REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-12

Report Release Date: July 27, 2007

Public Body: Acadia University

Issue: Whether a Third Party's bid to provide food services to Acadia University should be released to the Original Applicant.

Summary: A Third Party Applicant requested a Review of a decision of Acadia University to grant partial access to a Request for Proposal submitted by the Third Party Applicant for food services. The Third Party objected to the release of any part of the Record, claiming the information was confidential, citing s. 21 of the *Freedom of Information and Protection of Privacy Act* ["*Act"*]. The Original Applicant sought access to the Record submitting they had the right to know how public money is spent. The Review Officer found that the Third Party Applicant had successfully met the three-part test of s. 21 and recommended the Record not be disclosed.

Recommendations: 1. The Record not be disclosed by Acadia to the Original Applicant because the Third Party Applicant has successfully met the three-part test in s. 21 of the *Act*; and

2. Acadia, and all public bodies, should review both their REIs and RFPs, in particular, references to the *Act*, and consider being more specific with respect to the three requirements of s. 21; to put potential proponents in the procurement process on notice and to assist members of the public to understand when this mandatory exemption will apply. Also to ensure that all public bodies are aware that a mutual agreement between themselves and RFP proponents to keep information confidential does not meet all three parts of the statutory test in s. 21. While Acadia brought confidentiality to the attention of the Third Party Applicant in the REI and the RFP, a mere claim to confidentiality is not sufficient under the *Act* to withhold a Record under s. 21.

Key Words: Trade secret, supplied implicitly or explicitly in confidence, a reasonable expectation of significant harm, onus, procurement process, mandatory exemption, unsuccessful proposal, Third Party Applicant, unsuccessful proponent

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act* s. 2, s. 3(1)(n), s. 20, s. 21(1)(a), (b) and (c), s. 45(3)(b).

Case Authorities Cited: *Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R (2d) 27; 1997 CanLII 11497 (NS S.C.); Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services (2003), 230 F.T.R. 315; 2003 FCT 254 (CanLII); Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124; 2003 NSCA 124 (CanLII); O'Connor v. Nova Scotia, 2001 NSCA 132; 2001 NSCA 132 (CanLII); Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health, 2004 NSSC 54; 2004 NSSC 54 (CanLII); BC Order 331-1999; Vancouver Police Board's Refusal to Disclose Complaint-Related Records, Re, 1999 CanLII 4253 (BC I.P.C.); FI-05-54; Acadia University, Re, 2005 CanLII 45575 (NS F.O.I.P.O.P); BC Order 00-10; Liquor Distribution Branch Data on Annual Beer Sales, Re, 2000 CanLII 11042 (BC I.P.C.).*

REVIEW REPORT FI-07-12

BACKGROUND

On November 27, 2006, an application for access to a record held by the public body, Acadia University ["Acadia"], was made by the Original Applicant. For the purpose of this Review, the only relevant portion of the Original Applicant's request for information reads:

. . . a copy of any request for proposals and tenders issued for food services, including any and all submitted proposals and bids responding to the request.

Acadia issued a Request for Expression of Interest ["REI"] in April 2006 to solicit proposals and solutions for food service at the University. That process was completed in May 2006 and subsequently on July 5, 2006, Acadia invited those who had submitted REI bids to respond to the Request for Proposals ["RFP"] entitled *Request for Proposals for the management of food service including student dining, catering, retail outlets and event meal plans. [RFP 2006-07-05]*

The Third Party who requested this Review ["Third Party Applicant"] responded to Acadia's REI and subsequently to the RFP by supplying a proposal "for the management of food service including student dining, catering, retail outlet and event meal plans at Acadia University" together with a cover letter dated August 10, 2006. The Third Party Applicant was one of very few proponents who responded to the RFP. The RFP evaluation and vendor selection processes were to be completed by October 5, 2006.

The RFP provided in paragraph 7.01 of the Terms and Conditions that the "[r]equest for Proposals submitted shall be firm for 6 months (180) days". The application for access from the Original Applicant, dated November 27, 2006, was received by Acadia after the Vendor Selection deadline but during the period during which the proposal was, by the terms of the RFP, "alive" [109th day of the 180 day period during which the proposal submitted was considered "firm"].

Subparagraph 7.03 of the RFP established that no party who responded would be paid any money for its work. Subparagraph 7.03 reads, "There will be no payment to proponents for work related to and materials supplied in the preparation and presentation of the response to this RFP."

Paragraph 6.0 of the RFP, entitled *Freedom of Information/Protection of Privacy*, reads as follows:

> *Information obtained by the proponent in connection with this RFP is the property of Acadia and must be treated as confidential and not used for any purpose other than for replying to this RFP.*
>
> *Proponents may declare the confidentiality of their RFP; however, Acadia is required by law to adhere to the requirements of the Freedom of Information and Protection of Privacy Act as amended.*
>
> Similar provisions to this paragraph of the RFP were also contained in the REI.

Paragraph 8.0 dealing with Eligibility criteria for the RFP states:

> *The Proponent will clearly mark "Confidential" all information in their proposal which is of a proprietary or confidential nature. The University shall use all reasonable efforts to hold all information marked "Confidential" by the Proponent in strict confidence but shall not be liable for any disclosure. Similarly, information about the University obtained by a Proponent and declared by the University representatives to be confidential must not be disclosed.*

The first page of the Third Party Applicant's proposal contains a Confidentiality Statement, which reads:

Confidentiality Statement
[The Third Party Applicant] has developed this proposal as a confidential submission to Acadia University.
This document remains the property of [the Third Party Applicant]. We respectfully request that there be no duplication of materials or disclosure of content to third parties. We ask that this document and any sections distributed from this submission be returned to [the Third Party Applicant] in their entirety at [Third Party Applicant]'s request.

The Third Party Applicant was not the successful bidder and did not receive a contract for the delivery of food services from Acadia arising out of the RFP process.

The Third Party Applicant was notified by Acadia on December 5, 2006 that a request for access to the Record had been made pursuant to the *Freedom of Information and Protection of Privacy Act ["Act"]*. Acadia invited the Third Party Applicant and the other proponents to make a decision as to whether they objected to the release of the Record or were prepared to give their consent to its release. The Third Party Applicant did not consent to release of any part of the Record. The Third Party Applicant's proposal and cover letter to Acadia's RFP is the Record sought by the Original Applicant as one of the documents falling within the terms of the request for access to information.

By a subsequent letter dated February 5, 2007, Acadia notified the Third Party Applicant of its decision, which read as follows:

...decided to grant the applicant partial access to the information requested. Access will be given to information that we judge to fall outside the provisions of Section 21. As a courtesy to you, I am enclosing a copy of the document as we propose to sever it.

On February 9, 2007 the Third Party Applicant filed a Request for a Review of that decision by Acadia. In its request the Third Party Applicant stated:

The privacy office at Acadia University has made the decision to release part of the record sought under the application. As such, [the Third Party Applicant] would like to request that access not be granted to any part of the record in the Application for Access and that a review by conducted by the Review Officer for the Province of Nova Scotia, pursuant to section 23 of the Act.

RECORD AT ISSUE

The Record at issue in this Review, which falls within the scope of the request for information is "a copy of any request for proposals and tenders issued for food services, including any and all submitted proposals and bids responding to the request." The response is the entire proposal and its cover letter submitted by the Third Party Applicant to Acadia in response to the RFP.

THIRD PARTY APPLICANT'S SUBMISSION

The Third Party Applicant made two submissions to argue for the Record remaining confidential and not being disclosed under the *Act.* The first letter from the Third Party Applicant dated December 19, 2006 was to Acadia advising of the reasons for not consenting to the release of any part of the Record. The second dated June 26, 2007 was the Third Party Applicant's submission to support their Request for a Review to the Freedom of Information and Protection of Privacy Review Officer. In the latter, the Third Party Applicant noted that their submission did not apply to the two sections of the Record entitled Corporate Structure and University Culture and Community, noting that both sections contain information that is available on the company website. This information is material that is a matter of public record within the meaning of s. 4(2)(b) and therefore is not subject to the *Act.*

Where a Third Party objects to a public body releasing a Record, the *Act* stipulates that the onus rests on the party who is claiming access should be denied:

> *45(3)At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,*
> *(b) in any other case, the burden is on the third party to provide that the applicant has no right of access to the record or part.*

Both submissions from the Third Party Applicant have been considered in deciding whether or not the burden of proof under s. 21 has been met. Each will be summarized below:

Summary of Submission to Acadia [dated December 19, 2006]:

