NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER

Review Recommendation 13-064
July 1, 2013

Review File: 12-209-5

BACKGROUND

This matter arises out of an application by two related Third Party Companies who ask that I review the decision made by the Department of the Environment to disclose certain records in response to a Request for Information.

The original request for information was made in late June of last year. The request was for records between two given dates about a particular environmental spill and its cleanup. Some of the information responsive to the request included invoices and related records about the two Third Party Companies who where contracted to provide some of the cleanup services. These two companies objected to the disclosure of these records on the basis that the disclosure would prejudice their competitive positions (Section 24(1)(a)-(c)). They also objected to the disclosure of the names of individual employees who are named in the various invoices, suggesting that the disclosure of this information would be an unreasonable invasion of the privacy of the named individuals.

Most of the records in question are invoices sent to the Department of the Environment by the two Third Party Companies in relation to the cleanup in question.

I received submissions on the issues from the public body, from the two Third Party Companies and from the Applicant.

THE RELEVANT SECTIONS OF THE ACT

It is helpful to review the most relevant provisions of the *Access to Information and Protection of Privacy Act* in relation to this request and the starting point should always be Section 1 which sets out the purposes of the Act:

> 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.

Section 5 of the Act provides members of the public with the right to request access to records in the custody or under the control of a public body, but limits that right of access if the information is falls under one of the exemptions provided for in the Act. However, section 5(2) further requires that where exempted information can reasonably be severed from a record, an Applicant has a right of access to the remainder of the record. In all cases, disclosure will be the rule and any refusal to disclose must fall squarely within one or more of the exemptions provided for in the Act.

In this case, the Third Party Companies rely on section 24(1)(a)-(c) of the *Access to Information and Protection of Privacy Act* to justify their objections to the disclosure of the information in question. These sections are intended to protect proprietary information of third parties who provide goods and services to the Government of Nunavut, including trade secrets and financial details relating to the third parties that are not otherwise publicly available and which have been provided to the public body in confidence. The provisions read 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;

Also relevant in this case is Section 33 of the Act which provides that where a Third Party is seeking to prevent the disclosure of records or parts of records, the onus of establishing that the Applicant has no right of access lies with the Third Party trying to prevent that disclosure. It should be noted in this regard that, in light of the onus placed on them to establish their case, I invited the Third Party Companies in this case to provide me with confidential affidavits outlining in detail their concerns should the records be disclosed. No such affidavit was received.

There was also some discussion about the personal information of third parties (the names of employees for example) contained in the records in question. Because the Applicant has indicated that he has no objection to the removal of those personal details, I will not review this objection.

THE POSITION OF THE THIRD PARTIES

In their initial letter to me requesting the Review, the Third Party Companies, who appear to be related companies, say that the disclosure of the information in question will prejudice their competitive position. One of the two third parties states that it is one of only two private sector companies providing environmental services "in this highly competitive industry" and that the disclosure of the information requested would allow the competition to "undercut the prices charged" by the Third Party and that "it is highly likely that it would be used by [the Third Party Company's] competitor to bid against" them. They argue that this would make for an uneven playing field because the Third Party Company does not have the same information regarding its competitor's operations or proposals.

Some of the records identified as responsive to the Request for Information, they say, also contain "commercial and technical information regarding the comprehensive site assessment,

remediation action/work plan, temporary mitigation measures for containment of the spill as well as how the environmental cleanup will be conducted" which they argue are trade secrets within the meaning of section 24(1)(a) of the Act.

Finally, they argued that the itemized particulars of quantities, units and rate amounts set out in each invoice should be exempt from disclosure pursuant to Section 24(1)(c)(ii) on the grounds that "disclosure could reasonably be expected to prejudice the competitive position of" the Third Party Companies.

THE PUBLIC BODY'S POSITION

The public body takes the position that section 24(1) does not apply to invoices. They do, however, concede that it can apply to any part of the records that refer to a work plan, or a particular methodology used by the company. It is the department's position that in this case all of the responsive documents are essentially invoices which contain no trade secrets or confidential business information. They do not agree with the Third Party's assertion that the invoices were supplied in confidence. The invoices were sent to the public body so that they could be paid. However, because the Third Party Companies invoices were not itemized to show the amounts paid to sub-contractors, the department determined that they would not be disclosing the original invoices from the sub-contractors.

THE APPLICANT'S POSITION

The Applicant firstly indicated that he had no objection to the removal of the names of the individuals named in the records. Beyond that, however, he argues that the Third Party Companies had no expectation of privacy when they submitted their invoices for payment. They were aware that the cleanup work was being conducted under one of the environmental acts and that there would be a charge-back of the services provided to the property owner. In these circumstances, there should have been an expectation that the invoicing documents would be more widely disseminated than simply to the public body. Furthermore, he argues that there are no trade secrets involved in the records in question. The "work" done was to dig up and move dirt. Finally, the Applicant argues that because this was a sole source contract, there was no competitive process. In these circumstances, there is nothing in the records which might affect the Third Party Companies' competitive position in the future. The only thing

that might be revealed is the price that the Third Party Companies were able to demand on this sole source contract, without any competition as to price.

DISCUSSION

As noted above, Section 24 of the *Access to Information and Protection of Privacy Act* is intended to protect the sensitive commercial, financial and technical information belonging to third parties who work with the Government of Nunavut under contract or otherwise where that disclosure would be reasonably expected to harm the business interests of the third parties involved.

In Alberta, the Information and Privacy Commissioner has established a test (Order 96-003) that must be met to establish that there is a reasonable expectation of harm by the disclosure of information. The party who is asserting the claim (in this case the Third Party Companies) must provide objective evidence of three things:

a) there must be a clear cause and effect relationship between the disclosure and the harm;
b) the disclosure must cause harm and not simply interference or inconvenience;
c) the likelihood of harm must be genuine and conceivable.

The test is an objective one and it must be applied in the real world.

The Third Party Companies in this case, have not, in my opinion, met any of the three tests. There is no evidence, other than an assertion from the companies, that the disclosure of the records in question will result in harm to the companies. While they have raised the possibility that if the information were to get into the hands of a competitor there might be a competitive harm caused, there is nothing really to suggest that this is anything more than conjecture or a possibility. While the Third Parties tell me that they work in a “very competitive environment”, they also say that there are really only two companies in Nunavut which undertake this kind of work so that the competition is extremely limited. Nor is there anything before me to suggest that the information included in the invoices relating to the fees charged for certain work is something that isn’t already in the public domain. Surely, in order to do business, these companies must have a “price list” that, if not fully in the public domain, would be provided to any prospective customer. It would be reasonable for a customer looking to spend the kind of

dollars involved in an environmental cleanup to obtain quotes from both local providers. Further, it would be completely within the realm of possibility that that customer would then go to one or both of the competing companies to try to negotiate a lower fee, based on what he has been quoted by both companies. All this is to say that it is very likely that "the competition" is well aware of the general fee structure of the Third Party Companies, with or without the disclosure of these invoices to the Applicant. I am simply not convinced that there is any justification for a refusal to disclose most of what is contained in the invoices. As noted by both the public body and the Applicant, this contract was granted by the public body to the Third Party Companies on the understanding that the costs would be billed back to the property owner. As such, they could not have had any expectation that the information in the invoices would remain confidential only as between the public body and the Third Party Companies.

With respect to the "trade secrets" which might be contained in the records, the Third Party Companies have not pointed me to any specifics within the records which might fall within this category. They have said only that they contain "commercial and technical information regarding the comprehensive site assessment, remediation action/work plan, temporary mitigation measures for containment of the spill as well as how the environmental cleanup will be conducted". There is nothing to suggest that this information is unique to this company, or that there is anything proprietary about the information. They do not suggest that every environmental cleanup company approaches such cleanups differently, or with different technology or that the technology or methodology is in any way unique to the Third Party Companies.

The Third Parties in this case have simply not provided sufficient information from which I can conclude that Section 24(1) would justify the masking of any particular information in the records in question by reason of the fact that they might disclose trade secrets or technical information.

SUMMARY AND RECOMMENDATIONS

Applying this analysis to the specific records, I make the following recommendations:

Pages 479-481, 486-488, 531-532 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information

Page 738 - this page should be disclosed to the Applicant, subject only to the removal of the name of the employee which appears approximately half way down the page.

Pages 739, 740, 741, 742, 743, 744, 745, 746, 747,748, 749, and 750 - these pages should be disclosed to the Applicant, subject to the removal of any third party personal information and the names and contact information of the subcontractors whose invoices are represented.

By way of explanation, the responsive records include a large number of invoices from third party subcontractors who have not had the opportunity to provide submissions with respect to this matter. It would create significant further delay to consult with these third party contractors. It seems to me that by masking the identity of the subcontractors we can provide the Applicant with the most relevant information possible without delaying these recommendations to allow the subcontractors to be consulted. This said, two of the contractors are airlines, whose fee structure is a matter of public knowledge and I therefore see no reason not to disclose those invoices masking only the personal information of the traveler.

In the event that the Applicant seeks to have the names and contact information of the remaining third party subcontractors, these records should be withheld in full until such time as I can contact these subcontractors and obtain their specific input on the matter.

Pages 751, 752, 753, 754, and 755 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 756 and 757 - For these two pages, I would recommend the disclosure of that information relevant to the Request for Information. Much of this record is not responsive and can/should be redacted so as to limit the amount of commercial information being disclosed. The Applicant is asking only for information pertinent to the particular job in question and this is the only information that need be disclosed.

Pages 758 - 763 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Page 765 - this page should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Page 768 - this page should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 769 - 773 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 774 and 775 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Page 776 - this page should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 777 - 781 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 782 and 783 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above.

Pages 786, 787 and 788 - these pages should be disclosed to the Applicant, subject only to the removal of any third party personal information and the names of third party contractors, with the same conditions as set out above

Page 797 - this page should be disclosed to the Applicant, subject only to the removal of any third party personal information

Page 799 - this page should be disclosed without any edits

Pages 800 - 803 are the same as 754 -757 and should be treated accordingly

Pages 804 - 834 are the same as 758 - 788 and should be treated accordingly

Pages 835 - 846 are the same as 739 - 750 and should be treated accordingly.

Pages 847 and 848 make no mention of either of the Third Party Companies and are not, therefore, relevant to this review.

For ease of reference, I have provided the public body with copies of the records in question with the suggested redactions, along with these recommendations.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner.