NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 98-05
June 14, 1998
Review File: PC7376 / PC7371

BACKGROUND

On May 22nd, 1997, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Department of Health and Social Services (the "Public Body") for access to the following information:

1. The minutes of any meetings of the Keewatin Regional Health Board or its executive committee at which the contracting out of the dental services in the Keewatin Region was discussed.

2. Any reports or background papers provided to either the Board or its executive committee relating to the same matter.

3. A copy of the actual contract under which this service was to be provided by a particular named dental company.

After discussion with the Applicant, the request was narrowed to documents dated or created during the summer of 1996. There was some delay in dealing with the request for information as the Applicant had not included the necessary fee. By letter dated October 3rd, 1997, the Public Body advised the Applicant that they had reviewed their records and had in their possession only the contract referred to in paragraph 3. This letter also advised the Applicant that two Third Parties had been contacted, as required pursuant to Section 26 of the *Access to Information and Protection of Privacy* (ATIPP) *Act*, and their views had been obtained. As a result, the Public Body had decided to release the contract between the Keewatin Regional Health Board and the dental contractor, with significant portions of the contract severed. Notice was given to both of the Third Parties and they were given 30 days to request a review of the Public Body's decision to the Information and Privacy Commissioner.

There was some correspondence back and forth between the Third Parties and the Public Body and, eventually, both of the Third Parties submitted a Request for Review. I raised with counsel for the Keewatin Regional Health Board the possibility that there might be room to attempt to negotiate or mediate the matter, but this possibility was rejected by them, their position being that the information in question was not subject to the *Access to Information and Protection of Privacy Act*. In light of this, I proceeded to obtain the position of all parties.

It is to be noted that, pursuant to section 33 of the Act, the onus in these circumstances is on the Third Parties to show that the information requested should not be released to the Applicant.

In conducting my review, I requested and received from the Department of Health and Social Services a copy of the document in question, as well as a copy of the contract between the Department and the Keewatin Regional Health Board. I felt that it was necessary to review the latter document so that I could properly consider the relationship between the Department and the Health Board, in light of the nature of the argument being made by the Health Board.

RECORDS AT ISSUE:

There is really only one document in the hands of the Department which is responsive to the request. This document is a copy of the contract between the Keewatin Regional Health Board (KRHB) and a contractor of dental services. There is, however, a larger question to be considered in this ease, and that is the question as to whether other documents, such as minutes of meetings of the Health Board, are subject to the Act, and therefore available to the public upon request.

THE PARTIES POSITIONS:

Both of the Third Parties object to the release of the information in question.

The Keewatin Regional Health Board makes the following arguments:

1. The Board is not subject to the Access to Information and Protection of Privacy Act and, as the document in question belongs to the Board, it is not subject to disclosure.

2. The release of the document would be contrary to section 7 of the Financial Administration Act.

3. The release of the document contains information, the disclosure of which would be reasonably expected to cause it financial loss or otherwise interfere with its ability to do business, and is therefore protected under section 24(1) of the Access to Information and Protection of Privacy Act.

The dental contractor objects to the release of the document on basis that it contains financial, commercial, scientific, technical or labour relations information obtained from it (a third party) in confidence (section 24(1)(b)). They point to the fact that the contract in question contains a confidentiality clause. They further argue that the release of the information in the contract could be reasonably expected to result in undue financial hardship and is therefore protected from release under section 24(1)(c).

ISSUES:

The issues, then, are the following:

1. Is this document subject to the Access to Information and Protection of Privacy Act at all?

2. Does section 4 of the Access to Information and Protection of Privacy Act apply to prohibit the release of the document? To answer this question, one must determine whether Section 7 of the Financial Administration Act prohibits the release of this document.

3. Is this document, or any part of it, protected from disclosure to the public under section 24(1)(b) of the Act?

4. Is this document, or any part of it, protected from disclosure to the public under section 24(1)(c) of the Act?

DISCUSSION

A. **Is this document subject to the Access to Information and Protection of Privacy Act?**

The Keewatin Regional Health Board argues that Schedule A to the Act includes an exhaustive list of Public Bodies which are subject to the Act and that Regional Health Boards are not included in that list. It follows, they say, that documents belonging to the Regional Health Boards are not documents which are required to be disclosed under the Act. They suggest further that there was no obligation on the Keewatin Regional Health Board to provide the document in question to the Department of Health and Social Services but that it was provided merely as a "matter of courtesy". They submit that in these circumstances the Department has no proprietary interest in the document and it is not, therefore, legally obliged to disclose the document under the Act. They suggest that to allow the Applicant the information in question in these

circumstances would be permit that person to "use the back door" to do what no applicant is allowed to do "using the front door".