1. The Record is proprietary information supplied in confidence to Acadia;
2. The proposal contains financial and operating information related to the Third Party Applicant;
3. If disclosed, the information would give its competitors an unfair competitive advantage and result in financial loss to the Third Party Applicant;
4. If other parties such as customers or labour unions had access to this information that relates to business practices, the Third Party Applicant would be placed in an adverse negotiating position;
5. The proposal for services should be protected under s. 21 of the *Act* because it contains commercial, financial and operating trade secrets and should not be shared;
6. The proposal was only recently submitted to Acadia and, therefore, contains information that is both current and extremely confidential, which, if released, would result in significant harm to the Third Party Applicant in ongoing or future bids;
7. The Record is not a negotiated document between Acadia and the Third Party Applicant;
8. The Third Party Applicant claims sole proprietary interest in the Record that does not belong to Acadia; and

9. If released, the information in the Record could allow competitors to learn about the business dealings of the Third Party Applicant and gain an advantage in contracts currently open for tender.

Summary of Submission to the Review Officer [June 26, 2007]:

1. Acadia did not choose the Third Party Applicant as the successful proponent and, therefore, the parties did not enter into a contract for services related to the proposal;
2. When unsuccessful, the Third Party Applicant asked that copies of the proposal be returned. By agreement, Acadia kept one copy to be retained on a confidential basis and the remainder were shredded;
3. The Third Party Applicant has remained adamant throughout the process that the proposal not be released in whole or in part to any party;
4. Acadia decided to release the proposal with some information severed, a copy of which was shared with the Third Party Applicant, which it continued to strongly object to as not protecting its interests under s. 21;
5. The exceptions to access under the *Act* strike a balance between public right to information about public bodies and possible harm arising from disclosure, which in this case, weighs heavily in favour of the Third Party Applicant;
6. If all three conditions set out in s. 21 are satisfied, the Public Body must deny access to proprietary information because the obligation of the Public Body to refuse disclosure is mandatory; and
7. Analysis of the three part test under s. 21:

    a. Part 1 of the test – s. 21(1)(a) – Revealing Trade Secrets

        i. The Record contains the types of information referred to in s. 21(1)(a) but also the way in which the Record has been compiled warrants protection;
        ii. The information contained in the Record falls within the definition of "trade secret" as defined by the *Act*;
        iii. Company employees must agree to a restrictive covenant aimed at protecting the trade secrets;
        iv. The Record is made up of a kind of information and formatted in such a way that is innovative and unique to the Third Party Applicant; and
        v. The Third Party Applicant makes an effort to protect against the disclosure of the information contained in the Record including only sharing it with prospective clients on a confidential basis and seeking return or destruction at its request.

    b. Part 2 of the test – s. 21(1)(b) – Supplied in Confidence

        i. The Third Party Applicant's expectation of confidentiality is reflected in its Confidentiality Statement provided with its proposal to Acadia, the full text of which is reproduced in the Background of this Review *[supra, p. 3]*;

ii. The Third Party Applicant consented to Acadia shredding the proposal documents and retaining one copy based on its assurances that the proposal would remain confidential;
iii. In deciding whether particular information has been received in confidence, the test is to consider the circumstances as a whole. In this case, the Third Party Applicant believed it was supplying the Record to Acadia on a confidential basis and that the information belonged to the Third Party Applicant and would not otherwise be in the hands of Acadia. The Record is non-negotiable information owned solely by the Third Party Applicant which Acadia would not otherwise have in its possession; and
iv. The proposal is not a contract and does not form a part of a contract.

c. Part 3 of the test – s. 21(1)(c) – Reasonable Expectation of Harm

i. The proposal contains trade secrets, commercial and financial information about the business practices of the Third Party Applicant including business practices, operating procedures, expenses and pricing, which if released would give competitors a competitive advantage and could lead to financial loss. In particular, the Third Party Applicant argues that parties who wish to become competitors would have to expend considerable resources to develop this kind of information. If the Record is released, however, these parties could win contracts currently open for tender resulting in a negative impact on the financial resources of the Third Party Applicant;
ii. The information in the proposal is extremely current, which heightens its currency particularly in relation to future bids with current or prospective clients; and
iii. The proposal contains information developed by the Third Party Applicant based on its experience and knowledge which competitors could use to their benefit and to the detriment of the Third Party Applicant.

ORIGINAL APPLICANT'S SUBMISSION

The initial application for access was, in part, to obtain a Record held by Acadia as a result of its RFP issued on July 5, 2006. The Original Applicant's submission to the Review Office is summarized as follows:

1. Access to the information sought would enable the Original Applicant to evaluate how public money is spent;
2. The Atlantic Procurement Agreement, which the Original Applicant argues applies to Universities when the service bid exceeds $50,000, requires, on application of any person, to release the name and address of the successful bidder, after the award of a contract. That means financial information that otherwise would be considered confidential under s. 21 of the *Act* should be

public information to enable the public to know how government is spending public monies;

3. Access to the information would allow for the evaluation of how a public body goes about making a procurement decision; whether or not the process itself meets the standard of being open and fair; and
4. Value for money evaluations in the procurement process can only be achieved if the financial information included in the proposals can be reviewed. In other words, in order to assess the efficiency of a public body's delivery of services, the public is entitled to access detailed financial information.

Both the Original Applicant's and the Third Party Applicant's arguments will be considered in the Discussion below.

PUBLIC BODY'S SUBMISSION

Acadia elected not to make any formal representations with respect to this Review. This is understandable given that there is no onus on the public body to justify its proposed release of part of the Record. The Public Body decided the Record should be released with only a small amount of identifying personal information related to employment or educational history severed pursuant to s. 20(3)(d). Acadia also approached the third parties to sever the information themselves as it was difficult for Acadia to decide what constituted proprietary information that ought not to be released. Other third parties responded by severing their own documents. The Third Party Applicant seeks a Review of Acadia's decision to release part of the Record and objects to the release of any portion of the Record.

DISCUSSION

Section 21 of the *Act* is a mandatory exemption. Once the terms of the section are established, the public body must refuse to disclose the information and has no discretion to release. Section 21 reads as follows:

Confidential Information
21(1) The head of a public body ***shall refuse to disclose*** *to an applicant information*
(a) that would reveal
i. Trade secrets of a third party, or
ii. Commercial, financial, labour relations, scientific or technical information of a third party;
(b) that is supplied, implicitly or explicitly, in confidence; and
(c) the disclose of which could reasonably be expected to
i. harm significantly the competitive position or intervene significantly with the negotiating position of the third party,
ii. result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
iii. result in undue financial loss or gain to any person, or organization, or

iv. reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour-relations dispute.

The provisions set out in s. 21 (a), (b) and (c) are conjunctive and, therefore, once it is established that the subsections apply to the Record, the head of the public body must refuse to release the Record.

> *I therefore conclude that s. 21(1) should be read conjunctively and that a party seeking to apply it to restrict information must satisfy the relevant authority or the court that the information satisfies each of the lettered subsections of s. 21(1). [Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R (2d) 27; 1997 CanLII 11497 (NS S.C.), at para 28]*

According to the *Act,* the public body is responsible to advise the Original Applicant where the interests of third parties are at stake:

> *22(2) When notice is given pursuant to subsection (1), the head of the public body shall also give the applicant a notice stating*
>
> *(a) that the record requested by the applicant contains information the disclosure of which **may** affect the interests or invade the personal privacy of a third party.; and*
> *(b) that the third party is being given an opportunity to make representations concerning disclosure.*
> ***[Emphasis added]***

An exemption, particularly a non-discretionary one, is to be given a restrictive interpretation under the *Act* in keeping with the purpose of the legislation:

> *2(a) to ensure that public bodies are fully accountable to the public by*
> *(i) giving the public a right of access to records,. . .*
> ***(iii) specifying limited exceptions to the rights of access***
> ***[Emphasis added]***

Section 21 embodies one example of when the statutory right of access should be curtailed. The legislation seeks to protect a record held by a public body when a third party's interests could be seriously affected because the information was provided on a confidential basis, could reveal trade secrets, commercial, financial or labour relations and the disclosure could reasonably be expected to significantly harm the competitive or negotiating position or result in undue financial loss.

Section 22 outlines the requirements surrounding the Notices that a public body must give a third party and an applicant. These requirements compel the public body to maintain anonymity between the respective parties, reinforcing the point that disclosure in these kinds of circumstances can have serious privacy consequences for a third party and/or an applicant. Acadia has fully complied with the requirement not to disclose the identity of the parties to each other.

Each of the three requirements under s. 21 of the *Act* will be dealt with separately.

1. Trade Secret or Commercial Information s. 21(1)(a)(i) and (ii)

The *Act* defines "trade secrets" as follows:

s. 3(1)(n)
"trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that

- *(i) is used, or may be used, in business or for any commercial advantage,*
- *(ii) derives independent economic value, actual or potential, from not be generally known to the public or to other persons who can obtain economic value from its disclosure or use,*
- *(iii) is the subject of reasonable efforts to prevent it from becoming generally known, and*
- *(iv) the disclosure of which would result in harm or improper benefit;*

The Record consists of information developed by the Third Party Applicant as a result of many years of experience in the food industry. Nothing in the Record is as a result of information provided by or negotiated with Acadia, distinguishing it from other cases *[See Atlantic Highways Corp v. NS, at para 34]*. There are specifics about the company and how they would perform under a contract with Acadia, which clearly would have actual economic value if disclosed to others in the industry. The Third Party Applicant has gone to considerable lengths to prevent the information from being disclosed. On review of the Record, it is clear that it is information, in which the Third Party Applicant has considerable proprietary interest and that in the hands of others, both competitors and parties hoping to be competitors, could result in financial harm to the company. The Third Party Applicant argues that all of the information and the way it is formulated and presented in response to the RFP is a trade secret. I agree.

The Applicant included in its Review submission an argument that the way in which the materials were presented, in other words, the way in which they were formatted, supports their argument that the Record contains trade secrets. I do not think that argument can be supported and reject that the formatting contributes to my finding that the Record contains trade secrets. While formatting of course adds to the attractiveness of a presentation, nothing in this particular Record's formatting constituted a trade secret.

> *The applicant argues that its unique formula for responding to requests for proposals regarding property management is a trade secret as provided in paragraph 20(1)(a). The submission is that a trade secret does not have to be something of a scientific or technical nature but can include art, craft, rhetorical design and flavour. There exists a distinction, BLJC submits, between confidential information and trade secrets. A trade secret would include information that is not confidential, but is nonetheless worthy of protection because of the circumstances of its presentation. To the extent that the records in issue are not confidential, they are a trade secret by virtue of presentation.*

I am not persuaded by this submission. After exclusion of the alleged confidential information, there remain but a few paragraphs in the redacted records that, according to the applicant, constitute a trade secret. While counsel's attempts to characterize the "rhetorical presentation" as a trade secret were valiant, they were unconvincing. The "presentation" referred to and relied upon is no more than what one would expect of any individual attempting to secure employment, a contract, placement in a specific program at an educational institution and so on. The "technique" consists of nothing more than the age-old skill of putting the punch in the first paragraph and creating a positive first (and hopefully lasting) impression. This is not, by any definition, a trade secret. [Brookfield Lepage Johnson Controls Facility Management Services v. Canada (Minister of Public Works and Government Services (2003), 230 F.T.R. 315; 2003 FCT 254 (CanLII)]

Though the *Act* provides a very helpful definition, as this is the first case in Nova Scotia to make a finding that the Record contains "trade secrets", an outline of issues to be considered may prove helpful:

1. Trade secret has been defined elsewhere, in a manner consistent with the *Act* as:

   A formula, process, device, or other business information that is kept confidential to maintain an advantage over competitors; information - including a formula, pattern, compilation, program, device, method, technique, or process – that
   (1) derives independent economic value, actual or potential, from not being generally known or readily ascertainable by others who can obtain economic value from its disclosure or use, and
   (2) is the subject of reasonable efforts, under the circumstances, to maintain its secrecy.
   [Black's Law Dictionary, 8th Edition, "trade secret"]

2. A finding that particular information is considered to be a trade secret is not to be taken lightly as it allows a company to have a perpetual monopoly over the secret information as trade secrets do not expire distinguishing them from a patent.

3. The importance to companies cannot be overstated because if others are able to access trade secrets of a company that has devoted considerable resources to establish its place in the market based on those trade secrets, a company's capacity to maintain its market edge and economic stability could be significantly compromised.

4. Where a trade secret has been recognized, the company is entitled to consider the information to be intellectual property.
   [Black's Law Dictionary, 8th Edition, "intellectual property"]

In addition to the Record outlining in detail how it would perform the contract for food services [trade secrets], it also includes details about the Third Party Applicant's corporate structure, management, finances, staffing, and other commercial involvement, not publicly available.

On a thorough review of the Record, I find that the information, the content outlining particular methods, techniques and processes for food service delivery, constitute a trade secret within the meaning of s. 21(1)(a)(i) of the *Act*. This would be sufficient to meet the first part of the test but I also find the Record contains commercial and financial information of a third party within the meaning of s. 21(1)(a)(ii). The first requirement under s. 21 has been met by the Third Party Applicant.

2. Supplied in Confidence s. 21(1)(b)

There is no doubt that the Record consists wholly of information compiled by the Third Party Applicant and provided to Acadia solely for the purpose of the RFP and, as such, is information "supplied" within the meaning of s. 21(1)(b).

In Order 331-1999, the BC Commissioner drew the distinction between the use of the words "received" and "supplied" or "provided" in confidence, the latter words appearing more frequently in the *Act* than the former. He concluded meaning should be given to the difference in the word used "'received' in confidence requires that there be evidence of an expectation of confidentiality on the part of both the supplier and the receiver of the information."

This interpretation of "received" has been approved of by the Nova Scotia Court of Appeal in *Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124; 2003 NSCA 124 (CanLII)*. In s. 21 of the *Act,* the language is "supplied, implicitly or explicitly, in confidence". In applying the logical approach from the BC Commissioner's decision, in cases under s. 21, greater emphasis should be placed on the perspective of whether the Third Party Applicant believed it was *supplying* the information confidentially and can demonstrate that to be the case.

The Court of Appeal in *Chesal* went on to rely on a non-exhaustive list of factors developed by the BC Commissioner, which it considered helpful in determining whether the information was received in confidence:

> *What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following facts – which are not necessarily exhaustive – will be relevant in s. 16(1)(b) cases:*
>
> 1. *What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?*
> 2. *Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?*
> 3. *Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may*

not actually have understood that there was a true expectation of confidentiality.)

4. *Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)*
5. *Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?*
6. *Do the actions of the public body and the supplier of the record – including after the supply – provide objective evidence of an expectation of or concern for confidentiality?*
7. *What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?*

   [BC Order 331-1999; Vancouver Police Board's Refusal to Disclose Complaint-Related Records, Re, 1999 CanLII 4253 (BC I.P.C.) at para 37; Chesal, at para 72]

The Nova Scotia courts have made it patently clear that under our generous access to information legislation it is not sufficient for a public body to claim a record as confidential in order to shield it from the public eye. *[O'Connor v. Nova Scotia, 2001 NSCA 132; 2001 NSCA 132 (CanLII)]*. In that case, Justice Saunders cautioned to be wary of traps such as how something has been described:

> *…no government can hide behind labels. The description or heading attached to the document will not be determinative…There is no shortcut to inspecting the information for what it really is and then conducting the required analysis…The Review Officer must always be wary of such traps before embarking on the necessary inquiry.*
> *[O'Connor, at para 94]*

Simply labelling something "confidential", therefore, does not necessarily make it so for the purpose of the *Act.* The Supreme Court, similarly, has rejected a blanket exemption with respect to business information under s. 21 of the *Act.*

> *It is accepted that a broad exemption for all information relating to business would be both unnecessary and undesirable. Many kinds of information relating to business concerns can be disclosed without harmful consequences to the firms. Exemption of all business-related information would do much to undermine the effectiveness of a freedom of information law as a device for making those who administer public affairs more accountable to those whose interests are to be served.*
> *[Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health, 2004 NSSC 54; 2004 NSSC 54 (CanLII), at para 18]*

In the case at hand, there is objective evidence that the Third Party Applicant had an expectation of confidentiality; *supplying in confidence.* This is not a case of a public

body claiming confidentiality over a record. Quite the contrary, Acadia was prepared to release the Record with minor severing of personal information, subject to a third party objecting.

The RFP makes specific references to the confidentiality, albeit subject to the *Act*. Acadia had upgraded its RFP's wording to make that reference as a result of a recommendation from this Review Office *[see FI-05-54; Acadia University, Re, 2005 CanLII 45575 (NS F.O.I.P.O.P)]*. In the RFP, Acadia claims confidentiality over information it supplied to the Third Party Applicant. The RFP goes on to acknowledge that parties may declare confidentiality of their proposal subject to Acadia's obligation under the *Act.* Paragraph 8 of the RFP gives further details with respect to confidentiality when it invites the Third Party Applicant to mark all proprietary information as confidential and imposes an obligation on Acadia to use all reasonable efforts to keep that information confidential.

The Third Party Applicant begins its proposal with a strong and clear Confidentiality Statement. When it was the unsuccessful bidder, the Third Party Applicant requested the return of its proposal claiming proprietary interest in it and subsequently agreed to Acadia shredding all copies but one which the university would retain in confidence.

