

**THE NOVA SCOTIA FREEDOM OF INFORMATION
AND PROTECTION OF PRIVACY ACT**

REQUESTS FOR REVIEW of a decision of the **DEPARTMENT OF HEALTH** to disclose part of submissions made in two tenders on a biomedical waste disposal system.

REVIEW OFFICER: Darce Fardy

REPORT DATE: September 7, 2005

ISSUE: Whether the exemption under Section 21 of the FOIPOP Act supports the third party's objections to the disclosure of the submissions.

In two Requests for Review dated July 8, 2005, under the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, a third party asked that I recommend to the Department of Health (DOH) that it reverse its decision to disclose the records.

DOH had been asked by two different applicants for copies of the submissions made by the winning bidder on a biomedical waste disposal system. In accordance with **Section 22** of *FOIPOP*, it notified the winning bidder of the application and asked it if it would consent having its submissions disclosed. The third party refused consent.

DOH subsequently informed the third party that it had decided to disclose most of the information to the applicants. The third party asked that I review that decision, citing the exemption found in **Section 21**:

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 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.

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) The head of a public body shall disclose to an applicant a report prepared in the course of routine inspections by an agency that is authorized to enforce compliance with an enactment.

(4) Subsections (1) and (2) do not apply if the third party consents to the disclosure. 1993, c. 5, s. 21.

The submission of the third party's solicitor:

Recognizing that the burden of proof is on the third party to prove that disclosing the record would reasonably be expected to do significant harm to its interests, the submission provided by the third party's solicitor sets out to provide that proof. The solicitor also recognizes that all three subsections of s.21(1) must apply in order for the exemption to stand and he addresses those three subsections in his submission:

1. (1)(a) applies because the third party's submission responded to a competitive procurement tender and contains "trade secrets" and "commercial, financial, labour relations, scientific and technical information" relevant to the project at issue;
2. 1(b) applies because it is standard practice that responses to competitive bids be kept confidential throughout the procurement process leading up to the award of the tender. "Of key significance in this case is that the Department of Health chose to award a **conditional** contract with an in service delivery date of December 21, 2005. The contract has already been withdrawn from one proponent and placed with another proponent. It therefore is apparent that the procurement process is still live and will be at least until December 21, 2005. There may be other developments before the close of the tender process. In fact, the process could be terminated by the DOH and a fresh tender process implemented to secure the services being sought. My client

would be interested in pursuing the award which would most likely include submission of much of the same material being sought in this application.”

3. 1(c) applies because disclosing the submissions while the procurement process is ongoing “cannot help but create a reasonable expectation of significant harm.”

The Submission of DOH:

This submission responds to the third party’s comments related to ss 21(1)(b) and answers questions raised by the Review Office during the mediation process.

With respect to ss. 1(b), DOH said the Public Tenders Office confirms that most tenders are conditional upon a company complying with what it said it would do. In many cases Expressions of Interest and responses to Requests for Proposals are made public while contracts and agreements are still being negotiated.

DOH also noted that all “Expressions of Interest” and “Requests for Proposals” clearly stipulate that all documents, including expressions of interests and offers, are subject to disclosure under the FOIPOP Act. By submitting an expression of interest the proponent thereby agrees to its disclosure subject to the provisions of the Act.

With respect to the change in the proponent, DOH does not anticipate a repeat of what happened with the first proponent even though the conditional award is in place until the contract is signed.

DOH noted that much of the information contained in the third party's submission is already publicly available on its website. It cited my Review Report FI-03-11 in which I concluded:

“...if some of the information can be gleaned from news releases, it is difficult to assert that the same information provided . . . by the third party was done so with the understanding it would be kept confidential”

DOH says its decision to remove some parts of the submissions acknowledges that some of the information in the submission is proprietary and that disclosure could harm the interests of the third party.

Conclusions:

The Government's website with respect to public tendering includes “Standard and Conditions” adopted by the four Atlantic Provinces:

*Atlantic Provinces
Standard Terms and Conditions
Goods and Services
Effective 2005 June 30*

23. Confidentiality and Freedom of Information

23.1 All Bids submitted become the property of the Province. By submitting a Bid, the Bidder hereby grants the Province a license to distribute, copy, print or translate the Bid for the purposes of the Invitation. Any attempt to limit the Province's right in this area may result in rejection of the Bid.

23.2 Bidder's Bid package may be subject to disclosure under the Province's "freedom of information" legislation. By submitting a Bid, the Bidder agrees to the appropriate disclosure of the information supplied, subject to the provisions of the governing law. The Province cannot guarantee the confidentiality of the complete content of any Bid after the procurement has been awarded to the successful Bidder.

23.3 During the delivery and installation of goods and/or services, the Bidder or Bidder's staff may have access to confidential information belonging to the Province. Should this occur, the Bidder must ensure that such information is not released to any third parties or unauthorized individuals; failure to comply may result in criminal or civil charges and/or the Bidder's disqualification from any further Invitations issued by the Province.

Although this policy was promulgated by the provinces in June of this year, it follows a long time practice of the Nova Scotia Government. In my Report FI-97-01 I concluded:

Companies which bid on Government contracts . . . expect their bids to become public. In a document headed "General Conditions for Bidders," published by the Procurement Branch of the Department of Finance, it says: "By submission of this bid, the bidder consents to disclosure of the information supplied, subject to the provisions of the Freedom of Information and Protection of Privacy Act."

It is my view, that the third party had no reason to believe he was providing the information implicitly or explicitly in confidence. Consequently, since all three conditions of s.21(1) have not been met, that exemption does not apply.

Recommendations:

- That the DOH write to the third party reaffirming its decision to disclose the severed submissions.

Dated at Halifax, Nova Scotia this 7th day of September 2005.

Darce Fardy, Review Officer