Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT FI-13-28

December 29, 2015

Department of Finance

Summary: The Commissioner recommends full disclosure of the contract for the outsourcing of SAP services signed between the Department of Finance ("Department") and IBM. Three applicants sought access to the contract under the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). The Department was prepared to disclose it in full, but a third party objected. In agreeing to a contract, the Department and the third party negotiated the terms. The input of both the Department and the third party was critical to defining those terms. As a consequence, the Commissioner finds that the information in the contract is negotiated and not "supplied" as required under *FOIPOP*. In addition, the third party failed to prove that the disclosure would result in the kinds of significant harms contemplated by the *Act*.

Statutes Considered: *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5, ss. 15, 21, 45; *Freedom of Information and Protection of Privacy Act*, RSO 1990, c F.31, s.17

Authorities Considered: Alberta: Order F2013-47, 2013 CanLII 80416 (AB OIPC); **British Columbia:** Orders F06-20, 2006 CanLII 37940 (BC IPC); F11-14, 2011 BCIPC 19 (CanLII); F14-28, 2014 BCIPC 31 (CanLII); **Nova Scotia:** Review Reports FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); **Ontario:** Orders MO-2614, 2011 CanLII 24265 (ON IPC); PO-2632 2008 CanLII 1826 (ON IPC)

Cases Considered: *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NSSC); *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52 (CanLII); *Chesal v. Nova Scotia (Attorney General) et. al.,* 2003 NSCA 124 (CanLII) *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 123; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674

INTRODUCTION:

[1] The Department of Finance ("Department") received access to information requests from three different applicants for a copy of a contract between the Department and IBM regarding the outsourcing of SAP services. In response, the Department determined that it would fully disclose the contract and would partially disclose the schedules to the contract. The third party was notified of the Department's decision and objected to the full disclosure of the contract. The third party agreed with the partial release of the schedules.

[2] When the third party's request for review was received by this office in March 2013, as part of the informal resolution process the third party agreed to a partial disclosure of the contract and schedules. We asked the Department to release all of the records that the third party did not object to so that the applicants would at least have a portion of the responsive records. The Department did so on May 10, 2013. Only one applicant filed a request for a review of the partial release. That applicant later withdrew his review request.

[3] As a result, the only outstanding issue in this matter is whether or not the contract should be fully disclosed. The schedules to the contract did not form a part of this review as the third party agreed with the partial disclosure and no further objection was received from any of the applicants.

[4] In response for a request for submissions in preparation for this formal review, the third party withdrew its objection to the disclosure of 24 provisions it had previously sought to have withheld.[1] Therefore, this review is focussed on the remaining provisions of the contract withheld in the May 10, 2013 release to the applicants.

ISSUE:

[5] Is the Department required to refuse access to information under s. 21 of the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP") because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[6] Section 21 of *FOIPOP* provides in part:[2]

> 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;

[1] The 24 provisions no longer at issue are listed in Appendix 1 to this decision.
[2] For a complete copy of s. 21 and *FOIPOP* generally, visit our website at foipop.ns.ca .

(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

[7] Section 21 must be read conjunctively and so all three parts of the test must be satisfied in order for s. 21 to apply.

Burden of Proof

[8] Where a review is requested by the original access applicant, the public body bears the burden of proving that the applicant has no right to access the withheld information:

> 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.

[9] Section 45(3)(b) of *FOIPOP* provides that in the case of third party confidential information as described in s. 21, it is the third party who bears the burden of proof:

> 45(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

General Approach

[10] Nova Scotia's access legislation is unique in that it declares as one of its purposes a commitment to ensure that public bodies are fully accountable to the public. It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[3] *FOIPOP* strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party information are exempt from disclosure and it gives procedural protection through the third party notice process.[4]

[11] Canadian courts agree that exemptions are the exception and disclosure is the general rule, with any doubt being resolved in favour of disclosure.[5]

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[3] *O'Connor v. Nova Scotia*, 2001 NSCA 123 at paras. 54 – 57 [*O'Connor*].
[4] *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 23 [*Merck Frosst*].
[5] *Merck Frosst* at para. 95, *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52 (CanLII) at para. 20 [*Corporate Express*].

[12] In the context of third party business information, courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[6]

(a) Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party

[13] In evaluating this part of the s. 21 test, it is necessary to consider three questions:

1) Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information?
2) Is the withheld information, information of the third party?
3) Or does the withheld information reveal commercial, financial etc. information of the third party or allow for accurate inferences about such information?

