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Nunavut Information and Privacy Commissioner
Nunavunmi Tuhaqtauyukhaliqinirmun Kanngunaqtuliqinirmun Kamisina
Commissaire à l'information et à la protection de la vie privée du Nunavut

Commissioner's Final Report

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Summary

[1] The Applicant requested records that included a contract between the Department of Health and a private-sector service provider. One clause of the contract, containing financial details, was redacted. The Commissioner finds that Health did not correctly apply the exemption in section 24. The Commissioner recommends the redacted clause be disclosed.

Nature of Review and Jurisdiction

[2] This is a review of disclosure by the Department of Health. The request was filed under section 28(1) of the *Access to Information and Protection of Privacy Act* (ATIPPA). I conducted my review under section 31(1).

[3] I have jurisdiction over the Department of Health: ATIPPA, section 2, definition of "public body".

Issues

[4] The issues in this review are:

a. Did Health correctly apply the exemption in section 24(1)(b)?
b. Did Health correctly apply the exemption in section 24(1)(c)?
c. Did Health correctly apply the exemption in section 23(1)?

Facts

[5] On April 29, 2024, the Applicant filed a request for records with the Department of Health. The request also included some questions which were not a request for records. The Applicant was looking for financial details of a contract between Health and a private-sector service provider.

[6] The private-sector service provider is a "third party" within the meaning of the ATIPPA. As required by section 26(1), Health gave notice of the ATIPP request to the third party. Health received the third party's submission about disclosure.

[7] On June 3, Health released 14 pages of records to the Applicant. (In a separate letter, Health also answered the Applicant's questions.) The 14 pages were the contract between Health and the third party. The following information was redacted:

a. On page 2, Article 2.2 of the contract was redacted under sections 24(1)(b) and 24(1)(c) of the ATIPPA.

b. On pages 9 and 10, the personal e-mail addresses of the third party's principals were redacted under section 23(1).

c. On page 10, the handwritten signatures of the parties and witnesses were redacted under section 23(1). Their printed names were not redacted.

[8] On June 11, the Applicant requested review. The Applicant did not take issue with redaction of the e-mail addresses or signatures. These were proper redactions under section 23(1) and I will say no more about them. I recommend that Health continue to withhold the information redacted under section 23(1): see paragraphs 37 and 39 below.

[9] On the same day, and in accordance with section 30(b), I notified the third party of the review. I received a response from the third party the next day. The response consisted of a brief reiteration of the third party's position that Article 2.2 should not be disclosed.

Law

[10] To support its redaction of Article 2.2 of the contract, Health cites the following portions of section 24:

> 24. (1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
>
> …
>
> (b) financial, commercial, scientific, technical or labour relations information
>
> (i) obtained in confidence, explicitly or implicitly, from a third party, or
>
> (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;
>
> (c) information the disclosure of which could reasonably be expected to
>
> (i) result in undue financial loss or gain to any person,
>
> (ii) prejudice the competitive position of a third party,
>
> (iii) interfere with contractual or other negotiations of a third party, or
>
> (iv) result in similar information not being supplied to a public body;
>
> ….

[11] Sections 24(1)(b) and 24(1)(c) are related, but they have important differences. I will therefore consider them separately.

Section 24(1)(b)

[12] The core concept in section 24(1)(b) is confidentiality.

[13] There are various tests for confidentiality. In *Order 331-1999; Vancouver Police Board*,[1999] B.C.I.P.C.D. No. 44, the British Columbia Information and Privacy Commissioner gave a list of seven factors to aid in determining whether 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 factors - 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 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?

[14] In *Chesal v. Attorney General of Nova Scotia*, 2003 NSCA 124 (CanLII), the Nova Scotia Court of Appeal said this list was “helpful” (at paragraph 72) though not “determinative or exhaustive” (at paragraph 73). I take the same approach: the seven-point list is helpful, but not determinative or exhaustive. On that basis, I adopt it for purposes of this decision.

Section 24(1)(c)

[15] In section 24(1)(c), the core concept is reasonable expectation of business harm.

[16] In *Nunavut Housing Corporation (Re)*, 2021 NUIPC 25 (CanLII) at paragraphs 116 and 117, I explained the meaning of the phrase “could reasonably be

expected”. It occupies a middle ground between that which is probable and that which is merely possible. Speculation is not sufficient. Evidence is required.

[17] If section 24 is invoked, the onus is on the public body or third party to provide the necessary evidence: sections 33(1) and 33(3)(b). To support a redaction under section 24(1)(c), a public body must provide evidence “well beyond” a mere possibility of harm.

[18] In *Department of Community and Government Services (Re)*, 2022 NUIPC 23 (CanLII) at paragraphs 60 to 62, I considered the legal principles applicable to evaluating business harm.

[19] In paragraph 62 of that case, I quoted from *Ontario (Health and Long-Term Care) (Re)*, 2005 CanLII 56347 (ON IPC). I will reproduce the whole quotation here because it is directly relevant to the present case:

> While I can accept the Ministry’s and SSHA’s general concerns, that is that disclosure of specific pricing information or per diem rates paid by a government institution to a consultant or other contractor, may in some rare and limited circumstances, result in the harms set out in section 17(1)(a), (b) and (c), this is not such a case. Simply put, I find that the institutions have not provided detailed and convincing evidence to establish a reasonable expectation of any of the section 17(1)(a), (b) or (c) harms, and the evidence that is before me, including the records and representations, would not support such a conclusion.
>
> I also accept that the disclosure of this information could provide the competitors of the contractors with details of contractors’ financial arrangements with the government and might lead to the competitors putting in lower bids in response to future RFPs. However, in my view, a distinction can be drawn between revealing a consultant’s bid while the competitive process is underway and disclosing the financial details of contracts that have been actually signed. The fact that a consultant working for the government may be subject to a more competitive bidding process for future contracts does not, in and of itself, significantly prejudice their competitive position or result in undue loss to them.

[20] In the result, the adjudicator ordered release of the requested information, which included the per diem rates charged by the contractors.

Analysis

[21] This case is about a single clause in a contract between Health and a private-sector service provider. The clause states the rate at which the service provider will be paid for providing the contracted services. Health has refused disclosure on the basis of sections 24(1)(b) and 24(1)(c).

Section 24(1)(b)

[22] I find that section 24(1)(b) does not apply in this case.

[23] On its face, section 24(1)(b) applies only to information "obtained … from a third party" or "supplied by a third party". A clause in a contract is neither "obtained from" nor "supplied by" a third party. It is the end result of a process of negotiation.

[24] Section 24(1)(b) is directed at an entirely different kind of business information: for an example, see *Department of Health (Re),* 2022 NUIPC 6 (CanLII) at paragraphs 64 to 69.

[25] In any event, the contract overall does not meet the test for confidentiality: see paragraphs 12 and 13 above.

[26] A contract with the GN for the spending of public dollars is inherently a public matter, subject to specific exemptions for things like trade secrets. The subject-matter of this particular contract has been a matter of public interest in Nunavut for years.

[27] The tendency of the ATIPPA is to protect the process for the awarding or negotiating of contracts, but not the contracts themselves: see, for example, sections 14(1)(c), 16(1)(b), 17(1)(c)(iii) and 22(b)(ii).

[28] Another example of this tendency is section 23, which protects personal information. Section 23(4)(i) creates a conclusive presumption that disclosure of personal information is not an unreasonable invasion of personal privacy if the disclosure "reveals financial and other details of a contract to supply goods or services to a public body".

[29] The contract at issue in this case, in Article 13, acknowledges the applicability of the ATIPPA (Article 13.2). The GN promises not to disclose any information "obtained from or concerning the Contractor and its business or operations as a result of the Contract", but that promise has a qualifier: "unless required by law to do so". That is a proper qualifier, because the GN cannot contract out of its obligations under the ATIPPA. The ATIPPA prevails.

Section 24(1)(c)

[30] I find that section 24(1)(c) also does not apply in this case.

[31] As noted in the Law section above, section 24(1)(c) requires evidence "well beyond" a mere possibility of harm. In this case, neither Health nor the third party offer <u>any</u> evidence of harm. They merely assert it. For that reason alone, section 24(1)(c) is inapplicable.

[32] If a mere assertion of harm or a simple refusal of consent were intended to be sufficient grounds to refuse disclosure, the Legislative Assembly could easily have said so. But in section 24(1)(c) the Legislative Assembly has set the bar higher.

[33] In any event, a distinction can be drawn between (a) revealing information from a bid while a competitive process is underway, and (b) disclosing the details of contracts that have been signed: see the cases cited in paragraphs 16 and 17 above. An ongoing competitive process may often fall within section 24(1)(c), but concluded contracts usually will not.

[34] Finally, I note that the contract at issue in this case has almost expired. The original three-year term began on August 1, 2017, and ended on July 31, 2020 (Article 3.1). The term may be extended by two terms of two years each (Article 4.1). Assuming the contract was in fact extended in accordance with this clause, the contract expires on July 31, 2024. By the time we get to the Minister's deadline for a response (section 36) we will be within days of the contract's end-date. That is an additional reason why disclosure of Article 2.2 cannot "reasonably be expected to" cause one of the harms enumerated in section 24(1)(c).

Conclusion

[35] Health did not correctly apply the exemption in section 24(1)(b).

[36] Health did not correctly apply the exemption in section 24(1)(c).

[37] Health correctly applied the exemption in section 23(1).

Recommendations

[38] **I recommend** that Health disclose Article 2.2 of the contract.

[39] **I recommend** that Health continue to withhold the personal e-mail addresses on pages 9 and 10 of the contract, and the handwritten signatures on page 10.

Graham Steele
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