



REPORT
**Nova Scotia Freedom of Information
and Protection of Privacy
Report of Review Officer
Dulcie McCallum
FI-08-39**

- Report Release Date:** March 3, 2010
- Public Body:** Department of Economic Development
- Issue:** Has the Department of Economic Development [“Economic Development”] appropriately withheld the Record in accordance with the *Freedom of Information and Protection of Privacy Act* [“Act”] and, specifically:
- Does s. 21 of the *Act* require Economic Development to sever the final bid amounts for two unsuccessful proposals?
- Record at Issue:** Pursuant to s. 38 of the *Act*, Economic Development has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff. The responsive Record is made up of two sections from four separate proposals submitted in response to a Request for Proposals [“RFPs”] by three separate companies [one company submitted two separate proposals]. Two of the proposals were successful and two were not. During the Review process, the Applicant narrowed the focus to the final bid amounts of the two unsuccessful proposals received from a Third Party [Company #1].
- Findings:**
1. The Applicant is only interested in the final bid amounts for the two unsuccessful bids, submitted by the same company. I find the final bid information falls clearly within the definition of “commercial” and/or “financial” information for the purpose of s. 21 of the *Act*.
 2. I find that in this case the Third Party had explicitly and implicitly provided the information on a confidential basis.

3. Economic Development has not provided any evidence and therefore has not met its onus to show how the release of the final bid amounts could reasonably be expected to harm or cause undue financial loss to any person and, in particular, the Third Party.

4. I find that Economic Development has not met the threshold three-part test in s. 21 of the *Act* and, therefore, is not compelled to withhold the information.

5. Economic Development successfully met its duty to assist this Applicant while initially processing the access request.

Recommendation: Economic Development should provide the information contained in the Record, the two final bid amounts from the Third Party unsuccessful proponent [Company #1], to the Applicant.

Key Words: bid, business information, commercial information, confidential, consent, duty to assist, financial information, internet, proponent, request for proposals, RFP, significant harm, tender, third party, undue financial loss or gain.

Statutes Considered: *Nova Scotia Freedom of Information and Protection of Privacy Act* s. 2, 5, 7, 21(1), 21(4), 38, 45(1).

Case Authorities Cited: *NS Review Reports FI-07-38, FI-07-12; McLaughlin v. Halifax-Dartmouth Bridge Commission (1993), CanLII 3116 (NS C.A.); McCormack v. Nova Scotia (Attorney General) (1993), CanLII 3401 (NSSC); Atlantic Highways Corporation v. Nova Scotia (1997), 162 N.S.R.(2d) 27; BC Order 331-1999; Chesal v. Nova Scotia (Attorney General), [2003] NSCA 124.*

Other Cited: *Atlantic Provinces Standard Terms and Conditions Goods and Services, effective 2007 April 1, s. 23.*

REVIEW REPORT FI-08-39

BACKGROUND

On February 10, 2009 the Applicant made an Application for Access to a Record to Economic Development for the following Record:

Bids by [Third Party Company #1] and [Third Parties Companies #2 and #3] on RFP for [specified] Service Provision. RFP issued June 2007, Announced Contract Dec. 2007.

The Applicant made a request on his/her Form 1 for a waiver of fees as a “member of the media – information for the public good.”

On February 19, 2008, Economic Development contacted the Applicant with respect to the request for a fee waiver and the scope of his/her request. The public body informed the Applicant that, generally speaking, fee waivers based on public interest were reserved for matters of clear and broad benefit to the public such as environmental or health concerns. As a result of that discussion, on February 20, 2008, the Applicant agreed to amend his/her access request to:

A copy of ... “the ‘Ability to Meet Desired Completion Date (Item 10.4.7)’ and ‘Cost of Proposal’ (Item 10.4.8) within the proposals submitted by [Third Party Company #1, Third Party Company #2] and [Third Party Company #3] in response to the RFP for [specified] service, Issued June, 2007; contract announced Dec 2007.”

On April 4, 2008, Economic Development notified the Applicant that it required an additional 14 days in which to process his/her access request. The Applicant was informed of his/her right to complain to the Review Officer with respect to the time extension. No Request for Review was received from the Applicant in this regard.

