Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Tricia Ralph

REVIEW REPORT 24-07

March 21, 2024

Acadia University

Summary: An applicant requested all audits, reports and analyses that were prepared by a third party for Acadia University (public body). The third party objected to the release of the responsive records, claiming they should be withheld in part or in full under s. 21(1) (confidential business information) of the *Freedom of Information and Protection of Privacy Act*. The public body decided to withhold the responsive records in full from the applicant. The applicant filed a request for review with the Office of the Information and Privacy Commissioner. The Commissioner finds that the public body's evidence falls short of establishing that s. 21 was properly applied to the withheld records and so recommends the records be released in full.

INTRODUCTION:

[1] The applicant asked for all audits, reports and analyses prepared by a third party business (third party) for Acadia University (public body). The responsive records consist of a 55-page document and a 6-page document.

[2] The public body conducted a line-by-line review of the responsive records and planned to release them to the applicant with some information severed pursuant to the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*). The public body then consulted with the third party. The third party objected to the responsive records being released to the applicant. It said that s. 21(1) of *FOIPOP* requires the public body to withhold confidential business information of a third party. In the alternative, the third party said that the records could only be released with the information severed as initially proposed by the public body.

[3] After hearing from the third party, the public body decided to withhold the responsive records in full. The applicant requested a review of the public body's decision to withhold the responsive records in full. This matter was not resolved by informal resolution attempts and so proceeded to this public review report.

ISSUE:

[4] Was the public body required to refuse access to information under s. 21(1) of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Burden of proof

[5] When a third party files a request for review of a public body's decision to give an applicant access to all or part of a record containing information that relates to a third party, the third party bears the burden of proof.[1] In this case, the public body decided to withhold information on the basis of s. 21 and the applicant for the review is the applicant that made the access to information request. Therefore, under s. 45(1) the public body bears the burden of proving the applicant has no right of access to a record or part of a record.

Was the public body required to refuse access to information under s. 21(1) of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[6] Section 21 requires a public body to withhold information that could reasonably be expected to result in one or more of the harms listed in s. 21(1)(c) of *FOIPOP*. For the reasons set out below, I find that the public body's evidence (as supplied by the third party) falls short of establishing that s. 21 was properly applied to the withheld records and so I recommend that the responsive records be released in full to the applicant.

[7] Section 21(1) states:

> 21 (1) The head of a public body shall refuse to disclose to an applicant information
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> (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 disclosure of which could reasonably be expected to
> (i) harm significantly the competitive position or interfere 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.

[1] *FOIPOP*, s. 45(3)(b).

[8] Where the public body has made the decision to withhold information, the burden is on it to prove that all three parts of the s. 21 test have been satisfied:

1. The disclosure of the requested information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
2. The information in question was supplied implicitly or explicitly in confidence; and
3. The disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c).[2]

[9] As described in *Atlantic Highways Corporation v. Nova Scotia*,[3] s. 21(1) must be read conjunctively. This means that the party seeking to apply s. 21(1) to restrict access to information must satisfy all of the lettered subsections of s. 21(1) in order to establish that the information must be withheld.

Does the withheld information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party (s. 21(1)(a))?

[10] Section 21(1)(a) of *FOIPOP* requires that two things be true: (1) the information would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information; and (2) the information be "of a third party".

[11] In its representations to the Office of the Information and Privacy Commissioner (OIPC), the public body forwarded and endorsed the position and the arguments that the third party had provided to it. However, because the public body relied on these arguments and was the decision-maker in this case, I will attribute this position and the supporting arguments to the public body. The public body argued that the responsive records contain the third party's trade secrets. It said that this was true because the responsive records set out the methodology and framework designed by the third party to provide its services to the public body. It said:

> Specifically, the Records contain proprietary information about the strategies, approach, research, analysis and procedures in the form of objectives, charts, graphs, cost structures, financial projections and conclusions unique to [the third party] and developed by [third party] experts in conducting a consulting engagement of this nature.

[12] The public body went on to say that the third party's approach and methodology is not known to the third party's competitors. It argued that "The value of the [third party's] methodology lies in it being a unique approach and distinctive from other review processes." The public body's position was that release of the responsive records would prejudice the third party's competitive position because it would give competitors insight into the analytical processes used by the third party and into how the third party conducts its work for "an engagement of this nature." The public body thought that releasing the responsive records could allow the third party's competitors to acquire information about the third party's confidential developing strategies and analyses, which would harm the third party's competitive advantage in

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[2] *NS Review Report 19-06, Nova Scotia (Energy and Mines) (Re),* 2019 NSOIPC 7 (CanLII), at para. 80.
[3] *Atlantic Highways Corp. v. Nova Scotia,* 1997 CanLII 11497 (NS SC), at p. 7. See also *NS Review Report 17-08, Department of Health and Wellness,* 2017 NSOIPC 8 (CanLII), at para. 39.

a competitive marketplace. Finally, the public body said that it knew the third party brought a particular and unique expertise to the engagement for which it was hired.

[13] It is essential to effective, meaningful and robust access to information laws that public bodies fully appreciate the requirements to selectively sever records. As my predecessors and I have consistently said, the law does not create whole document carve outs. Rather, the law makes clear that public bodies are only permitted to withhold information exempted from disclosure. Everything else must be disclosed.[4] Even where mandatory exemptions apply, qualifying information must be specified and distinguished from information for which exemptions are not applicable, and that information must be disclosed. Unfortunately, that was not done in this case. The responsive records were withheld in full. One of the reasons this is problematic is because the public body did not specify what information on the responsive records it thought would reveal trade secrets, or commercial, financial, labour relations, scientific or technical information of the third party. Instead, it offered a general argument that the responsive records be withheld in full under s. 21.

[14] The information on the responsive records makes it clear that the majority of it is not "of a third party" as is required by the provision. Rather, the majority of the information on the responsive records originates from the public body. The public body then supplied this information to the third party so that the third party could conduct analyses of it. I direct the public body to the information set out on page 9 of the responsive records in this regard. Information that originates via governmental, municipal or public body input does not qualify as information "of a third party."[5] None of the information supplied by the public body on the responsive records can be considered to be "of a third party" and so that information cannot be withheld under s. 21.

[15] In terms of the remaining withheld information that was not supplied by the public body, it can only be withheld if it constitutes the third party's trade secrets (s. 21(1)(a)(i)) or its commercial, financial, labour relations, scientific or technical information (s. 21(1)(a)(ii)).

Section 21(1)(a)(ii)

[16] The public body's argument with respect to s. 21(1)(a)(ii) was to simply highlight s. 21(1)(a)(ii) in its representations. Nevertheless, I accept that some of the information in the responsive records meets the definition of "financial" information.

[17] The term "financial" is not defined in *FOIPOP*. Previous OIPC review reports and Nova Scotia court cases have generally accepted that dictionary meanings provide the best guidance in these circumstances, and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, scientific or technical matters, as those terms are commonly understood.[6]

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[4] *NS Review Report 20-06, Cape Breton Regional Municipality,* 2020 NSOIPC 06 (CanLII), at para. 12.
[5] *Atlantic Highways Corp. v. Nova Scotia,* 1997 CanLII 11497 (NS SC), at p. 9. See also *NS Review Report 17-08, Department of Health and Wellness,* 2017 NSOIPC 8 (CanLII), at para. 28.
[6] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at p. 268 cited with approval in *Merck Frosst Canada Ltd. v. Canada (Health),* 2012 SCC 3 (CanLII), [2012] 1 SCR 23, at para. 139; *NS Review Report 17-06, Nova Scotia (County of Kings)*, 2017 NSOIPC 6 (CanLII), at para. 17.

[18] The Concise Oxford English Dictionary defines "finance" as including "the monetary resources and affairs of a state, organization or person."[7]

[19] I don't dispute that the responsive records contain financial information, but all the financial information is about and supplied by the public body. There is no financial information about or "of" the third party. Thus, any financial information on the responsive records cannot be withheld under s. 21(1)(a)(ii) of *FOIPOP*.

Section 21(1)(a)(i)

[20] Although s. 21(1)(a)(ii) is not met, information not supplied by the public body could still be withheld if it constitutes the third party's trade secret(s), in additional to the harms articulated in s. 21(1)(c). The question for me to answer is whether the "strategies, approach, research, analysis and procedures in the form of objectives, charts, graphs, cost structures, financial projections and conclusions…"[8] of the third party shown on the responsive records constitute its trade secrets.

[21] Section 3(1)(n) of *FOIPOP* defines "trade secret" as:

> (n) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process, that
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> > (i) is used, or may be used, in business or for any commercial advantage,
> > (ii) derives independent economic value, actual or potential, from not being 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;

[22] The Nova Scotia Government engaged the third party to provide financial advisory services to the public body. It is evident from the records that the third party conducted analyses of the information supplied to it by the public body. The third party also provided financial and managerial advice on the responsive records. But can the analyses be said to be a "trade secret"?

[23] In *School District No. 42 (Maple Ridge-Pitt Meadows), Re,*[9] a public body sought to withhold a third party's confidential negotiating process and commission rate in relation to a contract for services (the contract was disclosed). Former British Columbia Commissioner Flaherty found that the withheld information was largely descriptive of the services the third party would perform. He said he did not have enough evidence to find that information about the process the third party would follow derived independent economic value, actual or potential, from not being generally known to the public or to other persons who could obtain economic value from its disclosure or use. He said the services set out on the records were typical of any

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[7] Concise Oxford English Dictionary, 12th ed (Toronto: Oxford University Press), at p. 532.
[8] This is how the public body characterized this information in its representations to the OIPC.
[9] *BC Order 320-1999, School District No. 42 (Maple Ridge-Pitt Meadows), Re,* 1999 CanLII 2435 (BC IPC).

such type of service that any third party would perform in that context. He concluded that the information was not proprietary information. Rather, he said the public had a right to know what the third party had done for the public body as shown on the responsive records.

[24] Aside from the position put forward that the records contain proprietary third party information, I was provided with no explanation of what specific information on the responsive records is proprietary and how. The argument was also put forward that the methodology is unique to the third party without any explanation about how it is unique. Without the benefit of arguments from the public body about which portions of the third party's analyses on the responsive records constitute the third party's trade secrets, my reading of the records leads me to find that the third party's analyses appear to be typical of any such audit type service.

[25] I also note that both s. 13 and s. 14 of *FOIPOP* allow public bodies to withhold information unless it is "background information". Background information is defined in s. 3(1)(a)(vii) as including a final report or final audit on the performance or efficiency of a public body or its programs or policies. In my view, the responsive records fall squarely in this category.

[26] Nova Scotia's access to information legislation is unique in that it declares as one of its purposes a commitment to ensure public bodies are fully accountable to the public. It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[10] Courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[11] Public expenditures are a key type of government information to which access laws are intended to provide access. Like former Commissioner Tully,[12] I agree with my colleagues in Newfoundland and Labrador and in Prince Edward Island that nothing is more central to the goals of accountability and transparency than the right to information about what public bodies and municipalities are spending public money on, and what they are receiving in return.[13]

[27] Therefore, I reject the argument that the responsive records constitute a trade secret within the meaning of *FOIPOP*. The public body's arguments fall short of establishing that release of the responsive records would reveal the trade secrets of a third party.

[28] Because the first part of the s. 21(1) test is not met, it is not necessary for me to consider the remaining requirements of s. 21. Since the three parts of the s. 21(1) test must all be satisfied (read conjunctively), and the first part of the test is not met, I conclude that s. 21 does not apply to the withheld records.

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[10] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII), at paras. 54-57.
[11] *NS Review Report 16-01, Nova Scotia Business Inc. (Re),* 2016 NSOIPC 1 (CanLII), at para. 14.
[12] *NS Review Report 17-06, Nova Scotia (County of Kings)*, 2017 NSOIPC 6 (CanLII), at para. 27.
[13] This point was made by former PEI Commissioner Rose in *PEI Order No. FI-17-002, Prince Edward Island (Finance) (Re),* 2017 CanLII 19215 (PE IPC), at para. 15 and former NL Commissioner Donovan in *NL Report A-2017-014, Memorial University of Newfoundland (Re)*, 2017 CanLII 37267 (NL IPC), at para. 16.

FINDING & RECOMMENDATION:

[29] I find that the public body's evidence falls short of establishing that s. 21 was properly applied to the withheld responsive records.

[30] I recommend that the public body disclose the responsive records to the applicant in full, within 45 days of the date of this review report.

March 21, 2024

Tricia Ralph
Information and Privacy Commissioner for Nova Scotia

OIPC File: 18-00422