REPORT
Nova Scotia Freedom of Information and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-07-11

Report Release Date: March 18, 2008

Public Body: Department of Justice

Issues: Has the Public Body properly applied s. 15, 17, 20 and 21 of the *Act* to sever two unsuccessful proposals?
Has the Third Party Applicant met the onus to demonstrate that the Record, which is its unsuccessful proposal submitted to Justice, be withheld in its entirety?

Summary: A Third Party Applicant requested a Review of the decision made by Justice to provide a severed portion of the responsive Record. The Original Applicant wants access to the whole Record or part of the Record. The Third Party Applicant requested a Review of the decision by Justice taking the position that the entire Record should be withheld. The Record consists of two unsuccessful proposals that were in response to a RFP about the electronic supervision of offenders.

Recommendation: 1. Justice should release the information that has been identified by it and the Third Party Applicant as releasable, but not any other information.
2. In future procurement cases, public bodies should be cognizant of the important responsibility they have, at the outset when first considering the application for access, to examine a record in detail to identify exactly what an applicant may be entitled to access and to distinguish that from what a third party may be entitled to keep private. This would enable a public body to make some initial decisions as to what they propose to supply to an applicant along with notice to third parties so they can know early on what s. 21

does not apply to. Withholding a proposal in its entirety will be the exception rather than the rule under the s. 21 exemption.
3. All public bodies should review both their REIs and RFPs, in particular, references to the *Act,* and consider being more specific with respect to the three requirements of s. 21 to put potential proponents in the procurement process on notice and to assist members of the public to understand when this mandatory exemption will apply. Also, to ensure that all public bodies are aware that a mutual agreement between themselves and RFP proponents to keep information confidential does not meet all three part of the statutory test in s. 21. While public bodies may bring confidentiality to the attention of third parties in the REI and the RFP, a mere claim to confidentiality is not sufficient under the *Act* to withhold a Record under s. 21.

Key Words: confidential information, disclosure of a proposal, limited and specific, procurement, reasonably be severed, successful proponent, Third Party, unsuccessful proponent

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act s. 3, 5(2), 15(1)(e), 15(1)(k), 17(1)(d), 20(1), 20(2)(f), 21(1)(a), 21(1)(b), 21(1)(c)(i), 21(1)(c)(ii), 21(1)(c)(iii), 22(1)(a)*

Case Authorities Cited: *Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R. (2d) 27; NS Report FI-07-12; ON Order PO-1911*

REVIEW REPORT FI-07-11

BACKGROUND

On August 15, 2006 the Original Applicant requested access to information. The request was narrowed on October 30, 2006 to:

> *A copy of the contract documents and a copy of the proposals submitted in response to last year's RFP about the electronic supervision of offenders. As you indicated, there were apparently three complete proposals submitted before the contract was awarded to [Third Party].*

After receiving the original request on October 20, 2006, Justice provided Third Party Notice to a contract proponent who had submitted two bids, both unsuccessful.

On October 25, 2006, the Third Party Applicant responded and advised Justice that it objected to the release of both proposals to anyone outside procurement or Justice.

Arguing the proposals fell within the definition of confidential information pursuant to s. 21 of the *Freedom of Information and Protection of Privacy Act ["Act"],* the Third Party Applicant outlined in detail how releasing the Record could affect their interests. Details of those concerns are outlined in the Third Party Applicant's Submission.

On November 16, 2006, Justice made a decision with respect to the Original Applicant's revised request for access to information. Justice advised the Original Applicant that the access request had been granted in part and that the contract would be released. That letter stated:

> *We have come to a decision regarding your revised request for: "a copy of the contract documents and a copy of the proposals(1) submitted in response to last year's RFP about the electronic supervision of offenders."*
> *(1) Note: As agreed three proposals were to be considered.*

The decision by Justice provided that the Third Party Applicant's proposals had been severed in their entirety under the following exemptions; s. 15(1)(e), 15(1)(k), 17(1)(d), 20(1), 20(2)(f) and 21(1)(a), 21(1)(b) and 21(1)(c)(i), 21(1)(c)(ii) and 21(1)(c)(iii) of the *Act.* No other explanation as to how these sections had been applied was provided by Justice.

