REPORT **FI-05–54**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A **REQUEST FOR REVIEW** of a decision of **ACADIA UNIVERSITY** to refuse to disclose a copy of a contract signed with a consultancy firm assisting in the development of a strategic plan for the University.

REVIEW OFFICER: Darce Fardy

REPORT DATE: November 29, 2005

ISSUE: Whether Section 17 (harm to the University's interests) and Section 21 (harm to the interests of a third party) support the decision to deny access to a contract.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act** (*FOIPOP*), dated August 2, 2005, the Applicant asked that I recommend to Acadia University (Acadia) that it disclose the records he is looking for.

The Applicant asked for records showing the contracted amount to the consulting company for its work on the 2004-2006 strategic plan including consultancy fees, travel, and all costs associated with data gathering and analysis and discussion workshops. He also asked for a copy of the contract between Acadia and the consulting firm.

In refusing to disclose, Acadia cited exemptions under **Section 17 (1)(a)** and **(b)** and Section **21(1)(a)(i)** and **(ii)**, **(b)** and **(c)(i)**, **(ii)** and **(iii)**.

Financial or economic interests

> **17 (1)** The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the Government of Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:
>
> (a) trade secrets of a public body or the Government of Nova Scotia;
>
> (b) financial, commercial, scientific or technical information that belongs to a public body or to the Government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

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, [or]
>
> (iii) result in undue financial loss or gain to any person or organization,

Acadia chose not to notify the interested third party formally of the application because it had decided to refuse to disclose the records.

However, in accordance with **Section 37** of *FOIPOP,* the Review Office invited the third party to make a submission with respect to the review. Acadia and the Applicant were also invited to make a submission. The Applicant chose not to.

Acadia's submission:

Acadia believes that disclosing the contract will put its relationship with the consulting firm in jeopardy because the agreement is still ongoing. It also asserts that disclosure could place Acadia in breach of the contract, which doesn't conclude until the Spring of 2006.

The submission continued:

> Revealing the information requested would disadvantage Acadia in that it would seriously harm the University's current and any future contracts with (the consulting company) . . . From the University's point of view both its financial and economic interests as well as its reputation would be placed in jeopardy by such a release. [S.17(1)]
>
> The Academic core of the Strategic Plan has been developed and is now in the public domain (on Acadia's website), but the next step - implementation - is still being guided by (the company).
>
> The University has shared certain proprietary information and future plans with (the company) during the contract period. [s.17(1)(a) and (b)]

Acadia believes it has been very open and inclusive in developing its strategy and points to its website as evidence of that. It quoted from page 3 of its "Principal Characteristics of the Strategic Planning Process":

> Throughout, principles of transparency, inclusion, consultation and respect have guided the work of strategic planning . . . All aspects of the

> process have been well publicized, and all the data gathered are available and easily accessible.

Although the third party made its own submission opposing disclosure, Acadia said the contract was distinctive because it includes the proposal which contains the intellectual and commercial property that the company wants to protect.

The third party's submission:

The third party says it was clear that the proposal was provided to Acadia in confidence because a "Statement of Confidentiality" leads off the proposal.

With respect to its claim that disclosure would result in "undue loss" to the third party it wrote:

> The nature of (the company's) work requires the creation of customized proposals which, in order to be successful, must contain very specific information related to the techniques and methodologies that are proposed to be employed . . .
>
> The potential damage to (the company) of opening its proprietary techniques and methodologies to public scrutiny - after having provided its services in good faith to Acadia on the understanding that it would be kept confidential - would be measured in the loss of current and future revenue.

With respect to ss.21(1)(c)(ii), the third party pointed out that universities have special needs in developing strategic plans, building a strong university community and improving student outcomes. Universities require very specialized advice and consulting services. It concluded:

> It is reasonable to conclude that (the company) would have been much less likely to offer Acadia the assistance it did if doing so would have the effect of undermining the company's competitive advantage.

In a subsequent oral submission, the third party said the methodology in the contract is what distinguishes it from other contracts. At the same time it concedes that the entire contract may not be exempt from disclosure.