Commercial or financial information

[14] The terms commercial and financial are not defined in *FOIPOP*. It has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[7]

[15] In this case, the record at issue is a contract – a Master Services Agreement between the third party and the Department for the provision of SAP development, maintenance, support and configuration services to the Province. Consistent with decisions in other jurisdictions, I find that withheld terms of the contract in this case contain commercial and financial information.[8]

Information of the third party

[16] Section 21(1)(a) requires not only that the withheld information be commercial or financial information but that the information be "of a third party". In Nova Scotia we have the benefit of a decision of the Supreme Court in which the Court determined that information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal or modified by the negotiation process that it clouded the third party's claim to a proprietary interest in the information.[9]

[6] NS Review Report FI-10-59(M) paras. 9-15, NS Review Report FI-09-100 at paras. 12-13, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 at para. 67 [*Imperial Oil*].
[7] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at 268 cited with approval in *Merck Frosst* at para. 139.
[8] See for example BC OIPC Order F14-28 at para. 9 where the adjudicator simply concludes that service contracts contain commercial and financial information. The adjudicator does not comment on whether or not such information is "of the third party." In Alberta OIPC Order F2013-47 at paras. 27 and 29 the adjudicator does consider whether information in a contract can be "of a third party" and determines that information in contracts that impart something about the terms under which a service will be provided by the third party or reveals the services the third party undertakes to provide can qualify as commercial information of a third party.
[9] *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NSSC) at p. 9 [*Atlantic Highways*].

[17] I agree with the Department in this case that the evidence establishes that the terms at issue were the result of a negotiated agreement between the parties. The agreement itself provides that "the parties have jointly contributed to the drafting of this Agreement".[10] The Department's evidence was that the Province brought forward its own information to contribute to the negotiations.

[18] In addition, virtually all of the individual terms that the third party seeks to have withheld give the Department some right, benefit, protection or authority. It is difficult to imagine that terms that so clearly benefit the Department were the unique contribution of the third party unchanged or uninfluenced by the negotiation process.

[19] In fact, the third party's submission supports the finding that the withheld terms were the product of negotiation. The third party states, "these are unique terms of [the third party] supplied to the Crown in response to specific concerns of the Crown in the context of this agreement." In essence, that is a description of the negotiation process. The Crown raised an issue it wanted addressed in the contract and the third party offered a solution. Obviously the Crown considered the terms and accepted them. There is no evidence as to whether or not the terms were drafted in accordance with the Crown's specific instructions, or altered once presented or adopted unchanged from the third party's offer. It doesn't matter. So long as the terms were the product of negotiation, they cannot be said to be information "of" the third party (subject to the discussion below regarding information "revealed" about the third party).

[20] Consistent with the decision in *Atlantic Highways*, I find that any commercial or financial information that the third party brought to the negotiation is now so modified by the negotiation process that it clouds the third party's claim to a proprietary interest in the information. I find that the withheld information is not "of the third party".

Information revealed about the third party

[21] This leads to the third question raised by the requirement that information be commercial or financial information of the third party. That is, despite the effects of the negotiation, can it be said that the withheld information "reveals" commercial or financial information of the third party or allows for accurate inferences to be drawn about this type of information?

[22] The third party says that what the withheld terms reveal is that the third party was willing to confer special rights on the Department, agree to special procedural or other legal requirements, or accept the risk of resulting additional costs. Put another way, the information reveals the third party's cost and risk allocation that the third party says are not present in other commercial contracts.

[23] There is no doubt that contracts generally, as the fruits of any negotiation, reveal a number of things about the parties. To a certain extent contractual terms will reveal the negotiating strengths and weaknesses of the parties. They may reveal the primary concerns of each party; they may reveal some information about the risk tolerances of each party, and certainly will reveal something of the negotiating strategies of each party.

[10] Master Services Agreement para. 1.12.

[24] The withheld terms in this case may tangentially reveal something of the third party's risk tolerance. But what exactly? A reader cannot know if the term represents the greatest possible risk the third party will tolerate or the least because the terms are all negotiated. Perhaps the government negotiator was particularly skilled at getting concessions out of the third party or perhaps the opposite was true. In addition, at least one of the withheld terms sets a privacy/security standard common to many Canadian jurisdictions. Therefore, it reveals nothing about either party's risk tolerance aside from a willingness to follow best practice.[11]

[25] I am not convinced that even if the third party had clearly established that the withheld terms would reveal the third party's risk tolerance, that this information is the type of information intended to be protected by s. 21 of *FOIPOP*. I agree with the Ontario Adjudicator in Order PO-2632 when she said:

> Although the terms of a contract may reveal information about what each of the parties was willing to agree to in order to enter into the arrangement with the other party or parties, this information is not, in and of itself, considered to comprise the type of "informational asset" sought to be protected by s. 17(1) [equivalent to s. 21].[12]

[26] I find that the withheld information does not satisfy the test set out in s. 21(1)(a). Since all three parts of s. 21 must be satisfied, there is no need to consider the other two parts of s. 21. However, for the purposes of completeness and to address arguments raised by the parties I will briefly discuss the other two elements of the s. 21 test.

(b) Supplied implicitly or explicitly in confidence

[27] There are two elements to evaluating whether or not the requirements of s. 21(1)(b) have been satisfied: was the information supplied, and if so, was it supplied in confidence?

"supplied"

[28] Several general observations about the "supplied" requirement are: the public body and third party claiming the exemption must show that the information was supplied; where government officials collect information by their own observations, the information will not be considered as having been supplied and whether or not information was supplied will often be primarily a question of fact.[13]

[29] The third party provided no evidence of specific information "supplied" by the third party. Rather, the third party argues that it is the information "revealed" by the negotiated terms that is therefore supplied. The third party argues that the revealed information is the inferences that can be drawn about the third party's risk tolerance.

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[11] It is not possible to provide further detail without disclosing the content of the withheld terms.

[12] Ontario Order PO-2632 at p. 31 and applied in Ontario Order MO-2614 at p. 7.

[13] *Merck Frosst* at paras. 150-157. For a further discussion of the "supplied" requirement, see NS Review Report FI-10-59(M) at paras. 36-46.

[30] I find that the provisions at issue are negotiated provisions and not supplied. The third party may have insisted upon the inclusion of these terms in the agreement or simply agreed to the terms and in so doing revealed something about its risk tolerance. However, this speaks to the bargaining stance of the third party rather than the inherent immutable nature of the withheld information. The Department had the option of whether or not to agree to these terms.[14] I find that the terms do not qualify as "supplied" within the meaning of s. 21(1)(b) of *FOIPOP*.

"in confidence"

[31] In an earlier Review Report I relied on a 2014 decision of the Alberta Court of Appeal when I said: *With respect to the requirement that the information be supplied "in confidence" I agree that this portion of the test is largely a subjective one*.[15]

[32] This month the Newfoundland Court of Appeal considered a provision similar to s. 21 of *FOIPOP* in Newfoundland's access legislation. In so doing the Court of Appeal agreed with the Trial Division in that case that, "*To meet the threshold of the requested information to be considered confidential, the test is an objective one, and whether the information is confidential will depend upon its content, its purposes and the circumstances in which it was compiled or communicated."*[16]

[33] Interestingly, whether the test is characterized as objective or subjective, the evidence examined by both the Newfoundland Court of Appeal and the Alberta Court of Appeal was evidence with respect to the content of the record, its purposes and the circumstances in which it was compiled or communicated.

[34] In Nova Scotia the Court of Appeal provided seven factors to consider when deciding whether or not information has been supplied in confidence.[17] I have applied that test here.

[35] In this case the content of the record reveals that the document contains a term requiring the party to treat "confidential information" as defined in the contract in the strictest confidence. The contract itself is stamped "confidential". The contract permits the Department to disclose service provider confidential information as required by the provisions of *FOIPOP*.[18] The third party states that it has consistently treated the information as confidential. The third party also argues that since the schedules are not subject to any review by this office, and that some of the withheld information in the contract contains information from the schedules, the Department and this office have therefore accepted that the information is confidential.

[36] The Department states that it considered the indicia of confidentiality but determined that the contract should be disclosed in accordance with *FOIPOP*.

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[14] The Adjudicator in BC Order F11-14 at para. 74 reached a similar conclusion. In Ontario Order MO-2614 at p. 7 the Adjudicator determined that inferences about risk tolerance and internal business sensitivities revealed by provisions in a contract were not "supplied" for the purposes of the Act.

[15] NS Review Report FI-09-100 at para. 40 citing *Imperial Oil* at para. 75.

[16] *Corporate Express* at para. 21.

[17] *Chesal v. Nova Scotia (Attorney General) et. al.,* 2003 NSCA 124 at para. 72.

[18] Master Services Agreement section 17.08.

[37] Since the schedules to the contract are not the subject of this review, it is incorrect to say that this office accepted that the information from the schedules is confidential. This office has not reviewed the application of *FOIPOP* to the schedules. The Department does not agree that any information from the schedules revealed in the contract is confidential. That is apparent from the Department's steadfast position that the contract should be disclosed in full.