The Original Applicant appealed this decision on January 15, 2007. During the Review process for that file, Justice reconsidered its original decision to withhold all three proposals submitted including one successful and two not successful. Third Party notices were given indicating to the Third Parties which portions of the Record it intended to release to the Original Applicant. The notice informed the Third Parties of their right to seek a Review if they did not agree with this decision.

The winning proponent did not ask for a Review. The unsuccessful proponent, now the Third Party Applicant, filed a Request for Review on February 8, 2007. This is the subject of this Review.

Mediation was not successful and the file was forwarded for formal Review on June 29, 2007.

RECORD AT ISSUE

The Record under Review consists of two unsuccessful proposals that were in response to a RFP about the electronic supervision of offenders. The Third Party Applicant requested a Review of the decision by Justice to provide a severed portion of the responsive Record. The Original Applicant was never informed by Justice of their intent to release a severed copy of the proposals. The Original Applicant wants access to the whole Record or a part of the Record. The Third Party Applicant takes the position that the entire Record should be withheld.

ORIGINAL APPLICANT'S SUBMISSION

The Original Applicant stated that its interest in the unsuccessful proposals was not simply an academic issue. In particular, the Original Applicant was interested in the financial costs and roles and responsibilities of the individuals working with the electronic supervision devices because of the implications for the group it represents.

The Original Applicant reiterated the main purpose of the *Act*, namely "to ensure that public bodies are fully accountable to the public" and "to provide for disclosure of all government information with necessary exemptions that are limited and specific…".

The Original Applicant referred to the RFP subsection (o) which states:

> *All documents, including proposals submitted to the Province become the property of the Province. They will be received and held in confidence by the Province, subject to the provisions of the Freedom of Information and Protection of Privacy Act.*

PUBLIC BODY'S SUBMISSION

On October 15, 2007, Justice sent its representations regarding the s. 21 exemptions. Justice submits that the Third Party Applicant has stated that the proposals largely fall within s. 21(1) of the *Act*, in particular, confidential information as summarized below:

- The proposals contain trade secrets unique to the Third Party Applicant;
- The information provided relates to the Third Party Applicant's commercial, financial, scientific models, that specifically provide the Third Party with a competitive advantage;
- The proposals were supplied on the basis they would be kept strictly confidential and disclosure would result in the Third Party not bidding again or providing information openly should they be disclosed to a third party;
- Releasing such information could significantly harm the Third Party's future competitive position;
- The Third Party is a publicly traded company and release of proprietary information will adversely affect share price, directly reduce revenues and could prompt shareholders to commence legal proceedings against a number of parties, including the Province;
- Existing contractual arrangements with [other companies] would be compromised and could precipitate legal proceedings against the Third Party and possibly the Province; and
- Even the disclosure of the Third Party's name could result in loss of potential business.

It is my opinion that Justice was implying that it accepted this reasoning. Justice continued in its submission to state that it did reiterate to the Third Party Applicant in correspondence dated February 2 and 5, 2007 that the tender document itself provided

specifically as to what was considered to be private and confidential and that the proposals were subject to the *Act*.

The two specific clauses from the tender referred to read as follows:

> *2.3 All responses containing information regarding system functionality that is private and confidential shall be submitted in a separate envelope marked "private and confidential."*
>
> *2.11 (o) All documents, including proposals, submitted to the Province become the property of the Province. They will be received and held in confidence by the Province, subject to the provisions of the Freedom of Information and Protection of Privacy Act (FOIPOP).*

The submission also contained a list of the portions of the Record that could be disclosed under the *Act*. No explanation was given regarding which exemptions applied to the remainder of the proposals, which Justice believes should be withheld.

On October 25, 2007, as part of the formal Review process, I sought clarification from Justice. The original decision letter from Justice to the Original Applicant included several exemptions. However, in its representations of October 15, 2007, Justice only included a Submission for the exemption in implying that they were accepting the Third Party Applicant's reasoning for why s. 21 of the *Act* applied. As such, I was requesting details in the form of a Submission of their reliance on the other exemptions since the burden of proof is with Justice to demonstrate how those exemptions apply. The Third Party Applicant has the burden for s. 21 of the *Act*, in accordance with section 45(3)(b), as it is the party that wants all the Record withheld.

On October 31, 2007, Justice stated the following, with respect to the other exemptions claimed:

- Re: s. 15(1)(e) and 15(1)(k): Outside, third party knowledge of the names of the tracking devices, base units, and the radio frequencies used would be reasonably expected to harm the security of the system, should a third party decide to jam the radio frequencies/other transmitters or engage in other types of behaviours that would make the system ineffective. An ineffective system has the potential to result in endangerment of law-enforcement officers and/or members of the public. Outside knowledge of the battery life, time to recharge the batteries, life span of back up batteries and tamper proof technologies could also result in behaviours intended to disrupt or interfere in conditional sentencing requirements, e.g., the offender is to be monitored at all times for security purposes;
- Re: s. 17(1)(d): Operational and security details associated with the proposed technologies are mentioned in the proposals. These detailed abilities may not have been offered as operational and security features submitted by other unsuccessful proponents. If details of these specific technologies were known by competitors, there would be a reasonable expectation of financial loss to the companies, who may lose a competitive edge should competitors offer similar product features.

Additionally, the ability to provide or ship the products within a short time period and with competitive pricing are positive marketing factors. Other competitive considerations would include training schedules intended to assist Department of Justice staff to use and maintain the equipment. In addition to the above mentioned security abilities, disclosure of details about planning and/or risk assessment tools could also result in financial losses to the top proponents should other companies incorporate similar activities in future proposals;

- Re: s. 20(1):The name, email addresses (contain the individuals' names) and the signatures of the individuals submitting each proposal are withheld, as this information is defined as personal information under FOIPOP clause s. 3(1)(i). Personal information was provided in the form of submitted employee *Curriculum Vitae*, and thus exempted under the *Act*;
- Re: s. 20(2)(f): The name, email address (contain the individuals' names) and signature of the individuals submitting each proposal are withheld, as this information is defined as personal information under FOIPOP clause s. 3(1)(i). Personal information was provided in the form of submitted employee *Curriculum Vitae*, including employment and educational history and thus exempted under the *Act.*

Justice also stated:

I have searched our files for documents that would suggest that in recent representations only section 21 of the FOIPOP Act was discussed. No such documents were sent by the Department of Justice to the Applicant.

THIRD PARTY APPLICANT'S SUBMISSION

The Third Party Applicant during the investigation phase at the Office responded in a letter dated July 12, 2007 and as summarized:

- The Third Party Applicant had an expectation of complete privacy and confidentiality when it submitted its bid response in its proposal;
- The Third Party Applicant retains copyright to all the information contained in the bid response and thus no part should be copied or transmitted with approval;
- The Third Party Applicant objects to the release of the total bid;
- While some information may appear generic, it represents intellectual property accumulated over many years and to release would be to give away competitive advantage to others;
- The Third Party Applicant submitted two bids that involved equipment for competing suppliers with whom they have respectively signed Non-Disclosure Agreements. For their information to be released means the competing suppliers' information will be made know and could have legal ramifications for the Third Party Applicant;
- The Third Party Applicant is unclear as to whether it has the onus of proof under s. 21; and
- Had the Third Party Applicant been the successful proponent, public interest would likely dictate for the information to be released. However, as they were

unsuccessful, the information could be used against them in upcoming bids. Release of the information, therefore, would not serve a public interest but would do quite the opposite by stifling both competition and creative bidding resulting in flat, relatively fixed competitions.

In its final submission dated October 22, 2007, the Third Party Applicant changed its position and indicated that the following sections were appropriate for disclosure:

- Executive Summary
- Section1.0
- Section 2.0
- Section 2.1
- Section 2.2 – except items (c), (d), (g), (h), (k), (l)
- Section 2.3 except (i)
- Section 2.5
- Section 2.6
- Section 2.7
- Section 2.9 except 2.9.1
- Section 2.10
- Section 2.11
- Section 2.12
- Section 2.13
- Section 3.0
- Section 3.1
- Section 4.0
- Section 4.1
- Section 4.2
- Section 4.3
- Section 6.0
- Schedule C

[Note: both proposals contain the same sections as set out in the RFP]

In that same submission, the Third Party Applicant made the following arguments, as summarized, for ***not*** disclosing the remaining sections of the Record:

Part A of the Test:

- Section 2.2 items (c), (d), (g), (h), (k), (l): These sections refer to sensitive product information about suppliers and is commercially valuable information which if disclosed would cause significant harm to the Third Party Applicant;
- Section 2.3(i): This specific information provides a competitive advantage to the holder as it is regarding location and timetables and is considered sensitive corporate information. It is of commercial value and if released would cause significant harm to the Third Party Applicant;
- Section 2.4 (all items): The information relates to the technical functioning and performance of its products. The nature of the information would potentially assist offenders who want to avoid compliance with program conditions having negative consequences on the Third Party Applicant's competitive position in the future;

- Section 2.8: The Third Party Applicant's current and future customers may be quite concerned about the operational procedures being publicly disclosed. The nature of the information would potentially assist offenders who want to avoid compliance with program conditions, having negative consequences on the Third Party's competitive position in the future;
- Section 2. 9.1: The training methodology reflects the Third Party's accumulated and proprietary intellectual capital. It is commercially valuable information;
- Section 3.2: The Third Party Applicant's responses reflect sensitive proprietary product information that its suppliers may be quite concerned about if disclosed, since it relates to the technical functioning and performance of its products. The nature of the information would potentially assist offenders who want to avoid compliance with program conditions, having negative consequences on the Third Party's competitive position in the future;
- Section 5.0: This section refers to pricing matters which is very sensitive corporate competitive information; and
- Schedules A, B, D, E, F, G, I, J, K: The Third Party Applicant's current and future customers may be quite concerned about operational procedures being publicly disclosed. The nature of the information would potentially assist offenders who want to avoid compliance with program conditions, having negative consequences on the Third Party Applicant's competitive position in the future.

Part B of the Test:

The Third Party Applicant continued by stating that every page of the body of the documents submitted were clearly labelled in the header as "This Submission is Private and Confidential in its Entirety" and each and every letter or correspondence to the Review Office indicated this was the understanding and that the documents and their contents are private information.

Part C of the Test:

The Third Party Applicant continued in its submission with the following concerns:

- There were only a few other proposals submitted in response to the RFP, suggesting that the market place is highly competitive and there are few RFPs for this type of equipment, less than one in every 3.5 years in Canada;
- The information is very current and reflected events that would take place in the immediate or near future as related to technical information and some labour practices;
- The requested information relates to business practices, corporate operations, financial and commercial interest which exist within a viable market place and this market place has had a slow start and is just starting to gather speed after extensive education programs by the Third Party Applicant and others. The Third Party Applicant derives independent economic value from this information not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;
- The detailed information about the technical operation would have commercial benefit to their competitors;

- The Third Party Applicant's unique approach as to how the information is organized, formatted and presented if disclosed could harm the Third Party Applicant's competitive position or result in undue financial losses;
- Pricing and other information related to hourly rates and possible discounted fees is not publicly known to competitors and other clients.

DISCUSSION

The purpose of the *Act*, which has been a broad and purposeful interpretation, provides:

> *2 The purpose of this Act is*
> *(a) to ensure that public bodies are fully accountable to the public by*
> *(i) giving the public a right of access to records,…*
> *(iii) specifying limited exceptions to the rights of access,*

The Applicant has a right of access to any record in the custody or under the control of a public body pursuant to s. 5, once a request has been received. Section 3(1)(k) of the *Act* defines record as follows:

> *"record" includes…papers and any other thing on which information is recorded or stored by graphic, electronic, mechanical or other means, but does not include a computer program or any other mechanism that produces records*

Section 21 of the *Act* is a mandatory exemption. Once the terms of the section are established, the public body must refuse to disclose the information and has no discretion to release. Section 21 reads as follows:

> *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 disclose 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.*

The provisions set out in s. 21 (a), (b) and (c) are conjunctive and, therefore, once it is established that the subsections apply to the Record, the head of the public body must refuse to release the Record.

> *I therefore conclude that s. 21(1) should be read conjunctively and that a party seeking to apply it to restrict information must satisfy the relevant authority or the court that the information satisfies each of the lettered subsections of s. 21(1). [Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R. (2d) 27, at para 28]*

Where the information requested is subject to an exemption in part, the public body must, where it is severable, provide disclosure to the remaining information that is the subject of the Request for Access, pursuant to s. 5(2) of the *Act*.

> *5(2) The right of access to a record does not extend to information exempted from disclosure pursuant to this Act, but if that information can reasonably be severed from the record an applicant has the right of access to the remainder of the record.*

In this case, Justice made the decision to provide some information that it considered could reasonably be severed. Originally the Third Party Applicant was of the opinion that the entire Record should be withheld but is now satisfied that specific, named sections can be released without causing harm. The remainder of the Record, the Third Party Applicant argues, should be withheld as "commercial information of a third party".

One of the central purposes of the *Act* is to ensure that public bodies are fully accountable to the public by giving the public a right of access to records subject only to specific and limited exceptions. There will be situations when the right of access should be curtailed. A mandatory exemption, if applicable, is one of these situations. If the mandatory exemption is applicable, the information should not be released. In a similar case involving the procurement process at a local university [Acadia], I stated:

> *Section 21 embodies one example of when the statutory right of access should be curtailed. The legislation seeks to protect a record held by a public body when a third party's interests could be seriously affected because the information was provided on a confidential basis, could reveal trade secrets, commercial, financial or labour relations and the disclosure could reasonably be expected to significantly harm the competitive or negotiating position or result in undue financial loss.*
> *[FI-07-12]*

1. <u>Commercial Information s. 21(1)(a)(ii)</u>

With respect to s. 21(1)(a)(ii), the *Act* does not provide definitions for "commercial" information. Definitions for these words can be found in an order of the Ontario Information and Privacy Commissioner (ON Order PO-1911), upheld on appeal.

In the absence of definitions in this *Act*, I adopt the Ontario Commissioner's definition.

> *Commercial information is information which relates solely to the buying, selling or exchange of merchandise or services.*

I believe that the Third Party Applicant has supplied sufficient rationale arguing that the remaining information is the "commercial information of a third party".

I believe repeating here what I discussed in the Acadia case, also involving an unsuccessful proponent Third Party Applicant claiming the information requested had been supplied in confidence, would be helpful:

> *2. Supplied in Confidence s. 21(1)(b)*
>
> *There is no doubt that the Record consists wholly of information compiled by the Third Party Applicant and provided to Acadia solely for the purpose of the RFP and, as such, is information "supplied" within the meaning of s. 21(1)(b).*
>
> *In Order 331-1999, the BC Commissioner drew the distinction between the use of the words "received" and "supplied" or "provided" in confidence, the latter words appearing more frequently in the Act than the former. He concluded meaning should be given to the difference in the word used "'received' in confidence requires that there be evidence of an expectation of confidentiality on the part of both the supplier and the receiver of the information."*
>
> *This interpretation of "received" has been approved of by the Nova Scotia Court of Appeal in Chesal v. Attorney General of Nova Scotia, 2003 NSCA 124; 2003 NSCA 124 (CanLII). In s. 21 of the Act, the language is "supplied, implicitly or explicitly, in confidence". In applying the logical approach from the BC Commissioner's decision, in cases under s. 21, greater emphasis should be placed on the perspective of whether the Third Party Applicant believed it was supplying the information confidentially and can demonstrate that to be the case.*
>
> *The Court of Appeal in Chesal went on to rely on a non-exhaustive list of factors developed by the BC Commissioner, which it considered helpful in determining whether the information was received in confidence:*
>
> > *What are the indicators of confidentiality in such cases? In general, it must be possible to conclude that the information has been received in confidence based on its content, the purpose of its supply and receipt, and the circumstances in which it was prepared and communicated. The evidence of each case will govern, but one or more of the following facts – which are not necessarily exhaustive – will be relevant in s. 16(1)(b) cases:*
> >
> > 1. *What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?*