Conclusions:

It is unfortunate that the Applicant did not avail himself of the opportunity to put his argument forward in a submission.

I do not know how familiar the third party was with Acadia's responsibilities under *FOIPOP*. It is incumbent on public bodies to make these requirements clear to companies they intend to do business with.

I have seen no evidence that public bodies have been unable to reach satisfactory contracts with proponents because of *FOIPOP*'s constraints, or that proponents have refused to do business with public bodies or that any have suffered significant harm as a result of the disclosure requirements of *FOIPOP*.

This case is unique for several reasons. All but one page of the document, described by Acadia as a "contract", contains the proposal made to Acadia by the company. It is identified as such on its front page. The final page contains the authorization signatures. All of it has been denied.

Contracts between public bodies and contractors are routinely disclosed. There have been arguments presented under s.21(1) to support a refusal to disclose, or partly disclose, bids and proposals, but disclosing contracts is accepted by public bodies as evidence of accountability and transparency in decision making.

No public body can be relieved of its responsibilities under *FOIPOP* (Nova Scotia universities have been subject to legislation since 2000) merely by agreeing to keep matters confidential. In fact, I am not aware of any public bodies which do not include in their bids for proposals an advisory that the proposals will be subject to disclosure under *FOIPOP*. This means that records in the custody and under the control of a public body should be disclosed unless an exemption under *FOIPOP* applies. There is a requirement for public bodies to inform proponents that *FOIPOP* applies. It is obvious that if public bodies could escape *FOIPOP*'s requirements under s.21(1) merely by agreeing to hold third party records in confidence, that exemption would be rendered meaningless.

Acadia says it demonstrated its commitment to openness and accountability by making public its strategic plan. Dated September 27, 2005, it appears on Acadia's website. During the preparation of this strategic plan it consulted with the Senate, the Board of Governors, the faculty and the staff.

While this is admirable, and provides readers with a chance to comment, it does not meet the demands of the Nova Scotia Court of Appeal that public bodies conform with the purpose of the Act to be "fully accountable."

In *O'Connor v. Nova Scotia* (2001) NSCA 132, Justice Saunders noted that the Nova Scotia Act is deliberately more generous to its citizens and is intended to give the public greater access to information. He notes one of the main purposes of the Act is to make public bodies "fully accountable" to the public and to provide for the disclosure of all public information subject only to "necessary exemptions that are limited and specific."

It is also clear from *O'Connor* that identifying a record as "confidential" does not automatically exempt it from disclosure:

> . . . no government (read public body) 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 upon the necessary inquiry. (Para. 94)

In another case, with respect to business information as recognized in s.21, the Nova Scotia Supreme Court said

> 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 v. Attorney General of Nova Scotia representing the Department of Health*, 2004 NSSC 54 para 18]

In this case the parties recognize that all three parts of s.21(1) must apply for that exemption to stand. The contract must contain trade secrets or commercial or financial information of a third party; that information must have been supplied in confidence; and there

must be proof of a reasonable expectation of significant harm to a third party if the record is disclosed.

The Nova Scotia Supreme Court has determined that contracts result from a give and take between the parties, making it difficult to determine which party "supplied" what information. It concluded it is difficult to isolate from a negotiated contract commercial and financial information of one of the parties to the agreement. [*Atlantic Highways Corp. et al V. Nova Scotia et al* (1997) N.S.J. No 238 (S.C.)]

However, I have already noted the uniqueness of this contract because the bulk of it is, in fact, the proposal. Proposals frequently contain proprietary information "supplied" by the proponent. The proprietary information may be denied if all three conditions of s.21 are satisfied and if a public body can meet the burden of proof.

The third party was satisfied that the proposal would be kept confidential because Acadia agreed not to disclose it. Acadia may have been unaware of the government's policy with respect to bids and contracts. As long as eight years ago, the government had a procurement policy which I cited in my Review Report FI-97-011:

> 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 Freedom of Information and Protection of Privacy Act."

