

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2013-1183-AP-607

May 24, 2013

Office of the Access to Information and Privacy Commissioner of New Brunswick

Case about unsuccessful bidder's access to the tendering information

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to the *Right to Information and Protection of Privacy Act*, S.N.B., chapter R-10.6 ("the Act") under subsection 73(1).
2. The Applicant filed a complaint after having received an unsatisfactory response from the Town of St. George ("the Town") to access information regarding a bid awarded by it in 2012.
3. The Town and other municipalities became subject to the Act in September 2012 and this matter was one of the first municipal access complaints filed with our Office.
4. Municipalities are different entities than Provincial departments and agencies and they have different functions and responsibilities. We have particularly observed unlike their provincial public body counterparts, many municipalities have limited resources and few staff and the additional regulatory business concerning access to information held in municipal records is proving difficult. With this in mind, we are encouraging municipalities to become fully compliant with their obligations under the Act and it is for these reasons that we have taken the opportunity of complaint investigations to lend guidance and afford the municipality a better understanding of the rules regarding access and privacy and how they should be applied.
5. In the present case, the Applicant submitted a bid for a public tender offered by the Town of St. George ("the Town"), but the Applicant was not the successful bidder. By letter dated November 14, 2012, the Applicant asked to obtain information about the tender process followed by the Town, along with notes and minutes that recorded the discussions in relation to the tenders and how the successful bid was awarded. The Applicant also wanted to know whether the lowest bid was accepted and if all of the bids that the Town had received had included all of the required elements, such as proof of insurance and references to verify previous work.
6. The Town provided a response to the Applicant by letter dated December 11, 2012 in which copies of Council meeting minutes and agendas, staff meeting notes, and summaries of the bids submitted for Council's consideration were included. The Town did not provide the information regarding other bidders' tenders but did not indicate why it was not doing so.

7. As the Applicant was an unsuccessful bidder, the Town held a debriefing session with the Applicant with a view to share information about the tender process the Town had undertaken and to provide feedback as to the reasons why the Applicant's bid was not retained. Although a separate process to that of an access to information request under the *Act*, we were pleased to learn of such debriefing meetings as a means to provide additional information about the Town's tendering process, and in this particular case, a means to provide to the Applicant some of the information sought in the access to information request.
8. We also note that the Applicant visited the Town's offices to review Council minutes and agendas while looking for additional records of discussions or decisions in relation to the tender process. The Applicant was not satisfied with the information received and for this reason, filed a complaint on January 7, 2013.
9. The Applicant was unhappy with the outcome of the tendering process and was looking for information to confirm whether the Town treated the Applicant fairly in its tendering process. In that regard, the Applicant wanted access to all records in relation to the tender.
10. The Applicant believed that the Town and its Council should have records detailing the discussions held in relation to the bids received and the award of the tender. The Applicant refused to accept that the records provided were the only records created in the tender process.

INFORMAL RESOLUTION PROCESS

11. Bearing all of the above in mind, we set out to devise a simpler but effective investigative process to best deal with such complaints: municipalities becoming compliant with the *Act* while minimizing the impact of our investigations on their time and resources. The aim of this simpler process is to lend the necessary guidance to municipalities to enable them better understand and therefore meet their lawful obligations so that applicants receive all of the information to which they are entitled under the *Act*. We believe this practical approach will nonetheless allow our Office to fully meet its oversight role and resolve complaints informally wherever possible.

12. In the present complaint, we held an initial meeting with the Town's officials to introduce our Office and explain our role as oversight body. In particular, we explained that we embarking on this simpler approach to investigations specifically for municipalities and we invited the Town to participate in this process to resolve the matter.
13. We discussed how the Town processed the Applicant's request for information and reviewed the relevant records on-site. We then provided feedback on those rules the Town had applied well and the instances where there was room for improvement.
14. In this case, the Town had properly identified the relevant records (all those that related to the Applicant's access to information request) and for the most part, it had appropriately responded to provide access to the information contained in those records.
15. The Town, however, was unsure how to approach the question of access to other bidders' information; for this reason, it proceeded more cautiously by withholding the information but did not address this question when responding to the Applicant.
16. How to treat other bidders' information, i.e., sensitive third party business information that a municipality receives during a public tendering process is a common—and somewhat complicated—issue. We understand from our review of cases in other jurisdictions that it will be the subject of many access requests for municipalities. With this in mind, we undertook to examine this subject matter in detail: how is a public tendering process undertaken under the laws of New Brunswick. From that analysis, we would be better suited to guide the Town and all other municipalities as to which information received during the tendering process can be disclosed to the public and that which must remain protected.
17. In order to fully understand the rules governing municipalities in relation to public tendering and their link to the rules governing access to information, we reviewed the provisions of the *Public Purchasing Act*, in particular, those that are addressed for municipalities. We also reviewed resources that had been prepared for specifically for municipalities by the Province on the issues surrounding the confidential nature of the bidding process, the requirements regarding transparency during this process as well as obligations that flow when a call for tender has been issued.

18. We found that the *Act* and the tendering process set out in the *Public Purchasing Act* work in tandem to ensure fairness and accountability, while protecting sensitive third party information where necessary. While there is a right of access to information under the *Act*, the general rule is that bidders' submissions will be treated as confidential.
19. Public tenders require that all bid submissions received at the closing date of the tendering process are opened in a public meeting publicly and only the names of those who submitted bids and the total price of their bid are read out. This constitutes the only information that becomes publicly known; for this reason, the names of bidders and their total bid price are no longer confidential after the public opening of all the submissions.
20. Therefore, aside from the bidders' name and total price, bid submissions continue to be treated as confidential after the public opening. The only exception to this rule is where the bidder (an individual or a company) has provided consent to release the information contained the bid submission (as per paragraphs 21(3)(a) and 22(3)(a) and section 34 of the *Act*).
21. We found there was another important aspect to the public tender process with regards to access to information. Any unsuccessful bidder has the right to obtain some additional information about the submission that was awarded the tender (as per section 22 of Regulation 94-157 of the *Public Purchasing Act*), specifically, information about the result of the evaluation conducted on the successful bid on each requirement of the tender. This information is usually provided during a debriefing meeting called at the request of an unsuccessful bidder.
22. After this examination, we found that the rules governing the public's access to information contained in bid submissions, including access to such information by an unsuccessful bidder, are clear and these rules respect (i.e., do not conflict with) those governing access and privacy as set out in the *Act*.
23. Again, with a view to assist municipalities in dealing with access to and protection of information found in these kinds of records, we prepared a guide on public procurement entitled the **Public Procurement Guide for Municipalities** and its association with the rules of the *Act*. A copy of this guide is attached to this Report as Appendix A. This guide sets out in simple format the steps that a municipality follows when a call for tender is issued and

links each of these steps to which information can or cannot be disclosed, including which information can be disclosed after an award has been made for the successful bid.

24. Therefore to conclude our work with the Town, we held a second meeting with its officials and provided a copy of the guide along with our findings as to which information the Town had properly withheld as well as identifying the information the Applicant ought to have received in this case. We then set out how the Town could informally resolve this complaint with the Applicant. Despite these efforts, the complaint could not be resolved in this manner and we had no choice but to issue the present Report of Findings as we are required to do under the *Act*.

FINDINGS

Responding to the Applicant's access to information request

25. We find that the Town identified all of the records to be relevant to the information sought by the Applicant in this case:

- minutes and agendas of Council meetings
- briefing notes to Council
- briefing notes to staff following Council meetings
- tender submissions and related documents, and
- summaries of tender submissions as prepared for Council's consideration.

26. The Town provided access to the Applicant to most of these records, except for withholding the tender submissions and related documents. There were few explanations for the information redacted, and some redactions were not consistent. These were minor issues in our view given the Applicant's principal concern there ought to be additional records in relation to discussions surrounding the public tendering process it had undertaken and the bid that had been awarded. There was little provided to the Applicant on that score.

27. We therefore questioned the Town's officials on that question and they reported to us that there were in fact no other records of Town or Council discussions or decisions. The Town's reasons were that the tender was neither a complicated file nor represented a major issue for the Town and there were no further Council or Town discussions beyond what was reflected in the minutes or briefing notes provided to the Applicant. The Town stated that it had no handwritten notes or written communications of discussions held with the

successful bidder. The lack of such records amounted to a denial of access to information to which the Applicant was entitled.

28. We have concerns that the Town did not better document its decisions about the tendering process in this case. Not properly documenting decisions regarding the public affairs of a public body is akin to removing the public's right of access to such information. In this regard, we encourage the Town in future calls for tender to properly document its decisions to ensure better transparency and accountability and to respect the public's access rights.

29. Despite this lack of records, the Town met most of its obligations when responding to the Applicant in this case by providing:

- a list of the records being released,
- explanations for redactions of severed information not relevant to the request,
- the name of the Town's contact person who could answer questions on this matter, and
- a notice to the Applicant of the right to complain if not satisfied.

30. The Town, however, did not respond fully to answer the Applicant's access to information request by:

- not including an explanation as to why other relevant records could not be released (ex. tender bids),
- blackening out information on the working document (summary) prepared for Council regarding the evaluation of the tender bids that should not have been redacted,
- not including explanations for the redactions on the working document (summary), and
- by not informing the Applicant that the Town had no further records or documentation about Town or Council discussions or decisions on the successful bid, or records of communications with the successful bidder.

31. We recall that the Town had held a debriefing meeting with the Applicant at the close of the tender process and we reviewed those notes that also had been provided to the Applicant. These notes gave additional information about the Town's tendering process undertaken in this case but they did not set out all of the specific information to which the Applicant was entitled to receive.

32. We find that the Town overall met its obligations when responding to the Applicant in this case, although it did not fully respond to the Applicant's request to access specific information. We elaborate further on that point below.

Access to other bidder's (third party) information

33. The Applicant received confirmation of the other bidders' names and total prices submitted to the Town during the tendering process, but the Applicant was not given any further information contained in the other bidders' submissions, nor explanations as to why the Town was not disclosing that information.

34. As explained above, the rules of the *Act* set out that a bidder's submission is confidential third party business information and it is protected from disclosure unless the bidder has been asked and has consented to the release of the information contained in the bid.

35. Accordingly, where the Applicant specifically requested access to the other bidders' submissions and for this reason, the Town was obligated to ask the individual bidders whether they consented to the release of their bid information. The Town could not refuse access to the information contained in the other bid submissions before it contacted the other bidders to ask whether they consented to the release of their submissions. If any bidder provided consent, the Town would have to provide the Applicant with a copy of the consenting bidder's submission. If the bidder did not consent, the Town would continue to keep that bid submission confidential and not disclose it to the Applicant, while explaining to the Applicant that consent for its release had not been obtained.

36. In this case, the Town did not ask for the other bidders' consent to disclose their respective bid submissions and on that basis, we find that the Town improperly refused access to the Applicant in regards to that specific information.

37. In addition, as an unsuccessful bidder in a public tendering process, the Applicant also had a right of access to certain information about the successful bidder. Specifically, the Applicant was entitled to receive confirmation as to whether the successful bidder met the tender requirements, including that which concerned the successful bidder's satisfactory previous work references and supporting documentation (such as proof of insurance in this case).

38. As a result, we do not find that the Applicant received access to all of the information to which the Applicant was entitled in relation to the other bidders' submissions.

RECOMMENDATION

39. Given our findings that while the Town overall met its obligations when responding to the Applicant in this case, but that it did not fully respond to the Applicant's request to access specific information in accordance with the *Act*, we recommend that the Town lawfully respond to the Applicant's access to information request by completing the following steps:

- Contact the other bidders in the public tendering process relevant to this complaint to ask whether they consent to the release of their respective bids, by using the sample template letter we prepared for this purpose (attached as Appendix B to this Report);
- Once the others bidders have replied, the Town is to prepare a revised response that provides the Applicant:
 - *Other bidders' information:*
 - copies of bid submissions of those bidders that have consented to disclosure
 - an explanation regarding those bidders who did not provided consent that their bid submission remains protected as confidential business information and cannot be disclosed
 - *Additional information about successful bid:*
 - the Town must confirm whether the successful bidder met the tendering process requirements, including reference checks on previous work and proof of insurance.

40. In accordance with section 74 of the *Act*, the Town has 15 days in which it must notify both the Applicant and our Office that:

- a) it will accept the recommendation and comply with it; or,
- b) that it will not accept the recommendation.

Dated at Fredericton, New Brunswick, this _____ day of May, 2013.

Anne E. Bertrand, Q.C.
Commissioner

Appendix A

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Office of the Access to Information and Privacy Commissioner of New Brunswick

Public Procurement Guide for Municipalities

PUBLIC PROCUREMENT GUIDE for Municipalities and the *Right to Information and Protection of Privacy Act*

April 2013

This GUIDE will assist Municipalities in determining what information is confidential or which information that can be released at each stage of the public procurement process.

During the procurement or tendering process, Municipalities collect a lot of information from various bidders. Access to information and public procurement rules both ensure that the public obtains only the information it is entitled to receive.

These rules provide the appropriate level of confidentiality of sensitive business and personal information while promoting fairness and accountability in the public procurement process.

CALL FOR TENDERS

- Tenders must be publicly advertised for the following purchasing thresholds:
 - Goods over \$25,000
 - Services over \$50,000
 - Construction over \$100,000
- Advertisement must show specific evaluation criteria that will be used to assess tender bids and weighting for each criteria, if applicable
- Advertisement must include tender documents that bidders use
 - Tender documents should indicate that bids received may be subject to release under the *Right to Information and Protection of Privacy Act*
 - Consider adding to the Tender documents this note:

If the Municipality receives a request for information regarding your bid, you will be asked for your consent to release the bid information.

- Therefore, if a request for information is received after a tender has been awarded, the Municipality can send an email or letter to the bidders asking for their consent to release their bid information:
 - If bidder says Yes, Municipality can release the information.
 - If bidder says No, Municipality explains to person who asked for the information that bids remain confidential and there was no consent to release the information.

BIDS DEPOSITS UNTIL CLOSING DATE

- Bids received are sealed until closing date of tender period
- Not even the number of bids received during tender period can be disclosed before closing date
- All bids received must remain sealed and securely stored until closing date

CLOSING DATE AND OPENING OF BIDS

- Bids are only opened at public meeting
- **Only the** Names of bidders and total price of each bid must be made public
- No other information is made public at this time
- Contents of bids remain confidential

BID EVALUATION PROCESS

- Bids remain confidential during evaluation process
- No information is made public at this time

AWARD OF TENDER

- Public announcement: **ONLY** the Name of successful bidder and total bid price
- Notices to unsuccessful bidders issued to inform of outcome
- Unsuccessful bidder has the right to request a debriefing meeting
 - Entitled to receive results of evaluation on all criteria used to compare bids of the unsuccessful bidder and the successful bidder
 - Unsuccessful bidder cannot access information regarding other unsuccessful bidders
- Public still does not have access to information in bids
- Information in bids continue to be treated by Municipality as confidential to protect sensitive business information from being disclosed, especially to competitors

Appendix B

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Sample template letter for seeking bidders' consent

Sample template letter for seeking bidders' consent

[Date]

[Name and contact info of bidder]

Dear [Bidder]:

**Re: Access request involving your information
*Right to Information and Protection of Privacy Act***

We are writing to advise you that we have received an access request involving the following information that belongs to you:

[Identify and list records]

[Example: Tender competition No., date of bid submission]

Do you consent to the release of this information? If so, please confirm to us by reply email. We will disclose this information only after we receive your written reply. If you do not consent to the release, please let us know and we will continue to protect your information.

We ask that you reply by _____, 201__.

If you have any questions or concerns, please do not hesitate to contact us.

Sincerely,

[Name and title of official]