On April 11, 2008, Economic Development issued the following decision to the Applicant:

*Four records in the custody / control of Nova Scotia Economic Development (NSED) were identified as responsive to your application. After reviewing these records in accordance with the FOIPOP Act, and consulting with and considering the interests of the affected third parties, NSED has decided you are entitled to **partial access** to these records. Information has been exempted from disclosure pursuant to s. 20 (third party personal privacy) and s. 21 (confidential third party info). For your convenience a Decision Report has been prepared (attached) which itemizes each record and the decision regarding access.*

*As the decision is to grant partial access, the FOIPOP Act requires affected third parties be given 20 days (i.e. until Thursday **May 1, 2008**) to ask the FOIPOP Review Officer to review the access decision. If a review is not requested, records*

will be disclosed to you in accordance with this notice of decision following expiry of the third-party 20-day notice period.

We are however, able to release Records #1 and #2 at this time in accordance with the access decision (enclosed), having obtained the consent of affected third parties to the decided partial access. You will notice that considerable information has been withheld from disclosure. This was required as the third party information requested is of a highly competitive nature, developed at considerable expense to the RFP proponent operating in a highly competitive telecommunications industry.

[Emphasis in the original]

On April 17, 2008, Economic Development provided the Applicant with the link to the Nova Scotia Government's Procurement website where some of the information regarding the two successful bids was publicly available.

No third party filed a Request for Review and, therefore, the third party consultation process ended on approximately May 2, 2008. At this time, the public body sent an (undated) letter to the Applicant, which stated as follows:

This letter is supplementary to my letter of April 11, 2008 in which I notified you of two matters:

- *that you were entitled to partial access to the records you requested, and*
- *that disclosure was deferred as affected third parties had the right to request a review of that decision.*

The period for third parties to request a review has expired and it has been confirmed with the FOIPOP Review Office that a review was not requested. Therefore, in fulfilment of the decision to provide partial access, please find enclosed your copy of the balance of requested records.

The Applicant was provided with a severed copy of the responsive Record.

On June 10, 2008, the Review Office received a Request for a Review from the Applicant, as follows:

This Request for Review arises out of an Application for Access to a Record or Request for Correction of Personal Information submitted to FOIPOP/Economic Development on the 10 day of Feb, 2008, . . . amended to the amount bid by [Third Party Company #1] on RFP [specific number cited].

The applicant requests that the review officer review the following decision, act or failure to act of the head of the public body; failure to successfully bear the burden of proof as required under Section 45 of the Act.

The applicant requests that the review officer recommend that the head of the public body give access to the record as requested in the Application for Access to a Record.

Economic Development has assisted the Applicant throughout the process, initially by making a thorough and comprehensive decision, which included a “Decision Report” that itemized the responsive Record and provided the Applicant with an explanation for why the exemptions were operative. The Decision Report allowed the Applicant to understand the nature and number of all parts of the Record that were under consideration, and is consistent with “best practices” endorsed by the Review Office. Thereafter, by providing additional information relating to the disclosure, directing the Applicant to other avenues for other types of questions and offering to be interviewed by the Applicant. Through all these steps, Economic Development successfully met its duty to assist this Applicant while initially processing the access request.

The file was not referred to Mediation. The Review Office requested final Representations, and the matter was referred for formal Review on December 17, 2009. Economic Development did not provide any additional Representations. The final Representation from the Applicant was received on January 21, 2010.

It became immediately apparent that the original Application for Access to a Record had been significantly reduced in scope over the course of the Review process to only the two final bid amounts for the unsuccessful proposals, not including the calculations associated with those bids. As a result, during the formal Review stage, I contacted Economic Development to inquire whether or not it had considered obtaining the consent of the Applicant to release his/her name to a Third Party [Company #1], in order to seek more informed feedback from them regarding the release. Economic Development did seek consent from the Applicant, which s/he provided. This information was shared with the Third Party by Economic Development to determine if the Third Party would consent if they knew the identity of the Applicant and the nature of the information sought – only the final bid amounts for two unsuccessful proponents. This is discussed in further detail in the Duty to Assist section of the Review Report.

RECORD AT ISSUE

Pursuant to s. 38 of the *Act*, Economic Development has provided the Freedom of Information and Protection of Privacy Review Office with a copy of the complete Record, including the information withheld from the Applicant. At no time are the contents of the Record disclosed or the Record itself released to the Applicant by the FOIPOP Review Officer or her delegated staff.

The responsive Record is made up of two sections from four separate proposals submitted in response to a Request for Proposals [“RFPs”] by three separate companies [one company submitted two separate proposals]. Two of the proposals were successful and two were not. During the Review process, the Applicant narrowed the focus to the final bid amounts of the two unsuccessful proposals received from a Third Party [Company #1].

APPLICANT’S REPRESENTATIONS

The following Representations only include those related to the narrowed scope of the access request and do not include arguments for items outside of the final focus of the access request or regarding the initial exemption claim under s. 20 of the *Act*.

On June 18, 2008, the Applicant provided the following Representation:

- The exemption cited protects against the disclosure of trade secrets and commercial, financial, labour relations, scientific or technical information of a third party when certain conditions are met.
- It has become the practice of the government to include in its RFP's a notice that the information contained in the proposal will be subject to freedom of information legislation, so that the bidder should be aware that a public body must consider applications such as this one.
- With respect to section 2, the Nova Scotia Court of Appeal has drawn special attention to the wording of the first line of the purpose of the *Act* – to ensure that public bodies are fully accountable to the public.
- The *Act* gives citizens the right to have sufficient information about a particular project to be able to make an informed decision on whether to support it or not.
- The department's response contains no evidence that it has heeded s. 45 of the *Act*, which lays the burden of proof of any alleged harm on the public body.

On June 17, 2009, the Applicant provided an additional Representation that is summarized as follows:

- The public body should not be allowed to just claim harm to a third party but should have some burden or argument or evidence to prove how providing the amount of the bid to the Applicant will harm the company.
- The Applicant will be satisfied if s/he gets just the bid amount of the unsuccessful bidder[s].
- The public body's response does not satisfy its obligation to be totally accountable to the public under section 2 of the *Act*.
- The Applicant cites the Supreme Court of Nova Scotia's decision in *O'Connor v. Nova Scotia* that found the Nova Scotia freedom of information legislation to be deliberately more generous to its citizens than is contemplated in other provinces and territories.
- The *Act* calls for limited exceptions.
- The Applicant also cites the Supreme Court of Nova Scotia's decision in *McLaughlin v. Halifax-Dartmouth Bridge Commission* that found the *Act* is to be read liberally in light of its stated purpose.
- Finally, the Applicant quotes the Nova Scotia Supreme Court's decision in *McCormack v. Nova Scotia*, where the judge stated that "mere recital of the words of the relevant section is not enough."

The final Representation from the Applicant provided on January 21, 2010, to the Review Officer, stated:

- The Parties submitting bids to the Nova Scotia government are made aware that the information that they provide is subject to the *Act*.

POINT OF CLARIFICATION WITH RESPECT TO THE APPLICANT'S REPRESENTATIONS

The Applicant in his/her Representations makes a reference to the onus on a public body in s. 45 of the *Act*. The Applicant was informed during the review process, that s. 45 is relevant to the Review process, not the access process and that I, as the Review Officer, must be satisfied, not the Applicant. The public body does bear the onus under s. 45 to demonstrate at a Request for Review to the Review Officer or Appeal to Court that the statute requires the public body to refuse access to the Applicant.

PUBLIC BODY'S REPRESENTATIONS

On June 29, 2009, Economic Development provided the following Representations to the Review Office:

- Disclosure of a tender submission in whole or in part, except by consent of the proponent, violates its nature and defeats its purpose.
- By definition, tender documentation fully meets the three-part test for confidential Information set forth in s. 21(1) of the *Act*.
- Due diligence suggests that the Applicant should in the first instance have sought consent from the Third Party, further to s. 21(4).
- As tender documentation is the intellectual property of the tenderer/proponent, a case could be made that the information requested is constructively beyond the scope of the *Act*, and that an application for access to it should have been made directly to the tenderer/proponent. This, of course, is without prejudice to the Province of Nova Scotia Procurement Policy, section 11 of which states, "After contracts have been awarded, access to tender documents is subject to the provisions of the Freedom of Information and Protection of Privacy Act."