On a preliminary issue, I do not accept the Board's argument that because the Regional Health Boards are not listed in Schedule A of the Act that they can automatically avoid the Act's requirements. This is not necessarily so. One must consider the nature of the relationship between the agency involved and the Department. This includes considering the legislation creating the body, the reporting requirements, financial relationship, responsibility for personnel and other incidents of the agency's existence. In this case, I have asked the Department to provide me with a copy of its contract with the Health Board so that I could examine more closely the relationship between the two.

Although the Health Board is almost completely reliant on the Department for funding, and there are fairly inclusive reporting requirements, all administrative, personnel, and program delivery matters are the responsibility of the Board. In these circumstances, I find that the Keewatin Regional Health Board is, much like the Labour Relations Board or the Liquor Inspections office, an independent agency of the government. It hires and pays its own personnel and carries out its own programs. As such, a Regional Health Board would have to be specifically included in Schedule A to become directly subject to the Act. The Act does not, therefore, apply directly to the Keewatin Regional Health Board so as to require it to comply with a Request for Information.

Does a document which has been given to the Department of Health by the Board, then, become subject to the Act?

Section 3 of the Act provides that:

> This Act applies to **all records in the custody of or under the control of a** public body, including court administration records, but does not apply to the following:

a) a record made from information in a court file, a record of a judge of the Court of Appeal, the Supreme Court or the Territorial Court or a record of a Justice of the Peace;

b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;

c) a record relating to a prosecution where all proceedings in respect of the prosecution have not been completed;

d) a question that is to be used on an examination or a test;

e) material placed in the Northwest Territories Archives by or for a person other than a public body;

f) a record made from information in a registry operated by a public body where public access to the registry is normally permitted. (emphasis mine)

There is no requirement under that Act that the Public Body have a "proprietary interest" in the information in question. In fact, the wording is quite clear that all that is really necessary is that the record be in the custody or control of the department. Nor is there any suggestion in the wording of the Act which requires the Department to consider the source or reason the information is in its possession. The mere fact that the information is in the custody or control of a Department brings it under the Act. Whether the document was provided to the Department of Health as a "courtesy" or as a result of the contractual arrangement it has with the Department is really irrelevant. If the Department has it, it is subject to disclosure under the Act, subject only to the exceptions contained in the Act.

2. Does section 4 of the Access to Information and Protection of Privacy Act apply to prohibit the release of the document?

To answer this question, one must determine whether Section 7 of the Financial Administration Act prohibits the release of this document.

Section 4(1) of the Access to Information and Protection of Privacy Act provides that:

> A public body shall refuse to disclose information to an applicant where the disclosure is prohibited or restricted by another Act or a Regulation under another Act.

The Keewatin Regional Health Board (KRHB) argues that Section 7 of the Financial Administration Act (FAA) provides that "a person who receives information under this Act from a person whose right to disclose the information is restricted by law, holds that information under the same restrictions respecting disclosure as those which governed the person from whom the information was obtained". They say that as a result of section 4 of the ATIPP Act, the protection afforded by section 7 of the Financial Administration Act applies to prevent the disclosure of the document in question.

The Department of Health and Social Services points out that the document under consideration did not come into the hands of the Department by virtue of the Financial Administration Act. If anything, it appears to have been provided to comply with the reporting requirements contained in the agreement between the KRHB and the Department of Health and Social Services, although the KRHB states in its argument that it was provided "as a courtesy". The section of the FAA relied on by the KRHB clearly states that information must be received "under this Act" to be subject to this section of the Act. As there is no indication that this information was given to the Department of Health pursuant to the FAA, the noted section of the Act simply does not apply. Furthermore, the KRHB has not provided me with anything to suggest that the release of this particular document is "prohibited" under the FAA or any other Act.

This argument, therefore, must also fail.

3. Is this document, or any part of it, protected from disclosure to the public under section 24(1)(b) of the Act?

Both of the Third Parties rely on this section of the Act. Section 24(1) (b) states 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;
>
> ii. that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;

Firstly, it is to be noted that this paragraph is mandatory and if the information in question falls within the category of information described in the section, access to the information must be withheld.

To fall under this section, the information in question must be "financial, commercial, scientific, technical or labour relations information" and the information must have been supplied or obtained in confidence, either explicitly or implicitly from a third party or the information is of a confidential nature and was supplied by a Third Party in compliance with a lawful requirement. There is clearly a two part test to be met and each of the branches of the test must be met to attract the protection of the section.

Although both Third Parties claim the protection of this section, they approach it from different angles. I will review both arguments.

The KRHB suggests that it is "abundantly clear" that the information contained in the contract in question is financial and/or commercial information and it thereby meets the first requirement of the section. It further states that the contract was provided to the Department on the implicit understanding of confidentiality with respect to the

information contained in it. They invite me to find evidence of this implicit confidentiality in their reluctance to allow the information in the contract to be released to the Applicant. In the alternative, they suggest that the information contained in the document is clearly confidential in nature. They invite me to find that a contract was provided to the Department of Health and Social Services as a legal requirement of their contract with the Department.

