NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER
Review Recommendation 14-084
September 30, 2014

Review File: 14-130-5

BACKGROUND

In December, 2013, the Applicant in this case submitted a request pursuant to the *Access to Information and Protection of Privacy Act* to the Department of Community and Government Services (CGS) for "all records of evaluations and point scores conducted on all bids received in response to RFP ##2011-22, Medical Travel on Scheduled Airlines". CGS responded that none of the responsive records would be disclosed, citing the following exemptions provided for in the *Act*:

- s. 14(1)(b)(i) - consultations or deliberations involving officers or employees of a public body
- s. 14(1)(c) - positions, plans, etc. developed for the purpose of negotiations by the Government of Nunavut
- s. 14(1)(f) - contents of agendas, minutes etc. of a public body;
- s. 17(1)(c)(iii) - information that could reasonably be expected to harm the economic interest of the Government of Nunavut by interfering with negotiations of the Government
- s. 24(1)(c)(i) - information that could reasonably be expected to result in undue financial loss or gain to any person

The Applicant argues that the section 14 exemptions noted were not properly applied and that these provisions were

> not intended as catch all provisions that allow an institution to refuse whatever it does not wish to disclose. Rather, they are intended to provide public officials with some degree of latitude to engage in frank and open debate and discussions about public policy....Evaluations of proposals do

> not fit into the types of information intended to be protected by these sections.

He goes on to argue that section 17 does not apply because evaluations of proposals do not form the basis of negotiations. Furthermore, this RFP closed almost four years ago, which means that even if there were some negotiations involved, those negotiations are long since completed and the disclosure of any associated information could no longer affect the outcome of the negotiations.

With respect to the section 24 exemption, the Applicant argues that this section applies only to information provided to the Government of Nunavut and not to information created by the public body. The evaluations requested do not contain information provided by third parties. If any proprietary information is included, those sections of the evaluations alone would be severable.

This Applicant suggests that evaluations of proposals are routinely disclosed under access to information legislation in other jurisdictions and, indeed, that the Government of Nunavut has disclosed this exact type of information to him through a previous request.

The Public Body's Position

With respect to the request as a whole, the Department of Community and Government Services argued that:

> Proposals and tenders, by their very nature, contain commercially sensitive information such a pricing, structures and methodologies, which bidders expect to remain confidential.

They argue that the work of evaluation teams reviewing proposals received is confidential and falls within the permitted exemptions in section 14. No further explanation was provided.

The public body did provide a copy of all of the responsive records, along with a chart indicating which exemption section has been applied to each record. No further explanation, however, was provided and I am, therefore, left to evaluate each record based only on the content.

The Applicant's Response

In response to the public body's submissions, the Applicant provided further input. Having received the chart showing the records identified as being responsive, the Applicant firstly indicated that he did not require most of the records listed in that chart. He asked me to focus only on a very few of the records identified. This reduced the scope of the review considerably. Furthermore, none of the records identified by the Applicant for review were records which the public body identified as requiring third party consultation. In fact, all of the records identified by the Applicant are records to which the public body has claimed an exemption pursuant to section 14 of the Act.

The Applicant points out that section 14 is a discretionary exemption and that the Department has the onus of establishing that there is no right to access to the records in question. He notes:

> In deciding whether to exercise a discretionary exemption, the head of a government institution is required to consider and weigh the public interest for and against disclosure.

He cites the case of *Babcock v. Canada (Attorney General)*, [2002] 3 S.C.R. 3 in support of this statement. He goes on to note that the public body provided no evidence that they had actually exercised their discretion. Rather, it appears that they simply classified the records as subject to section 14 and refused to disclose them, without any real exercise of discretion. By failing to offer an actual explanation for the refusal, the Applicant argues that the department has fallen far short of meeting the burden to establish that the discretion was properly exercised.

The Applicant further makes the following points:

- though the department suggests that evaluation process is “confidential” and that this is sufficient for section 14 to apply, confidentiality is not a part of the test for refusal to disclose pursuant to section 14;
- while section 14 is intended to provide a “measure of confidentiality in the policy-making process”, the Federal Court has determined that “democratic principles require that the public, and this often means the representatives of sectional interests, are enabled to participate as widely as possible in influencing policy development” [*Canadian Council of Christian Charities v. Canada (Minister of Finance)*, [1999] 4 F.C. 245, para. 32];
- to the extent that the evaluation records involve decisions or deliberations, they in no way related to the development of public policy because once an RFP has been issued, there are no public policy matters left to be determined;
- government institutions are accountable for how they spend public funds and are required to demonstrate that policies established through the policy-making process have been implemented in a fair and transparent manner;
- section 14(1)(c) cannot apply to any of these records because by the time an RFP has been issued and bids received,

> “positions, plans, criteria etc. have long since been determined, and the RFP is a result of that process. In fact, the government is prohibited by law from introducing new positions, plans, etc. during the RFP evaluation process”.

The Public Body’s Further Submissions

In providing its response to the Applicant’s submissions, the public body argues that their evaluation teams meet in private in order to reach consensus scores for each proposal. These meetings require frank deliberations, and the participants need to be able to debate and evaluate privately. Their decision is not private: it results in the award of a contract to the high-scoring proponent. They refer to my Review

Recommendation 04-15 in which I noted that in order for section 14 to apply, a consultation or deliberation must be:

a) sought or expected, or be part of the responsibility of a person by virtue of that person's position;
b) directed toward taking an action; and
c) made to someone who can take or implement the action.

They argue that all three parts of the test are met because RFP evaluation committees are expected to deliberate and consult, because they have been tasked by their respective departments to do so. The sole purpose of an evaluation committee is directed toward taking an action and then to recommend to the deputy head of the department that the contract be awarded. They reiterate their concerns that the information that is the subject of the deliberations and consultations is often commercially sensitive information and the meeting notes and point score sheets etc. could reference information that would otherwise be exempt from disclosure through the application of section 24(1).

The Applicant's final submissions

In response, the Applicant argues that the public body's definition of "consultations and deliberations" is overly simplistic. The Applicant argues that section 14 was not intended to apply to all work conducted by government officials. They point to *Canada (Information Commissioner) v Canada (Minister of Environment)* 2006 FC 1235 in which the Federal Court adopted the following, plain language definitions:

> The term "consult" is defined as "to ask advice of, seek counsel from; to have recourse to for instruction or professional advice.." "Deliberation" is defined as "...careful consideration with a view to decision or the consideration and discussion of the reasons for and against a measure by a number of councillors"

The court went on to state that "it follows from the definitions above that factual information must generally be excluded from the scope of paragraph 21(1)(b)" which is the exemption in the federal *Access to Information Act* which is equivalent to our section 14. It is argued that the information which the Applicant is seeking is information about how government officials have implemented the pre-determined criteria for the purpose of evaluating proposals and that this is "factual" information.

This position, they state, is supported by the Ontario case of *Ontario (Ministry of Transportation) v. Cropley* 2004 CanLII 11768. It is argued that this case is similar to the Ontario case in that the applicant was seeking summaries and scores of proposals. The Ontario Information and Privacy Commissioner's office, in its review of the request, stated as follows:

> I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially **providing the factual basis** upon which any advice or recommendations would be developed. Broadly viewed, the Ministry's approach could be taken to mean that every time a government employee expresses an opinion on a policy-related matter, or sets pen to paper, the resultant work is intended to form part of that employee's recommendations or advice to senior staff on any issue [emphasis added].

The Commissioner's order was appealed to the Ontario Court of Justice. The court reviewing the Commissioner's order focussed on the fact that the scores sought by the requester were "primarily of a factual or background nature". The court agreed with the conclusions of the Information and Privacy Commissioner.

The Relevant Provisions of the *Act*

As always, it is important to consider section 1 of the *Act* which outlines the purposes of the legislation. As it pertains to this review, that section reads as follows:

> 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;...
> (c) specifying limited exceptions to the rights of access;...

For those records which the Applicant has identified as being important to him, the exemptions claimed by the public body are subsections 14(1)(b) and 14(1)(c):

> 14. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to reveal ...
> (b) consultations or deliberations involving
> (i) officers or employees of a public body, ...
>
> (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;...

Neither of the parties has referred to section 14(2) but I believe subsection (b) of 14(2) may also be relevant:

> (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;...

As noted by the Applicant, section 33 of the Act puts the onus of establishing that an exemption applies on the public body:

> 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.

DISCUSSION

All reviews must begin with a consideration of the purposes of the Act. It is widely accepted that access to information legislation is, in all cases, to be interpreted in favour of disclosure and that exceptions are to be narrowly construed and applied. All records must be disclosed unless they fall narrowly and strictly within one of the exemption provisions. Where the claimed exemption is discretionary, public bodies should always start from the position that the record will be disclosed and decide to refuse disclosure only where they have carefully reviewed the options and made a considered, careful decision not to disclose for good reason. The onus of showing that any exemption applies lies on the public body.

For the purposes of this review, I have the advantage of having the relevant records before me for analysis. I will refer to each record, or set of records, by the numbering system assigned by the public body.

<u>Pages 7 through 7-42</u>

These pages are described as containing “point scores” in draft form. The public body has provided no specific explanation as to the nature of the record or how the information in the record was compiled and/or applied or what the relevance is, if any, of this record being a draft. I am, therefore, left to interpret them on the face of their content. Each page in this record shows the same chart with the following columns:

Rating Criteria
Points Awarded
Assigned Weight
Total Points

The information under the columns “Rating Criteria” and “Assigned Weight” are the same on each page. The only information that varies is under the columns entitled “Points Awarded” and the “Total Points”. The “total points” is reached simply by multiplying the “points awarded” by the “assigned weight”. It appears, therefore, that these pages represent a simple non-discretionary application of a pre-established set of evaluation criteria and a resulting point value for each portion of the contract. It does not constitute advice or a deliberation. It might, however, be described as the product of the deliberative process between the members of the evaluation committee. This appears to be a very similar kind of document as that discussed in the case of *Ontario (Ministry of Transportation) v. Cropley*, 2004 CanLII 11768 (ON SCDC) referred to by the Applicant. This case was an appeal from an Order of the Ontario Information and Privacy Commissioner, who had ordered the disclosure of the requested records. The Applicant was seeking copies of evaluation sheets for all proponents for a particular consulting contract. Here, the Ministry acquired consulting services by means of a competitive bidding system. Each component of the project was evaluated by a project manager and Ministry staff. These evaluators recorded their evaluation of each component of each proposal as a score. The scores were then added to arrive at an overall evaluation score for each proponent. This resulted in a comparative score by each evaluator whose scores were then averaged for each proponent. The applicant was seeking disclosure of the evaluation scores given in respect of the projects. The public body refused to disclose the records on the basis of section 13 of the Ontario Act which reads as follows:

> 13. A head may refuse to disclose a record where the disclosure would reveal advice or recommendations of a public servant or any other person employed in the service of an institution or a consultant retained by an institution.

The facts, therefore, are very similar to this case.

The Ontario Information and Privacy Commissioner's office, in its decision, made the following observations:

> It appears that the awarding of a contract ... is based on a non-discretionary application of an established formula or pre-set criteria. If, as the Ministry suggests, after totalling up the scores, there is no further assessment of the information contained therein, no balancing or options or opinion to put forward, I am somewhat at a loss to understand the nature of the advice being given. In other words, rather than the selection panel putting the consultant forward to the Chairperson (or any other senior management for that matter) with a recommendation that this party be awarded the contract, it appears that the process is designed such that, once the mechanics of the assessment are completed, based on the application of established criteria, there is no discretionary decision to be made; there is no advice to be accepted or rejected during the deliberative process.
>
> Even if there is an element of discretionary decision-making, that is, an ability of the recipient to accept or reject the awarding of the contract to a particular consultant, in my view, the development of the advice or recommendations would only occur once the completed scores for the technical component are given to the Chairperson (or Manager) and the remaining calculations are made based on the overall compilation of all of the variables.
>
> I do not accept the Ministry's argument that these scores represent the judgment of the scorer for the purpose of making a recommendation to senior staff. In applying the pre-set criteria to the information contained in the proposals, the evaluators are essentially providing the factual basis upon which any advice or recommendations would be developed.

The Ontario Court of Justice accepted the Commissioner's findings in this regard. In the Judgment, the court noted:

> As argued by counsel for the Commissioner, to the extent that the factual information is to be translated, it involves an element of judgment; however, it is not advice, because it represents an objective assessment of factual information.

I am persuaded by this analysis. These pages represent nothing more than the application of a mathematical formula to a pre-determined list of evaluation criteria. I am not convinced that section 14(1)(b) applies such as to provide the public body with an exemption. The pages contain no proprietary information of the third party proponents. While there is some information specific to a number of third parties, it is information that is publicly available information. I recommend that these pages be disclosed.

Page 12

This record is a one page email. It is written by the "Executive Director, Corporate Services" but it is unclear to me whether the author is an employee of the department or of an outside agency and no explanation has been provided. A search of the Government of Nunavut website does not reveal any employees by the name of the author as at the date of the writing of this review. The job title suggests to me that the author is not a GN employee. Portions of this email do involve what appears to be advice and/or recommendations with respect to policy issues, but it is impossible, without any other context or background, to determine if the content meets the three part test for the application of a section 14 exemption, in this case, section 14(1)(c) which gives public bodies a discretionary exemption from disclosure where the information could reasonably be expected to reveal "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". I suspect that the content of this email would have

qualified and exemption pursuant to section 14(1)(c) at the time it was written. It is, however, now four years later and the public body has not provided me with enough information to determine the matter. Furthermore, there is no evidence provided to me that the information in this email was developed for the purpose of contractual or other negotiations and, if so, whether those contractual negotiations have since been completed. As the email is some four years old at this point, I suspect that any such negotiations are long since completed. In all of the circumstances, therefore, I recommend the disclosure of this page. The department has not met the onus of establishing that the exemption applies and nor is there any evidence provided that the public body actively exercised its discretion in refusing to disclose it.

Pages 22-1 through 22-27

These pages are the same forms as in pages 7 through 7-42, though in “final” form. The same analysis applies and I recommend that these pages be disclosed.

Pages 32-1 through 32-37

These pages appear to be the same as those in pages 22-1 through 22-27, but with a number of hand written notations, mostly numbers, but in some cases, notes or comments. The same considerations apply. I recommend that these pages be disclosed.

Pages 38-1 through42-2

This series of documents appear to be, once again, a series of calculations done, in this case for the purpose of evaluating the various proposals in accordance with the NNI policies which give certain benefits to companies who employ beneficiaries and who use supplies/materials supplied by NNI named companies. As I understand it, companies who meet some or all of the NNI policy requirements receive specified downward adjustment to their total bid submission for the purposes of evaluating the

bid. Some of the information in these sheets is proprietary information belonging to the proponents, including the names of their subcontractors. Furthermore, there is personal information in the names of individuals employed by the proponents, and their income information. These details should be removed pursuant to the mandatory exemptions in sections 23 and 24 of the *Act*. I therefore recommend:

a) Page 38-1 – that this page be disclosed in full with the exception of the numbers immediately after the words “Bid Adjustments” and before the “=”

b) Page 39-1 and Page 40-1– that these pages be disclosed in full with the exception of the numbers immediately after the words “Inuit Employment” and before the “=” and the numbers between the words “Bid Adjustments” and before the “=”

c) Page 41-1 and 42-1 – that these pages be disclosed in full with the exception of the numbers immediately after the words “Inuit Employment” and before the “=” , the numbers after the words “Total spend”, and the numbers between the words “Inuit Firms” and the words “Bid Adjustments”

d) Page 38-2, Page 39-2, Page 40-2, Page 41-2, Page 42-2 – that these pages be disclosed but for
   - the number after the words “Total Unadjusted Price of Contract”
   - the names under the column entitled “Supplier Name and Residence of Worker”
   - the numbers under the column “Value”
   - the numbers under the column “Value of Adjustment...”
   - the names under the column “Supplier Name”
   - the numbers under the column “Value”
   - the numbers under the column “Value of Adjustment...”
   - all of the numbers hand written at the bottom of the page

CONCLUSIONS AND RECOMMENDATIONS

As noted above, I am not convinced that the records in question qualify for an exemption from disclosure pursuant to section 14 of the Act. While the records in

question may reflect the end result of a consultation or deliberation, they do not contain any of the information that went into that deliberation. They contain numbers - the end result of the application of a set of predetermined criteria to proposals. As noted above, I recommend that these records be disclosed with very few exemptions. I note, as a postscript that section 14(2) which provides that the exemption provided for in section 14(1) does not apply to information that is a statement of the reasons for a decision that is made in the exercise of a discretionary power or an adjudicative function. It seems to me that one could also argue that the records which the public body is seeking to hide from disclosure amount to little more than the “reason” that the contracts were awarded to the successful proponent. This said, because of the above analysis, I do not believe that this needs to be explored further.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner