



INQUIRY REPORT
File# 10-033AR

**Pursuant to section 52 of the
*Access to Information and Protection of Privacy Act***

**Tim Koepke
Information and Privacy Commissioner**

Public Body: **Public Service Commission**

Date: **September 12, 2012**

Summary: The Applicant requested a review of the decision of the Public Service Commission (PSC) to refuse access to information severed in two proposals submitted by Third Parties (COMPANY ABC, and COMPANY XYZ) in response to “Request for Proposals, Yukon Government Health and Safety Management Consulting and Training, April 1, 2010 to April 1, 2013”. The Applicant was unsuccessful in obtaining the contract to provide the described services. PSC refused access to the information relying on section 24(1) of the *Information and Protection of Privacy Act*.

Findings: The Information and Privacy Commissioner (IPC) confirmed that pursuant to section 54(1) the burden of proof rested with the Public Body.

With respect to the COMPANY ABC proposal the IPC concluded that the evidence was not sufficient to establish that the severed information was “supplied explicitly or implicitly in confidence” as required by section 24(1)(b)

and the PSC was not required to refuse the Applicant access to the severed information.

The IPC also determined that some information was the personal information of a third party and pursuant to section 25 PSC is required to refuse to disclose this information.

With respect to COMPANY XYZ's proposal, the IPC determined that the three part test in section 24(1) of the ATIPP Act had been met and PSC was required to refuse to give the Applicant access to the severed information.

Recommendations:

With respect to the COMPANY ABC proposal the IPC recommended that the PSC give the Applicant access to the information in the COMPANY ABC proposal which had been severed pursuant to section 24(1) of the ATIPP Act.

He also confirmed that pursuant to section 25(1) the PSC was required to refuse to give the Applicant access to the information identified as the personal information of a Third Party.

With respect to COMPANY XYZ's proposal, the IPC confirmed that PSC is required to refuse access to the Applicant of the information severed pursuant to section 24(1).

Statutes Considered:

Access to Information and Protection of Privacy Act, R.S.Y. 2002,c.1, sections, 24(1)(a)(ii)(b) and (c)(i)(ii)(iii), and 25(2)(d)

Decisions Considered:

Ontario IPC Order PO-2944
Yukon IPC Order #98-090A
Yukon IPC Order #03-049A
Alberta IPC Order F2003-004
Alberta IPC Order 99-018
Alberta IPC Order 96-013

I INTRODUCTION

- [1] Pursuant to section 48(1)(b) of the *Access to Information and Protection of Privacy* (ATIPP) Act, the Applicant requested a review by the Information and Privacy Commissioner of the Public Service Commission's (the Public Body)(PSC) decision to refuse to disclose some information contained in each of three proposals submitted to the Yukon Government. The proposals pertain to the Yukon Government Request for Proposals (RFP) to provide Health and Safety Management Consultation and Training April 01, 2010 - April 01, 2013.
- [2] The three proposals are identified as follows:
1. Health and Safety Management Consultation and Training submitted by COMPANY XYZ;
 2. Health and Safety Management Consultation and Training submitted by COMPANY ABC; and
 3. Health and Safety Management Consultation and Training submitted by COMPANY OPQ.
- [3] The Public Body severed information from each of the proposals on the basis that:
- section 25(2)(d) applied to some of the information and disclosure would be an unreasonable invasion of third party personal privacy; and
 - section 24(1)(a)(ii)(b) and (c)(i)(ii)(iii), applied to some of the information and disclosure would be harmful to the business interests of the third parties.

Mediation

- [4] Mediation was authorized and COMPANY OPQ gave its consent to the release of the information in its proposal that had been severed on the basis of section 24.
- [5] As not all matters under review were settled the remaining matters proceeded to Inquiry.

- [6] Submissions were made to the IPC by the PSC, each of the remaining two Third Parties, COMPANY ABC, COMPANY XYZ and the Applicant. Submissions were exchanged and the parties given an opportunity to respond by way of a reply submission. The PSC is the only party to make a reply submission.
- [7] The Applicant in his initial submissions in relation to each proposal withdrew his request to review the PSC's decision to sever information to which section 25(2)(d) had been applied on the basis that disclosure was an unreasonable invasion of third party's personal privacy.
- [8] In the result, the scope of the Inquiry was narrowed to the information severed in the COMPANY ABC and COMPANY XYZ proposals on the basis of section 24(1)(a)ii)(b) and (c)(i)(ii)iii).¹

Production of Records

- [9] Pursuant to section 53 of the ATIPP Act, the PSC provided the IPC with a copy of each proposal with the severed information marked. At no time was the record or any of its contents disclosed to the Applicant by the IPC or any of the IPC's delegated staff.

Records in Dispute

- [10] The records consist of the proposals submitted by COMPANY ABC and COMPANY XYZ in response to Government of Yukon RFP. The information at issue is the information severed on the basis of section 24 in each of the proposals submitted by COMPANY ABC and COMPANY XYZ.
- [11] **COMPANY ABC:** In this proposal severing occurred on the following pages: 3, 9, 10, 11, 12, 13, 17-29 and 51-52.
- [12] **COMPANY XYZ:** In this proposal severing occurred on the following pages: 2, 3, 6, 7, 8, 11, 14, 15, 16, 17-26; Appendix B1 and B2.

¹ In reviewing the Document Schedule for both proposals supplied by the PSC, I note that the section 24 references in the right hand column of the table all contain a typographical error. Each of the section 24 references should properly be shown as "s. 24(1)(a)...etc. The subsection (1) has been omitted from each entry.

Burden of Proof

[13] The question of which party has the burden of proof in any Inquiry is addressed by section 54 of the ATIPP Act.

54(1) In a review resulting from a request under section 48, it is up to the public body to prove

(a) that the applicant has no right of access to the record or the part of it in question, or...

(2) Despite subsection (1), in 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) if the information is personal information, it is up to the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and

(b) if the information is not personal information, it is up to the third party to prove that the applicant has no right of access to the record or part.

[14] A close reading of these sections reveals that section 54(1) describes the burden of proof in this case. As the Public Body is refusing to give access to part of the record, section 54(1) places the burden on the Public Body. The burden of proof would only shift to the third party under 54(2)(b) if the Public Body had decided to grant access to the Applicant and the third party had disagreed with that position. Therefore in this Inquiry, the burden of proof lies with the PSC to prove that the Applicant has no right of access to the information in dispute. (emphasis added)

[15] Former Yukon Information and Privacy Commissioner Hank Moorlag commented on the burden of proof requirements in similar circumstances in Commissioner's Report After Review #03-049AR:

"The Public Body has misconstrued the application of section 54(2) to the circumstances of this case. This is quite understandable because section 54 is not as clear as it might be in setting out why, in some situations, the burden of proof shifts from the public body to the applicant....."

Subsection 54(2) only applies when a public body had made a decision to give an applicant access.

Since the Public Body refused the Applicant access in the present reviews, section 54(2) does not apply, and the Public Body has the burden of proof under 54(1).”

- [16] The Notice of Written Inquiry dated December 15, 2010 incorrectly identified the applicable burden of proof as section 54(2) which places the burden of proof on the third parties. As discussed above under section 54(1) the burden rests with the PSC because of its refusal to disclose part of the record to the Applicant.
- [17] The PSC addressed the burden in its submission, however it suggested the burden rests with the Third Parties. This may explain why the PSC’s submissions in relation to both proposals states that it is “ neutral” in this matter and offers little more in the way of explanation for its decision that section 24 applies to the severed information.
- [18] The Applicant correctly identified the applicable section as 54(1) but submitted the burden of proof rests on both the Third Party and the Public Body.
- [19] Neither of the Third Parties addressed the burden of proof in their submissions but both did make a submission objecting to disclosure and providing some evidence supporting the public body’s refusal to disclose information.
- [20] I am satisfied that the Third Parties are not prejudiced in any way as a result of the error in the Notice of Inquiry. A failure of the Public Body to discharge the burden of proof would not by itself permit me to find that disclosure would not be harmful to a Third Party’s business interests. The exception to disclosure created by section 24 is a mandatory one, meaning the Act prohibits the disclosure of information that would be harmful to the business interests of a third party. In the absence of evidence from the PSC I will consider the applicability of the exception based on my independent review of the content of the entire record and the submissions of the Third Parties.

Preliminary Issue

- [21] In its initial submission COMPANY ABC objects to “the contents” of the proposal being disclosed.
- [22] In its initial submission, COMPANY XYZ objects to the disclosure of the proposal in its entirety.

- [23] I am unable, in this Inquiry, to consider either COMPANY ABC's or COMPANY XYZ's objection to the release of the entire "contents" or "any" information in each of their proposals. Some of the information in the proposals has already been released to the Applicant earlier in the process for dealing with access requests for third party business information as set out in the ATIPP Act.
- [24] The ATIPP Act, in sections 26 and 27, set out a process for a public body to follow when receiving a request for access to third party business information. Before giving access to information that a public body believes may contain information to which section 24 applies, the records manager must give the third party notice that a request has been made and allow the third party to make any representations explaining why the information should not be disclosed.
- [25] After considering any representations made by the third party, the public body must inform the third party of its decision. Where the decision is to give access to some or all of the information, it must also notify the third party of its right to request a review of that decision by the IPC. If a review is requested by the third party the IPC can review the public body's decision to disclose the information and make recommendations to the public body.
- [26] In this case the PSC decided to give the Applicant access to some information in the COMPANY ABC and COMPANY XYZ proposals. PSC informed COMPANY ABC and COMPANY XYZ of its decision to disclose some information and received representations from COMPANY ABC and COMPANY XYZ. After considering the representations, the PSC confirmed its decision to give the Applicant access to some of the information in the proposals. PSC advised COMPANY ABC and COMPANY XYZ of its decision and notified the companies of their right to request a review of that decision by the IPC.
- [27] Neither COMPANY ABC nor COMPANY XYZ requested a review by the IPC of the decision to release some of the information in its proposal. Having confirmed that neither party requested a review within the time frame allowed by the ATIPP Act, PSC released the proposals with some information severed to the Applicant. The opportunity to have the IPC review the decision to disclose the entire "contents" of the COMPANY ABC proposal or "any" information in the COMPANY XYZ proposal has passed.
- [28] In this Inquiry I can only review and make recommendations in relation to the information that the PSC severed from the proposals at the time the proposal was released to the Applicant. This is the severed information in the records identified above in paragraphs [11] and [12].

II ISSUE

[29] The issue is whether the Public Body is required by section 24(1) of the ATIPP Act to refuse access to the severed information in each of the two proposals.

III DISCUSSION OF ISSUE

Operation of Section 24 Harm to Third Party Business Interests

[30] While one of the purposes of ATIPP Act is to shed light on the operations of government, section 24(1) serves to limit disclosure of confidential business information of third parties that could be exploited by a competitor in the market place.

[31] Section 24(1) is a mandatory (“must”) section of the Act. If section 24 applies, a public body does not have a choice and must refuse to disclose the information.

[32] The relevant part of section 24 is as follows:

24(1) A public body must refuse to disclose to an applicant information

- (a) that would reveal
 - (i) trade secrets of a third party
 - (ii) commercial, financial, labour relations, scientific or technical information of a third party;
- (b) that is supplied, implicitly or explicitly, in confidence; and
- (c) the disclosure of which could reasonably be expected to
 - (i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,
 - (ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization,

[33] For the section 24(1) exception to apply the severed information must meet each part of the following three part test:

- disclosure would reveal information that is commercial, financial, labour relations, scientific or technical information of a third party;
- the information must have been supplied to the public body in confidence either implicitly or explicitly; and
- there exists a reasonable expectation that disclosure of the information would result in one of the harms specified in paragraph c(i)(ii)(iii).

Application of Section 24(1) to the Information Severed in the Records COMPANY ABC Consulting Proposal

[34] I will deal first with the COMPANY ABC proposal and apply the test to the information severed in the proposal.

1. Would disclosure of the information reveal commercial financial, labour relations, scientific or technical information of a third party?

Submissions

[35] In its Document Schedule, the PSC indicated section 24(1)(a)(ii) applies to the information in issue.

[36] PSC says that disclosure of the information would reveal commercial, financial, labour relations, scientific or technical information of a third party. However, in both its Initial Submission and Reply Submission, PSC does not mention or provide any further description of the information it severed from the record, or identify how that information is commercial, financial, labour relations, scientific or technical information.

[37] The Third Party suggests that the information at issue is commercial information saying its “Proposal writing styles, content, cost, etc. are all assets of the business and often allow us to be more effective in a competitive market”.

[38] The Applicant in his submission states that "... it is unlikely that any of the severed information fits the description in (a)(i)" – trade secrets of a third party.

[39] The Applicant makes no specific argument other than that any information severed which meets the description in (a)(ii) must still satisfy the remaining two parts of the section 24 test.

Analysis

[40] Access legislation in Alberta contains an exception similar to the Yukon's ATIPP Act section 24.² The definition of commercial information has been considered in a number of Alberta decisions and has been defined as information that relates to the buying and selling or exchange of merchandise or services³. It has been considered to include a third party's associations, history, references, bonding and insurance policies, and the names and title of key personnel and contract managers when it relates to how the third party proposes to organize its work.⁴

[41] COMPANY ABC submitted a proposal to the Yukon Government to try and win a contract to provide Health and Safety Management Consultation and Training over a three year period. Based on my review of the information in the proposal and the arguments of the parties, I am satisfied that, with the exception of the information referred to in paragraph 41(c) and (e) and (f) below, the severed information is commercial information has commercial value in that the information constitutes COMPANY ABC's particular strategic approach and methodology that would be applied to the PSC's requirements. The identification of past and present clients and their projects, the detailed approach to the project, work plan etc. is part of COMPANY ABC's confidence that it has something unique and special to offer to PSC for the project and would be of value to its competitors.

² Freedom of Information and Protection of Privacy Act R.S.A. 2000,c.F-25 s.16

³ Alberta Order 96-013 at page 5

⁴ Alberta Order F2003-004 at page 9

Conclusion

[42] In summary I have concluded as follows:

- (a) Pages 3, 11, 12, 17, 18 to 29 and 51 to 52: the information severed on these pages is of commercial information. It describes the Third Party's strategies and methodologies for undertaking the work and uses information of how its strategies and methodologies were applied to projects of other clients. It meets the criteria in section 24(1)(a)(ii) and remains to be considered under 24(b).
- (b) Page 9: the information severed on page 9 with the exception of the six bulleted items in the second information box on the page is commercial information. It provides information on the qualifications of the personnel and composition of the team the Third Party proposes to assign to the work. It meets the criteria in section 24(1)(a)(ii) and remains to be considered under 24(1)(b).
- (c) Page 9: With respect to the six bulleted items in the second information box on Page 9, I fail to see how the listing of common general job titles constitutes any of the kind of information included in section 24(1)(a)(i)(ii). As the six bulleted items are not commercial, financial ...etc., the first part of the section 24 test has not been met in relation to this information, section 24 does not apply to this information and the Public Body is not required to refuse to disclose this information.
- (d) Page 10: All of the information severed on page 10 with the exception of that referred to in the paragraph (e) below is commercial information. It meets the criteria in section 24(1)(a)(ii) and remains to be considered under 24(1)(b).
- (e) Page 10: The information severed in the last two boxes is general in nature: the client name has already been released in the first paragraph of page 3 and also appears on the company's website; the name of the organization is used in such a general descriptive statement and simply acknowledges that (unnamed) team members have worked with that organization and other government organizations. In my view

none of the information withheld in the last two boxes on the page is the kind of information included in section 24(1)(a)(i)(ii). The first part of the section 24 test has not been met in relation to this information. The Public Body is not required to refuse to disclose this information.

- (f) Page 13: the information has been severed by PSC pursuant to section 24. However in my view the information properly falls under section 25 (unreasonable invasion of third party personal information). This information is similar to the severed information on pages 14, 15 and 16 for other key personnel positions that was withheld relying on section 25. The information in question provides the details of the named person's education and employment and as such falls under section 25(d) as personal information relating to employment and educational history. None of the relevant circumstances in section 25(4) apply in the circumstances of this case to require disclosure. As section 25 is a mandatory exception PSC is required to refuse to disclose this information.

2. Was the information supplied to the public body in confidence, either implicitly or explicitly?

- [43] The second question is whether the information identified as commercial information above was supplied "implicitly or explicitly in confidence." The requirement that the information in question "... must be supplied, implicitly or explicitly in confidence ..." to the public body reflects the purpose of section 24 of protecting the informational assets of a third party.
- [44] I am satisfied that the information was "supplied" to the PSC by COMPANY ABC directly in response to the Yukon Government RFP.
- [45] I adopt the test required to satisfy the "implicitly or explicitly in confidence" component of this part of section 24 articulated by the Alberta Information and Privacy Commissioner in Alberta IPC Order 99-018⁵. The test requires that the third party has a reasonable expectation of confidentiality with respect to the information that was supplied. This expectation must have an objective basis.

⁵ Alberta Order 99-018 at pages 6-8

[46] The determination of whether an expectation of confidentiality is based on objective grounds is a question of fact and requires a consideration of all the circumstances of the case including such things as whether the information was:

- communicated to the institution on the basis it was confidential and that it was to be kept confidential;
- treated consistently in a manner that indicates a concern for its protection from disclosure by the third party prior to being communicated to the Public Body;
- not otherwise disclosed or available from sources to which the public has access;
- prepared for a purpose that would not entail disclosure.

Submissions

[47] PSC provided a copy of the RFP. The RFP in Section 21 provides as follows:

“Subject to the Access to Information and Protection of Privacy Act (ATIPP), information, other than price, contained in the proposals submitted will be held in confidence. However, please note that all documents submitted to the Yukon Government are subject to ATIPP.”

[48] The section continues on to indicate access to some records is possible, while it is prohibited with respect to others on grounds that disclosure could be “... significantly harmful to business interests or would be an unreasonable invasion of personal privacy”. Yukon Government commits to receiving the information in confidence but cautions there is no guarantee that the application of the ATIPP Act could protect it from disclosure unless the disclosure would be “... significantly harmful to business interests or would be an unreasonable invasion of personal privacy”. In my view this effectively put the Third Party on notice that some business information may in fact not be kept confidential.

[49] Section 21 continues with the statement:

“Accordingly, proponents are encouraged to:

- a) identify those portions of their submission which they are supplying in confidence and for which disclosure to others would be significantly harmful to their business, or would be an unreasonable invasion of their privacy, as defined in sections 24 and 25 of ATIPP and;**
- b) be prepared to justify that determination if challenged to do so by someone who applies for access to the information.”**

[50] PSC has clearly provided an avenue by which the proponent can explicitly identify the specific information it is supplying on a confidential basis.

[51] The Applicant in the Initial Submission refers to section 21 of the RFP to support his view that the information was not provided implicitly or explicitly in confidence. He concludes:

“Consequently, there is no reasonable basis nor should there have been any expectation on the part of the Third Parties that their proposal submissions were supplied to the Public Body “implicitly or explicitly in confidence”. On the contrary, Third Parties were notified that submissions were subject to the provisions of the Act, and could be disclosed unless the third party successfully challenged an application for disclosure.”

[52] On the question of confidentiality the PSC disagrees with the Applicant’s position and simply points to section 21 of its RFP which I have quoted from in paragraphs [47-49] above without any further explanation.

[53] The PSC does mention the August 17, 2010 letter from COMPANY ABC to the ATIPP Office in response to PSC’s initial consultations upon receipt of the access request where COMPANY ABC states in part:

“Please be advised that the cover page and table of contents of the document in question are the only pages that may be made available to the public.”

[54] In its Initial Submission to this Inquiry, COMPANY ABC does not add to the above in relation to the question of confidentiality. COMPANY ABC does say in its submission... “In responding to bids it is the expectation of vendors that information is provided for the use of the buyer only and not for the benefit of other vendors.” I take

this to mean it was their expectation that the information in the proposal would be kept confidential.

Analysis

- [55] An examination of COMPANY ABC's entire proposal does not reveal any statement in the proposal itself saying it was being submitted in confidence at the time the proposal was submitted in response to the RFP.
- [56] Further, I can find no indication that COMPANY ABC took the opportunity to identify the information therein that it was encouraged to identify by section 21 of the RFP as being supplied in confidence at the time the proposal was submitted in response to the RFP. The statement in their submission on this Inquiry that "In responding to bids it is the expectation of vendors that information is provided for the use of the buyer only and not for the benefit of other vendors" falls short of what PSC offered as a specific opportunity to identify those portions of their submission which they are supplying in confidence as invited by section 21 of the RFP.
- [57] The first time COMPANY ABC identifies the information as confidential is in its August 17, 2010 letter mentioned above provided in response to the initial consultations undertaken by the PSC after the request for access had been made by the Applicant.
- [58] On September 14, 2010 the PSC advised COMPANY ABC that their Third Party representations had been considered, that PSC had decided to grant the Applicant access to some of the information in the proposal and advised COMPANY ABC of its right to request a review by the Information and Privacy Commissioner of the PSC's decision. No review was requested by COMPANY ABC. This further indicates to me that it was content with its general exposure to the ATIPP ACT as described in section 21 of the RFP.
- [59] Statements made in this Inquiry by COMPANY ABC after the fact that it understood or intended the information to be supplied in confidence do not carry much weight. I am satisfied there was no clear objective evidence that COMPANY ABC proposal was supplied explicitly in confidence.
- [60] The issue then turns to the question of whether the information can be said to have been supplied "implicitly" in confidence. The word "implicit" denotes a particular state of understanding: a belief in a certain set of facts though not plainly expressed. COMPANY ABC says that "it is the expectation of vendors that information is provided for the use of the buyer only and not for the benefit of other vendors"

suggesting the expectation of confidentiality is implicit. Further section 21 of the RFP does say that information, other than price, will be held in confidence. However as mentioned above section 21 goes on to caution that “documents are subject to ATIPP that prohibits some, but not necessarily all disclosures by the Yukon Government, in particular of ...confidential business information” and encourages proponents to identify those parts of the submission they are supplying in confidence. Given this I do not think it is reasonable for COMPANY ABC to suggest there was an implicit expectation of confidentiality.

Conclusion

- [61] In coming to my conclusion I considered the PSC Request for Proposals, the COMPANY ABC Proposal and the submissions of the three parties.
- [62] I find that there is no particular circumstance or facts that would give rise to a reasonable expectation that the information was communicated on the understanding that it was supplied, explicitly or implicitly, in confidence.
- [63] I conclude that the second part of the section 24 test has not been met in that there is no clear objective evidence that the COMPANY ABC Proposal was supplied, implicitly or explicitly, in confidence as required by section 24(1)(b).
- [64] As noted earlier, section 24 is a three part test which requires all three parts to be met. In light of my finding that the second part, section 24(1)(b), has not been met, it is not necessary for me to examine the application of the third part, section 24(1)(c).
- [65] In summary, I conclude as follows:
- (a) PSC is not required to refuse to give access to the information that has been severed pursuant to section 24 on pages 3, 9, 10, 11, 12, 17, 18 to 29 and 51 to 52. I recommend the PSC give the Applicant access to this information.
 - (b) PSC is required to refuse to give access to the severed information on page 13 pursuant to section 25(1) of the Act

COMPANY XYZ Proposal

- [66] I now turn to the application of the section 24 test described above to the COMPANY XYZ proposal.

1. Would disclosure of the information reveal commercial financial, labour relations, scientific or technical information of a third party?

Submissions

- [67] In its Document Schedule, the PSC indicates it severed the information relying on section 24(1)(a)(ii) commercial, financial, labour relations, scientific or technical information of a third party. However, in both its Initial Submission and Reply Submission, PSC does not mention or provide any further description of the information it severed from the record, or identify how that information is commercial, financial, labour relations, scientific or technical information.
- [68] In its letter of August 21, 2010 submitted to PSC in response to PSC's consultation regarding the request for access and its January 20, 2011 submission in this Inquiry, COMPANY XYZ makes the argument that its proposal contains trade secrets, "...intellectual property ... ideas, approaches, thoughts, strategy..." from which it "...derives commercial advantage"... COMPANY XYZ states "...all aspects of our approach, proposal team, methodologies, schedules and technical content in the proposal are our competitive strategy."
- [69] As was the case for the COMPANY ABC proposal, the Applicant in his submission states that "... it is unlikely that any of the severed information fits the description in 24(a)(i) – trade secrets of a third party". The Applicant makes no specific argument with respect to whether section 24(a)(ii) – commercial, financial, etc. applies other than that any information severed which meets this description must still satisfy the remaining two parts of the section 24 test.

Analysis

- [70] COMPANY XYZ suggested the severed information in its proposal was a trade secret and commercial, financial, labour relations, scientific or technical information. In a past Inquiry ⁶, former Commissioner Moorlag summarized the definition of "trade secret" found in the ATIPP Act:

"Section 3 of the ATIPP Act defines "trade secret" as information, including, among other things, a method, technique or process that may be used in

⁶ Yukon Order #98-090A at page 2

business for any commercial advantage. The definition also requires that an independent economic value be derived from not being generally known to the public or other persons who can obtain economic value from its disclosure or use. Furthermore the information should be the subject of reasonable efforts to prevent it from becoming generally known, and that its disclosure would result in harm or improper benefit.”

[71] In my view a “trade secret” under section 24(1)(a)(i) should be differentiated from matters of business privacy which are protected under section 24(a)(ii). While the description in the record concerns “the process or methods” COMPANY XYZ intends to follow in providing services, I have not been provided with sufficient information to determine that the information in question otherwise meets the definition of a “trade secret” in the Act. Nothing on the face of the record assists me in deciding that the records contain or would reveal trade secrets. However, I am satisfied that except for the information referred to in paragraph [73(b)] and [73(c)] below it is commercial information that relates to the buying and selling or exchange of merchandise or services⁷.

Conclusion

[72] Based on a review of the severed portions of the proposal and the proposal as a whole, I conclude as follows:

- (a) The severed information on pages 3, 6, 7, 8, 11, 14, 15, 16, 17-26 and Appendices B1 and B2 has commercial value in that the information they contain constitute COMPANY XYZ’s particular strategic approach and methodology that would be applied to the PSC’s requirements. The identification of past and present clients and their projects is part of COMPANY XYZ’s confidence that it has something unique and special to offer to the PSC for the project. The first part of the three part test has been met in relation to this information and the information remains to be considered under section 24(1)(b).
- (b) On page 2, PSC identified sections 24 and 25 as both applying to all of the last set of bulleted notes under the heading

⁷ Alberta Order 96-013

“Extensive experience and qualifications including some key important relevant experience”. I disagree with that view in that the last two bulleted items do not contain personal information nor do they contain commercial information. They simply make factual statements unrelated to any identifiable person. This information is not personal information of a third party under section 25 nor does it meet the first part of the section 24(a)(ii) test. PSC is not required to refuse to disclose the information.

- (c) For clarity, the first five bulleted notes on page 2 in the same list are not at issue as this is third party personal information which was severed by the PSC pursuant to section 25. The Applicant withdrew his request to review information to which section 25 had been applied by PSC.

2. Was the information supplied to the public body in confidence, either implicitly or explicitly?

- [73] I am satisfied that the information was directly “supplied” to the PSC by COMPANY XYZ in response to the Yukon Government Request for Proposal.
- [74] As mentioned above this part of the test requires that the third party has a reasonable expectation of confidentiality with respect to the information that was supplied. This expectation must have an objective basis.

Submissions

- [75] The Applicant in his submission points to section 21 of the RFP to support his view that the information was not supplied implicitly or explicitly in confidence. He concludes:

“Consequently, there is no reasonable basis nor should there have been any expectation on the part of the Third Parties that their proposal submissions were supplied to the Public Body “implicitly or explicitly, in confidence”. On the contrary, Third Parties were notified that submission would be subject to the provisions of the Act, and could be disclosed unless the Third Party successfully challenged an application for disclosure.”

[76] The PSC in its Reply Submission rejects the Applicant's assertion that "there is no reasonable basis nor should there have been any expectation on the part of Third Parties that their proposal submissions were supplied to the Public Body implicitly or explicitly, in confidence."

[77] The PSC cites section 21 of its RFP, discussed in the preceding COMPANY ABC analysis, that invites a proponent to identify what it is submitting in confidence but cautions that it is subject to the application of ATIPP.

[78] The PSC points to COMPANY XYZ's attention to that provision and states:

"The bid from the Third Party clearly stated on page 28 that the proposal was submitted in confidence. His letter of August 21 reiterates that."

[79] COMPANY XYZ says it submitted its entire proposal in confidence. It refers to the specific statement of confidentiality contained on page 28 of the proposal to demonstrate the expectation that the entire proposal be kept confidential. On page 28 of the proposal COMPANY XYZ sets out in considerable detail its reasons for requesting that that "...all parts of the proposal to be held in confidence" and not disclosed including information about the potential harm that would result from disclosure,⁸ COMPANY XYZ also states that it has not made this information available publicly.

[80] The expectation that the entire proposal be kept confidential was also stated in the August 21, 2010 letter provided to the PSC in response to the Third party consultations consequent on the Applicant's request for access to the proposal.

Conclusion

[81] I am satisfied that there are objective grounds for finding that COMPANY XYZ's had a reasonable expectation of confidentiality with respect to the information supplied that is at issue in this Inquiry. The invitation in the proposal by PSC to treat information supplied in confidence subject to the ATIPP Act, coupled with COMPANY XYZ's inclusion in the proposal itself a statement of the information it supplied in confidence

⁸ I have indicated above why in this Inquiry I am not dealing with the "entire proposal" and have identified the specific information at issue in paragraph 12.

and the details of the harm that might result from disclosure satisfies me that the information severed on pages 3, 6, 7, 8, 11, 14, 15, 16, 17-26 and Appendices B1 and B2 was explicitly supplied in confidence as required by section 24(1)(b). This information meets the criteria under section 24(1)(b) and remains to be considered under 24(1)(c).

3. Would the disclosure reasonably be expected to harm significantly the competitive position, result in similar information no longer being supplied to the public body or result in undue financial loss or gain to any person or organization?

[82] Section 24(1)(c) provides:

24(1)A public body must refuse to disclose to an applicant information

(a) ...

(b) ...

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position, or interfere significantly with the negotiating position of the third party,

(ii) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied,

(iii) result in undue financial loss or gain to any person or organization,

[83] Decisions from other jurisdictions provide some guidance on the evidentiary burden which must be met in determining significant harm and undue financial loss or gain. In Ontario Order PO 2944 the Adjudicator was dealing with the equivalent to section 24(c) found in the *Ontario Freedom of Information and Protection of Privacy Act* and described the evidentiary burden this way:

“To meet this part of the test the institution and/or the public body must provide detailed and convincing evidence to establish a

reasonable expectation of harm.... Evidence amounting to speculation of possible harm is not sufficient...

“The failure of a party resisting disclosure to provide detailed and convincing evidence will not necessarily defeat a claim from exemption, where harm can be inferred from other circumstances. However only in exceptional circumstances would such a determination be made on the basis of anything other than the records at issue and the evidence provided by the party in discharging its onus.”⁹

[84] In the same Order the rationale for the evidence to be “detailed and convincing” is expressed this way:

“The need for public accountability in the expenditure of public funds is an important reason behind the need for detailed and convincing evidence to support the harms outlined in section 24(1). Parties should not assume that harms under section 24 are self-evident or can be substantiated by submissions that simply repeat the words of the Act.”¹⁰

Submissions

- [85] The Applicant’s Initial Submission addresses only the issues of the appropriate application of the section 24 three-part test, including his views on the onus of proof. No comments are offered on the issue of harm.
- [86] PSC in its submissions makes no comment in relation to the reasonable expectation of harm resulting from disclosure.
- [87] COMPANY XYZ’s in its proposal as well as its August 21, 2010 letter and the Initial Submission sets out in considerable detail the harm that would occur if the record was disclosed. It explains that release of the information in its proposal would be detrimental to its competitive position in a market in which the Applicant also competes. COMPANY XYZ makes a rather compelling argument that its approach,

⁹ Ontario Order PO-2944 at page 14

¹⁰ *Ibid* at page 14

proposal team, methodologies, schedules and technical content are part of its competitive strategy. It describes in some detail how the release of it could put COMPANY XYZ at a disadvantage while providing the Applicant an advantage at no cost to the Applicant.

Conclusion

[88] I am satisfied that COMPANY XYZ has provided detailed and convincing evidence that in this case the disclosure of the severed information in question could result in undue financial loss or gain.

[89] In summary I find that the third part of the three-part test in section 24(c)(iii) of the ATIPP Act has been met with respect to the information severed in the following records: pages 3, 6, 7, 8, 11, 14, 15, 16, 17-26 and Appendices B1 and B2.

[90] In summary I have concluded as follows:

(a) Having satisfied all parts of the section 24 test in relation to the information severed on pages 3, 6, 7, 8, 11, 14, 15, 16, 17-26 and Appendices B1 and B2 the Public Body is required to refuse access to this information.

(c) Page 2 last two bulleted items do not contain personal information nor do they contain commercial information. PSC is not required to refuse access to this information.

IV FINDINGS

COMPANY ABC Proposal

[91] For the reasons set out above:

1. The PSC is neither authorized or required to refuse access to the information severed on pages 3, 9, 10, 11, 12, 17, 18 to 29 and

51 to 52 and pursuant to section 57(2)(a). I recommend the Public Body give the Applicant access to the information.

2. PSC is required to refuse to disclose the severed information on page 13 pursuant to section 25 and I confirm under section 57(2)(c) that the PSC is required to refuse access to this information.

COMPANY XYZ Proposal

[92] For the reasons set out above:

1. PSC is required to refuse access to the information severed pursuant to section 24 on pages 3, 6, 7, 8, 11, 14, 15, 16, 17-26 and Appendices B1 and B2 and I confirm under section 57(2)(c) that the Public Body is required to refuse access to the information.
2. PSC is neither authorized nor required to refuse access to the last two bulleted items on page 2 and I recommend that the PSC give the Applicant access to this information.

VI PUBLIC BODY'S DECISION AFTER REVIEW

[93] Section 58 of the Act requires PSC to decide, within 30 days of receiving this report, whether to follow my recommendations. PSC must give written notice of its decision to me and the parties who received a copy of this report, noted on the distribution list below.

[94] If PSC does not give notice of its decision within 30 days of receiving this report, it is deemed to have refused to follow my recommendations.

[95] If the PSC does not follow my recommendations, it must inform the Applicant, in writing, of the right to appeal that decision to the Yukon Supreme Court.

VII APPLICANT'S RIGHT OF APPEAL

- [96] Section 59(1)(a), gives the Applicant the right to appeal to the Yukon Supreme Court when the Public Body PSC does not follow my recommendation to give access to part of the record.
- [97] Section 59(1)(b) gives the Applicant the right to appeal to the Yukon Supreme Court when a determination is made under section 57 that the Public Body is required to refuse to give access to part of the record.

September 12, 2012

ORIGINAL SIGNED BY

Tim E. Koepke
Yukon Information and Privacy Commissioner

Distribution List:

- Public Body – Public Service Commission
- Applicant
- Third Party – COMPANY ABC
- Third Party – COMPANY XYZ

