NORTHWEST TERRITORIES
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 15-139
File: 14-195-4
July 14, 2015

BACKGROUND

An Applicant made a request to the Department of Industry, Tourism and Investment for

> All records, not including those in draft form, dated from December 20, 2012 to May 26, 2014, related to Deepak International's plan to acquire the exclusive rights to use the Polar Bear Diamond Trademarks.

Because the records requested involved a third party, the Department consulted with the third party, Deepak International Ltd. (DIL), as required pursuant to Section 26(1)(b) of the *Access to Information and Protection of Privacy Act*. After the consultation, the public body decided to disclose the requested records with some limited exceptions and the third party was advised of the decision. The third party then requested a review of that decision pursuant to section 28(1) of the Act.

It is to be noted that, pursuant to section 33(3)(b) of the Act, 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, the onus is on the third party to establish that the applicant has no right of access to the record.

THE RELEVANT SECTIONS OF THE ACT

The Third Party relies on sections 23 and 24 of the *Access to Information and Protection of Privacy Act* for their argument that the records in question should not be disclosed. Section 23 prohibits the disclosure of information where that disclosure would constitute an unreasonable invasion of an individual's privacy. Section 23(2) of the Act outlines the circumstances in which an unreasonable invasion of privacy will be

presumed. DIL relies specifically on subsection23(2)(h) which reads as follows:

> (2) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy where
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> (h) the personal information consists of the third party's name where
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> (i) it appears with other personal information about the third party, or
>
> (ii) the disclosure of the name itself would reveal personal information about the third party.

DIL also relies on section 24(1)(b) and (c). These provisions provide 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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> (b) financial, commercial, scientific, technical or labour relations information
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> (i) obtained in confidence, explicitly or implicitly, from a third party, or
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> (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
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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.

THE THIRD PARTY'S POSITION

The third party in this case is a company doing business in the Northwest Territories' diamond industry. Their contention is that most of the information which the public body intends to disclose is the company's commercial information, provided explicitly or implicitly in confidence to the GNWT. They argue that 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.

Each record is addressed individually. It is to be noted, however, that in addition to the arguments set out below, DIL also refers to the submissions made by the Department of Industry, Tourism and Investment (ITI), (summarized below) in which the department states that some portions of the records in question contain financial and commercial information about the business. Their submissions suggest that the department's statement to this effect constitutes proof of that fact.

1. January 22, 2013 email

I understand DIL's position to be that the whole of this page should be withheld from the Applicant because it:

> contains commercial information that was supplied by DIL to ITI representatives in confidence within the meaning of section 24(1)(b) of the Act. That information was not otherwise available to the public, was communicated with a reasonable expectation that it would not be disclosed and was provided in the context of DIL's business relationship with ITI. The maintenance of confidentiality in this context is not contrary to the public interest and should be fostered. The information also falls within the scope of section 24(1)(c) of the Act since its disclosure could reasonably be expected to result in undue financial loss, prejudice DIL's

competitive position and interfere with DIL's contractual and other negotiations.

2. March 18, 2013 email

This email is contained in a two page record of another chain of emails. DIL's comments are restricted only to one of the emails in the record - the one dated March 18, 2013 (1:18 pm). DIL argues that the entire email should be redacted pursuant to section 24(1)(c). Their full submission on this point is as follows:

> As recognized by ITI, disclosure of the information contained in the March 18, 2013 email could reasonably be expected to prejudice DIL's competitive position and could interfere with contractual or other negotiations.

3. April 12, 2013 email

This record consists of a two page email chain. DIL's submissions with respect to this record are as follows:

> DIL submits that the April 2013 email should be completely redacted under section 23 of the Act, including the substantive portion that contains a personal opinion and the personal information contained in the email signature.

4. The Trademark Agreement

DIL states that the Trademark Agreement was entered into following a "competitive, globally advertised RFP process". As will be noted later in this report, the Department disagrees with this statement. DIL argues that:

a) the information in the Trademark Agreement must be viewed in the context of section 24 of the Act;
b) the GNWT must be able to ensure that private parties' proprietary information is protected;
c) while the GNWT is a party to the agreement, that does not transform DIL's confidential business information into public information that can be accessed by competitors and the general public;
d) the agreement contains DIL's proprietary financial and commercial information (though they do not specify exactly what parts of the agreement they are referring to in this regard);
e) there is a "contractual obligation of confidentiality" in the Agreement which "makes it clear that both parties intended that any information regarding DIL's business affairs would remain confidential";
f) the information in the agreement would not be available from other public sources and could not be obtained by public observation or independent study;
g) maintaining DIL's private commercial information in the circumstances of this case is not contrary to the public interest.

They argue that these points meet the "test" under section 24(1)(b) and that, in result, the public body is prohibited from disclosing any of DIL's commercial information in the Trademark Agreement. In their view, almost the entire agreement should be protected.

It is further their position that the substantive clauses in the agreement are protected from disclosure pursuant to section 24(1)(c) because it sets out detailed terms and conditions governing the relationship between DIL and the GNWT. Those terms and conditions were the product of negotiations between the parties and reflect the conditions upon which they agreed to do business:

> The substantive terms and conditions, when viewed as a whole, clearly reflect the business interests of DIL and would provide valuable insight to a third party, not only about DIL's confidential and proprietary business

> practices, but also regarding the terms and conditions that are acceptable to both DIL and the GNWT.

They argue that this would give competitors of DIL an unfair advantage by allowing them to use financial and commercial information contained in the agreement in order to compete with DIL in the future. They state, without providing evidence, that the diamond market in the Northwest Territories is highly competitive and any small advantage or disadvantage could have significant implications for DIL. They note, again without supporting evidence, that "numerous other companies submitted RFPs with respect to the Trademark Agreement" who would like to have use of the trademarks in question. They go on to state, without explaining, that:

> The fact that DIL was granted exclusive rights in this highly competitive atmosphere simply enhances DIL's concerns about the potential misuse of its confidential and proprietary information.

5. The Certification Agreement

DIL uses the same arguments as set out above to establish their position that the Certification Agreement should be withheld pretty much in full. No new or additional evidence is provided to support their arguments.

6. The Monitoring Agreement

Once again, DIL relies on the arguments and submissions with respect to the Trademark Agreement.

THE PUBLIC BODY'S POSITION

The public body has assessed each of the records as well and has concluded that some portions of each of these records should be protected from disclosure pursuant to

section 24(1) of the Act. They take the position, however, that significantly larger portions of the records should be disclosed than DIL would want to see disclosed.

It is to be noted, as a preliminary matter, that ITI disagrees with DIL's assessment as to how the parties came to be contracting parties. While DIL says there was a competitive RFP process, with numerous proponents, ITI indicates that DIL initially submitted an application through a Request for Qualification (RFQ) process that was subsequently discontinued. A year later, DIL submitted another application, outside of any RFQ process. That application was approved and further negotiations led to the Trademark Licence Agreement.

1. January 22, 2013 email

The department would disclose all of the information in this one page email chain except for two and a half lines in the earliest email in the chain. They take the position that these lines are protected from disclosure pursuant to section 24(1)(b) of the Act because they contain commercial information obtained in confidence from DIL. They say it references information about DIL's marketing plans and status of negotiations with wholesalers and retailers to enter agreements and that the disclosure could be reasonably expected to result in undue financial loss to DIL and prejudice its competitive position in the industry. They argue that it could also impact DIL's contractual or other negotiations with third parties with whom it is engaged in business.

2. March 18, 2013 email

ITI says that the portion of this email chain that ITI proposes to redact includes commercial information obtained from DIL. They argue that it references information about DIL's status of commercial operations, the disclosure of which could be reasonably expected to result in undue financial loss to DIL and prejudice its competitive position in the industry, including impacting its competitive negotiations with other third parties.

3. April 12, 2013 email

In this two page email chain, ITI indicated that it would remove the following information from the email at the top of the second page of the record:

- the email address of one of the principals of DIL
- the name of the principal
- the position held by the principal
- the business phone numbers (including fax and cell) of the DIL principal

In addition, they would mask the body of this email. For all of these edits, the public body takes the position that the disclosure of these portions of the record would constitute an unreasonable invasion of the author's personal privacy.

4. Monitoring, Certification and Trademark Licence Agreements

The public body proposes to withhold only portions of these records pursuant to section 23(1). In particular, they would remove the names, business telephone numbers and business addresses of third parties.

ITI argues that in order for the GNWT to properly monitor approved NWT Diamond Manufacturers such as DIL and track their handling of the diamonds in order ensure they have complied with the terms the agreements, these third parties must provide certain sensitive information about their finances and commercial operations. They also state that some of the information contained in the agreements was obtained in confidence from DIL. They argue, therefore, that portions of each of the three agreements should not be disclosed. ITI does not, however, agree with extent of the edits proposed by DIL.

They point out that in order to attract the protection of 24(1)(b) of the Act, the information in question must have been "obtained" from the third party in confidence.

They take the position that negotiated terms were not “obtained” from DIL and do not, therefore qualify for an exemption pursuant to section 24(1)(b). Furthermore, they argue that many of the clauses which DIL proposes to mask are standard clauses used for all approved manufacturers.

Insofar as section 24(1)(c) is concerned, the public body points out that for this subsection to apply, something more than speculation about harm or a mere possibility of harm must be established. Consequently:

> generalized concerns and assumptions about the effect the disclosure of information will have on competition within the industry is not sufficient to warrant exemption.

They did, however, agree that portions of all three agreements should be withheld on the basis that the disclosure of those portions could reasonably be expected to exceed the threshold of third party harm required by subsection 23(1)(c). Based on their assessment, they also felt that the disclosure of those portions of the Agreements could also reasonably be expected to harm the economic interests of the GNWT.

With respect to the Certification and the Monitoring Agreements, ITI indicates that the documents they propose to disclose are standard form agreements. All approved NWT Diamond Manufacturers are required to sign the same agreements. It is their opinion that the disclosure of these agreements, apart from some limited edits which they have proposed, would not result in undue financial loss to DIL, nor would it in any way prejudice their competitive position.

In terms of the Trademark Agreement, they agree that it is more specific to DIL but it is still based on “boilerplate” provisions that would be included in most trademark licensing agreements. While they agree that section 24 would apply to some of the information in this record, they do not agree that it would be appropriate to withhold the entire agreement.

THE APPLICANT'S POSITION

The Applicant was invited to provide any input he might have, but he did not do so.

DISCUSSION

General Discussion

As noted above, when a third party seeks to prevent the disclosure of records which a public body has decided to disclose, the onus is on that third party to establish that an exception to disclosure applies and the information should be protected. Any third party contracting with the GNWT, or any other government, must generally be taken to understand that the terms of the resulting contracts will be public records available to the public. While there may be some limited provisions in such contracts containing proprietary information belonging to the third party company, when public funds are involved, public scrutiny should be anticipated. Disclosure will be the rule and any exemptions will be narrowly interpreted and applied.

The third party seeking to prevent disclosure will have to provide some empirical evidence to support their case that harm will result from disclosure.

In this case, the third party relies strongly on the "confidentiality" of the records. Generally, when relying on section 24(1)(b), the information in question must have been supplied by the third party, in confidence, to attract the protection of this section. In *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194 MacKay J. outlined the "indicators" of confidentiality:

a) the content of the record must 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) the information must originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and

c) the information must 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.

In this case, while some of the information which the third party wishes to withhold from the Applicant appears to have been supplied by DIL, most of it was not. When we are speaking about the negotiated terms of a contract between the GNWT and a third party, the details of the general terms of the contract cannot be said to have been "supplied" by the third party. Negotiated terms are not "supplied" by the third party.

