



**REPORT**  
**Nova Scotia Freedom of Information  
and Protection of Privacy  
Report of Review Officer  
Dulcie McCallum  
FI-07-38**

- Report Release Date:** April 16, 2008
- Public Body:** Nova Scotia Pension Agency
- Issues:**
- Has the Nova Scotia Pension Agency properly applied s. 20 and s. 21 of the *Act* to sever portions of the successful proponent's proposal in response to the access request of the Original Applicant?
- Has the Third Party Applicant met the onus to demonstrate that the Record, which is two successful proposals submitted to the Pension Agency, should be withheld in its entirety pursuant to s. 21?
- Summary:**
- A Third Party Applicant requested a Review of the decision of the Nova Scotia Pension Agency to grant partial release of Proposals (by severing out Third Party information) submitted by two Third Party Applicants who were successful proponents in a bid to provide services to the Nova Scotia Pension Agency. The Third Party objected to the release of the proposal made by them in its entirety claiming its release would breach the privacy of individuals and would reveal trade secrets and commercial information. The Review Officer found that the Nova Scotia Pension Agency was correct in severing out Third Party information, however that s. 21 of the *Act* does not apply to this access request and the Original Applicant should be granted partial disclosure of the Proposals.
- Recommendation:**
1. The Pension Agency should provide a copy of the Record to the Original Applicant with all personal information of staff severed including names and resume information. The hourly rates of service can be included in the records responsive to the access request, but with the names of the staff for each severed.

2. The Pension Agency should review its RFP with a view to amending it to make specific reference to the *Freedom of Information and Protection of Privacy Act* to ensure prospective proponents are aware of the access to information provisions.
3. The Pension Agency should review its RFP with a view to amending it to make reference to confidentiality informing prospective proponents of how to proceed with information they wish to remain confidential, particularly if they are the successful proponents.
4. The Pension Agency should review its RFP with a view to amending it to make specific reference to the three requirements that must be met by a proponent/third party for the mandatory exemption in s. 21 of the *Act* to apply.
5. If the Public Body agrees with the Third Party Applicant that the release of the Record will have a negative impact on the competitiveness of future RFP processes, the Pension Agency should turn their attention to the provision in the RFP that states clearly that the proposal will become incorporated by reference into a negotiated contract.

**Key Words:**

clients, competitive position, confidential information, disclosure of a contract, employees, incorporated by reference, motivation, personal information of clients, personal information of staff, procurement, reasonably be severed, reference letter, Request for Proposals [RFP], successful proponent, Third Party

**Statutes Considered:**

*Nova Scotia Freedom of Information and Protection of Privacy Act* s. 2, 3(1)(i), 3(1)(k), 5(2), 20, 21(1)(a),(b) and (c), 22(1); *Personal Information Protection and Electronic Documents Act [PIPEDA]*

**Case Authorities Cited:**

*Atlantic Highways Corporation v. Nova Scotia*, (1997), 162 N.S.R. (2d); NS Report FI-O7-12; ON Order PO-2632; ON Order PO-2579; ON Order MO-2283.

## REVIEW REPORT FI-07-38

### BACKGROUND

On February 26, 2007, the Original Applicant requested access to information by submitting two separate Form 1s that are almost identical, other than each make reference to two different Requests for Proposals [“RFPs”] that relate to the provision of slightly different services. The first Form 1 reads as follows:

*A copy of the winning proposal that was submitted to the Pension Services Group of the Nova Scotia Department of Finance (Pensions and Investments Branch) in response to the Request for Proposal under Tender No. 60128274 issued in 2006 for the provision of actuarial services for funding purposes to certain pension plans administered by the Department.*

The second Form 1 submitted reads as follows:

*A copy of the winning proposal that was submitted to the Pension Services Group of the Nova Scotia Department of Finance (Pensions and Investments Branch) in response to the Request for Proposal under Tender No. 60128267 issued in 2006 for the provision of actuarial services for accounting purposes to certain pension plans administered by the Department.*

After receiving the original access requests on March 8, 2007, the Nova Scotia Pension Agency [“Pension Agency”] (formerly the Pensions and Investments Branch of the Department of Finance) provided Third Party Notice on March 9, 2007 advising the Third Party that a request which affected their interests had been received and asked them to respond as to whether or not they objected to the release of the Record. Notice is required pursuant to s. 22(1) of the *Freedom of Information and Protection of Privacy Act* [“Act”], which reads:

*22(1) On receiving a request for access to a record that the head of a public body has reason to believe contains information the disclosure of which must be refused pursuant to Section 20 or 21, the head of the public body shall, where practicable, promptly give the Third Party a notice*  
*(a) stating that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests or invade the personal privacy of the Third Party;*

On March 23, 2007, the Third Party Applicant responded and advised the Pension Agency that they did object to the release of the requested information based on s. 20 and s. 21 of the *Act*, claiming a proprietary interest in the total proposal package. The Third Party Applicant outlined in detail how releasing the Record could affect their interests. Details of those concerns are outlined below in the Third Party Applicant’s Submission.

On May 25, 2007, the Pension Agency made a decision with respect to the Original Applicant's revised request for access to information. The Pension Agency advised the Original Applicant that access to the information responsive to both access requests would be provided, subject to the Third Party Applicant seeking a Review, which letter stated:

*. . . After receiving representations from the third party, your application for access has been partially granted...  
Information falling under the following exemption provisions has been severed from the record(s) in accordance with Section 5(2) of the Act and access to the severed parts of the record is refused for the following reasons:  
s 20 Personal information for which no consent to release has been obtained; or  
s 21 Confidential information*

On May 25, 2007, the Pension Agency advised the Third Party Applicant by letter of its decision to grant partial access. Accompanying the letter was a copy of the severed Record that the Pension Agency proposed to send to the Original Applicant. The Pension Agency's letter provided in part:

*This is a follow-up to my letter of March 9, 2007 in which I explained to you the process relating to your rights as a third party under the Freedom of Information and Protection of Privacy Act.*

*We received your correspondence in which you indicate that you do not wish certain information to be disclosed. We have taken your representations into account. However, we have decided to grant the applicant partial access to the information which was requested. On the basis of your representations of March 23, 2007, we have severed information as per the relevant section of the Act set out beside each section.*

*However, prior to our release of this information to the applicant, you have the right to request a review.*

On June 15, 2007, the Review Office received a Form 8 with a letter dated June 12, 2007, from the Third Party Applicant requesting a Review. The Third Party Applicant requested that the Review Officer recommend:

*that the head of the public body not give access to any part of the records requested in the Application for Access to a Record that contains information the disclosure of which may affect the interests or invade the personal privacy of the Third Party.*

Accompanying the Form 8, the Third Party Applicant sent comprehensive reasons for requesting a Review, which will be discussed in the Third Party Applicant's Submission below. In addition, the Third Party Applicant provided their version of a proposed severing of the two requested Records.

Mediation was unsuccessful. None of the positions of the parties taken during mediation, including the Original Applicant and the Third Party Applicant, have been

considered in this Review as they are not known to the Review Officer. On December 5, 2007, the Original Applicant, the Third Party Applicant and the Pension Agency were advised the matter was being referred to formal Review and were requested to submit representations to the Review Officer.

## **RECORD AT ISSUE**

The Record consists of two successful proposals that were responsive to two Requests for Proposals [“RFPs”] about the provision of actuarial services for funding and accounting purposes. The original requests for access outlined in the two Form 1s await the outcome of this Review.

## **ORIGINAL APPLICANT’S SUBMISSION**

The Original Applicant did not make a submission to the Review Officer. There is no onus on the Original Applicant under s. 20 or s. 21 of the *Act* to demonstrate why the exemptions should not apply.