On June 30, 2005, the Atlantic Provinces published "Standards and Conditions" for the supply of goods and services. It refined the eight-year old policy but the intent remains.

Although this policy applies to government and government agencies, it is reasonable to expect all public bodies to follow the policy.

In its submission to this Review, Acadia also used the argument that the request should be turned down because the agreement is still ongoing and Acadia could be in breach of the contract if it disclosed it. I find nothing in *FOIPOP* that exempts records for that particular reason.

Although the third party asserts that disclosure could harm the interests of the consulting company, the burden of proof rests with Acadia to make that case. [Section 45(1)] It's a high hurdle.

The Supreme Court of Canada requires "a clear and direct connection between the disclosure of specific information and the injury that is alleged."[*Lavigne v. Canada (Office of the Commissioner of Official Languages*) 2002 S.C.C. 53 at para 58]

The Nova Scotia Supreme Court and Court of Appeal endorsed the view of the Supreme Court of Canada that

> "... the legislators, in requiring 'a reasonable expectation of harm' must have intended that there is more than a possibility of harm to warrant refusal to disclose records. Our Act favours disclosure and contemplates limited and specific exemptions and exceptions." [*Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124]

> "Evidence that relates to consequences that could ensue from disclosure that describe the consequences in a general way falls short of meeting the burden of entitlement to an exemption from disclosure." [*Chesal v. Attorney General of Nova Scotia*, 2003 NSSC 010]

The Ontario Court of Appeal found reasonable a view of the Ontario Information and Privacy Commissioner than evidence of harm "must be detailed and convincing." [Ontario (*Workers' Compensation Board) v. Ontario (Assistant Information and Privacy Commissioner*) 1998 CanLii 7154 (ON C.A.]

The Manitoba Court of Queen's Bench, which considered the same phrase, "could reasonably be expected" to harm, in its legislation, said

> "[t]here will always be some possibility of an adverse impact when negotiating positions are released, but here the drafters have included the word "reasonable" expectation, thus adding the objective and qualitative elements. [*Kattenburg v. Manitoba (Department of Industry, Trade and Tourism, Minister*) [1999] M.J. No. 498]

The Alberta Information and Privacy Commissioner says it must be shown that disclosure would cause "damage" or "detriment" not simply "hindrance" or "minimal interference." (*Practice Note 1, Office of the Information and Privacy Commissioner*)

In my opinion Acadia's claim of significant harm to the interests of the Company, or to its own financial and 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] I agree with the third party that the company is open to a real risk of having a competitor benefit from reading the company's proposal.

Acadia has also suggested that if any of the "contract" is disclosed, the company may no longer be interested in consulting with the university. I have seen no explicit threat that this would happen. As noted, the company has no objection to the disclosure of parts that do not contain its methodologies.

Below are my recommendations for disclosure and the reasons why I concluded the exemptions cited do not apply.

Recommendations:

That Acadia disclose:

- ❑ Copies of the three pages of its "Strategic Plan - Summary of Activity" for the fiscal years 2005 and 2006 and the "Summary of Activity." *These three records were created by Acadia and supplied to the consulting company so s.21 does not apply. I have received no arguments that these three particular records, if disclosed, would harm the interests of Acadia or cause the consulting company to refuse to do business with Acadia in the future. Of all the matters where public bodies must be "fully accountable" one of the most obvious is its disbursement of funds. It would be unreasonable and perhaps impractical to expect Acadia to keep these figures private.*
- ❑ Page 2 of the "Contract." *This record, in my view, does not contain a strategy or methodology as those words are understood to mean.*

- ❑ The signature page. *Again this page contains none of the methodologies of the company.*

I also recommend that Acadia, in the future, notify all proponents, that their proposals are subject to *FOIPOP*.

Section 40 of the Act requires Acadia to make a decision on these recommendations within 30 days of receiving them and to notify the Applicant and the Review Officer, in writing, of that decision. If a written decision is not received within 30 days, Acadia University is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 29th of November 2005.

Darce Fardy, Review Officer