The dental contractor claims that there was an explicit confidentiality clause in the document in question and points to paragraph K of the contract, which reads as follows:

> The Contractor shall use its best efforts to ensure that any and all information related to the affairs of the KRHB to which the Contractor becomes privy as a result of performing the services required under this Agreement, is kept confidential during and after the term of this agreement and shall not be divulged, released or published without the prior written approval of the KRHB.

They suggest that they "became privy" to the entire document when they signed it. They go on to argue that, even if the information in the contract was not explicitly "provided" in confidence, it was implicitly so provided. They suggest that the manner in which the contract is drafted reveals much which would allow the reader to draw an accurate inference of how services are to be performed, and at what cost. They point out that the contract is based on such things as market information that they have researched, internal pricing policies which they have developed and customer service information which they have gathered by trial and error in their ongoing commercial operations. They say that it was never anticipated by them that this document would be subject to public scrutiny. There was an implicit understanding that the contract would be confidential.

I have no problem in finding that much of the information in the contract in question is commercial in nature. I think that this term must be given its ordinary, dictionary

meaning. This contract contains information such as pricing, accounting, provision of facilities, insurance, and other matters of a commercial nature. Therefore, the first requirement of the section has been met insofar as the commercial information in the document is concerned. Not all of the information, however, is of a commercial nature. Much of it is just standard contractual fare and this part of the document will not attract the protection of this section.

Perhaps the more difficult requirement of this section is to prove that the information was provided in confidence. It requires more than simply a statement to that effect made by the Third Party. It requires some substantive indication of the statement. In British Columbia Commissioner's Order No 26-1994, the Privacy Commissioner of British Columbia was prepared to accept that information was provided "in confidence" if:

a. The Third Party had provided original or proprietary information that remains relatively unchanged in the contract; and

b. Where the disclosure of the information would permit an applicant to make an accurate inference of sensitive Third Party business information that would not in itself be disclosed under the Act.

Did the KRHB provide original, or proprietary information which remains relatively unchanged in the contract? It seems to me that, at least insofar as the information in the contract relates to commercial matters, its contract with the dental contractor does, in fact, contain proprietary information. It outlines the terms and conditions which it has been able to negotiate with a service provider. The Department had no hand in developing or creating the contract, though it did have a secondary interest in the terms of the contract. The information does, therefore meet the first test of "implied confidentiality".

The second question, then, is whether the disclosure of the information would permit an applicant to make an accurate inference of sensitive Third Party business information that would not in itself be disclosed under the Act.

The KRHB is a government agency. It cannot say that this "business information" would not otherwise be disclosed. The KRHB has an obligation to provide an accounting to the Department of Health and Social Services on a regular basis. It spends public money and must be accountable for the monies spent in a very public fashion. From the point of view of the KRHB, therefore, this information cannot be labeled as "sensitive business information". However, from the point of view of the dental contractor, the information in question is very definitely sensitive business information. The dental industry is a competitive one and the specific terms of a contract such as the one in question would undoubtedly put the contractor at a disadvantage if revealed to a competitor.

I therefore find that, such of the information in the document as can be considered "commercial" information is protected from disclosure under section 24(1)(b) of the Act. Specifically, the following parts of the contract should be severed:

a. On the Index page, the words following the Index letters D, E, F, G, and O

b. Paragraph A.4 from the word "with" in the second line to the end of the sixth line

c. Paragraph A.5

d. Paragraphs C.1 and C.2

e. Paragraphs D.1, D.2 and D.3

f. Paragraphs E.1, E.2, E.3, E.4, E.5, E.6, E.7, E.8 and E.9;

g. Paragraph F.1

h. Paragraph G.1

i. Paragraph H.1

j. Paragraph I.1

k. Paragraphs J.1, J.2 and J.3

l. Paragraph L.1

m. Paragraphs N.2

n. Paragraph O.1

o. Schedules A and B

Briefly dealing with the dental contractor's contention that clause K of the contract explicitly provides for confidentiality, I cannot agree. This paragraph certainly requires that the dental contractor maintain confidentiality. It does not, however, place the same burden on the KRHB. The clause was clearly intended to protect the KRHB. This clause would prevent the dental contractor from providing a copy of the agreement to the Department of Health and Social Services or to any other party. The fact that the KRHB itself has chosen to provide a copy of the document in question to the Department, however, negates any obligation on the dental contractor to maintain that confidentiality vis a vis that body. In order to rely on such a clause to protect the confidentiality of the contractor, it would have to be drafted in a much broader fashion.