## **PUBLIC BODY’S SUBMISSION**

On January 14, 2008, the Pension Agency sent its representations to the Review Officer. The submission can be summarized as follows:

1. The Pension Agency began its submission by describing its work as an Agency and details of the contract process of securing actuarial consulting firm services;
2. The Pension Agency has supplied all of the cited documents to the Review Officer and in keeping with its goal of full transparency of its operations agreed to the release of the information;
3. Having said that, however, the Pension Agency is cognizant of the need to be able to get the best price from suitable vendors to keep costs contained and understands that if the sensitive information is released against the wishes of one of its service providers, that this would limit the opportunity for competitive bidding for future Request for Proposals. The Pension Agency appreciates that vendors will be less likely to deal with government if they cannot accept the risk of their fees and staff information being released under the *Act*;
4. The Pension Agency recognizes that releasing sensitive financial information about the work of individuals within the firm could result in damage to the company because it would mean the potential release of this information to a competitor in a tight local market as exists in Halifax.

## **THIRD PARTY APPLICANT’S SUBMISSION**

On March 23, 2007, in its original response to the Pension Agency’s inquiry about the access request, the Third Party Applicant outlined its objections to disclosure which can be summarized as follows:

1. Object to the disclosure of personal information with respect to the Third Party Applicant’s employees pursuant to s. 20. The employees consented to the use of

- their personal information including names, employment and educational history and professional memberships and affiliations, for limited purposes. They have not provided consent for any other use. The Third Party Applicant cannot consent on behalf of their employees;
2. Object to the disclosure of personal information with respect to the company's clients pursuant to s. 20. Clients have provided limited and specific consent for use and disclosure, which does not include disclosure to other parties for unidentified purposes;
  3. Assert the disclosure of personal information of employees and clients of the Third Party Applicant would:
    - constitute an unreasonable invasion of personal privacy contrary to s. 20(1) of the *Act*
    - not be justified under any of the exceptions contained in s. 20(4) of the *Act*;
    - compromise adherence to the Third Party Applicant's internal privacy policy and professional standards and the professional standards imposed by professional bodies with oversight of the employees
    - compromise compliance with the federal *Personal Information Protection and Electronic Documents Act* ["*PIPEDA*"];
  4. Object to disclosure of commercial, financial and technical information [particularly billing rates and fee quotes] that may reasonably be expected to significantly harm the competitive position of the Third Party Applicant and would be commercially damaging;
  5. Object to the disclosure of information that was supplied in confidence. Professional standards of the Third Party Applicant are stringent and include a strict prohibition on disclosure of client information without specific consent. Client references were provided in confidence and for the limited use of the proposal process;
  6. Argue it is impossible to assess the rationale behind the information requested because the Original Applicant's identity is not known, is anonymous under the legislation and does not consent to its release. Consider that if the Original Applicant wanted the Record for a legitimate purpose, such as transparency in public decision-making, they would not object to the Third Party Applicant knowing their identity. Fear that the request may be nothing about their relationship with the Pension Agency and all about undermining the commercial interests of the Third Party Applicant;
  7. State their business development initiatives are a critical component of the ongoing viability of the Third Party Applicant as a commercial enterprise. One of the key mechanisms for business development is the proposal process. Experts have been retained with respect to messaging, branding and work processes. Disclosure to unknown external parties for an undisclosed purpose potentially undermines the investment in this regard in the future, in what is, arguably an extremely competitive industry.
  8. The Third Party Applicant claims a proprietary interest in the total proposal package.

On June 12, 2007, the Third Party Applicant made a submission to the Review Officer during the Review investigation. That submission can be summarized as follows:

1. The primary basis for the objection is that the proposed disclosures would compromise the personal information of the Third Party Applicant's employees and clients, as well as its company's commercial interests;
2. They object to the release of employees' names in concert with information that describes their educational and/or work experience as being an invasion of personal privacy;
3. Release of this same information would also potentially undermine their commercial interests as possibly being used as a "road map" for employee recruitment efforts by competitors;
4. The proposed release of a letter of appreciation regarding an employee of the Third Party Applicant falls squarely in the exception in s. 20(3)(g) of the *Act*;
5. Whether information is innocuous or highly sensitive is largely dependent on context. An example in this case is the question of billing rates. While freely and widely communicated in some contexts in the actuarial industry, it is closely guarded information. This proposal is based on a fixed fee basis and billing rates are not central to this contract proposal as they relate only to work done outside the original services, should that be necessary;
6. The processes, tools, resources and approaches to various elements or the services developed and offered by the Third Party Applicant, at a significant expense, are very important to allow it to remain distinct from competitors. Release of this kind of information could undermine the commercial utility of our resources and harm our competitive position;
7. Aware that in the process the Original Applicant is entitled to remain anonymous but it causes the Third Party Applicant to question the motives for making the access request and query whether it is for a purpose under the *Act* or for another purpose – for private gain;
8. Their business is significantly different from many other professional services and it is not correct to assume that the "normal" rules of public versus private information apply in this industry.

On January 7, 2008, the Third Party Applicant filed a submission with the Review Officer in response to being notified that the matter had been forwarded to formal Review. The highlights of that submission can be summarized as follows:

1. The Third Party Applicant describes the nature of the specialized advice and technical support it gives to clients as a consulting firm;
2. As they work in a highly competitive industry, the Third Party Applicant carefully guards the confidentiality of what it refers to as its proprietary information;
3. The Original Applicant has refused consent to allow the Third Party Applicant to know his or her identity. Since they do not know who is applying for access and as the bid was made in the context of a highly competitive bidding process, the Third Party Applicant objects to the release of any of its proposal submitted to the Public Body based on s. 20 and 21 of the *Act*;
4. The Third Party Applicant maintains that the requested information is proprietary in nature and that its release would seriously undermine its competitive position in the marketplace;

5. The requested disclosure, if allowed, will have the effect of reducing independent competition for government work thus reducing the number of potential bidders and increasing costs to government for services;
6. Pursuant to s. 20 of the *Act*, the Third Party repeats its objection to the release of any personal information of its employees as the latter's consent for its use was for a limited purpose and it cannot provide consent on behalf of its employees for the release of their personal information;
7. Pursuant to s. 20 of the *Act*, the Third Party repeats its objection to the release of any personal information about its clients whose consent was given for a specific purpose and did not include purposes unknown at the time the consent was provided;
8. The Third Party asserts that the disclosure of either their employees' or their clients' personal information constitutes an unreasonable invasion of privacy under s. 20(1) of the *Act* and cannot be justified under s. 20(4);
9. Release of the information would compromise the Third Party's ability to adhere to:
  - a. its internal policies and professional standards;
  - b. standards imposed by professional regulatory bodies with oversight of its professional staff;
  - c. the federal *Personal Information Protection and Electronic Documents Act*; and
10. The information requested contains significant discussion of the Third Party's proprietary technical processes and tools. The sensitive information included in the bid was provided solely in the context of the proposal process and to disclose it for any other purpose and for further dissemination could be commercially damaging, contrary to s. 21 of the *Act*;
11. Professional standards that apply are very stringent and include a strict prohibition on disclosure of client information without specific consent. Client references were provided in confidence;
12. Certain highly sensitive financial information about the bid is, like competitors in the industry, not published or publicly available. That information is provided solely for the purpose of the proposal process and was never intended for any other purpose than the government's request for proposals;
13. The Third Party believes the access request is directed at undermining its commercial interests, which are unrelated to any relationship between itself and the public body;
14. This request falls outside the public policy rationale for freedom of information legislation – transparency in public decision-making. The information sought is not necessary to monitor the relationship between the Pension Agency and the Third Party Applicant. The financial relationship between the Pension Agency and the Third Party Applicant is a matter of public record through the accounting provided through Public Accounts. Thus there is a process in place to monitor the commercial relationship between the parties without damaging the commercial interests of the Third Party Applicant;
15. The release of the information potentially discloses insider information to other potential proponents in a highly competitive marketplace thus lessening the opportunity for real price competition – reducing the margin between bid proposals – to the ultimate detriment of government;



16. The release of the information could result in everyone in the marketplace questioning whether the damage to its competitive interests outweighs any benefit to companies participating in the request for proposal process with government. In a highly competitive market where there are few proponents for this kind of service, government's choices in the future could be significantly limited;
17. A critical component for the Third Party Applicant in maintaining its viability as a commercial enterprise is business development initiatives, a key mechanism of which is the contract proposal process. Significant time, resources and energy are devoted to messaging to prospective clients, organizational branding and work processes, at great expense to maximize successful outcomes. To release information to external parties for undisclosed purposes unrelated to the proposal process would potentially undermine the investment made by the Third Party Applicant.

## 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,*

*(iv) preventing the unauthorized...disclosure of personal information by public bodies*

Where the information requested is only partly subject to an exemption, the public body must, where it is severable, provide disclosure of 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, the Pension Agency has made a 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, which sections were previously listed. The remainder of the Record, the Third Party Applicant argues should be withheld as “commercial information of a Third Party”.

The purpose 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 to the rights of access. 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.*

*[NS Report FI-07-12]*

The Applicant has a right of access to any record in the custody of 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 books, documents, maps, drawings, photographs, letters, vouchers, 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 EXEMPTION**

Section 21 of the *Act* is a mandatory exemption, which provides for the protection of business information contained in a record. Once the terms of the section are established, a 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.*

***[Emphasis added]***

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]*

1. Trade Secrets, Commercial Information s. 21(1)(a)

The Third Party Applicant argues that the portions of the Record that it believes should not be released contain critical information that relates to its branding, pricing, and billing rates.

The information contained in the Record is largely comprised of details regarding how the Third Party Applicant provides actuarial services to their clients in a highly competitive market. Much of the information has been developed by the Third Party Applicant through branding and other business development initiatives to give it a competitive edge over their small number of competitors.

Commercial information has been interpreted to mean:

*Commercial information is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].*

*Financial information refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs [Order PO-2010]. [ON Order PO-2579]*

I am satisfied that the information severed meets the first part of the test in s. 21 of the *Act* falling within the meaning of “commercial information.”

2. Supplied in Confidence s. 21(1)(b)

The Third Party Applicant claims that the proposal was supplied in confidence. In Review Report FI-07-12, on the matter of “supplied in confidence”, I stated:

*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]  
[NS Report FI-07-12]*

Although the resulting agreements/contracts were not requested by the Original Applicant, the proposals submitted by the successful bidder became part of the three signed contracts. Schedule A of each agreement provides:

***A.2 Supplier's Proposals***

*The Proposal submitted by the Supplier dated February 2006, is incorporated herein by reference.*

The RFP made specific reference to the fact that Schedule A of the agreements would refer to the tender and successful supplier's proposal in the contract. The prospective proponents were on notice at the time of tender and again at the time of negotiating an agreement/contract to provide services that their proposal would be referentially incorporated into an agreement if they were successful bid. This runs counter to the argument that the Third Party Applicant makes that they considered what they submitted to have been provided in confidence *in perpetuity*.

*In determining whether an expectation of confidentiality is based on reasonable and objective grounds, it is necessary to consider all the circumstances of the case, including whether the information was:*

- *communicated to the institution on the basis that it was confidential and that it was to be kept confidential*
- *treated consistently in a manner that indicates a concern for its protection from disclosure by the affected person prior to being communicated to the government organization*
- *not otherwise disclosed or available from sources to which the public has access*
- *prepared for a purpose that would not entail disclosure [Order PO-2043] [ON Order MO-2283]*

The relevant facts in this case related to the claim of confidentiality submitted by the Third Party Applicant are as follows:

1. The Third Party Applicant claims that the RFP makes no mention of access to information or the *Act*. It does, however, state clearly in two places the following statement:

*By submitting a response to this tender, you acknowledge that you have read and complied with the applicable Nova Scotia Procurement documents.*

One of the listed documents, the Atlantic Standard Terms and Conditions includes at s. 23 information about "Confidentiality and Freedom of Information."

2. Nowhere on either of the proposals is the word "confidential" or the phrase "on a confidential basis". There is no provision in the text of the proposals with respect

- to the proposal being provided on a confidential basis. There is no stamp on any of the pages of the Record marking them confidential;
3. There is a paragraph contained in the RFP that indicates that the tender documents and the proposal submitted by the successful supplier will be included in a Schedule to the agreement. That paragraph reads as follows:

*This document will always be updated (as part of the award process) to include the vendor name, contact information, maximum amount payable, dates etc. **Schedule A will be updated to reference the tender documents (including addenda) and the Proposal submitted by the successful supplier, and may be expanded to reference any correspondence or clarifications.***

**[Emphasis added]**

Schedule A attached to each agreement and signed by the Third Party Applicant states as follows:

***“The Proposal submitted by the Supplier . . . is incorporated herein by reference.”***

**[Emphasis added]**

As I find the Third Party Applicant has failed to meet the second part of the three part test in s. 21(1), it is unnecessary to discuss paragraph (c). As the three part test in s. 21 is conjunctive and when, as here, the Third Party Applicant is unable to meet one of the parts – in this case, supplied, implicitly or explicitly, in confidence – it cannot rely on the exemption to argue for the Record to be withheld. In relation to the contents of the Record related to one specific portion, I believe the Third Party Applicant had a *bona fide* expectation of confidentiality, namely the financial aspects. Despite the comprehensive submissions to me claiming confidentiality by the Third Party Applicant, I can find no evidence to support that claim.

## **SECTION 20 PERSONAL INFORMATION**

The definition of personal information found in Section 3 of the *Act* includes:

*3(1)(i) “personal information” means recorded information about an identifiable individual, including*

*(i) the individual’s name, address or telephone number. . .*

*(vii) information about the individual’s educational, financial, criminal or employment history. . .*

Section 20 of the *Act* is a mandatory exemption which provides for the protection of personal information contained in a record. The section reads:

*(1) The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party’s personal privacy.*

*(2) In determining pursuant to subsection (1) or (3) whether a disclosure of personal information constitutes an unreasonable invasion of a third party’s*

*personal privacy, the head of a public body shall consider all the relevant circumstances, including whether. . .*  
*(f) the personal information has been supplied in confidence. . .*  
*(3) A disclosure of personal information is presumed to be an unreasonable invasion of a third party's personal privacy if. . .*  
*(d) the personal information relates to employment or educational history. . .*  
*(g) the personal information consists of personal recommendations or evaluations, character references or personnel evaluations. . .*  
*(4) A disclosure of personal information is not an unreasonable invasion of a third party's personal privacy if. . .*  
*(f) the disclosure reveals financial and other similar details of a contract to supply goods or services to a public body. . .*

Once it is determined that the information falls within the definition and a determination is made that to release the information would be an unreasonable invasion, the public body has no discretion to release.

The Third Party Applicant submits that the personal information of both its employees and its clients should not be disclosed. It contends that the information about both groups was provided for specific purposes and on a confidential basis.

Clearly, the resume summaries of the employees and information provided by clients contain information falling directly within the statutory definition of personal information. There is a duty on public bodies to refuse to disclose information if it falls within the definition of personal information, the release of which falls within the circumstances contemplated by s. 20(2) of the *Act*.

In this Review, the staff and clients of the Third Party Applicant supplied their information on a confidential purpose for a specific purpose – the proposal process. The Third Party Applicant cannot waive the necessity to obtain their consent for release for another purpose. The release of the personal information contained in the Record is unnecessary in order to achieve the primary purpose of access to information legislation. All personal information regarding the Third Party Applicant's staff, including any reference to their name should be severed from the Record provided to the Original Applicant. The opinions expressed by the clients about the Third Party Applicant can be released as such information is not about an identifiable individual and therefore does not fall within s. 20 of the *Act*, nor does it fall within the definition of personal information found in *PIPEDA* which reads as follows:

*“personal information means about an identifiable individual, but does not include the name, title or business address or telephone number of an employee of an organization.”*

#### **OUTSTANDING ISSUES:**

The Third Party Applicant raised the matter of who the Original Applicant was and attempted to argue that his or her or its motivation for making the access request may be for a purpose other than simply seeking access to hold a public body to account. They

argued that the information sought in the Record may be used in a manner that would affect their competitive edge and have a negative impact on their company in what is considered to be a highly competitive market.

A similar argument was made by a party who argued in its submission in an Ontario case that *the issues in this appeal [should take] into consideration the identity or intentions of the appellant, and the potential uses to which the information, if disclosed, may be put.*

The response in that Ontario case was, in part, as follows:

*In my view, this interpretation of the purposes of the Act suggested by the Company is untenable, and I reject it for the following reasons... Together with the purposes section set out above, it provides for a basic right of public access, but also recognizes that this right is not absolute and must at times be balanced against various legitimate interests, including the protection of confidential third party information.*

*Nowhere in the Act is the word “public” defined, or restricted, to exclude certain categories of requesters, including those fitting the description of “Competitor, Union or Customer;” nor is there any valid reason to impose such restrictions on the right of access. Rather, I take it as a central tenet to carrying out the purposes of the Act that the right to access be exercised without regard to either the identity or the intention of the requester.  
[ON Order PO-2632]*

Nowhere in the *Act* is there a restriction on who an applicant can or cannot be – it can be any person. Nor is there any provision that allows the Review Officer to take into account the motivation of an applicant in seeking a particular record or what s/he intends to do with the information requested. Therefore, the Third Party Applicant’s submission that the Original Applicant could use the information contained in the Record for employee recruitment efforts is not a relevant consideration as it speaks to the use of the information.

The remaining issue is with respect to the Third Party Applicant’s submission that their ability to adhere to the rules contained in the *PIPEDA* would be compromised if the information is released. It is important to bear in mind that *PIPEDA* would apply where the Third Party Applicant was considering an access request directly as a company who falls under that federal statute. *PIPEDA* has no application in this case where a public body is considering an access request, albeit information it received from a company, about a Record under its care and control, the release of which is subject only to the *Freedom of Information and Protection of Privacy Act*.

## **FINDINGS:**

1. The access request was for a Record of two proposals submitted by the Third Party Applicant who was the successful proponent to provide actuarial services to the Pension Agency.



2. The Pension Agency proposed providing a severed copy of the Record to the Original Applicant in keeping with their policy of transparency, which the Third Party Applicant objected, taking the position that the Record should be withheld in its entirety.
3. The Record contains information about employees of the Third Party Applicant [a non public body] that clearly falls within the definition of personal information and was, therefore, appropriately withheld by the Pension Agency from the Original Applicant under s. 20 of the *Act*.
4. The Pension Agency is prepared to release information in the Record to the Original Applicant, which the Third Party Applicant objects based on the exemption in s. 21 of the *Act*.
5. By the terms of the RFP, the proposal of successful proponents would be incorporated by reference into any agreement for actuarial services resulting out of the RFP process. The Agreement makes a similar reference thus putting the Third Party Applicant on notice that its proposal could be visible.
6. The Record contains the Third Party Applicant's commercial information.
7. There is no evidence that the information was supplied explicitly or implicitly in confidence by the Third Party Applicant.
8. The identity of the Original Applicant should remain confidential. It is inappropriate for a Third Party Applicant to try to obtain the name of the Original Applicant and, when, as here, they are unable to obtain it, draw a negative inference.
9. The identity of the Original Applicant and for what purpose s/he is making an access request is irrelevant. There are no restrictions under the legislation regarding who can make an access request. It can be any person, company or other public body.
10. Similarly, the motivation for making the access request and/or the purpose for which an applicant makes a request is equally irrelevant under the *Act*.
11. *PIPEDA* has no application in this case where a public body is considering an access request.

## **RECOMMENDATIONS:**

1. The Pension Agency should provide a copy of the Record to the Original Applicant with all personal information of staff severed including names and resume information. The hourly rates of service can be included in the records responsive to the access request but with the names of the staff for each severed.
2. The Pension Agency should review its RFP with a view to amending it to make specific reference to the *Freedom of Information and Protection of Privacy Act* to ensure prospective proponents are aware of the access to information provisions.
3. The Pension Agency should review its RFP with a view to amending it to make reference to confidentiality to put prospective proponents on notice of how to proceed with information they wish to remain confidential, particularly if they are the successful proponents.
4. The Pension Agency should review its RFP with a view to amending it to make specific reference to the three requirements that must be met by a

proponent/Third Party for the mandatory exemption in s. 21 of the *Act* to apply.

5. If the Public Body agrees with the Third Party Applicant that the release of the Record will have a negative impact on the competitiveness of future RFP processes, the Pension Agency should turn their attention to the provision in the RFP that states clearly the proposal will become incorporated by reference into a negotiated contract.

Respectfully,

Dulcie McCallum

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