I find that the Third Party Applicant is successful in meeting the test under s. 21(1)(b) that the information was "supplied…explicitly, in confidence." This finding is based the confidentiality provisions in the RFP and the Confidentiality Statement in the Third Party Applicant's proposal that makes it patently clear they were submitting their information on a confidential basis. Nothing that is contained in the Record over which the Third Party Applicant claims a proprietary interest was negotiated information with Acadia. In addition, throughout the entire process from the proposal being submitted to Acadia to its submissions to this Review Office, the Third Party Applicant has been consistent and adamant about the importance of confidentiality of the Record, asking for its return from Acadia immediately following the end of the procurement process.

A finding with respect to supplied in confidence meets the second part of the s. 21 test but is not in and of itself sufficient to refuse access to the Record.

3. Harm or Loss from Disclosure s. 21(1)(c)

One of the most challenging aspects of a case such as this is how to articulate that the Third Party Applicant has demonstrated that if what is contained in the Record is disclosed, it "would reasonably be expected to" result in harm of a kind listed in paragraphs (i) through (iv) of s. 21(1)(c), without revealing information that should remain confidential in the course of doing so.

The Nova Scotia courts have interpreted *reasonable expectation of harm* as meaning something more than a mere chance:

> *…the legislators, in requiring "a reasonable expectation of harm", must have intended that there be more than a possibility of harm to warrant refusal to*

disclose a record. Our Act favours disclosure and contemplates limited and specific exemptions and exceptions.
[Chesal, at para 38]

This Freedom of Information and Protection of Privacy Review Office has recognized what proponents have invested in responding to RFPs:

In my opinion Acadia's claim of significant harm to the interests of the Company, or its own financial economic interests, if even parts of the "contract" or other records were disclosed, is not persuasive and does not meet the standard of proof laid down by the courts. However, in my view, FOIPOP supports a refusal to disclose a company's methodologies if significant harm can be shown to result from disclosure. The Ontario Information and Privacy Commissioner has concluded that proponents responding to "Requests for Proposals," similar to the one issued by Acadia in this case, develop their own unique style of responding to RFPs, having spent substantial sums of money and time to do so [Order PO-1818].
[FI-05-54, at p. 7]

The latter case cited involved Acadia and a third party company both objecting to the release of a contract they had entered into after an RFP process. The company, as a Third Party, was objecting on the basis that the contract, but for one page, was the proposal it had submitted in response to the RFP. The Review Officer held, "I agree with the third party that the company is open to real risk of having a competitor benefit from reading the company's proposal." *[Re FI-05-54, at p. 7]*

In that case, notwithstanding the exchange of public funds under the contract, the Review Officer withheld a portion of the contract containing the company's methodologies.

Courts have been clear that the Legislature was purposeful in its use of the word *significant* and intended something more than mere harm or speculation of harm.

It is neither possible nor wise to attempt an exhaustive definition of what is meant by "harm significantly". It is something more than mere harm, but it is difficult to go further than that in defining it. At the very least, the party bearing the burden of proof must prove that the anticipated harm is, when looked at in light of the circumstances affecting the third party's competitive position or negotiating position, a material harm to that party's competitive position.
[BC Order 00-10; Liquor Distribution Branch Data on Annual Beer Sales, Re, 2000 CanLII 11042 (BC I.P.C.), at p. 8]

The Third Party Applicant has demonstrated that disclosure could compromise its competitive position and, as a result, *disclosure could reasonably be expected to result in undue financial loss or gain to any person or organization* pursuant to s. 21(1)(c)(iii). Decisions from both Ontario and BC assist and;

[c]onsistently show that if disclosure would give a competitor an advantage, usually by acquiring competitively valuable information, effectively for nothing, the gain to the competitor will be undue.
[BC Order 00-10, at p. 8]

I find the Third Party Applicant has met the onus upon it to meet the test in s. 21(1)(c)(i) that "the disclosure of which would reasonably be expected to harm significantly the competitive position…of the third party" because:

1. the Record is made up solely of their information in which they have a ***proprietary interest***;
2. the Record was submitted to Acadia with few other proponents in what can only be described as a ***highly competitive RFP market***; and
3. the information in the Record is extremely current; the Record was requested immediately following the closing date for the RFP selection and ***during the period while the proposals were, by the terms of the RFP, firm.***

[Emphasis added]

The Original Applicant argued that the public is entitled to have access to information to enable it to evaluated public monies spent and to know the identity of the successful bidder. This case does not involve either of these two situations, which may well justify access to the information. The Original Applicant also argues that by making this Record available the public would have a greater appreciation for the way in which decisions are made in the procurement process. Nova Scotia's Auditor General had called for a review of documentation around the competitive procurement process in order to measure efficiency. In her 2006 Annual Report, the Information and Privacy Commissioner of Ontario called on government organizations "to make the full procurement process much more transparent – releasing information not only about the winning bid, but of all bids." *[Annual Report, at p. 3]*