[38] Since the terms of the contract contain a confidentiality requirement subject to the requirements of *FOIPOP* this factor is neutral. Stamping and endorsing of documents as confidential is far from determinative.[19]

[39] I conclude that the evidence does not support a finding that the information was supplied in confidence. Therefore I find that the requirements of s. 21(1)(b) have not been met.

(c) Reasonable expectation of harm

[40] The burden of proof rests with the third party. In fact, the third party is in the best position to provide evidence of harm to its business resulting from any disclosure. A reasonable expectation of harm requires evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.[20] The Nova Scotia Supreme Court recently revisited the "reasonable expectation of harm" test in *FOIPOP*. In *Monkman v. Serious Incident Response Team*[21] the Court examined the leading Nova Scotia case and the leading Supreme Court of Canada case on the meaning of the reasonable expectation of harm test in the context of the application of s. 15 of *FOIPOP* (harm to law enforcement). The Court concluded that:

> [61] Reading the decisions of the Supreme Court of Canada with that of the Nova Scotia Court of Appeal leads to the following conclusion: that the burden falls on the Director to show that it is more than merely possible, but at a standard less than a balance of probabilities that the disclosure could harm "law enforcement".

[41] As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the third party and the public body is helpful; evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would all assist in determining whether the test has been satisfied. In all cases it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.[22] Alternatively, some empirical, financial or statistical evidence would generally be required to substantiate the third party arguments.[23]

[42] The third party's harm arguments can be summarized as follows:

- Competitors could replicate for free what took the third party significant resources to produce.

[19] *Corporate Express* at para. 29. *O'Connor* at para. 94.
[20] NS Review Report FI-10-59(M) at para. 63, citing *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31, [2014] 1 S.C.R. 674.
[21] *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 (CanLII).
[22] I have applied this approach in other Review Reports such as NS Review Report FI-10-59(M) at para. 66 and NS Review Report FI-09-100 at para. 45.
[23] *Corporate Express* at para. 44.

- Competitors could use the terms of the agreement to engage in anti-competitive behaviour in future competitive situations with other potential customers in different commercial circumstances.
- Potential customers in different commercial circumstances could use the terms of the agreement to harm the third party's competitive and negotiating positions.

[43] The third party provided no evidence in support of its arguments.

[44] In a recent British Columbia access request a third party argued that disclosure of the record would reveal its overall risk tolerance. In so doing, the third party in that case argued that the disclosure would harm its negotiations with other clients because these partners would expect the same indemnification and liability amounts that the public body obtained.[24]

[45] This is the same argument made by the third party in this case. However, mere heightening of competition for future contracts is not significant harm or significant interference with competitive or negotiating positions.[25]

[46] In this case, disclosure of the withheld information, in my opinion, would simply put prospective bidders on a more equal footing. This is how it should be, for it ultimately makes the Department, as a public body, more accountable.[26]

[47] I conclude that there is insufficient evidence to find that the disclosure of the withheld information could reasonably be expected to cause any of the harms enumerated in s. 21(1)(c) of *FOIPOP*.

FINDINGS & RECOMMENDATIONS:

[48] I find that:

1. The withheld information is commercial and financial information but it is not information "of the third party" nor does it reveal information of the third party.
2. The information was negotiated and was not supplied in confidence.
3. The disclosure of the withheld information could not reasonably be expected to cause any of the harms enumerated in s. 21(1)(c) of *FOIPOP*.

[49] I recommend that the Department disclose the contract in full.

December 29, 2015

Catherine Tully
Information and Privacy Commissioner for Nova Scotia

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[24] BC OIPC Order F11-14 at para. 80.
[25] BC OIPC Order F06-20 at para. 20 cited recently in BC OIPC Order F11-14 at para. 86.
[26] The Newfoundland Court of Appeal made a similar point in *Corporate Express* at para. 43.

Appendix 1: Contract Provisions No Longer At Issue

The third party identified the following contract provisions as no longer being at issue:

1. 1.14
2. 7.03(g)
3. 7.14
4. 8.05
5. 17.03 (in part)
6. 18.02
7. 18.04
8. 18.06
9. 22.05 (in part)
10. 22.06 (in part)
11. 24.01
12. 24.04
13. 24.06(b)
14. 24.06 (d) (in part)
15. 25.02(a)
16. 25.02(b)
17. 27.01(g)(iv)
18. 27.02
19. 27.03 (in part)
20. 27.04(1) (in part)
21. 27.05
22. 27.06(1)(b)(i) (in part)
23. 27.06(2) (in part)
24. 28.01(f)