2. *Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?*
3. *Was the record in question explicitly stated to be provided in confidence? (This may not be enough in some cases, since other evidence may show that the recipient in fact did not agree to receive the record in confidence or may not actually have understood that there was a true expectation of confidentiality.)*
4. *Was the record supplied voluntarily or was the supply compulsory? Compulsory supply will not ordinarily be confidential, but in some cases there may be indications in legislation relevant to the compulsory supply that establish confidentiality. (The relevant legislation may even expressly state that such information is deemed to have been supplied in confidence.)*
5. *Was there an agreement or understanding between the parties that the information would be treated as confidential by its recipient?*
6. *Do the actions of the public body and the supplier of the record – including after the supply – provide objective evidence of an expectation of or concern for confidentiality?*
7. *What is the past practice of the recipient public body respecting the confidentiality of similar types of information when received from the supplier or other similar suppliers?*
   [BC Order 331-1999; Vancouver Police Board's Refusal to Disclose Complaint-Related Records, Re, 1999 CanLII 4253 (BC I.P.C.) at para 37; Chesal, at para 72]

The Nova Scotia courts have made it patently clear that under our generous access to information legislation it is not sufficient for a public body to claim a record as confidential in order to shield it from the public eye. [O'Connor v. Nova Scotia, 2001 NSCA 132; 2001 NSCA 132 (CanLII)]. In that case, Justice Saunders cautioned to be wary of traps such as how something has been described:

> *…no government 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 on the necessary inquiry.*
> *[O'Connor, at para 94]*

Simply labelling something "confidential", therefore, does not necessarily make it so for the purpose of the Act. The Supreme Court, similarly, has rejected a blanket exemption with respect to business information under s. 21 of the Act.

> *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 Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health, 2004 NSSC 54; 2004 NSSC 54 (CanLII), at para 18]

In addition, referring back to the discussion in that same Acadia Review with respect to harm or loss resulting from disclosure under s. 21 is helpful:

3. Harm or Loss from Disclosure s. 21(1)(c)

One of the most challenging aspects of a case such as this is how to articulate that the Third Party Applicant has demonstrated that if what is contained in the Record is disclosed, it "would reasonably be expected to" result in harm of a kind listed in paragraphs (i) through (iv) of s. 21(1)(c), without revealing information that should remain confidential in the course of doing so.

The Nova Scotia courts have interpreted reasonable expectation of harm as meaning something more than a mere chance:

> *...the legislators, in requiring "a reasonable expectation of harm", must have intended that there be more than a possibility of harm to warrant refusal to disclose a record. Our Act favours disclosure and contemplates limited and specific exemptions and exceptions.*
> *[Chesal, at para 38]*

This Freedom of Information and Protection of Privacy Review Office has recognized what proponents have invested in responding to RFPs:

> *In my opinion Acadia's claim of significant harm to the interests of the Company, or its own financial 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].*
> *[FI-05-54, at p. 7]*

The latter case cited involved Acadia and a third party company both objecting to the release of a contract they had entered into after an RFP process. The company, as a Third Party, was objecting on the basis that the contract, but for one page, was the proposal it had submitted in response to the RFP. The Review Officer held, "I agree with the third party that the company is open to real

risk of having a competitor benefit from reading the company's proposal." [Re FI-05-54, at p. 7]

In that case, notwithstanding the exchange of public funds under the contract, the Review Officer withheld a portion of the contract containing the company's methodologies.