The Original Applicant has not been tasked with auditing the procurement process. If they are concerned as to whether the whole of the process was fair, there are other avenues open to them to seek an audit or file a complaint of maladministration or unfairness. The Atlantic Procurement Agreement does not apply to this kind of situation and, in any event, does not apply where the Record involves a person who was the unsuccessful bidder. No public funds were exchanged between Acadia and the Third Party Applicant during the RFP process and no contract resulted between the parties. While opening up the procurement process may be a valid public policy objective to provide for greater public scrutiny to measure the integrity and value-added of the process, once the three-fold test has been met in s. 21, there is no discretion in the public body to release the Record to the Original Applicant. As our Supreme Court has said:

I accept that AHC[Atlantic Highway Corporation] appears to have submitted certain confidential information to the Province a part of the negotiations process and if the process had not resulted in a contract that they would like have been able to keep such information confidential through the effects of our Act.
[Atlantic Highways Corp, at para 40]

Summary of Section 21 Analysis

The following factors are determinative of why the Record in this case should not be released. In the circumstances where the Third Party Applicant:

1. is an unsuccessful proponent and the Record sought is the proposal it submitted in response to an RFP;
2. provides the information in its proposal that relates to its business practices, corporate operations, financial and commercial interests, and how it intends to provide services to a public body in a very specific and unique manner falling within the definition of trade secret;
3. explicitly supplies the Record on a confidential basis;
4. continues to claim confidentiality at the conclusion of the RFP process when it requests the return of its proposal in full;
5. as the unsuccessful bidder, receives no public funding as a result of entering into a contract for food services;
6. receives no public funding in preparing its proposal under the terms of the RFP; and
7. demonstrates that the disclosure of the information would reasonably be expected to harm significantly its competitive position and result in undue financial gain to another person or organization.

FINDINGS

The Third Party Applicant has met the onus under s. 21 of the *Act* and, therefore, the Record should not be disclosed by Acadia to the Original Applicant based on the following findings of fact:

1. The Original Application for information was submitted to the public body immediately following the dates for selection and during the time which, by the terms of the RFP, the bid was deemed "firm". Clearly the close proximity in time of the proposal in response to the RFP and the application for access by the Original Applicant supports the Third Party Applicant's contention that the information contained in the proposal is current and confidential;
2. Given the number of RFP proponents, I find the area of business – food services for universities – to be highly competitive. There is also evidence that there are active and ongoing competitions for food services;
3. The Third Party Applicant's proposal contains confidential information particular to their company and its operations that, if released, could reveal its trade secrets;
4. The proposal was "supplied" by the Third Party Applicant to the public body on a confidential basis;
5. Release of the financial and commercial information contained in the Record could result in a substantial financial loss to the Third Party Applicant, particularly had it been released at the time the request for access was made while the bid was still firm;
6. Information obtained and retained by Acadia from a RFP proponent, such as the Third Party Applicant, who was ultimately an unsuccessful bidder and there was no contract between the public body and the third party;

7. The Third Party Applicant was an unsuccessful bidder in the RFP process. The Third Party Applicant received no public monies from Acadia. A proposal submitted by the Third Party Applicant to Acadia is not a contract or negotiated document between these two parties;
8. I have examined the Record and am satisfied that the information, including the formatting or styling of that information, contained therein, if disclosed, could reasonably be expected to harm significantly the competitive position of the Third Party Applicant and result in undue financial loss or gain to any person or organization.

RECOMMENDATIONS

1. The Record not be disclosed by Acadia to the Original Applicant because the Third Party Applicant has successfully met the three-part test in s. 21 of the *Act*; and

2. Acadia, and all public bodies, should review both their REIs and RFPs, in particular, references to the *Act,* and consider being more specific with respect to the three requirements of s. 21 to put potential proponents in the procurement process on notice and to assist members of the public to understand when this mandatory exemption will apply. Also to ensure that all public bodies are aware that a mutual agreement between themselves and RFP proponents to keep information confidential does not meet all three part of the statutory test in s. 21. While Acadia brought confidentiality to the attention of the Third Party Applicant in the REI and the RFP, a mere claim to confidentiality is not sufficient under the *Act* to withhold a Record under s. 21.

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer
for the Province of Nova Scotia