**Office of the Information and Privacy Commissioner for Nova Scotia**
**Report of the Commissioner**
**Catherine Tully**

# REVIEW REPORT 18-10

# November 7, 2018

# Waterfront Development Corporation Limited[1]

**Summary:** In December 2015, the Waterfront Development Corporation Limited issued a call for proposals in relation to a Halifax waterfront business opportunity – a waterfront beer garden. In response to a request for copies of the submissions, the Waterfront Development Corporation Limited relied on two harms-based exemptions to withhold most of the information from successful and unsuccessful bid proposals and from the final bid evaluation sheet. Neither the third parties nor the public body provided any evidence or submissions in support of their positions that information should be withheld. Public accountability in the expenditure of public funds goes to the heart of the *Freedom of Information and Protection of Privacy Act*'s purposes and is an important reason behind the need for detailed and convincing evidence for withholding information. Since there is no evidence to support the public body's decision to withhold information, the Commissioner recommends full disclosure of the requested records. To assist public bodies with the third party notice process, the Commissioner lays out the necessary steps to follow in giving third party notice.

**Statutes Considered:** *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 5, 7, 17, 20, 21, 22, 23, 45*; Develop Nova Scotia Act*, SN 2018, c 25.

**Authorities Considered: Nova Scotia:** Review Reports 17-06, 2017 NSOIPC 6 (CanLII); FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP).

**Cases Considered:** *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII); *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231(CanLII).

**Other sources considered:** Karanicolas, Michael. *The Costs of Secrecy: Economic Arguments for Transparency in Public Procurement*, Open Government Partnership. (May 2018).

[1] Waterfront Development Corporation Limited is now known as Develop Nova Scotia following passage of Bill 2, the *Develop Nova Scotia Act*, SN 2018, c 25.

## INTRODUCTION:

[1] The applicant sought copies of submissions by bidders who responded to a request for proposal (RFP) in late 2015 related to a Halifax waterfront business opportunity – a waterfront beer garden. In response, the Waterfront Development Corporation Limited (WDCL) provided partial access to the records, withholding portions under s. 17 (harm to economic interests of the public body) and s. 21 (harm to business interests of a third party).

## ISSUES:

[2] There are two issues under review:

1. Is the WDCL authorized to refuse access to information under s. 17 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) because disclosure could reasonably be expected to harm the economic interests of the public body?
2. Is the WDCL required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

## DISCUSSION:

### Background

[3] The WDCL does not frequently receive access to information requests. As with many other smaller organizations, it can be a significant challenge to properly process an access to information request when, in practice, there are so few. In this case, the WDCL made two errors that affected the applicant and the third parties. I will deal with these as preliminary matters.

#### *Error with respect to the third parties*

[4] Upon receipt of the request, the WDCL notified five affected third party businesses. The notification sent to the businesses incorrectly cited s. 20 (unreasonable invasion of third party personal privacy) as the provision at issue. In fact, it was s. 21 that was being considered (harm to third party business information). The notice then failed to properly advise the businesses that in order for the WDCL to apply s. 21, a three-part test needed to be satisfied. Most importantly, s. 21 requires that there be evidence of harm from the disclosure. In response to the third party notices, four of the five businesses indicated a reluctance to have business information disclosed. None specifically addressed the s. 21 test, nor did they provide any evidence of harm.

[5] Upon receipt of the comments from the third party businesses, the WDCL added additional severing to some of the records in keeping with requests from two of those third parties. The WDCL never issued a final decision to the third parties although it did advise the applicant that it was awaiting responses from the third parties.

[6] In any event, as part of this review process, all of the third parties were contacted again and were given an opportunity to provide submissions and/or evidence regarding the application of s. 21 to the records at issue. None provided any submissions. The WDCL also did not provide any submissions, nor did the applicant.

[7] When a public body receives a request for records it believes might affect the business interests of a third party, there is an eight-step notice process involved. Below I have set out instructions for access administrators on how to complete this process.

1. **Review the Records:** First, the public body must carefully read the records at issue and decide if there is reason to believe the records contain or may contain information the disclosure of which must be refused under s. 21.[2] Only if there is some reason to believe s. 21 might apply does notice need to be given. This is not a high test, but it is a necessary first step. Public bodies should stop here if there is no reason to believe s. 21 applies. No notice is required if the public body determines that s. 21 does not apply to the records.

2. **Time Extension:** If the public body decides that s. 21 might apply, then third party notice is required. In total, the process can take up to 50 days to complete. The law specifically provides that the 30-day time period for responding to requests is not extended by reason only that a notice has been given to a third party.[3] Public bodies will need to consider whether or not they must take a time extension under s. 9 or request a further time extension from the Information and Privacy Commissioner to ensure they have enough time to complete the third party notice process and provide a final response to the applicant.

3. **Letter #1 to Third Party**: If s. 21 might apply, the public body must highlight those portions of the records it thinks s. 21 applies to and send a copy of the records, a copy of s. 21 of the *Act* and a letter to the third party explaining that it is seeking the third party's evidence on whether or not s. 21 might apply to the records. It should include an explanation of the three-part test in s. 21 and remind the third party that it must prove that all three parts of the test apply to any withheld information. The public body must tell the third party that it has 14 days to either consent to the disclosure or to provide evidence of why s. 21 should be applied.[4]

4. **Letter #1 to the Applicant**: On the same day the public body writes to the third party, it should also write to the applicant advising him/her that it has notified a third party and is awaiting the third party's response.[5] It must advise the applicant that it has up to 30 days to decide whether to give access to the records or part of the records.

---

[2] Section 22(1) of *FOIPOP* provides that notice to third parties is required, "on receiving a request for access to a record that the head of the public body has reason to believe contains information the disclosure of which must be refused pursuant to section 20 or 21." The Supreme Court of Canada has made clear that the requirement for third party notice has a low threshold. Observing a low threshold for third party notice ensures procedural fairness and reduces the risk that exempted information may be disclosed by a mistake. See *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII), at para 80 [*Merck Frosst*].

[3] Section 22(3) *FOIPOP*.

[4] Section 22(1)(c) *FOIPOP*.

[5] Section 22(2) sets out the obligation to give the applicant notice that the third party is being given an opportunity to make representations.

5. **Make a Decision**: Once 14 days have expired since sending the letters, the public body must decide whether it will give access to the records or part of the records. It has up to 30 days from the date notice was given to the applicant (step 4) to decide but it cannot decide before it hears from the third party or after 14 days from when the notice is given, whichever comes first.[6] If the third party consents to the disclosure, it cannot sever any information under s. 21. If the third party does not consent to the disclosure, then the public body must consider any information provided by the third party or any other evidence it has that all three parts of the s. 21 test have been met. It then can make a final decision on what, if anything, will be withheld under s. 21.

6. **Letter #2 to the Third Party**: The public body must write to the third party and advise the third party of its decision.[7] Best practice is to provide a copy of the records with any proposed severing. If the public body intends to disclose part or all of the records, its letter must advise the third party that it has the right to request a review of that decision within 20 days.[8]

7. **Letter #2 to the Applicant**: On the same day the public body sends letter #2 to the third party, it must write to the applicant and advise him/her of its final decision regarding the third party business information.[9] It also must advise that it will give access to the records consistent with its decision unless the third party files a request for review within 20 days.

8. **Send Access to Information Response to the Applicant:** Once the 20-day appeal period has expired, the public body must confirm that the third party has not filed an appeal (by contacting the Office of the Information and Privacy Commissioner). If there is no outstanding appeal, it can then send the final decision and package of responsive records to the applicant.

