

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 03-08
April 15, 2003
Review File: 02-258-5

A. BACKGROUND

On September 23rd, 2002, the Applicant requested from the Department of Health and Social Services a copy of the current contract(s) for Air Ambulance Medevac Services in the Baffin Region or any portion of that document that could be provided.

The following day, the Department answered the request by a letter indicating that the Department would not disclose the contents of the Air Ambulance Medevac Services Contract or any part of it because such disclosure would put the Department in breach of section 24(2)(b) and (c) of the Act.

By letter dated September 27th, 2002 and received in my office on October 3rd, the Applicant requested that I review the decision of the Department of Health and Social Services to refuse access. On October 14th, a letter was sent to the Department asking that they provide this office with a detailed explanation as to why access to the records was denied. The Department's response was received on November 7th, 2003 and was forwarded to the Applicant for any further comments. I also received a copy of the records which the Department considered responsive to the request for information. These records were received for the purpose of my review only and were not provided to the Applicant. The Department's response was not detailed and did not provide any argument as to how or why they felt that the *Access to Information and Protection of Privacy Act* prevented the release of the records to the Applicant. As a result, the Department was asked if they wished to expand on their submissions, but, by letter dated December 2nd, 2002, they declined the invitation to do so.

Comments were also requested from the Third Party (the party who held the contract for the provision of Air Ambulance Medevac Services for the Baffin Region). Those

comments were supplied in late January, 2003 and were forwarded to the Applicant for his further comment. The Third Party objected to the release of the contract in question to the Applicant.

B. ISSUES

The records in question include

- a) a contract between the Baffin Regional Health and Social Services Board and a Third Party dated December 1st, 1999
- b) another contract between the Baffin Regional Health and Social Services Board and another Third Party, dated November 1st, 1999
- c) a copy of an Amending Agreement between Health and Social Services and the 2nd Third Party dated September, 2001;

The Department also provided a copy of a Request for Proposals and related materials as background material but these are not responsive to the request for information and I will not be commenting on them.

In its comments to this office, the Department cited section 24 of the *Access to Information and Protection of Privacy Act*, but only to say that if the records had been provided to the Applicant, the Department would have been in contravention of that section. They suggested that only two pieces of information should be released, being the contract expiry date (2005) and that the Baffin Region Medevac Services budget allocation is 2.6 million dollars (it is to be noted that this latter piece of information does not appear anywhere within the three responsive records which are the subject of this Review).

One of the affected Third Parties also provided submissions. They relied on sections 24(1) of the Act, and in particular subsections (a), (b)(ii), (c)(i) and (c)(ii). It, too, provides little detail in its letter except to make the following points:

- a) the contract was put out for tender by the Government of Nunavut and is, therefore, by its very nature, a competitive engagement;
- b) although they did not object to the applicant receiving a copy of the form of contract that was required by the Department of Health, they strongly objected to the Applicant being provided with any financial information or other information contained in the contract relating to the logistics of the provision of the medevac services, such as scheduling, aircraft types, positioning, cost recovery provision, per diems, etc.
- c) they also objected to providing the Applicant with any information relating to their contractual arrangements to provide paramedic support for the purposes of the contract.

The Applicant, in his response to the remarks of the Department, reiterated that he was not asking for information regarding any Third Party's costs of doing business. He did, however, feel that he was entitled to know what the government, and ultimately the taxpayer, was paying for the services provided under the contract . He argued that this kind of information should be readily available to citizens to ensure competent and prudent government spending.

C. THE LEGISLATION

Section 24 of the Act reads as follows:

- 24.(1)** Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
- (a) information that would reveal trade secrets of a third party;
 - (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;
 - (d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax;
 - (e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body;
 - (f) a statement of financial assistance provided to a third party by a prescribed corporation or board; or
 - (g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).
- (2) A 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.

Also relevant to my review of this matter are sections 1 and 33

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by

- (a) giving the public a right of access to records held by public bodies;
 - (b) giving individuals a right of access to, and a right to request correction of, personal information about themselves held by public bodies;
 - (c) specifying limited exceptions to the rights of access;
 - (d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and
 - (e) providing for an independent review of decisions made under this Act.
- 33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.
- (2) On a review of a decision to refuse an applicant access to all or part of a record that contains personal information about a third party, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations.
- (3) On a review of 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 onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and
 - (b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

E. DISCUSSION

Before going into the merits of whether or not the Department's decision to refuse access to the information requested by the Applicant, it is important to remind ourselves of the purpose of the ATIPP Act as set out in section one which is reproduced above. One of the objects of the Act is to make the government more accountable and ensure

that the public has access to government records. Section 1 also provides, however, that that right of access is to be subject to the limited exceptions set out in the Act. Similar stated purposes appear in access to information legislation in several Canadian jurisdictions and has been the subject of comment by my counterparts in those jurisdictions and by the courts. A general interpretative rule has emerged which suggests that those exceptions are to be narrowly construed. As the Federal Court of Appeal states in *Rubin v. Canada (Minister of Transport)* [1998] 2 F.C. 430 (C.A.) at para. 23.

... where there are two interpretations open to the Court, it must, given Parliament's stated intention, choose the one that infringes on the public's right to access the least. It is only in this way that the purpose of the Act can be achieved. It follows that an interpretation of an exemption that allows the government to withhold information from public scrutiny weakens the stated purpose of the Act.

Furthermore, in a case such as this where the Department is refusing to disclose the records requested, the onus is on the Department to establish that one of the exemptions to disclosure applies.

Every jurisdiction in Canada that has access to information legislation have provision which provide exemptions from disclosure for third party information. The exemption, in almost every jurisdiction, including Nunavut, is mandatory in that, if the exemption is found to apply, the Department must refuse access to the record in question. The question then becomes, what constitutes Third Party information and to what extent is it exempted from disclosure pursuant to section 24 of the Act.

Unfortunately, the Department has not made any real effort in this case to explain why they have taken the position they have with respect to this Application for Information. They have simply stated as a given that the disclosure of the contracts in question would put the Applicant, who appears to be a direct competitor of the Third Parties who currently hold the contracts in question, in an advantageous position in future competitions "by knowing their competitor's operational and pricing structure". I would simply comment at this juncture that very little about the application and interpretation

of the *Access to Information and Protection of Privacy Act* is that obvious. Application of the Act and, in particular, section 24, requires a careful review of the provisions of the Act and a knowledgeable application of the concepts articulated in the legislation. If a public body refuses to provide records requested, they must be prepared to defend their decision and to provide a detailed explanation as to the reasoning behind their thinking.

In this case, because of the Department's failure to provide such an explanation, I am left with simply the documents themselves to make the argument for them. Fortunately, I have had the benefit of being able to review all of the responsive documents.

Section 24 of the Act is intended to protect the business interests of Third Parties and to ensure that the Government of Nunavut is able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although government needs to be open and accountable, they are also a business and in order to do business effectively, they must be able to assure their private sector partners that their trade secrets and financial positions will not be readily disclosed to competitors and the general public. This is a fine balancing act which is not always an easy one.

This section precludes a public body from disclosing information relating to a Third Party where the information would reveal trade secrets or other confidential financial or technical information of the Third Party.

The three documents that are the subject of this request for information are all contracts between the Government and Third Parties. Two of the contracts were signed within a month of each other and are very similar in their terms and I will deal with these two contracts (November 1st, 1999 and December 1st, 1999) together. The third record is an Amending Agreement signed several years later. I will deal with this record separately.

The first six pages of each of the two contracts signed in 1999 are pretty much "standard form" contracts which form the basis of the majority of government contracts

with private sector suppliers. Some of the information in each contract is extracted from the Request for Proposals (RFP), which all proponents on the RFP would have received. The rest of the first six pages of each of these two contracts deals with general provisions, including the term of the contracts, contact information, records that are required to be kept, inspection provisions, liability and insurance, termination of the contract, and the process for amendment or assignment of the contracts. None of this information could be properly said to be a “trade secret” as that term is defined in the Act or financial, commercial, scientific, technical or labour relations information.

Each of these two contracts also has a number of Schedules. In each case, Schedule “A” is also fairly general in nature. There are two or three places in each of these two schedules which refer to the number of aircraft which the contractor is to have available for the work contemplated. I can imagine circumstances in which the number of aircraft that are dedicated to a particular contract might be considered to be a trade secret. However, that argument has not been made by either the Department or the Third Parties. I think it more likely that the northern airline industry is such that all northern airlines pretty much know what equipment their competitors have at hand and what each aircraft is dedicated to. Without any submissions upon which I can find to the contrary, it seems appropriate, in the spirit of the legislation, to err on the side of disclosure of the number of aircraft involved in the contract.

Other than reference to the number of aircraft, once again the provisions of the schedule appear to be “standard” for this kind of contract. Schedule “A” is virtually identical in each of the two 1999 contracts. I am not convinced that the disclosure of this kind of information would disclose any trade secret or financial information of the Third Party contractor. Nor is there anything in this schedule that was “obtained” from the Third Party so that section 24(1)(b) is not applicable.

Each of the two 1999 contracts also contains a “Schedule B” which lists the specific make of aircraft that are being contracted for the work to be done. Again, I do not believe that this can be said to be a “trade secret” as it would be fairly simple to determine, with some research, what aircraft are owned by each company.

Each of the two 1999 contracts also contains a “Schedule C”. This part of each contract contains the specific dollar values for the work to be provided by the contractor under the terms of the contract and the specifics of the payment schedule. Keeping in mind the definition of “trade secret” which includes a formula, pattern, compilation, program, device, product, method, technique or process:

- a) that is used or may be used, in business or for any commercial advantage;
- b) that derives independent economic value, actual or potential, from not being generally known to the public or to other persons who can obtain economic value from its disclosure or use;
- c) that is the subject of reasonable efforts to prevent it from becoming generally known; and
- d) the disclosure of which would result in harm or improper benefit

it is not unreasonable to conclude that the specifics of the payment schedule might well be considered trade secrets and would be exempt from disclosure under section 24(1) (a) of the Act. I am also of the view that, because the airline industry in the North is obviously a thriving and competitive one, the disclosure of these kinds of specifics could well be expected to “prejudice the competitive position of the third party”. Section 24(1)(c), therefore, would also apply to prohibit the disclosure of these specifics.

But even here, there are parts of the Schedule which are general in nature and do not fall under the protection of section 24. More specifically, paragraphs 1, 3 and 5 of Schedule C of each contract do not, in my opinion, contain any information of the kind contemplated in any of the subsections of section 24.

The December 1st contract also has a Schedule C1 which appears to be taken directly from the proposal put forward on the RFP by the Third Party. This entire document clearly contains trade secrets and the disclosure of the information contained could reasonably be expected to prejudice the competitive position of the Third Party. This Schedule, therefore, is exempted from disclosure pursuant to section 24.

Each of the two 1999 contracts also has a Schedule "D" which deals with insurance coverage to be obtained by the contractor. The schedule is identical in each contract. Furthermore, the provisions appear to be the standard provisions included in virtually all government contracts. As such, the insurance requirements are not confidential, nor do they constitute "trade secrets". The disclosure of this information could not in any way affect the competitive position of the Third Party as the same insurance requirements will apply to almost every private sector business which contracts with the government in any sector.

Finally, each of the two 1999 contracts has a Schedule "E" entitled "Equipment Responsibility of Air Medevac Carriers". Both contracts are, again, identical. The Schedule lists the medical and technical equipment that the contractor is required to supply and maintain. The list is a generic one and appears to be pretty intuitive. For example, one of the requirements is "heating /cooling systems capable of maintaining a desired cabin temperature". In my opinion, the information in this Schedule cannot be said to be in the nature of "trade secrets", nor would the disclosure of this part of the contract be reasonably expected to prejudice the competitive position of the Third Party as I suspect that any party entering into a contract for the provision of medevac services to the government will be required to provide the same list of equipment.

The third document in question in this case is an Amending Agreement dated in September 2001 and it relates back to the November, 1999 contract. It is much shorter than the other two documents. There is nothing in the preamble to the Agreement which could be considered a "trade secret" or financial, commercial or technical information. The section entitled "Provision 1" deals only with the term of the contract and, in my opinion, this information cannot be said to fall within any of the exceptions contained in Section 24.

Provision 2 deals with specifics as to remuneration and the disclosure of that information might reasonably be expected to prejudice the competitive position of the Third Party if disclosed.

None of the other Provisions of the Amending Agreement contain any information which, in my opinion, falls under the exclusions listed in Section 24 of the Act

F. CONCLUSION

Section 5(2) of the *Access to Information and Protection of Privacy Act* provides that “the right of access to a record does not extend to information excepted from disclosure under Division “B” of this Part, but where that information can be reasonably severed from a record, an applicant has a right to access to the remainder of the record”. In this case, there are parts of each of the three documents which, in my opinion, are excepted from disclosure under the Act. However, those parts are relatively small and can be easily edited from the records so that the balance of the records can be provided to the Applicant. Specifically, it is my opinion and recommendation that the three records should be disclosed to the Applicant **except for** the following items which should be edited out:

November 1st, 1999 Contract:

Schedule C, Paragraphs 2 and 4

December 1st, 1999 Contract:

Schedule C, Paragraphs 2 and 4

Schedule C-1

September 2001 Amending Agreement

Provision 2 including handwritten notations.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner