical and personal information about third parties. The summary prepared, therefore, was prepared specifically in response to the Applicant's request for information.

Because of the nature of the information in question, being person medical and other information about third party individuals, the public body must be very careful. The approach taken by the public body appears to be a reasonable compromise – the preparation of a summary of the invoices received and paid. The summary prepared includes the following information:

Fiscal Year
The Health Authority requesting the services
Place Flight Originated
Stops made
Travel Date
Warrant Number
Fee paid
Trip Miles

Because of the details of personal health information which would appear in the invoices, I agree with the public body that it cannot provide the Applicant with those records. Even with judicious severing of the information, it would be difficult to protect the personal information in those invoices. The compromise that the public body suggested, which would provide the Applicant with the financial details of the public monies spent on this public service, seems to me to be a reasonable one. It is detailed enough to ensure that the government is subject to public scrutiny, but not so detailed as to breach personal privacy of individuals or to reveal the specific fee structures of the Third Party.

I have not discussed the issue of whether or not the disclosure of more detailed information about the Third Party's fee structures etc might be reasonably expected to affect the Third Party's competitive position. I do not think that the discussion is necessary in this case in light of my conclusion that the severed information was information supplied to the public body by a Third Party in confidence. However I would comment, as an aside, that it is clear simply from the nature of the request for information made by the Applicant that the airline industry, and in particular the "medevac" industry, is one which is very competitive. To reveal more details about the pricing structure contained in the contract, either by disclosing the contract itself or the detailed invoices, may well have a negative impact on the business and competitive interests of the Third Party for future competitions. The information provided in summary form is sufficient to ensure that the public has the ability to scrutinize the use of public monies, while protecting the commercial and financial specifics of the Third Party contractor.

CONCLUSION AND RECOMMENDATION

In view of the above discussion, it is my conclusion that the public body properly applied sections 14 and 24 of the *Access to Information and Protection of Privacy Act*. More particularly, it is my recommendation that :

a) the contract be disclosed to the Applicant with the exception of Schedules A and C

b) that the first four pages of the Evaluation report be provided to the Applicant. With respect to the balance of the report, those portions of the report which involve a "transcription" of the information contained in the Third Party's original proposal to the evaluation, those portions of the report are protected from disclosure pursuant to section 24 of the Act. With respect to those portions of the balance of the report which constitute analysis and recommendations, the public body need only show

that it has exercised its discretion and considered carefully, in all of the circumstances, whether or not to disclose the records. In this case, I am satisfied that the public body has exercised that discretion

c) the individual invoices for medevac services contain information which would, if disclosed, constitute an unreasonable invasion of the privacy of individual third party patients. Furthermore, the invoices would, once again, disclose informational assets of the successful third party, including pricing specifics. The preparation of a summary of the invoices, showing the information outlined above, is a fair compromise which will ensure the protection of the third party's business information, while allowing the applicant sufficient information to scrutinize the public body's use of public funds.

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