In response to an attempt at an informal resolution, the public body provided the following Representation dated October 13, 2009:

- The information that would satisfy the Applicant, namely the final bid amounts for all the proponents, is information which meets the threefold test of section 21(1) of the *Act*.

POINTS OF CLARIFICATION WITH RESPECT TO THE PUBLIC BODY'S REPRESENTATIONS

In its Representations, Economic Development made two points that were clarified by the Review Office during the process, which bear comment. The first was that the Applicant has no responsibility or onus to seek consent of a third party under s. 21(4). The *Act* contemplates that the public body will seek that consent.

The second point was the public body suggested that the Applicant should, in the first instance prior to making submitting an Application for Access to a Record, make an access request directly to the company[ies] who have the intellectual property rights to the information. Economic Development went on to suggest that because the Applicant is required to take this first step that this access request may be beyond the scope of the *Act*. This is a wholly untenable position and is inaccurate. The Record requested of the public body is in its custody and control and, by the terms of the RFP, is a Record subject to the *Act* and becomes the property of Economic Development. In addition, whatever other avenues the Applicant may or may not have to obtain information, s/he has a right of access under the *Act* subject only to specific exceptions.

ISSUES

The only issue in this Review is whether s. 21 of the *Act* requires Economic Development to sever the final bid amounts for two unsuccessful proposals.

DISCUSSION

The purpose of the *Act*, which has been given 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,

(ii) giving individuals a right of access to, and a right to correction of, personal information about themselves,

(iii) specifying limited exceptions to the rights of access,

(iv) preventing the unauthorized collection, use or disclosure of personal information by public bodies, and

(v) providing for an independent review of decisions made pursuant to this Act;

[Emphasis added]

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.

5 (1) A person has a right of access to any record in the custody or under the control of a public body upon complying with Section 6.

(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 to the remainder of the record.

Economic Development made a decision to sever information from the two unsuccessful bids, making up the Record at issue, based on s. 21 of the *Act*, which reads as follows:

21(1) The head of a public body shall refuse to disclose to an applicant information

- (a) that would reveal ...
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
- (b) that is supplied, implicitly or explicitly, in confidence; and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,
 - (iii) result in undue financial loss or gain to any person or organization, ...

As it is the public body that is refusing access to part of the Record, the burden is with Economic Development to demonstrate that the Applicant has no right of access to that part of the Record.

45(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

Section 21 is a mandatory exemption, which requires the public body to sever any and all information contained in the Record that meets the test therein. The questions related to the exemption claimed in this case are as follows:

1. Would the business information in the file reveal commercial, financial, labour relations, scientific or technical information about a third party? If yes,
2. Was the business information supplied in confidence? If yes,
3. Could disclosure of the information reasonably be expected to harm the competitive position or interfere significantly with the negotiating position of a third party? Or result in similar information no longer being supplied? Or result in undue financial loss or gain to any person or organization?

The test in s. 21 of the *Act* is conjunctive, which means that all three questions must be answered in the affirmative for the mandatory exemption to apply. When it is a mandatory exemption (in this case business information of a Third Party), if the Third Party does not consent to release of the information, the Public Body has no authority to release the information to the Applicant if the information fits the three-part test. The Nova Scotia Supreme Court has established the manner in which s. 21(1) of the *Act* should properly be approached. In *Atlantic Highways Corporation v. Nova Scotia*, Judge Kelly determined that the s. 21 exemption is to be read conjunctively:

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 sub-sections of s. 21(1).

For purposes of considering the application of s. 21(1), I suggest the burden the Appellant AHC must satisfy under that section to qualify the Omnibus Agreement as exempted information must be to satisfy the court of the following:

(a) that disclosure of the information would reveal trade secrets or commercial financial, labour relations, scientific or technical information of a third party;

(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and

(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).

[Atlantic Highways Corporation v. Nova Scotia (1997), 162 NSR(2d) 27]

In Review Report FI-07-38, I outlined the conditions that must be met to satisfy each of these tests. For further analysis under s. 21 of the *Act* refer to Review Report FI-07-12. The statute acknowledges that in the course of carrying out public responsibilities, public bodies will often receive information about the activities of private businesses. Section 21 is designed to protect the “informational assets” of businesses or other organizations that provide information to the public body.

PART 1 OF THE TEST UNDER SECTION 21:

Unlike trade secrets, neither commercial nor financial information are not defined in the *Act*.

In FI-07-38, I adopted the following definitions:

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].

The Applicant is only interested in the final bid amounts for the two unsuccessful bids, submitted by the same company. Although the public body did not identify which type of information it claimed was in the Record, including the bid amounts, under s. 21 of the *Act*, I find the information requested falls clearly within the definition of “commercial” and/or “financial” information.

PART 2 OF THE TEST UNDER SECTION 21:

Having decided that the first criterion has been met, the second step of the s. 21 requirements is whether the information has been supplied explicitly or implicitly on a confidential basis.

In this case, the wording in the actual RFP provides the following in its “instructions regarding this purchase” section:

By submitting a response to this tender, you acknowledge that you have read and complied with the applicable Nova Scotia Procurement documents. The following documents apply to this tender, and are available from the above web page...:

- *Atlantic Standard Terms and Conditions (revised April 1, 2007)*
- *Supplement – Request for Proposals (revised January 2005)*

The issue of confidentiality is addressed in section 9.1 of the RFP, which reads as follows:

All documents submitted, including Proposals, become the property of the Nova Scotia Economic Development. They will be received and held in confidence by the Nova Scotia Economic Development, subject to the provisions of the Freedom of Information and Protection of Privacy Act.

Nova Scotia Economic Development agrees that all Requests for Proposal response material must be kept in strict confidence, and be used only in the evaluation of these proposals.

In addition in s. 23 of the Atlantic Provinces Standard Terms and Conditions Goods and Services, effective April 1, 2007 or later, reference is made to “Confidentiality and Freedom of Information”:

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

23.2 Bidder's Bid package may be subject to disclosure under the Province's "freedom of information" legislation. By submitting a Bid, the Bidder agrees to the appropriate disclosure of the information supplied, subject to the provisions of

the governing law. The Province cannot guarantee the confidentiality of the complete content of any Bid after the procurement has been awarded to the successful Bidder.

In Review Report FI-07-38, I repeated what I had said in an early Report in which the relevant precedent from our Nova Scotia Court of Appeal was cited in detail:

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]*

[NS Report FI-07-12]

I went on to note that decisions of the Nova Scotia Supreme Court have established that simply labelling a document as “confidential” would not be sufficient to meet the test in s. 21(1)(b); rather, evidence must be provided in line with the tests above to show how expectations of confidentiality were established. In this case, one bid is marked confidential on the cover page but neither is marked confidential on the page where the bid number is found. This distinction may be lost on the third parties as the RFP itself indicates the proposals will be kept in strict confidence even though it goes on to state it will also be subject to the *Act*. I find that in this case the Third Party had explicitly (on the proposal stamped confidential) and implicitly provided the information on a confidential basis at the time it was submitted to Economic Development based on the representations in the RFP. While the third parties may have expected their proposals were being submitted on a confidential basis, equally they knew or ought to have known their proposals were subject to the three part conjunctive test in s. 21 of the *Act*, as there are ample judicial and administrative decisions on this point.

PART 3 OF THE TEST UNDER SECTION 21:

Turning to the final step in s. 21(1) of the *Act*, the question becomes whether or not disclosure could reasonably be expected to harm significantly the competitive position of a third party, result in similar information no longer being supplied to the public body, or result in undue financial loss or gain to anyone. In its final Representation, Economic Development stated that the three-part test in s. 21 of the *Act* applied with respect to the request for the bid amounts of the unsuccessful proponent. Economic Development did not provide any evidence or argument with respect to how the third part of the exemption had been demonstrated. The onus is on the public body to demonstrate to the Review Officer how the release of the final bid amounts could reasonably be expected to harm or cause undue financial loss. If the public body does not have a full understanding of how the harm may manifest itself to a third party, it is incumbent on the public body to seek out that information from the third party and include it in its Representations to the Review Office. In some Canadian jurisdictions, the public body obtains this information from third parties in affidavit form and includes those with its Representations.

In a similar case from Ontario involving tenders on school bus service, in response to the request the public body prepared a chart containing the bottom line bids of all bidders by name, route and the price awarded for each route.

To discharge the burden of proof under the third part of the test, the Board and/or the affected party resisting disclosure must present evidence that is detailed and convincing, and must describe a set of facts and circumstances that could lead to a reasonable expectation that one or more of the harms described in s. 10(1) would occur if the information was disclosed (Order P-373)

[t]he Board must provide “detailed and convincing” evidence to establish a “reasonable expectation of probable harm”
[Ontario Order MO-1368]

The Applicant had narrowed his/her request substantially to the bid amounts and was no longer requesting anything else in the Record including the calculations as to how that amount was reached. I find that Economic Development has not met the threshold of the third part of the test in s. 21 of the *Act* and, therefore, is not compelled to withhold the information.

The distinction between an RFP and a tender may be of assistance. In this case, the Applicant's original request would have encompassed all the information contained in the proposal in response to the RFP, in which the proponents lay out in detail how they intend to undertake a project and the associated costs. By narrowing the request to the final bid amounts only, the Applicant is essentially getting information more along the lines of a response to a tender. That is, in a tender process the public body outlines the project it wants done and proponents simply provide a bid amount. There is no foreseeable harm in releasing the sum of the bids if none of the commercial or financial information provided by the proponent is included in demonstrating how it arrived at that sum. If there were foreseeable harm, the public body ought to have included evidence to that effect in its Representations to the Review Office.

DUTY TO ASSIST

There are two points with respect to duty to assist. The first is that in the Background section of this Review Report, I detailed the steps Economic Development had taken to successfully meet its duty to assist under s. 7 of the *Act*. The Applicant attempted to argue otherwise, but I find s/he was not correct in that complaint and that Economic Development went to substantial lengths to assist the Applicant with the initial request.

The second point is with respect to obtaining consent of third parties. Section 22 required Economic Development to give notice to any and all third parties when it determined that the Record contains information the disclosure of which must be refused pursuant to s. 21. Notice was given to the three third parties who submitted proposals for the RFP. Two of the third parties opposed the release of the information as proposed by the public body. All three third parties provided feedback to the public body, which it considered in its disclosure decision. After receiving notice of their opportunity to Request a Review to the Review Officer, none of the third parties made such a request. Once the file came to me for final Review, I had an opportunity to review the entire file including the exchanges between the public body and the third parties. I had reason to believe that had the unsuccessful proponent known who the Applicant was it may have provided its consent to the release of the information. While in a previous case, *FI-07-38*, I suggested that a third party should not make assumptions as to who the applicant is and thereafter draw negative conclusions, it is open to the public body to seek the consent of an applicant to disclose his/her identity to the third parties with a view to reaching a resolution with respect to the Application for Access to a Record. The same holds true of attempts at informal resolution or mediation at the Review Office.

In this case, I asked the public body to obtain consent from the Applicant in order for Economic Development to be able to provide his/her identity to the Third Party [Company #1] in case they would be more inclined to consent to the release of the

Record. Consent from the Applicant was received and his/her identity made known to the Third Party by the public body. The Third Party, fully knowing who the Applicant was and what part of the Record remained at issue in the access request, did not provide their consent to the release.

Although not successful in this case, this approach is something all FOIPOP Administrators should consider where s. 20 and/or s. 21 of the *Act* are thought to apply. An early consent at the time the public body is processing the Application for Access to a Record could save a lot of time for all parties and possibly avoid a Request for a Review being filed.

FINDINGS:

1. The Applicant is only interested in the final bid amounts for the two unsuccessful bids, submitted by the same company. I find the final bid information falls within the definition of “commercial” and/or “financial” information for the purpose of s. 21 of the *Act*.
2. I find that in this case the Third Party had explicitly and implicitly provided the information on a confidential.
3. Economic Development has not provided any evidence and therefore has not met the onus on it to show how the release of the final bid amounts could reasonably be expected to harm or cause undue financial loss to any person and, in particular, the Third Party.
4. I find that Economic Development has not met the threshold three-part test in s. 21 of the *Act* and, therefore, is not compelled to withhold the information.
5. Economic Development successfully met its duty to assist this Applicant while initially processing the access request.

RECOMMENDATION:

Economic Development should provide the information contained in the Record, the two final bid amounts from the Third Party unsuccessful proponent [Company #1], to the Applicant.

Respectfully,

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