

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 01-02
February 6, 2001
Review File: 00-233-5

A. BACKGROUND

On January 24th, 2000, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Department of Health and Social Services for

Any documents in the possession of the Government of the Northwest Territories and Nunavut (formerly part of the Northwest Territories) and in particular the Kitikmeot Health Board or any agents or affiliates of the Kitikmeot Health Board (including, but not limited to Diane Brouwer, Alice Isnor, Jean Morrision, Mike Natyshen, Bernadette Akmavigak, Nancy Maghagak, Brent Buddy and D.J. Webster that:

- a) relate to the provision of Dental Services in the Kitikmeot Region; and
- b) relate to Hazem Kobaisey, the Kekertak Co-op (as it was then known) or Axel Hahling; and;
- c) were generated between December 1, 1995 and July 1, 1996

Although it is somewhat unclear from the information before me, it appears that the date in the last paragraph was extended from July 1, 1996 to October 31st, 1996 by a request to the Department dated April 3, 2000.

By letter of July 27, 2000 the Department of Health and Social Services provided a number of documents, but denied access to others. This letter was not specific as to what documents had been denied and did not indicate the sections of the Act which were relied on for the refusal to disclose.

On September 12, 2000, the Information and Privacy Commissioner's office received a request that the decision to refuse access to some of the records be reviewed.

The Department was asked for a detailed explanation as to why access to these records was refused. Their response was provided on October 25, 2000. Although the Applicant was invited to provide further input, they declined the invitation.

In conducting my review, I requested and received from the Department of Health and Social Services, a copy of the records in question.

B. RECORDS AT ISSUE:

In its reply to this office, the Department of Health and Social Services indicated that two documents were considered to be exempt from disclosure and that the Department was relying in Section 24(1)(b)(i) as the reason for its refusal to disclose.

The first document to which access was denied was a proposal submitted by Dr. Koabaisy and the Keretak Co-op in response to a request for proposals. In this regard, the Department indicated that it was their understanding that the Government of Nunavut contracting practices have an explicit assumption that proposals submitted remain confidential.

The second document in question related to the scoring of the proposals submitted. In this regard, the government's response states that these documents were refused because the Government of Nunavut stated explicitly in the Request for Proposals that such information would remain confidential.

As a preliminary matter, it is to be noted that, pursuant to section 33 of the Act, the onus in these circumstances is on the head of the public body to establish that the Applicant has no right of access to the record or part of the record. It is also to be

noted that if the records in question do fall under subsection 24(1)(b), the prohibition on disclosure is mandatory.

C. ISSUES

In my view, there are really two issues here. The first is whether subsection 24(1)(b) applies to the proposal submitted by Dr. Koabaisy and the Keretak Co-Op. The second question is whether the evaluation forms are protected under any section of the Act.

1. Does section 24(1)(b) apply to prohibit the production of the “proposal” document requested?

Section 24(1)(b) states as follows:

Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant:

- a) 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;

Subsection (2) reads as follows:

The head of a public body may disclose information described in subsection (1)

- a) with the written consent of the third party to whom the information relates; or
- b) if an Act or regulation of the Northwest Territories or Canada authorizes or requires the disclosure.

In order to be protected by subsection 24(1)(b), two conditions must be met. The information must relate to the financial, commercial, scientific, technical or labour

relations circumstances of the third party, **and** the information must have initially been given to the Public Body either explicitly or implicitly, in confidence.

Unfortunately, the Department's response to my request for detailed submissions on the issue was not very helpful. Nor is there any indication that the Third Party in this case was canvassed about whether or not it would object to the disclosure of the records in question as is required by section 26(1) of the Act. In my opinion, that should have been done in this case. Without the input of the Third Party, it is difficult to determine whether either of those two conditions are met with respect to the disclosure of the proposal document. And, because the onus is on the public body to show that the records should not be released, the explanation given is far from sufficient.

In the interests of making a recommendation, however, I will attempt to interpret the Act in reference to the records in question, which I have had the benefit of reviewing.

The first question to be asked is whether the information in the proposal contains the "financial, commercial, scientific, technical or labour relations circumstances" of the Third Party.

In Order 96-018, the Alberta Information and Privacy Commissioner considered the meaning of the term "financial information" in a similar provision in the Alberta Act. He held at that time that

"Financial information, in my opinion, is information regarding the monetary resources of the third party and is not limited to information relating to financial transactions in which the third party is involved."

I accept this definition and find that there is no "financial information" in the proposal.

Is the information "commercial" information? In the case of *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989) F.J.C. No. 453 MacKay J. considered the

meaning of the words "finance, commerce, science or technical matters" and held that "...dictionary meanings provide the best guide...". This approach was also followed in *Information Commissioner of Canada v. Minister of External Affairs* [1990] 3 C.F. 665. This approach was adopted by the Ontario Commissioner in Order P-394 [1993] O.I.P.C. No. 2 in which it is stated that "only information which relates to the buying, selling, or exchange of merchandise or services qualifies as commercial information under the Act."

I am satisfied, having read the proposal, that the information contained in it is almost exclusively "commercial" in nature.

Having found that this is the case, I do not need to consider whether the information is scientific, technical or labour relations information. That having been said, it is my opinion that the proposal contains no such information about the third party.

Having found that the proposal contains "commercial information" about the third party, the next question is whether the information was provided either explicitly or implicitly in confidence.

The only thing that might suggest that it was intended and expected that proposals would be considered confidential is that they were to be submitted in sealed envelopes. I would think, however, that that would be more to prevent tampering or the unfair disclosure of the contents of the proposal during the tendering process than to ensure privacy after the fact. There is nothing in the Call for Proposals itself which suggests that the information in the proposal will remain confidential. In other words, there is nothing explicit to suggest that the information in the proposal was submitted in confidence.

Unfortunately, because the Third Party has not been given notice of this Request for Information, we do not have the benefit of knowing from them whether they had an

expectation of confidentiality. We can make certain assumptions, but cannot know with any certainty if they considered the information to have been provided in confidence. Nor is there anything in the Department's submissions which assist us. They merely make a statement that they "understood" that there was an implicit assumption that proposals submitted remained confidential. They give no reasoning, background or historical underpinnings for the statement. Because the onus is on the public body to establish that section 24(1) (b) applies, this is insufficient. If it were to be assumed that all financial and commercial information of Third Parties was to be protected, the second part of subsection 24(1)(b) would not be necessary.

In making my recommendations, I can rely only on the information before me. In this case, although the public body has not met the onus to show that the information was received by the public body in confidence, I am able to consider the overall circumstances of the case and rely on the observations of my counterparts in Alberta, Ontario and British Columbia in similar circumstances.

It becomes a matter of common sense. Would this information have been provided if the proposer thought that the information would be shared with his competitors? Would disclosure of the information prejudice its competitive position with respect to other proponents? Assuming that the provision of dental services in the North is a competitive industry, it is reasonable to conclude that it was expected that the information in the proposal would be kept confidential so as to protect the competitive position of the various proponents. I am prepared to find, on the specific facts of this case only, that it was implicit that the information provided would be protected from disclosure.

On this question, therefore, it would be my recommendation that the decision of the Department of Health and Social Services to refuse access to the Third Party's proposal should be upheld.

2. Are the documents which show the “scoring” of the proposals received protected from disclosure?

Clearly, section 24(1)(b) does not apply to this question because the information in question is not information obtained from a third party. It is information generated by the public body itself. In its submissions, the public body relies on a paragraph in its Request for Proposals which states that:

Each rating is confidential and no rating shall be released for any proposal.

The Act states at section 4 that:

- 1) The head of a public body shall refuse to disclose information to an applicant where the disclosure is prohibited or restricted by another Act or a regulation under another Act
- 2) If a provision of this Act is inconsistent with or in conflict with a provision of another Act, the provision of this Act prevails unless the other Act expressly provides that it, or a provision of it, prevails notwithstanding this Act;
- 3) Two years after the day on which section (5) comes into force, subsection (1) is repealed and subsection (2) comes into force.

The time period in subsection three (3) has been extended by subsequent amendment and, for that reason, subsection one (1) still applies in this case. However, the public body has not referred me to any Act or regulation which prohibits the release of the information in question. They refer only to a statement made in a standard form Request for Proposals. This is insufficient to take the information in question outside of the realm of the *Access to Information and Protection of Privacy Act*.

I have reviewed other sections of the Act to see if there are any other provisions which might apply to this information. There are two possibilities and I will, therefore, review those two possible exceptions.

Section 14 of the Act states, in part:

- (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal....
 - (c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the Government of Nunavut or a public body, or considerations that relate to those negotiations;
- (2) Subsection (1) does not apply to information that....
 - (b) is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function.

It might be argued that the evaluations of the proposals might reveal “criteria” developed for the purpose of contractual negotiations. Without deciding this question, I simply point to subsection (2) which specifically allows that subsection (1) does not apply to a statement of the reasons for a decision that is made in the exercise of a discretionary power. The awarding of a contract after a Call for Proposals is clearly the exercise of a discretionary power and, for that reason, the evaluations constitute the “reasons” for that award. The evaluations cannot be protected from disclosure under section 14.

The other section which might apply to protect the evaluations from disclosure is Section 22 which reads:

- (2) The head of a public body may refuse to disclose to an applicant personal information that is evaluative or opinion material compiled solely for the purpose of determining the applicant’s suitability, eligibility or qualifications for employment or for the awarding of government contracts or other benefits when the information has been provided to the public body explicitly or implicitly in confidence.

It is to be noted, however, that this section applies only to “personal information” which is defined as being information about an identifiable individual. A corporation or partnership cannot, by definition, be an individual. Corporations do not have “personal

information” and this section cannot, therefore, apply to the Third Party, which is a business.

In conclusion, there is nothing in the Act which protects the evaluations from disclosure to the applicant and it would be my recommendation that those evaluations be provided in accordance with the request for information made.

D. SUMMARY AND RECOMMENDATION

In summary, it is my finding and recommendation that Minister accept the decision of the Department of the Health and Social Services to deny access to the proposal submitted by the Third Party. However, I further recommend that the evaluation and scoring sheets prepared in rating the various proposals be released to the applicant.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
February 6, 2001