NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 11-053
September 11, 2011
Review File: 10-164-5

BACKGROUND

In September, 2010, I received a request from an individual asking me to review what he considered to be an incomplete response to his Request for Information made to Community and Government Services (CGS). The request, originally made in April, 2010 was for access to the following records:

a) from January, 2005 to April 2010, per fiscal year, a list or record of contracts awarded and amendments with respect to GN RFP #2005-4; Arctic Resupply of Dry Cargo for all regions, including contract number, dates, vendors, title, and amount for dry cargo resupply within the sealift contracts.

b) for the same fiscal years by region, the cubic metric volume that each dry cargo supply contractor and/or supplier has obtained under dry cargo resupply contracts

c) for 2009 and 2010, rationales and approval records in connection with extending the dry cargo resupply contracts for more than one year

d) other records released/to be released on these subjects.

The public body requested clarification with respect to (d) from the Applicant but it is unclear from the correspondence received whether or not that clarification was received.

The public body responded to the Applicant in early June. Access to a number of the records were denied based on one of several sections of the Act as follows:

a) with respect to the amounts of contracts awarded, the public body refused to disclose that information pursuant to section 25(1) of the Act

b) the request for access to 2009 and 2010 rationales and approval records in connection with the extension of the dry cargo resupply contracts was refused with no explanation other than that the materials requested were "exempt from disclosure under the Access to Information and Protection of Privacy Act"

c) some records were disclosed, but with portions of them severed pursuant to sections 13(1) and 25(1) of the Act.

d) access to "other records released or to be released on these subjects" was denied on the basis that the public body felt they required more specific details in order to process that part of the request.

Further responses were provided to the Applicant on June 30th and July16th. In the June 30th letter, the public body simply advised the Applicant as follows:

> In doing a supplementary search of our records pertaining to these contracts, it was identified that on May 7, 2010 contract extension letters were sent to all carriers ..... The letters were to extend the contracts from April 1, 2011 to March 31, 2012 in order to cover the 2011 shipping season.

It does not appear that copies of the extension letters were provided.

The July 16th letter to the Applicant provided the following further explanations in response to the Applicant's follow up:

> The information you are requesting access to, "copies of the contracts by contractor by region" is exempt from disclosure under section 24(1)(c) of the *Access to Information and Protection of Privacy Act*. The Department of Community and Government Services has previously provided you with all of the information which can be disclosed, however, the contract itself cannot be disclosed as per the attached section of the *Access to Information and Protection of Privacy Act.*
>
> We can confirm that there have been no amendments made from the signing of the extension notice. Also, as previously stated in my last letter dated June 30, 2010, it was identified that on May 7, 2010 contract extension letters were sent to all carriers ..... The letters were to extend the contracts from April 1, 2011 to March 31, 2012 in order to cover the 2011 shipping season.

THE APPLICABLE SECTIONS OF THE ACT

The following sections of the Act have been referred to and relied on by the public body or are otherwise relevant to this review:

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.

5.(1) A person who makes a request under section 6 has a right of access to any record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) 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 reasonably be severed from a record, an applicant has a right of access to the remainder of the record.

6.(1) To obtain access to a record, a person must make a written request to the public body that the person believes has custody or control of the record.

(2) The request must provide enough detail to enable the public body to identify the record.

7.(1) The head of a public body shall make every reasonable effort to assist an applicant and to respond to an applicant openly, accurately, completely and without delay.

13.(1) The head of a public body shall refuse to disclose to an applicant information that would reveal a confidence of the Executive Council, including

(a) advice, proposals, requests for directions, recommendations, analyses or policy options prepared for presentation to the Executive Council or the Financial Management Board;

(b) the contents of agendas, minutes or records of decision of the Executive Council or the Financial Management Board or deliberations or decisions of the Executive Council or the Financial Management Board;

(c) consultations among members of the Executive Council or the Financial Management Board on matters that relate to the making of government decisions or the formulation of government policy; and

(d) briefings to members of the Executive Council or the Financial Management Board in relation to matters that

(i) have been before, or are proposed to be brought before, the Executive Council or the Financial Management Board, or

(ii) are the subject of consultations described in paragraph (c).

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;....

(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.

25.(1) The head of a public body may refuse to disclose to an applicant information that is otherwise available to the public or that is required to be made available within six months after the applicant's request is received, whether or not for a fee.

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.

THE PUBLIC BODY'S POSITION

The public body takes the position that the procurement process in awarding contracts is treated with confidentiality. They also take the position that contracts, once awarded, are also confidential. They rely primarily on section 24 of the *Access to Information and Protection of Privacy Act* for their refusal to provide all of the information requested and section 24(2)(c) in particular. It is their position that, in order to ensure that the RFP process is fair and that contracts are awarded to those best able to provide the services required, CGS requires that companies divulge a lot of proprietary information in their proposals such as pricing discounts and the use of Inuit Labour and Training programs. They say that this information is obtained in confidence and "the companies may see that discloser (sic) of this information to other companies or the public may harm their business interest".

CGS took the position that the contracts themselves were protected from disclosure pursuant to section 24, but they did not elaborate on that statement.

The public body also relied on the comments made by Justice B. Browne in *Qikiqtaaluk Corporation v. Nunavut (Commissioner)* 2009 NUCJ 06 in which the Court considered what information should be available to a company appealing the awarding of a contract by a government body. It was their position that in this case, the judge determined that it was inappropriate to disclose the proprietary information of third parties.

THE APPLICANT'S POSITION

The Applicant takes the position that the public body has failed to properly identify and disclose the existence of all documents responsive to his request for information and, in particular, feels that the department failed to identify those records responsive to parts "c" and "d" of the Request for Information. He suggests that there have to be "other records" in relation to the Arctic Resupply of Dry Cargo contracts. He further feels that the request was specific enough for the public body to be able to identify the responsive records. It is his position that if the department has a record in its possession that falls within the scope of the request, there is a positive obligation imposed on them to identify and disclose it, subject only to the limited and narrowly interpreted exemptions set out in the Act.

The Applicant further suggests that the public body should have provided an index of the responsive records provided, along with an indication of the exemptions applied to those records not disclosed. He also pointed out that the public body did not appear to have done a line by line analysis of the records to which access was denied.

With respect to the exemption provided by section 24 of th Act, the Applicant argues that the "blanket" application of the section to deny access to entire contracts is not in accordance with the Act. He points out that no evidence was provided to support their assertion that the information requested was commercially confidential or that the competitive positions of the Third Parties would be compromised by its disclosure and

that the onus is on the public body to establish that exemptions to disclosure apply. With respect to the Nunavut Court of Justice decision in the *Qikiqtaaluk Corporation* case, he seeks to distinguish that case on the basis that in that case, the litigant was seeking access to the proposal documents upon which the contract was awarded, not the actual contract itself, as is the case in this situation. Furthermore, he suggests that this case in fact supports the disclosure of the information requested and provides the following excerpt:

> Accountability for public funds and fairness in public administration are values essential to the preservation of a democratically elected government. Public trust and fairness in public administration are values transcending all others. These complement each other. It is difficult for one to exist without the other. These values must be preserved and protected by the process employed by government to expend public funds. Transparency of process is as integral to the building and maintaining of trust in matters of public administration as it is to the justice system itself.

He argues that by refusing to disclose who the legal contractors are, there is no way for citizens to know if the project proponents who submitted the proposals are in fact the legal parties who were awarded the contracts. Further, if there is no obligation to disclose the dates and details of amendments to existing contracts, then the public cannot monitor or follow material changes in the public administration of the contract over the project, including changes in such things as project scope, dollar value, price or terms of service or any other relevant material administrative or legal change.

The Applicant emphasizes the need for public bodies to be accountable to the public with respect to the granting of large contracts and argues that most Canadian jurisdictions disclose contracts such as these as a matter of routine practice.

With respect to the department's reliance on Section 25 of the Act, as noted above, Section 25 provides that a public body may refuse to disclose information that is otherwise available to the public. The Applicant, however, says that he has done a diligent search of the public records available on line and he has been unable to find

web based copies of the records requested. He has not been advised where else he might be able to find the records requested.

The Applicant argues, as well, that it is not sufficient to offer written explanations about contract extensions in response to a request for copies of specific records, in this case, the amendments or extensions of the contracts.

With respect to the public body's reliance on section 13 of the Act, the Applicant takes the position, once again, that there must be a line by line analysis of each record and that it is inappropriate to claim a blanket exemption for an entire record. Further, he suggests that the public body cannot simply declare that a document is protected pursuant to section 13 without providing any explanation as to how the section applies to the record. He points out that when he made a similar request of the Nunavut Housing Authority, he received records which originated with CGS which were responsive but were not identified or disclosed by CGS. He suggests that this is proof of the fact that CGS failed to properly search for and identify responsive documents as they are required to do pursuant to the Act.

DISCUSSION

CGS was asked to provide me with all of the records they identified as being responsive to the Request for Information. As a preliminary comment, I would say that it does not appear that the public body has, in fact, properly identified all of the records which are or are potentially responsive to the Applicant's request. In particular, rather than provide the relevant records related to the extension of the contracts in question, the public body simply provided the Applicant with confirmation that extensions had been granted. It seems to me that an extension of a contract would require something in writing and most likely some correspondence back and forth between the Third Party companies and the public body. These documents should have been identified as responsive and provided to the Applicant, subject to any applicable exemption. It is not sufficient merely to provide confirmation that there has been an extension.

Furthermore, based on the documents provided by the Applicant which he received from another public body in response to a separate Request for Information, it is clear that there are records which originated with CGS which were not identified or disclosed. Nor has the public body either identified or disclosed any records in response to part "d" of the Applicant's request - that is, no records "related to" the contracts in question have been identified or produced. In the circumstances, I am not satisfied that CGS has done an adequate job of identifying all the records responsive to the Applicant's request.

As a general comment, I would refer to section 5(2) of the *Access to Information and Protection of Privacy Act* which provides as follows:

> (2) 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 reasonably be severed from a record, an applicant has a right of access to the remainder of the record.**

It is, therefore, inappropriate to apply a blanket exemption to any one record. In this, the Applicant is quite correct. There must be a line by line review of every record and insofar as it is possible to sever those parts of the record that are subject to an exception to disclosure, those parts should be severed and the remainder of the record disclosed. This said, in most cases, there is not a lot of proprietary information in contracts involving the government and a Third Party. Proprietary information is information which originates from the Third Party, such as unit prices, technical requirements, labour information and the like. To the extent that this information is contained in government contracts, it is usually included as an appendix and does not form any part of the main body of the contract. The details of the contract are not proprietary information. They do not originate with the Third Party.

In this case, the public body relied largely on section 24 of the Act. This section prohibits the disclosure of Third Party information, including financial, commercial, and technical information obtained in confidence from the third party, or information that is

of a confidential nature and was supplied by a third party in compliance with a lawful requirement. This section also prohibits the disclosure of information which could reasonably be expected to result in undue financial loss or gain to any person, prejudice the competitive position of a third party, or interfere with contractual or other negotiations of a third party.

Keeping in mind that the onus of establishing that an exemption applies in this case lies on the public body, it is up to the public body to establish that the records in question fall within the exception. In a case like this, it seems to me that it would be difficult or impossible to establish that the disclosure of the information would interfere with the Third Party's competitive position or that the disclosure would interfere with the contractual or other negotiations of the third party without the input of the Third Parties themselves. For this reason, I contacted the three Third Parties involved to advise them of the request and to ask them for their input. Two of the three Third Parties responded and indicated that they had no real objection to the disclosure of the information requested, except for certain, specific information. The third Third Party did not respond at all, which suggests that they had no significant objections to the disclosure. One of the third parties objected to the disclosure of "volumes" but this information had already been disclosed by CGS in the records which were provided to the Applicant. This information, however, appears to be publicly available in any event.

In light of all this, I am not satisfied that CGS has met its obligations under the Act or that it has properly applied the Section 24 exemption.

With respect to section 13, which prohibits a public body from disclosing information which would reveal a confidence of the Executive Council, the public body did not provide me with any explanation at all about how the contracts in question might qualify as a confidence of the Executive Council. Simply saying that something is a cabinet confidence does not make it so. There must be an indication that the record was created for the Executive Council and that it contains advice, proposals, recommendations, analyses or policy options for discussion. There is no such analysis

done in this case and for that reason I am not satisfied that the public body has met the onus place on it to establish that the exception applies.

RECOMMENDATIONS

Based on the above, I make the following recommendations:

1. I recommend that the public body begin its search again and that it identify ALL records responsive to all parts of the Applicant's request. This search is to include not only paper records, but electronic records and e-mail records as well. If the public body requires more information, section 7 of the Act requires that the public body take such steps are necessary to narrow and hone the request, including consulting with the Applicant.

2. Once ALL responsive records have been identified, I recommend that the public body should compile a list or index of all such records. To the extent that the search identifies records not previously identified, I recommend that these records be fully vetted in accordance with the Act and keeping in mind the comments and discussion above. Once that process is complete, there should be a further disclosure to the Applicant, including a detailed explanation as to the reasons for any records not disclosed, either in whole or in part. The Applicant will have the right to request a further review if he remains unhappy with the response received. Because of the time that it has taken to get to this point, I recommend that this process be completed within 30 days of the date that these recommendations are received by the public body.

3. I specifically recommend that the contracts which are the subject of this Request for Information be reviewed on a line by line basis and that they be disclosed to the Applicant, subject only to severing any information that is proprietary in nature. In this regard, I recommend that the Third Party who did not respond to my consultation be given notice of the records to be disclosed and that that Third

Party be given 30 days notice of the public body's intention to disclose the record. If the third party objects, it will have the option of seeking a review of the disclosure through this office.

Elaine Keenan Bengts
Information and Privacy Commissioner