NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-099
11-112-4
July 12, 2011

BACKGROUND

This matter was brought before me by an individual third party (who I will refer to in this report as A.B. for ease of reference) seeking to prevent the disclosure of certain information to an Applicant under the access provisions of the *Access to Information and Protection of Privacy Act*. The original request was for "total billings for legal aid work by each law firm and sole practitioner for 2009-2010 fiscal year". Because of the nature of the information being sought, the public body advised the third parties involved that they were considering disclosing a list of lawyers/law firms who had billed the Legal Services Board of the Northwest Territories during that fiscal year, along with the aggregate total of the amount paid to each of those lawyer/law firms. A.B. was included in the list and wrote the public body a letter indicating that he was objecting to the disclosure. At that point, the Legal Services Board considered the objections and decided, nonetheless, to disclose the records, giving A.B. notice of that decision. A.B. then asked me to review that decision. Both the public body and A.B. were given the opportunity to provide me with their submissions with respect to the issues.

A.B.'s SUBMISSIONS

A.B.'s concern about the disclosure of the information in question is a business issue. He is concerned that if the amount of money he receives for his services to the Legal Services Board is disclosed, it will significantly affect his competitive position. He has a contract which is awarded through a tender process, to provide specific legal services to the public body. With his current contract up for renewal in a short period of time, he

was concerned that the disclosure of the amount of money he received from the contract would give his competitors an advantage over him. As he has similar contracts in other jurisdictions as well, he was further concerned that the disclosure of the information could very well affect his competitive position when bidding in other jurisdictions. He says that it was his understanding that the amount paid to him under his contract was confidential information, between him and the Government of the Northwest Territories.

THE PUBLIC BODY'S SUBMISSIONS

The public body simply indicates that, after reviewing A.B.'s concerns, they determined that there were no grounds upon which to base a refusal to release the requested information and, in particular, they did not consider that A.B.'s objection fell under the protection afforded by section 24 of the *Access to Information and Protection of Privacy Act*.

THE LEGISLATION

The relevant sections of the *Access to Information and Protection of Privacy Act* are as follows:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

    (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;

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 ...

33.(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,

(a) in the case of personal information, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and

(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.

DISCUSSION

The first thing to be determined is whether the information in question is personal information about the third party (A.B.) or not. If it is A.B.'s personal information, the onus is on the person seeking the information to establish that disclosure of the information would not be contrary to the Act. However, if the information is not A.B.'s personal information, the onus will be on A.B. to establish that the information should not be disclosed.

A.B. did not argue that the information was his personal information. Rather, he was taking the position that the disclosure of the information requested would hinder his business position. In this case there might have been an argument that the information was A.B.'s personal information (i.e. information about an individual's employment or

financial history) and that the disclosure of that information would therefore be presumed to be an unreasonable invasion of A.B.'s privacy pursuant to section 23(2)((f) which raises a presumption that it would be an unreasonable invasion of his privacy if disclosed because it describes the third party's finances, income, assets, liabilities, net worth, bank balances, financial history or activities or credit worthiness. He did not make this argument so I conclude that A.B. did not consider the information requested to be his personal information such that its disclosure would result in an unreasonable invasion of his privacy. He took the position, instead, that the information, if disclosed, would hurt his business or competitive position. As such, then, the onus falls on him to establish that the disclosure of the information could be "reasonably expected" to prejudice his competitive position and/or result in an undue financial loss.

I considered the application of this section in my Review Recommendation 98-03. In that case, I made the following observations:

> 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. ..... It must only show 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. However, as pointed out in the case of the *Ontario Workers' Compensation Board v. Ontario (Assistant Information and Privacy Commissioner*), reported at 23 OR (3rd) 31, the harm must be significant and the evidence must involve more than speculation and more than just possibility of harm. The Federal Court, Trial Division in the case of the *Canadian Information Commissioner v. Canada (Prime Minister)* [1992] FCJ No. 1054 reviewed Canadian jurisprudence interpreting the Access to Information Act and set out some of the guidelines which are useful in assessing whether there is a reasonable expectation of probable harm from disclosure in a given situation. These guidelines are:
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> 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
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> 2. The considered opinion of the Information Commissioner should not be ignored: *Rubin v. Canada (Canada Mortgage and Housing Corp.)*, reflex, [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)* reflex, (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 to 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)*, reflex, [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 falls 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

10. Exemptions from disclosure should be justified by affidavit evidence explaining clearly the rationale exempting each record: *Nick Turnette v. The Solicitor General of Canada* (T-522-84) November 22, 1991, at p. 31 *(T.D.) and Merck Frosst Canada Inc. v. the Minister, Department of Health and Welfare* (T-1422-87) June 21,1988 at p. 3 (T.D.)

Based on these criteria, I am not satisfied that A.B. has satisfied the onus on him. His justification for wanting to refuse disclosure is based on nothing more than his speculation that the disclosure of the information might affect his competitive position in any future tendering process for the same contract. He has provided me with no information about the nature of the competition for this particular contract or whether there were other firms or individuals who specialized in this area who would likely participate in a future tender process. Furthermore, the information which the public body proposes to disclose is an aggregate number only. It does not differentiate between legal fees paid and legal disbursements recompensed. It does not provide any indication as to the number of hours dedicated to the contract by the lawyer, or the hourly rate charged per hour. As an aggregate number, it reveals no specific information about the terms or the conditions of the contract, other than the aggregate amount paid to the lawyer as a result of the contract over the course of one fiscal year. I am not convinced that this information alone is sufficient to provide any competitor with an unfair advantage over A.B. in any future tendering process.

RECOMMENDATIONS

I recommend that the record be disclosed to the Applicant.

Elaine Keenan Bengts
Northwest Territories Information and Privacy Commissioner

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