Courts have been clear that the Legislature was purposeful in its use of the word significant and intended something more than mere harm or speculation of harm.

> *It is neither possible nor wise to attempt an exhaustive definition of what is meant by "harm significantly". It is something more than mere harm, but it is difficult to go further than that in defining it. At the very least, the party bearing the burden of proof must prove that the anticipated harm is, when looked at in light of the circumstances affecting the third party's competitive position or negotiating position, a material harm to that party's competitive position.*
> *[BC Order 00-10; Liquor Distribution Branch Data on Annual Beer Sales, Re, 2000 CanLII 11042 (BC I.P.C.), at p. 8]*

The Original Applicant's sole argument, on the other hand, which is that this is not an academic exercise but an important issue because of who it represents, is not a factor for consideration. The stake a particular requester has in the information s/he is trying to gain access to should not be a determining factor. Once released, the information becomes public and it is accessible to everyone regardless of who made the original request.

Turning the discussion to the representations from Justice, there appears to be some misunderstanding with respect to s. 21 of the *Act*. Justice made the following statement:

specifically provide [the Third Party Applicant] with a competitive advantage.

This is not a reason for non-disclosure. Section 21(1)(c)(i) states "harm significantly the competitive position or interfere significantly with the negotiating position of the third party". The exemption is to address the issue of when disclosure would result in harm as a result of the disadvantage it places a party in. It is not about when release would provide the party with an advantage.

Justice, in its submission, stated:

the proposals were supplied on the basis they would be kept strictly confidential and disclosure would result in the Third Party Applicant not bidding again or providing information openly should they be disclosed to a third party.

The Tender had an explicit provision regarding confidentiality, which stated:

All responses containing information regarding system functionality that is private and confidential shall be submitted in a separate envelope marked "private and confidential".

Confidentiality and the potential result of the Third Party Applicant not bidding again could be factors for consideration. "[P]roviding information openly", however, is not a factor under consideration and as exceptions are to be limited and specific is in fact an advantage to releasing the information requested.

Justice submits that the names of Third Parties and other personal information on the curriculum vitae should be withheld under s. 20. Section 20 imposes a duty on public bodies to refuse to disclose personal information where to do so would be an unreasonable invasion of a third party's personal privacy. I agree; this fits the definition of "personal information", and as such it must be withheld. Justice and the Third Party Applicant both feel that the release of the company name should be withheld. It is important to point out that the names of Third Parties as contract proponents are already available publicly on the Nova Scotia Government Procurement Website. Therefore, the statement "even the disclosure of the Third Party's name could result in loss of potential business" has no applicability in this case and s. 20 does not apply.

That being said, this Review finds that due to the nature of the information contained in the severed portion of the Record, it is my opinion upon review of the Record that s. 21 of the *Act* applies to the information withheld.

In addition, it is important to consider s. 15 of the *Act.* Justice relied on two subsections of s. 15.

15(1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to

(e) endanger the life or physical safety of a law-enforcement officer or any other person;…
(k) harm the security of any property or system, including a building, a vehicle a computer system or a communications system.

In its final submission Justice claimed knowledge of the system could mean a person could tamper with it and place law-enforcement officers at risk. In addition, Justice claimed that knowledge of the battery back-up system could disrupt the accuracy of the offender tracking system thus harming the security of a system.

It is interesting that Justice could have, but did not, claim the more relevant exemption, s. 15(1)(c) of the *Act* in addition to 15 (1)(e) & (k), given its submission with respect to inappropriate access to information about electronic supervision of offenders. That section provides:

(c) harm the effectiveness of investigative techniques or procedures currently used, or likely to be used, in law enforcement.

