



Nova Scotia

**Freedom of Information & Protection of Privacy Review Office
Review Officer Report FI-06-60**

A Third Party **REQUEST FOR REVIEW** of a decision of **GUYSBOROUGH ANTIGONISH STRAIT HEALTH AUTHORITY** to release the successful proposal submitted in a Request for Construction Management Services, St. Martha's Hospital.

November 27, 2006



ISSUE:

Whether Section 21(1) of the *Freedom of Information and Protection of Privacy Act*, supports the decision of the Guysborough Antigonish Strait Health Authority to release the successful proposal.

In a Request for Review dated August 29, 2006, the Third Party requested I recommend to the Guysborough Antigonish Strait Health Authority (“GASHA”) that it not release any portion of the successful proposal (“proposal”) it submitted for a Request for Construction Services.

On June 26, 2006, GASHA received an application for access to a record under the *Freedom of Information and Protection of Privacy Act* (“FOIPOP”). The Applicant sought a copy of the proposal submitted by the successful bidder under a Request for Construction Management Services, St. Martha’s Hospital. In accordance with Section 22(1) of FOIPOP, GASHA notified the Third Party (the successful bidder) of the application. The Third Party did not consent to the disclosure of the proposal. However, in a letter dated August 11, 2006, GASHA informed the Third Party of its decision to grant access to the Applicant, citing the absence of confidentiality as defined in s.21 of FOIPOP.

During the Review Office’s mediation process, the scope of the application was narrowed to the technical submission portion of the proposal (Section 3.1, 3.2, 3.3, 3.4, 3.5, 3.6 and Appendix C). All parties were requested to make a submission to the Review Office. A submission was received from the Third Party.

LEGISLATION CONSIDERED:

The relevant sections of FOIPOP are:

Confidential information

21(1) The responsible officer shall, unless the third party consents, 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, . . .

Burden of proof

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 prove that the applicant has no right of access to the record or part.

The information requested in this instance pertains to a company. Section 45(3) places the burden of proof on the Third Party to establish that the Applicant does not have a right to access all or part of the record(s).

SUBMISSION OF THE THIRD PARTY:

The proposal is “proprietary and may be used by a competitor to put [the Third Party] at a disadvantage in further proposals.” The Third Party addressed all sub-sections of the exemption:

Section 21(1)(a)

The proposal contains detailed commercial, financial, labour relations, scientific or technical information of a third party, including human resources, budget/schedule control procedures and methodologies, quality assurance/quality control strategies, occupational health and safety programs, past project history, information technology systems and fees.

Section 21(1)(b)

It is typical, in our industry, for RFP’s soliciting construction services to make reference to the FOIPOP Act in the text of the bid documents, thereby advising respondents that the information submitted may be shared. This did not occur and to the contrary the following clause was included in Part 6 - General Conditions, Item 6.25, “Ownership of Proposals: All documents, including proposals, submitted to GASHA become the property of GASHA. Notwithstanding this, GASHA undertakes to use them only for the purposes of this project and to keep their contents in confidence except to the extent disclosure is required for evaluation and award.”

Section 21(1)(c)

The Maritime construction industry is “small with only a few competitors who compete on a regular basis” on most requests for construction. “The written words in a proposal are often the only means of differentiating services between competing firms, even the format, layout and

graphic design in a proposal are important and proprietary.” Services are sold not only by what is presented, but the manner in which it is presented.

ANALYSIS AND FINDINGS:

Atlantic Highways Corp. v. N.S. (1997), 162 N.S.R.(2d) 27 (SC) and *Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Department of Health*, 2004 NSSC 054, established that third parties must meet all listed requirements of s.21(1).

Application of Section 21(1)

(a) Trade Secrets, Commercial, Financial, or Technical Information

I accept that portions of the proposal contains information which meet the definitions of financial and technical information of the Third Party. Definitions for these words can be found in an order of the Ontario Information and Privacy Commissioner (PO-1911), upheld on appeal. In the absence of definitions in *FOIPOP*, I believe it is reasonable to adopt Ontario Commissioner’s definitions. “Financial” information refers to information relating to money and its use or distribution and must contain or refer to specific data. “Technical” information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields are architecture, engineering or electronics.

(b) Supplied in Confidence

To fall within s.21(1)(b) of *FOIPOP*, the Third Party is required to establish the proposal was “supplied, implicitly or explicitly, in confidence.” The Third Party cites Item 6.25 of the Request for Proposals for Construction Management Services, St. Martha’s Hospital in support of the conclusion that the proposal was supplied in confidence. Item 6.25 reads as follows:

- 6.25 Ownership of Proposals: All documents, including proposals, submitted to GASHA become the property of GASHA. Notwithstanding this, GASHA undertakes to use them only for the purposes of this project and to keep their contents in confidence except to the extent that disclosure is required for evaluation and award.

