

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2015-2483-AP-1364

Date: January 15, 2016

“Case about disclosure of contracts regarding third party suppliers of orthopedic devices held by a public body through an external group purchasing organization”

INTRODUCTION

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. The Applicant made a request to Horizon Health Network for a copy of a contract between it and the provider of orthopedic prosthesis, also referred to as "the Medbuy contract" ("the Request").
3. Horizon Health Network ("Horizon") responded indicating that the "contract would contain sensitive commercial information. We are not prepared to provide a copy of the contract to [the Applicant]" ("the Response").
4. The Applicant was not satisfied and filed a Complaint with our Office. In doing so, the Applicant questioned how the requested information could be harmful to a third party's business or financial interests as described in subsection 22(1). The Applicant also assumed that a contract for the purchasing of medical devices by a public body would be accessible in order to maintain transparency.

INFORMAL RESOLUTION PROCESS

5. As in all complaint investigations, our Office first seeks to resolve the matter informally to the satisfaction of both parties and in accordance with the rights and obligations set out in the Act. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work remains the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the Act.
6. The Commissioner's authority to investigate and resolve complaints is established under section 68, with subsection 68(2) delineating the parameters of an informal resolution of a complaint "*in a manner consistent with the purposes of the Act*". This means that the resolution cannot be a mediated settlement or an outcome obtained by the parties' compromise. The Commissioner's authority to affect an informal resolution of an access complaint requires that it be done in a manner that respects the law, upholds an applicant's access rights, and fulfills a public body's statutory obligations.

7. A public body has the right to disagree with our interpretation of the *Act*, and in fact, we welcome such dialogues as it provides an excellent opportunity to better understand the public body's approach and its application of exceptions to disclosure. The process must remain consistent with the purposes of the *Act* and the Commissioner remains bound by her duties to ensure conformity with the *Act* and this means that a complaint must be resolved in conformity with the *Act*.
8. A full description of the steps involved in the Commissioner's information resolution process can be found on our website at <http://info-priv-nb.ca>. Below is a summary of what this process provides:
 - to the public body, the benefit of our independent Office's interpretation of the law and an opportunity to correct any error in access that may have been made;
 - for the public body, the satisfaction of having complied with its obligations under the *Act*;
 - to the requester of the information (the applicant), the benefit of an independent analysis of which information was truly required to be released under the *Act*; and
 - for the public in general, the satisfaction of understanding right of access to information and having that right respected under the *Act*.

Informal resolution undertaken in this case

9. We sought to resolve this case accordingly. At the outset, we explained our informal resolution process and invited Horizon to participate. We held discussions with Horizon officials, reviewed all elements of the Request, and obtained Horizon's input on how it processed the Request, including the reasons why it had been unwilling to disclose the requested information. Following these discussions, we provided our initial findings that would see the Applicant obtaining access to the three identified relevant contracts, with redactions for information about other signatories to the contracts. In doing so, we invited Horizon to share our findings with the third party companies (without identifying the Applicant), which Horizon did.
10. After receiving input from the third party companies, Horizon informed us that it maintained the view that those contracts contained financial and commercial information protected from disclosure under paragraphs 22(1)(b) and 22(1)(c), as well as for personal information under paragraph 21(2)(e).

11. Therefore, Horizon, having considered our findings as well as the third party companies' input, ultimately decided not to proceed with the informal resolution process by disclosing the contracts to the Applicant.
12. The Complaint then became the subject of the present Report of Findings to conclude our investigation as required by section 73 of the *Act*.

BACKGROUND

13. Three contracts govern how Horizon purchases orthopedic joints for several of its health care facilities around the Province. Prior to 2008, each of the former Regional Health Authorities had their own agreements with different companies to purchase prostheses. After Horizon was created as a new Regional Health Authority, Horizon decided to participate in a group purchasing arrangement with Medbuy. Medbuy is a national group purchasing organization, incorporated under the laws of Ontario, and works under contract with public sector health care providers to provide procurement services. In June 2009, Horizon signed a Participation Agreement with Medbuy, thus making Horizon a *Medbuy Member* and eligible to participate in Medbuy's group purchasing activities.
14. In 2013, Horizon participated in a procurement process for new contracts with suppliers for orthopedic joints led by Medbuy on behalf of its interested members. Medbuy issued a request for proposal for orthopedic joint supplies. Physicians with Horizon participated in the evaluation and scoring process of the submissions received from sellers, as did physicians from other health care bodies. After the final evaluation and assessment was completed, Medbuy then entered into contracts directly with the successful sellers (three in total). The three contracts in question signed between Medbuy (the external group purchasing organization) and selected sellers, with Horizon being a participant to these contracts. This means that Horizon is committed to purchasing a minimum percentage of specific kinds of products from each of the successful sellers.
15. Various health care Zones under Horizon selected different commitment levels with each of the three sellers and Horizon is bound by those terms and conditions. The Medbuy Participation Agreement sets out the sanctions that may be imposed on Horizon should Horizon not comply with the terms of that Agreement or the terms of a contract with a seller to which Horizon is a participant.

16. Horizon officials made arrangements with Medbuy to obtain copies of the requested contracts and provided them for our review.

LAW AND ANALYSIS

Transparency

17. The *Act* requires all public bodies to be transparent in their business dealings with the private sector, meaning that some information generated by these commercial relationships must be made publicly available.
18. As a public body, Horizon is required by law to be transparent and is ultimately accountable in how it conducts business on behalf of the public from the public purse. This includes making some information about its business dealings with external sources and information about contracts and payments made to suppliers of medical equipment and supplies known, in keeping with the transparency requirements under the law.
19. By virtue of Horizon agreeing to participate and be bound by the terms of these contracts, this brings these contracts under the scope of the law, notwithstanding the fact that Horizon outsourced the procurement and contracting processes to a group purchasing organization (Medbuy). We point out that doing so did not have the effect of removing all information generated by those activities from the reach of the *Act* and furthermore, public bodies cannot contract out of their obligations under the law.

Relevant contracts and clauses regarding disclosure of the information

20. Each of the three contracts concluded between Medbuy and the sellers is silent on the question of confidentiality.
21. In reviewing the Medbuy Participation Agreement (signed by Horizon in June 2009, making it a *Member*), however, we noted that it included the following with respect to confidentiality and applicable laws:

8.1 The Member acknowledges that information to which it will have access as a result of its relationship with Medbuy and Approved Suppliers is confidential. Such information includes, but is not limited to:

- (a) the terms of the Approved Supply Contracts, including pricing, terms of sale and volume requirements;

(...)

(e) any information compiled or assembled by Medbuy for the use of its Members.

In addition, Medbuy may be provided or have access to information related to the Member which is confidential (the confidential information of Medbuy, Approved Suppliers and the Member being herein referred to as "Confidential Information").

8.2 Each of the Member[s] and Medbuy agrees that neither it nor any of its employees, agents or representatives shall at any time, whether during the term hereof or thereafter disclose, disseminate, otherwise make available to any person any Confidential Information or use any Confidential Information for any purpose other than in conjunction with the Member's involvement with Medbuy and Approved Supplier Contracts unless:

(...)

(d) disclosure is required pursuant to an order of a court of competent jurisdiction, or a statute or regulation of Canada or province or territory thereof, provided that the party required to disclose advises the other party immediately upon becoming aware of such requirement and affords the other party an opportunity to review and, at the option of such party, contest such disclosure by appropriate action.

22. As noted in clause 8.2, information that is deemed to be confidential by clause 8.1 is *nevertheless subject* to a statute or regulation of the Province that requires disclosure of such information. It follows that these contracts, to which Horizon is a participant, are subject to possible disclosure under the *Act* (as they should).
23. Furthermore, these clauses effectively give notice to Medbuy that some information about the business dealings that result from Horizon's participation into Medbuy's group purchasing activities may be made public. This illustrates Horizon's legal obligations as a public body to be transparent and accountable in how it spends from the public purse.
24. As a general rule, the contents of a contract involving a public body and a third party will not be protected from disclosure under the *Act*. Our Office has addressed this question in previous investigations (see Report of Findings **2014-1902-AP-1038** at paragraph 57):

Disclosure standards in this Province today require the disclosure of contracts that have been concluded with government. There are few cases where exceptions to this governing rule may apply, but only where the facts are clear and are sufficiently

distinct to lawfully permit a public body to protect some information in a concluded contract. We note that these cases will be rare.

25. With this in mind, we now turn our attention to the three requested contracts and whether any of the information in these contracts is protected from disclosure as third party information under section 22 (disclosure harmful to third party business interests), specifically paragraphs 22(1)(b) and 22(1)(c).

Section 22: Disclosure harmful to third party business or financial interests

26. Paragraphs 22(1)(b) and 22(1)(c) serve as mandatory exceptions to disclosure as follows:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

(...)

(b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party, or

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

(i) harm the competitive position of a third party,

(ii) interfere with contractual or other negotiations of a third party,

(iii) result in significant financial loss or gain to a third party,

(iv) 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, or

(v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.

27. We begin our analysis with paragraph 22(1)(b).
28. In order to meet the requirements of paragraph 22(1)(b), information must fall within one of the five kinds of protected information (commercial, financial, etc.) and that:
- a third party supplied the information;
 - the information was supplied on an explicit or implied confidential basis; and,
 - the third party has consistently treated the information as confidential.

29. We find that the contracts in this case do contain commercial information such as details about the services the seller will provide, terms and conditions, as well as pricing lists for various products that can be purchased through each contract.
30. That being said, we do not find that this same information was *provided or supplied* on a *confidential* basis by the third party, given that it forms part of a negotiated and concluded contract.
31. By including this kind of information in the contracts, the information is no longer solely that of the third party's; rather, this information details the terms and conditions as well as the amount of money that Horizon, by agreeing to be a participant, has contractually agreed to pay for these products. As such, we do not find that paragraph 22(1)(b) applies to any of the information in these contracts and Horizon could not rely on this exception to disclosure to refuse access to the requested information.
32. We now consider the application of paragraph 22(1)(c). Having already established that the contracts contain commercial information, the next step is to determine whether the disclosure of any of the information in the contracts could reasonably be expected to result in one of the five contemplated types of harm found in (c).
33. That test requires Horizon to present detailed and convincing evidence between the possible disclosure of the information in question and the why it is reasonable to expect that it could harm the third party's business interests.
34. Horizon officials expressed concerns about the impact of the disclosure of the contracts, particularly the pricing information, on its working relationship with the sellers, fearing that disclosure could cause sellers to raise their prices or refuse to continue to conduct business with Horizon. For their part, the third parties feared that the disclosure of the contracts would negatively impact their business interests.
35. While we have come across in many cases similar concerns about disclosure of such information negatively affecting government business relationships with external companies, we have found that these concerns are speculative at best.
36. Given the overall financial value of contracts of this nature, it is unlikely that sellers will be disinclined to continue to seek out public sector business opportunities. Furthermore, the disclosure of contracts, including pricing information, may have the effect of encouraging sellers to be more competitive with their pricing and delivery or

goods or services. In addition, sellers who conduct business with the public sector need to be made aware of the transparency and accountability obligations that public bodies have about how they spend public funds.

37. In the present case, Horizon did not present to us sufficient facts or arguments to substantiate how the disclosure of any of the information in the contracts would be harmful to the sellers' business interests so as to merit protection from disclosure under paragraph 22(1)(c). For this reason, we find that Horizon was not at liberty to rely on this exception to disclosure to refuse access to the requested information.

Personal information—Section 21

38. Horizon indicated that the third parties also objected to the disclosure of the names and contact information for their officials that appear in the contracts, referring to paragraph 21(2)(e) (*third party employment, occupational or educational history*), which deems information of this nature to be an unreasonable invasion of third party privacy.
39. We note that while this particular information is personal information about those named individuals. Subsection 21(3) of the *Act*, however, deems it not to be an unreasonable invasion of privacy to disclose certain kinds of information.
40. In particular, paragraph 21(3)(e) deems it not an unreasonable invasion of privacy to disclose the information about the third party's business name, address, telephone number, facsimile number, electronic mail address or title.
41. Given that the contracts were all signed by senior officials of each of the external companies, we find that the disclosure of this information, including the names of the officials in this capacity, would not be an unreasonable invasion of those officials' privacy.
42. On a final note, the contracts included information about other participants to the contracts, and this information has nothing to do with Horizon or Horizon's contractual obligations. We find that this information alone can be protected from disclosure on the basis of not being relevant to the Request.

FINDINGS AND RECOMMENDATION

43. Based on all of the above, we find that Horizon could not lawfully on the exceptions to disclosure found in paragraphs 22(1)(b), 22(1)(c), or 21(2)(e) to refuse access to the requested information in this case.
44. The Commissioner therefore recommends pursuant to subparagraph 73(1)(a)(i) of the *Act* that Horizon disclose the three contracts in question in full, except for a single redaction of the information relating to the other participants to the contract.

Dated at Fredericton, NB, this _____ day of January, 2016.

Anne E. Bertrand, Q.C.

Access to Information and Privacy Commissioner