A key factor in retaining portions of this Record is that it is composed of proposals submitted to Justice regarding electronic supervision of offenders. The proposals in the Record contain the systems manuals, which are not available publicly and if released I agree it could be harmful to law enforcement. Therefore I find that section 15 is applicable.

As I have found both s. 15 and s. 21 exemptions are applicable, it is unnecessary for me to comment on a third exemption claimed, that being s. 17.

FINDINGS:

1. Justice's attempt to provide partial access part way through the Review Office investigation, of the other file related to the original access request, was done appropriately and showed a willingness to work with the Original Applicant and the Review Office. Ideally, this approach to considering what can be severed and what can be released should be taken before the matter goes to formal Review. Since all can never mean all - public bodies cannot have a standing *carte blanche* rule that when the Record is an unsuccessful proponent's proposal, access is to be denied. It is a mistake to assume that when the request for access is to documents relating to an unsuccessful proponent, all of the information contained in the Record will fall under the s. 21 exemption.
2. Section 3 of the *Act* states limited and specific when it refers to exemptions and the courts have consistently found that to be the Legislative Assembly's intention. While all unsuccessful proposals are likely to have a portion that will be protected under s. 21 of the *Act*, most will not fall under s. 21 in their entirety.
3. The Original Applicant's argument that this is not an academic exercise but an issue because of who it represents is not a factor for consideration. The stake a particular requester has in the information s/he is trying to gain access to should not be a determining factor. Once released, the information becomes public and it is potentially accessible to everyone regardless of who made the original request.
4. For any Third Party [contract proponent] to assume, despite representations about confidentiality in the procurement process, that all of the information in a Record when it is information in an unsuccessful proposal meets the three-step process under s. 21 of the *Act,* is a mistake. A perfect example is that so much information provided by proponents in a RFP proposal will already be available on the internet/world-wide web.
5. I believe that the Third Party Applicant has supplied sufficient rationale arguing for non-disclosure of the portions of the Record that it did not list in its submission as being appropriate for disclosing is applicable, because the mandatory exemption under s**.** 21(1) of the *Act* applies to "commercial information of a third party", which was supplied in confidence and would cause harm if released, particularly given the competitive nature of this industry.
6. The Third Party Applicant has demonstrated that the test applies to some of the Record, but not all. The portion of the Record identified as appropriate to release to the Original Applicant is information that does not fit under s. 21.
7. A key factor in considering the information severed from the Record is that it is composed of proposals submitted to Justice regarding electronic supervision of

offenders. The proposals in the Record contain the systems manuals, which are not available publicly and if released could be harmful to law enforcement. Justice has demonstrated that s. 15 of the *Act* applies.

8. Section 20 does not apply to the company name as the names of the contract proponents are already publicly available.

RECOMMENDATIONS:

1. Justice should release the information that has been identified by it and the Third Party Applicant as releasable, but not any other information.
2. In future procurement cases, public bodies should be cognizant of the important responsibility they have, at the outset when first considering the application for access, to examine a record in detail to identify exactly what an applicant may be entitled to access and to distinguish that from what a third party may be entitled to keep private. This would enable a public body to make some initial decisions as to what they propose to supply to an applicant along with notice to third parties so they can know early on what s. 21 does not apply to. Withholding a proposal in its entirety will be the exception rather than the rule under the s. 21 exemption.
3. All public bodies should review both their REIs and RFPs, in particular, references to the *Act,* and consider being more specific with respect to the three requirements of s. 21 to put potential proponents in the procurement process on notice and to assist members of the public to understand when this mandatory exemption will apply. Also, to ensure that all public bodies are aware that a mutual agreement between themselves and RFP proponents to keep information confidential does not meet all three part of the statutory test in s. 21. While public bodies may bring confidentiality to the attention of third parties in the REI and the RFP, a mere claim to confidentiality is not sufficient under the *Act* to withhold a Record under s. 21.

Respectfully,

Dulcie McCallum
Freedom of Information and Protection of Privacy Review Officer for Nova Scotia