Generally speaking, when relying in section 24(1)(c), the third party must be able to demonstrate that the harm they claim will result from disclosure is likely and significant. Again, there must be some empirical evidence that the stated harm will occur. In Alberta, the Information and Privacy Commissioner has established the test (Order 96-003) that must be met to establish that there is a reasonable expectation of harm by the disclosure of information. The party who is asserting the claim (in this case the third party) must provide objective evidence of three things:

a) there must be a clear cause and effect relationship between the disclosure and the harm;
b) the disclosure must cause harm and not simply interference or inconvenience;
c) the likelihood of harm must be genuine and conceivable.

The test is an objective one and it must be applied in the real world. I have accepted this test in a number of my previous recommendations.

Finally, with respect to the application of Section 23, it is important to note that the disclosure of personal information will not always constitute an unreasonable invasion of the privacy of an individual. I am not entirely convinced that the information which the public body proposes to withhold pursuant to this section would result in an unreasonable invasion of the privacy of the third party individual in this case. I leave this, however, to another day.

Because this is a third party objection to the disclosure of records (or portions of records), I will comment only on those portions of the records which the third party seeks to withhold which the public body proposes to disclose. I will not be assessing or commenting on the redactions that the public body has applied. It will remain open to the Applicant to make a Request for Review with respect to those deletions at a later date.

Application to the Records

Note that in the discussion below, reference to "the undeleted portion" of a record is a reference to the portion of a record which the public body proposes to disclose to the Applicant.

1. April 22 email.

There is nothing in the undeleted portion of this record which could in any way be interpreted as referring to DIL in any way. Section 24 most certainly does not apply. I recommend that this record be disclosed as proposed.

2. March 18, 2013 email

Again, there is nothing in the undeleted portion of this record which could in any way be interpreted as referring to DIL in any way. Section 24 does not apply and I recommend that the record be disclosed as proposed.

3. April 12, 2013 email

While the undeleted portion of this record does make reference to DIL and its contract with the GNWT, there is no real commercial or financial information contained which would attract the protection of section 24. Nor is there anything which could reasonably be expected to prejudice DIL's competitive position or interfere with its contractual or other negotiations. I therefore recommend that this record be disclosed as proposed.

4. The Trademark Agreement

DIL objects to the disclosure of most of this agreement. Because this Agreement is the product of a negotiation between DIL and the GNWT, section 24(1)(b) does not apply to the record. In terms of the application of section 24(1)(c), DIL has not established on the basis of any empirical evidence that the disclosure of the undeleted portion of this record will likely cause it any real harm. The terms which the public body proposes to disclose appear to me to be standard terms one would expect to find in a Trademark Agreement. Furthermore, this is an exclusive agreement, which suggests to me that there are no competitors for DIL for this contract. DIL has given me nothing to allow me to conclude that the disclosure of the undisclosed portions of this record will interfere with its contractual relations or negotiations with any other government or organization. I note, as well, that the confidentiality clause of the Agreement specifically makes the clause "subject to any applicable law", which would, of course, include the *Access to Information and Protection of Privacy Act.* Furthermore, it refers only to "information of a confidential nature related to the affairs of" DIL to which the GNWT might become privy to as a result of the agreement. It does not provide that the contract itself is to be confidential.

I recommend that the public body disclose this agreement as proposed.

5 and 6 - The Certification Agreement and the Monitoring Agreement

For the reasons set out with respect to the Trademark Agreement, I recommend the disclosure of these two records as proposed by the public body.

CONCLUSIONS

When third party businesses enter into contracts with the Government of the Northwest Territories, or any other public government, they know (or ought to know) that these contracts are subject to public scrutiny. It is not the same as contracting with another private company. When contracting with the GNWT, companies are, in fact, contracting with the people of the Northwest Territories and all of those people have the right to know what the contracts say subject to narrow and defined exceptions. If a third party wants to prevent the disclosure of these contracts, they need to provide some evidence that their interests are likely to be harmed by the disclosure. That evidence is simply not present in this case.

As noted above, I have not commented on or made any assessment of those portions of the records which the public body has said it will redact from the response provided to the Applicant. It remains open to the Applicant, should he wish to do so, to ask me to review those redactions.

Elaine Keenan Bengts
Information and Privacy Commissioner