4. Is this document, or any part of it, protected from disclosure to the public under section 24(1)(c) of the Act?

Section 24(1)(c) of the Act provides as follows:

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

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

The KRHB argues that it is evident that the agreement between the KRHB and the dental contractor contains information, the disclosure of which would result in undue financial loss or gain to "a person". They suggest that if there is disclosure of the information, the dental contractor would not be able to bid on any future contract on the same footing as other contractors. They point out that a competitor of the dental contractor, knowing the terms of the contract, would be able to strategically underbid this contractor, inevitably resulting in an unfair negotiating position. They also suggest that it is "obvious" that the release of this information can reasonably be expected to result in an undue financial loss to the dental contractor, prejudice its competitive position, and interfere with its ability to negotiate future contracts. They do not provide any basis for this assertion, but rely on "common sense". The dental contractor, in its argument, goes further in outlining how and why they feel that there is a reasonable probability of all three disadvantages befalling them if the information in question is released. Specifically, they say that they were able to negotiate their contract on the basis of market studies and experience in field and that any knowledgeable person reading the contract would be able to come to accurate conclusions about the contractor's strategies and they would, therefore, be put at an unfair disadvantage.

This section was discussed at some length in Review Decision 98-03. In that decision, I found that in order for a Third Party to successfully prevent the release of information under section 24(1)(c), it needs to show only that there is a reasonable expectation that the release of the information will have one of the effects outlined in that subsection. In

this respect, our legislation is somewhat different than similar legislation in other parts of the country where the Third Party must also show that the information is of a commercial nature and provided in confidence. For this reason, it is much easier to fit under the protection of our 24(1)(c).

That being said, the Third Party must still prove that there is a reasonable expectation of probable harm to it. This evaluation, by its very nature, involves some speculation. The future is always uncertain. The harm anticipated must be "significant" and the evidence must involve more than mere speculation (*Ontario Workers' Compensation Board v. Ontario (Assistant Information and Privacy Commissioner)*, reported at 23 OR (3rd) 31).

In the case of the *Canadian Information Commissioner v. Canada (Prime Minister)* [1992] FCJ NO.1 054, the Federal Court, Trial Division reviewed Canadian jurisprudence interpreting the Access to Information Act and set out some of the guidelines which have been established as being useful in assessing whether there is a reasonable expectation of probable harm from disclosure in a given situation. These guidelines are:

1. The exceptions to access require a reasonable expectation of probable harm; *Canada Packers Inc. v. Canada (Minister of Agriculture)* [1989]1 F.C. 47 at p. 60

2. The considered opinion of the Information Commissioner should not be ignored: *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, [1989] 1 F. C. 265 at p. 272

3. Use of the information is to be assumed in assessing whether its disclosure would give rise to a reasonable expectation of probable harm: *Air Atonbee Ltd. v. Canada (Minister of Transport)* (1989) 27 F.T.R. 194 at p. 216

4. It is relevant to consider if the information sought to be kept confidential is available from sources otherwise available by the public and whether it could be obtained by observation or independent study by a member of the public acting on his or her own: *Air Atonbee*, (supra) at p. 210

5. Press coverage of a confidential record is relevant to the issue of expectation of probable harm from its disclosure: *Canada Packers*, (supra) at p.63; *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989]2 F.C. 480 at p. 488

6. Evidence of the period of time between the date of the confidential record and its disclosure is relevant: *Ottawa Football Club* (supra) at p.488

7. Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way fails short of meeting the burden of entitlement to an exemption from disclosure: *Ottawa Football Club* (supra) at p. 488; *Air Atonbee*, (supra) at p. 216

8. Each distinct record must be considered on its own and in the context of all the documents requested for release, as the total contents of the release are bound to have considerable bearing on the reasonable consequences of its disclosure: *Canada Packers* (supra) at p. 64

9. Section 25 of the Act provides for severance of material in a record that can be disclosed from that which is protected from disclosure under an exemption provision. The severance must be reasonable. To disclose a few lines out of context would be worthless: *Montana v. Canada*, [1988] F. T. R. at p. 26

Ultimately, the ATIPP Co-Ordinators, and this office, must rely on the statements of the Third Parties and assess the credibility of those statements within the context of the each application for information. I have reviewed the document in question with the general principals outline above in mind. I am satisfied, based on those principles and the arguments made by the dental contractor, that there is a reasonable expectation that the release of the portions of the contract outlined above would put the contractor at a significant disadvantage in attempting to negotiate a similar contract in the future and that would thereby prejudice its long term competitive position.

SUMMARY AND RECOMMENDATION:

In summary, it is my finding and recommendation that the contract in question be released to the Applicant, but with those portions outlined on pages 11 and 12 of this review decision, severed.

Elaine Keenan Bengts
Access to Information and Privacy Commissioner