

**NUNAVUT  
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 08-043

April 28, 2008

Review File: 07-286-5

**A. BACKGROUND**

This matter arises as a result of an application made by an organization for information relating to three individual companies which all submitted a proposal on a Request for Proposals issued by the Department of Community and Government Services. Each of the companies' proposals were evaluated on the Nunavummi Nangminiqagtunik Ikajuuti Policy (NNI ) and given a ranking based partially on those evaluations. The Applicant wished to know which of these companies received full marks or partial marks under the NNI policy.

All three of these companies (Third Parties) were contacted and advised that a request had been made for this information and asking each of the Third Parties if they had any concerns about the disclosure of the information requested. Two of them consented to the disclosure. The third company objected to the disclosure for several reasons.

Firstly, they said that the request for information was too vague and amounted to a "fishing expedition" by the Applicant. Further, they indicated that if the information in question were to be disclosed, it would amount to a disclosure of the company's confidential information about suppliers, contractors, employees, etc that the company would use if awarded the contract.

The public body considered the position of the Third Party Company and, notwithstanding the objections, decided to disclose the information requested. The Third Party was given notice of the decision. The Third Party then made this request for me to review that decision.

Both the public body and the Third Party were invited to provide their input as to why the information in question should or should not be disclosed, and both did so.

## **B. ISSUE**

The issue in this case is whether the public body properly applied section 24 of the *Access to Information and Protection of Privacy Act* in making its decision to disclose the information requested.

## **C. THE RELEVANT PROVISIONS OF THE ACT**

The relevant provisions in the *Act* are all contained in section 24 which provides 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 Nunavut or Canada authorizes or requires the disclosure.

Also relevant is section 33(3)(b) of the *Act* which puts the onus on the Third Party objecting to the disclosure to establish that the disclosure of the information would be contrary to the *Act*:

- (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.

## **D. DISCUSSION**

According the Government of Nunavut's web site, the NNI policy is a policy that was established as:

...one of the Government of Nunavut's main tools for economic development, attempting to leverage change to the structure of the Nunavut economy through government contracting. Through a proactive training and education strategy, the NNI Policy will also be a significant tool for capacity building in Nunavut, the long-term goal being the creation of a well-educated, well-trained Inuit workforce that can more fully participate in the social and economic development of the Territory.

The central goal of the policy is to "maximize the participation of Nunavut, Inuit, and community-based (Local) businesses in Government of Nunavut contracting". As I understand it, this policy essentially gives priority to local companies when awarding government contracts based on an evaluation system. Under this policy, points are given in the evaluation of contract proposals according to how much or how little the proposing company complies with the policy. The information which the Applicant sought in this case was an indication of how well each of the companies mentioned in the request had done in this part of the proposal evaluation process for a particular contract. The responsive information is contained in a one page record which is a chart showing the companies evaluated and the number of points each of them received under various headings and sub-headings of the policy, including "Inuit Labour", "Inuit Training" and "Inuit Firm". Also included in the chart are the range of points that are available for each category and the number of points that were awarded to each of the companies being evaluated under each heading. The only thing included in this record are the actual points awarded. There is no specific information which suggests how those points were arrived at based on the proposals received.

As I understand it, the objecting Third Party did receive a copy of this record, at least insofar as it related to itself, so that it would be aware of specifically what information the public body intended to disclose.

The Third Party has relied on three grounds for their objections to the disclosure of the information in question.

The first concern they have is that the disclosure of this record "reveals how [the company] conducts their business affairs and, in particular, the confidential relationships between the operation of the parent company and its subsidiaries". They indicate that they consider the operation of the various companies as highly confidential, and in the nature of trade secrets and say that the disclosure of the relationship between the companies and how they operate will result in harm to their businesses.

Under the *Access to Information and Protection of Privacy Act*, a trade secret is defined as "information, including a formula, pattern, compilation, program, device, product, method, technique or process that

- a) 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.

In their submissions, the Third Party says that the breakdown of the scoring under the subheadings within each of the three main headings will allow third parties to determine how they have organized their business relationships for this bid - specifically the ownership component and design for the purpose of the bid. They say that the company derives independent economic value from that information not being generally known to the public and that the company has taken considerable efforts to prevent that information from being generally known.

Secondly, the public body objects to the disclosure of the information as the company understood that the ownership component and design for the purposes of the bid was supplied in confidence when it was provided to the Government.

Thirdly, the Third Party suggests that the disclosure of this information would reveal the personal information of third parties. They point out that under the heading "Inuit Labour" there is a breakdown of scores. They are concerned that the revelation of those scores would reveal personal information about individuals and their employment with the company.

The Third Party suggests a compromise to the disclosure of the record in question. They suggest the "aggregate numbers" for the Inuit requirements in the categories of Inuit Labour, Inuit Training and Inuit Firm be disclosed, leaving the more detailed scores attributed to the company under each subheading as confidential.

The public body indicates that it carefully considered the arguments made by the public body and by the Third Party and made the decision to disclose the information. They did not consider that the disclosure of the evaluations, by themselves, could in any way disclose trade secrets. They relied on comments contained in my Annual Report for 2006/2007 in which I encouraged the Government of Nunavut to move toward a policy of openness in informing the public about how government contracts are awarded and how government funds are spent.

As noted above, the onus is on the Third Party objecting to the disclosure of information to establish that the information should not be disclosed. I do not believe that the Third Party has met that onus. Looking at the record in question, the only things that appear in the evaluation are numbers or "points" awarded to each company in each category. There are no reasons indicated for the points awarded and no evaluation of the various proposals such that one could determine what, specifically, the points are based on. As an outsider looking at this record, I can say that the numbers shown on the record would in no way reveal to me any trade secret of any of the companies involved. Nor can I say that the numbers reveal to me any specific relationships between the parent company and its subsidiaries. It may be that a more practiced or knowledgeable eye might be able to take more from the numbers than I can. However, it seems to me that, even if that were the case, that kind of information is generally available in any event through the public registry where these corporations are registered. This is not

information that is "secret". The fact that two companies might be related to one another is available to anyone who cares to research the public registry. I am not convinced that the rating numbers revealed in this record would reveal anything more than that the Third Party may have a subsidiary who might be involved in this project were the contract awarded to them. Without more details about how and why the points were awarded, I fail to see how the numbers in this record can possibly reveal anything more than that.

The company indicates that they consider the operation of its various companies as highly confidential in the nature of trade secrets and say that the disclosure of the relationship between the companies and how they operate will result in harm to their businesses. No specific details have been provided about how this knowledge might affect their business or what harm might result. Again, it may be that someone with more intimate knowledge of the companies in question might be able to read more into the numbers, but it is not obvious to me how the numbers might reveal anything about the company's operations.

In order for section 24(1 )(a) to apply to the information in question, the company must establish that it constitutes a "trade secret" and for that, it must meet the requirements of the definition, namely:

- a) that the information is used or may be used for a commercial advantage,
- b) that the information 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 the information is the subject of reasonable efforts to prevent it from becoming generally known, and
- d) that the disclosure of the information would result in harm or improper benefit.

With the onus on the company, they must present cogent and specific particulars about how the information is used for commercial advantage, how the company derives independent economic value from it not being generally known, what kind of efforts there have been to prevent it from becoming generally known, and what kind of harm or improper benefit might result from its disclosure. It is not sufficient simply to say that it is so. It is also necessary for the company to establish that the information is a secret and cannot be otherwise discovered with reasonable efforts. In the end, the company has not provided me with enough to satisfy me that the information in question constitutes a trade secret, or that its disclosure might result in harm or improper benefit.

In terms of the second objection, that the ownership component and design for the purposes of the bid was supplied in confidence when it was provided to the Government, again the Third Party has failed to convince me that the disclosure of the evaluation numbers could disclose any specific information about the ownership of the company. It provides only an indication of the number of points that were awarded for each category of evaluation. It is not obvious to me how that would reveal any specific "ownership" information which might have been provided in the proposal itself. It reveals only the number of points that were awarded. The only thing that this tells me, in comparison to the others, is that the company fared better or worse in each category than the other companies submitting proposals. Again, the Third Party has failed to convince me that the disclosure of this information might reveal any "ownership" information of the company.

Finally, with respect to the suggestion that third party personal information might be revealed, I can say categorically that there is no personal information contained in the record and nothing that, in my opinion, could reveal individual third party information. This objection to the disclosure has no merit.

## **E. RECOMMENDATIONS**

Having reviewed the record in question, and considering the arguments raised by the

Third Party, I would respectfully agree with the decision made by the public body to disclose the information contained in this record and I recommend that they do so.

Elaine Keenan Bengts  
Information and Privacy Commissioner