***Error with respect to the applicant - duty to assist***

[8] In responding to access to information requests, public bodies have a duty to assist applicants. They are required to make every reasonable effort to assist applicants and to respond without delay, openly, accurately and completely.[10]

[9] When it comes to applying exemptions under *FOIPOP*, the duty to assist includes two obligations. First, the public body must only remove the information to which a specific exemption applies (i.e. sever) and release the remaining information.[11] Second, public bodies

---

[6] Section 23(1) sets out the obligation to make a decision not before the earlier of 15 days after the first notice is given or the day a response is received by the third party and overall, within 30 days after notice is given to the applicant.

[7] Section 23(2)(b) sets out the public body's obligation to notify the third party of its decision.

[8] Section 23(3) provides that where the decision is to give access to the records or part of the records, the public body must notify the third party of its right to request a review within 20 days after the notice is given.

[9] Section 23(2)(a) sets out the public body's obligation to notify the applicant of its decision.

[10] Section 7(1)(a) *FOIPOP*.

[11] Section 5(2) of *FOIPOP* requires that where information can reasonably be severed, the public body must do so and release the remainder of the records.

must clearly identify the specific section relied upon for withholding information, on a line-by-line basis.[12]

[10] The response package received by the applicant consists of numerous blank pages and a number of pages with content clearly removed. There is no annotation whatsoever on the 129 pages as to why any particular piece of information was removed. It is only the cover letter that indicates that s. 17 and s. 21 were being relied upon to withhold information. When the WDCL was asked to specify where s. 17 applies and where s. 21 applies, its representatives were unable to specify the records or information that was withheld under those individual provisions.

[11] The duty to assist requires that public bodies clearly note the section relied upon to withhold information beside the withheld information. This is usually a line-by-line effort, although where whole paragraphs or pages are withheld under a specific exemption, it is sufficient to note the exemption just once beside the paragraph or on the page at issue. The failure to conduct a line-by-line, page-by-page annotation of the withheld records was a significant failure to meet the duty to assist in this case.

**Burden of Proof**

[12] The WDCL bears the burden of proving that the applicant has no right of access to a record.[13]

**Is the WDCL authorized to refuse access to information under s. 17 of *FOIPOP* because disclosure could reasonably be expected to harm the economic interests of the public body?**

[13] Section 17 provides that a public body may withhold information where disclosure is "reasonably expected to harm" the financial or economic interests of the public body or the Government of Nova Scotia. Detailed and convincing evidence is required to establish a reasonable expectation of harm. Evidence amounting to speculation of possible harm is not sufficient. One of the fundamental purposes of *FOIPOP* is to provide for the disclosure of all government information with necessary exemptions that are limited and specific. Public accountability in the expenditure of public funds goes to the heart of *FOIPOP*'s purposes and is an important reason behind the need for detailed and convincing evidence.[14]

[14] The WDCL provided no evidence nor any submissions in support of its application of s. 17 to the records. In fact, as noted above, the records themselves do not specify which information was withheld under s. 17 and which information was withheld under s. 21. When asked, the WDCL was unable to recall which information attracted s. 17 severing.

[15] The records at issue consist of the proposals submitted by five different businesses in response to the RFP related to the operation of a beer garden on the Halifax waterfront. In addition, the records include a two-page evaluation of the five proposals. I have carefully

---

[12] Section 7(2)(a)(ii) of *FOIPOP* requires that where a public body refuses access to a record or part of the records, the public body must provide the reasons for the refusal and the provision of the Act on which the refusal is based.
[13] Section 45 of *FOIPOP* also provides that if the public body determines that it will disclose information to which s. 21 might apply, on an appeal by the third party, it is the third party who bears the burden of proof that s. 21 applies to the record.
[14] NS Review Report FI-09-100 at para 68.

reviewed all of the records provided and it is certainly not apparent what information could have attracted s. 17 severing. Information relating to unsuccessful bidders such as contact information, financial proposals or reference letters provided in support of proposals all relate to third party businesses but have no obvious connection to the financial or economic interests of the WDCL. As noted above, it is the public body's obligation to identify the exact information to which an exemption has been applied. The WDCL has not done so in this case.

[16] Section 17 is a harms-based exemption. Where the exemption is harms-based, the public body must produce evidence of harm from the disclosure.

[17] The assertion that disclosure of procurement-related information might somehow harm the economic or financial interests of a public body has been recently challenged. In a 2018 international study of open procurement practices, the author found that disclosure of procurement-related information can result in significant benefits to the public body.[15] The study highlights a number of benefits of open procurement practices including that it enhances the ability of businesses to understand and engage with the public procurement system which increases competition and levels the playing field among contractors. Another benefit highlighted by the study is that open procurement practices help to enhance the ability of the public, including watchdog groups, to track public procurement expenditure, promoting efficiency and accountability by making it easier to uncover waste and mismanagement.[16]

[18] The WDCL bears the burden of proof. This is not a case of inadequate proof, it is a case of no proof at all. On that basis, I find that the WDCL has failed to meet its burden of proving that s. 17 applies to any of the withheld information.

**Is the WDCL required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?**

[19] Nova Scotia's access to information legislation is unique in that it declares as one of its purposes a commitment to ensure that 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.[17]

[20] *FOIPOP* strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party information are exempt from disclosure and it gives procedural protection through the third party notice process.[18] 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.[19]

---

[15] Karanicolas, Michael. *The Costs of Secrecy: Economic Arguments for Transparency in Public Procurement*, Open Government Partnership. (May 2018). [Karanicolas].
[16] Karanicolas at pp. 3-4.
[17] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII), at paras 54 – 57.
[18] *Merck Frosst* at para 23.
[19] NS Review Report FI-10-59(M) paras 9-15, *Imperial Oil Limited v. Alberta* (Information and Privacy Commissioner), 2014 ABCA 231 (CanLII), at para 67.

[21] In this case, the third parties were given an opportunity to comment on the potential disclosure of their bids by the WDCL and a second time through this review process. The WDCL provided us with copies of its correspondence with the third parties. That correspondence consists of very brief email exchanges generally confirming that the WDCL intended to withhold all information highlighted on copies sent to the third parties. No third party offered any evidence in support of its claim that there would be harm from the disclosure of the withheld information to the WDCL and no third party provided any submissions in this review process.

[22] The test for the application of s. 21 is clearly set out in the provision. The burden is on the public body in this case to establish that:

1. the disclosure of the requested information would reveal trade secrets of a third party or commercial, financial, labour relations 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).

[23] I have previously accepted that portions of bids may qualify as commercial or financial information of a third party.[20] In this case, I have no evidence in support of whether or not the information in the proposals was supplied implicitly or explicitly in confidence. I also have no information or evidence to establish if any harm would come from the disclosure, let alone harm of the type specified in s. 21(1)(c). To be clear, s. 21(1)(c) requires that the disclosure could reasonably be expected to harm significantly the competitive position of the third party or result in undue financial loss or gain among other things. In other words, the law anticipates that there could be some harm to a competitive position or some financial loss or gain without attracting s. 21. Rather, the law requires evidence of significant harm or undue financial loss or gain.

[24] I find that the WDCL has failed to establish that the three-part test set out in s. 21 applies to any of the withheld information. As noted, the third parties provided no evidence in support of the application of s. 21. Ideally, in a situation such as this, the public body's original decision should have been to fully disclose the requested information. The third parties would then have had 20 days to file an appeal of that decision. On such an appeal, the third parties, and not the public body, would have borne the burden of proving that s. 21 applies to the records. Alternatively, if the third parties had not filed a review request, the public body could then have fully disclosed the records.

**FINDINGS & RECOMMENDATIONS:**

[25] I find that the WDCL:

1. has failed to meet its burden of proving that s. 17 applies to any of the withheld information.
2. has failed to establish that the three-part test set out in s. 21 applies to any of the withheld information.

[20] NS Review Report 17-06 at para 23.

[26] I recommend that the WDCL disclose the requested records in full.

November 7, 2018

Catherine Tully
Information and Privacy Commissioner for Nova Scotia