The Request for Proposal also includes the following clauses under Part 6 - General Conditions:

- 6.2 Any information contained in a Technical Submission, which is considered proprietary by the proponent must be clearly identified. GASHA and their representatives shall respect the confidential nature of any information so identified.

- 6.7 GASHA intends to initiate and negotiate a contract that would obligate the proponent to meet any warranties and representations made during the selection process. GASHA will require that a copy of the completed proponent proposal be included as a schedule in the final Agreement. This Agreement will be governed solely by the laws of the Province of Nova Scotia.

Clause 6.25 of General Conditions is fairly explicit in that GASHA's intention is to keep the contents of the proposal in confidence. However, clause 6.25 cannot be read in isolation of other provisions in the proposal and stages of the contractual process. The proposal's status changes as a result of becoming part of the negotiated agreement. Clause 6.7 states, "GASHA will require that a copy of the completed proponent proposal be included as a schedule in the final Agreement. This Agreement will be governed solely by the laws of the Province of Nova Scotia." This of course, includes *FOIPOP* legislation. The Third Party did not identify any information contained in the proposal as confidential. As well, the Third Party's proposal was successful, and became a schedule to the final Agreement. I therefore conclude the "in confidence" element has not been met.

It is also my view that the information contained in the proposal was not "supplied" to GASHA within the context envisioned by s.21(1)(b) of *FOIPOP*. The British Columbia Office of the Information and Privacy Commissioner addressed this question in Order 01-39. This Order summarized the Commissioner's approach to the "supply" issue where a bid proposal information is involved:

- [45] . . . A bid proposal may be "supplied" by the third party during the tendering process. However, if it is successful and is incorporated into or becomes the contract, it may become "negotiated" information, since its presence in the contract signifies that the other party agreed to it.
- [46] In other words, information may originate from a single party and may not change significantly - or at all - when it is incorporated into the contract, but this does not necessarily mean that the information is "supplied." The intention of s.21(1)(b) [same as that in Nova Scotia *FOIPOP*] is to protect information of the third party that is not susceptible of change in the negotiation process, not information that was susceptible to change but, fortuitously, was not changed . . .

The Nova Scotia Supreme Court addressed this question in *Atlantic Highways Corp.* [1997] N.S.R. No. 238. In that case, Kelly, J., concluded:

[49] The Review Officer in his written reasons for his recommendation concluded that a private company cannot expect to keep private the information contained in an agreement signed with government, particularly when public funds are involved. I confess to some difficulty with this broad statement as there may be rare circumstances where it could be in the public interest to do so. For example if such a contract also involved other protect information under the Act such as certain personal information. However, the general statement is valid in most circumstances as it reflects the right of citizens to be informed of the use of public funds. The obvious danger is the use of the protection of ‘commercial information’ as a shield to keep from the public the information necessary to properly assess government acts . . .

Based upon these decisions, I find the information in dispute does not meet the “supplied” requirement of Section 21(1)(b). GASHA agreed to the information in question as proposed by the Third Party. Also the “supplied” is unchanged in the final Agreement.

(c) Harm of Disclosure

Section 21(1)(c)(i), requires the Third Party establish that disclosure of the Contract would “harm significantly” the competitive position of or “interfere significantly” with the negotiating position of the Third Party. This harm must be in keeping with the standards set out in several court cases including *Chesal*.

The Third Party advance the position that the release of the information would harm its competitive advantage via competitors becoming aware of its services and the manner in which the Third Party presents them. These statements in themselves, without clarification or detail do not, in my opinion, meet the standard set out in *FOIPOP* for limiting access to records on the basis of harm.

Other Consideration:

After reviewing the proposal, it came to my attention that it contained information that may be exempt under s.20 of *FOIPOP* (personal information). This personal information involves the names, addresses and employment history of members of the staff of the Third Party. I believe disclosing the personal information contained in the proposal is an unreasonable invasion of privacy. As such, it should be severed and withheld from the Applicant.

RECOMMENDATION:

That the Guysborough Antigonish Strait Health Authority disclose to the Applicant the Contract in part, severing the personal information of identifiable individuals.

Section 40 of the *Act* requires GASHA 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, GASHA is deemed to have refused to follow these recommendations.

Dated at Halifax, Nova Scotia this 27th day of November 2006.

Dwight Bishop
Acting Review Officer