

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: 2013-1065-AP-547

Date: October 31, 2013

Case about an unsuccessful bidder wanting access to the results of the proposals submitted to Facilicorp NB for a security contract

INTRODUCTION and BACKGROUND

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. On July 30, 2013, the Applicant requested information from FacilicorpNB regarding the results of a Request for Proposals for a security contract in which the Applicant was not the successful bidder. Specifically, the Applicant requested each bidder's proposal and the evaluation committee's review of each proposal with overall rankings, as well as pricing and overall ranking for each bidder's proposal (the "Request").
3. FacilicorpNB responded to the Request on August 7, 2012 by refusing access in full to the requested information, solely based on subsection 22(1) of the Act:

This letter is further to [FacilicorpNB's Right to Information Coordinator's] correspondence to you dated August 2, 2012, acknowledging receipt of your Right to Information Request, to access results of RFP FCNB 2011-004, including each proponent's proposal, the evaluation committee's review of each of the proposals with overall ranking and the pricing of each proponent and the ranking.

Pursuant to subsection 22(1) of the *Right to Information and Protection of Privacy Act*, (the Act), we are unable to disclose the information you have requested. Other proponent's proposals, the evaluation committee's review of each of the proposals with overall ranking, and the pricing of each proponent and the ranking, are confidential information and not subject to disclosure.

Specifically, in accordance with the provisions of the Act, we are unable to disclose:

- 1) information and or documents, the disclosure of which could be harmful to a third party's business or financial interests;
- 2) information which would reveal trade secrets of a third party, commercial, financial or technical information supplied to us, explicitly or implicitly, on a confidential basis, and treated consistently as confidential information by the third party; or

3) financial or technical information the disclosure of which could reasonably be expected to:

- a) harm the competitive position of a third party;
 - b) interfere with the contractual or other negotiations of a third party;
- or
- c) 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.

Accordingly, confidential information contained within the RFP Proposals, pricing information, RFP criteria, scoring and proponent's responses are not disclosed. ...

(the "Response")

4. A Request for Proposal ("RFP") is an invitation to all those interested in bidding for the performance of a service contract, where criteria other than just price are used to evaluate submissions and where the award is made based on the highest compliant score. Proposals are the bids received in response to an RFP and in general, the RFP process is used when procuring complex services where the method of completing a project is usually left up to the bidders.
5. FacilicorpNB informed us that it held a debriefing session with the Applicant with a view to share information about the RFP undertaken and to provide feedback as to the reasons why the Applicant's RFP was not retained. Although the debriefing is 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 FacilicorpNB's RFP process, and in this particular case, a means to provide to the Applicant some of the information sought in the access to information request.
6. In the debriefing session, FacilicorpNB granted access to the Applicant's own RFP proposal records and stated that the Applicant was informed that there were a total eight bidders and what was the Applicant's overall ranking, as well as ranking but only in relation to certain categories when compared to the other seven bidders.
7. Recognizing to not having received all of the requested information notwithstanding that received during the debriefing session, the Applicant remained dissatisfied with FacilicorpNB's Response to the Request and filed a complaint at our Office on October 10, 2012.

INFORMAL RESOLUTION PROCESS

8. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations provided by the *Act*. The informal resolution process provides guidance to both public bodies and applicants with a view to better understand this new legislation. It is hoped that in all cases, the informal resolution process will lead to a prompt and satisfactory outcome to the complaint by inviting public bodies (where applicable) to issue a "revised response" that provides access to the information the applicant was entitled to receive under the *Act*. (Note: The Commissioner's informal resolution process can be found on our website at <http://info-priv-nb.ca/>).
9. In the present complaint, we held an initial meeting with FacilicorpNB to look into how FacilicorpNB processed the Request and how it went about formulating its Response and we reviewed the records relevant to the Request in this matter. We also undertook many discussions and shared our findings with FacilicorpNB during the months that ensued with a view to conclude this matter informally.

Public Purchasing Act and Access to bidders' information

10. FacilicorpNB is a government body and is therefore subject to the *Public Purchasing Act* that governs procurement of goods, services and construction by public bodies, including the RFP process. How to treat bidder's information, i.e., sensitive third party business information that a government body receives during a RFP process is a common yet somewhat complicated issue. In order to fully understand the rules governing government funded bodies in relation to public RFPs and their link to the rules governing access to information, we reviewed the provisions of the *Public Purchasing Act*, in particular, those that applied to FacilicorpNB as a government body.
11. We also reviewed resources that had been prepared by the Province on the issues surrounding the confidential nature of the RFP process, the requirements regarding transparency during this process, as well as the obligations that flow when a call for RFP has been issued.
12. 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' proposals will be treated as confidential.

13. The *Public Purchasing Act* also requires that the RFPs clearly indicate the criteria to be used and the method by which the proposals will be evaluated by the government funded body, including the relative weight assigned to each criterion. The proposals must be evaluated by an evaluation committee comprised of people with public procurement knowledge and/or people who understand the project and have no conflicts of interest with the procurement. Once the RFP has closed and all proposals have been received, a copy of each proposal must be distributed to each committee member, with a caution that all information related to the RFP process must remain confidential until an award has been made.
14. After our examination, we found that the rules governing the public's access to information contained in RFP proposals, 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*.
15. Therefore, in the present case, we set out to determine what information FacilicorpNB ought to have released to the Applicant that was found in the relevant RFP records in order for us to invite FacilicorpNB to resolve this complaint informally. Despite our efforts, the Complaint could not be resolved in this manner and we are presenting this Report of Findings to issue our recommendation accordingly.

LAW AND ANALYSIS

Adequacy of search for relevant records

16. Normally when our Office meets with a public body to discuss the complaint and to review records, we ask that the public body make all records relevant to the Request available for our review, notwithstanding whether or not access to the records was granted to the applicant by the public body.
17. FacilicorpNB provided us all the records relevant to the Applicant's Request, and much more. Records the Applicant was seeking did not consist of all of the record we were provided for review. The Applicant sought:
 - a) each bidder's proposal,
 - b) the evaluation committee's review of each of proposal with overall ranking;
 - c) the pricing of each bidder; and,
 - d) the bidders overall ranking.

We reviewed these records and can conclude that FacilicorpNB conducted an adequate search for the records relevant to the Request in this case.

Conformity of the Response

18. When responding to an access request, a public body must follow section 14 in all respects to ensure that an applicant receives a complete and meaningful response. To be compliant with the *Act*, a public body must always identify the relevant records regardless of their nature, the type of information they contain, and the likelihood the public body may withhold them. A list of responsive records must be drawn not from the perspective of exceptions to disclosure or protection of privacy, but rather, the list must be prepared from the perspective of *relevance to the information sought*.
19. The public body must then indicate which relevant record on the list will be granted, and which relevant record on the list will not be released. For those records or information not released, a meaningful explanation must be provided. The response must elaborate on why the exception applies in order to help the applicant understand why there is no right of access to the requested information. This will help an applicant understand what information a public body has that is relevant to the request and the reasons why access to any of that information is being refused.
20. While FacilicorpNB did not list the records identified as relevant to the Request, in its Response, FacilicorpNB repeated those records requested while informing the Applicant on the question of access to those documents. We do not take exception in this case to the lack of a list having been given to the Applicant given the small number of records at play and given the fact that those records were enumerated in the body of the Response. Where access was being refused, however, a meaningful explanation ought to have been provided to the Applicant, beyond simply re-stating the wording of the exception provision as the reason for the refusal.
21. FacilicorpNB did state the relevant provisions of subsection 22(1) of the *Act* as the exception provision it was relying on to refuse to grant access and referred to the refused access on the basis of the confidentiality of the information belonging to third parties other bidders. For the reason that most information requested was third party information, received in confidence in an RFP process, we do not consider the format of the Response to have been improper as it identified the relevant records and refused

access to all of them on the same basis of subsection 22(1) with a brief explanation that the information belonged to other bidders.

22. We find that the content of the Response is not in complete conformity with the *Act*.
23. FacilicorpNB failed to undertake a third party notification process (found under section 34) to ask for the other bidders' consent before FacilicorpNB made a decision under section 22 to refuse access to the bidders' information outright. We explain.

Access to other bidders' (third party) information

24. The Applicant received confirmation that there were seven other bidders' who submitted RFP proposals, but the Applicant was not given access to any information contained in the other bidders' proposals as FacilicorpNB relied on subsection 22(1) of the *Act*, which provides:

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

- (a) a trade secret of a third party,
- (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 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.

25. Subsection 22(1) of the *Act* offers protection of private interests, which refers to the safeguarding of information that shapes the private interests of organizations, businesses, or corporations. The *Act* has specifically identified these private interests to

guide public bodies during the processing of access to information requests where applicants seek this type of information.

26. “Business information” is not defined in the *Act*, but under the exception to disclosure relating to business information, the *Act* refers to commercial, financial, or similar types of information relating to private sector business or corporate entities. Examples include a private entity’s activities, trade secrets, confidential contracts, proposals, sources of revenues, and other information about its operations.
27. When organizations or companies deal with public bodies in a commercial capacity, the information generated from these interactions will rest in records held by the public bodies and will thus be subject to possible disclosure under the *Act*. The general right of access to this kind of information encourages accountability of public bodies in conducting business dealings with the private sector and likewise, private sector entities should expect that some information about their dealings with the Province will be made available to the public. The *Act* has recognized, however, that some information relating to private companies require protection in certain circumstances.
28. Where the information requested relates to information that belongs to a private sector entity, the public body will be guided by the rules regarding disclosure found in all the specific provisions set out in subsections 22(1), including subsection 22(3).
29. In this matter, our review of the bidders’ proposals raises no doubt that the bidders’ proposals consist of confidential third party business information as they contained a variation of the following information:
 - the proposed project,
 - how the bidders meet the requirements of the RFP,
 - references,
 - pricing information,
 - proof of provincial licenses,
 - proof of insurance,
 - workplace safety,
 - invoices, etc.
30. We acknowledge that bidders’ proposals may be protected from disclosure pursuant to subsection 22(1) as they contain commercial, financial and/or technical information provided by the third parties (the bidders) to the public body (FacilicorpNB).

31. A clause found in each proposal stated that all information gathered by FacilicorpNB would not be shared with anyone, therefore, we can conclude that the information was provided to FacilicorpNB on a confidential basis and treated consistently as confidential information by the third parties.
32. This exception to disclosure, however, only applies **unless** the bidder has been asked and has consented to the release of the information contained in the RFP, as stated in subsection 22(3). Although subsection 22(1) is a mandatory exception to disclosure, this does not mean that any information or records relating to third party business information are automatically excluded from disclosure under this provision.
33. Subsection 22(3) provides that the mandatory exception to disclosure found in subsection (1) does not apply if
 - (a) the third party consents to the disclosure,
 - (b) the information is publicly available,
 - (c) an Act of the Legislature or an Act of the Parliament of Canada expressly authorizes or requires the disclosure, or
 - (d) the information discloses the final results of an environmental test conducted by or for the public body unless the test was done for a fee paid by the third party.
34. Consequently, a public body cannot arbitrarily find that the requested records or information falls within the mandatory exception to disclosure at subsection 22(1) without also having regard to subsections (3) of the *Act*.
35. It is for this reason that we find FacilicorpNB's Response was not in conformity with the *Act*. When required to respond to the Applicant's Request in this case dealing with RFP proposal, FacilicorpNB was not at liberty to simply refuse access on the basis of confidentiality of bidders' information, but was required to take another step and ask whether the bidders consented to the release of the information contained in their proposals and about their evaluations and ranking.
36. FacilicorpNB could not arbitrarily refuse access to the information contained in the other RFP proposals before it contacted the other bidders to ask whether they consented to the release of their proposals.
37. If a bidder provided consent, FacilicorpNB would have had to release that bidder's information to the Applicant. Where the bidder did not consent, FacilicorpNB was entitled to continue to keep that RFP proposal confidential and not disclose it to the

Applicant, while providing an explanation to the Applicant that consent for its release had not been obtained.

38. In this case, FacilicorpNB did not ask for the other bidders' consent to disclose their respective RFP proposals, and on that basis alone, we find that FacilicorpNB improperly made a decision to refuse access to the Applicant in regards to that specific information.

Obligation to provide information under the Public Purchasing Act

39. As stated above, FacilicorpNB is subject to the *Public Purchasing Act* and upon reviewing that statute, we find that any unsuccessful bidder has the right to obtain additional information about the proposal that was awarded the RFP (as per section 22 of Regulation 94-157 of the *Public Purchasing Act*).
40. Specifically, upon request, an unsuccessful bidder is entitled to receive the name and total bid price of the successful bidder, as well as information about the results of the evaluation, other than price, conducted on the successful RFP on each requirement of the RFP used to compare both the successful and unsuccessful bidder making the request. This information is usually provided during a debriefing meeting called at the request of an unsuccessful bidder. This means that the government body must disclose the score or result of the successful bidder for each criterion the RFP was used to evaluate each proposal.
41. This type of information would normally fall within the mandatory exception to disclosure found at subsection 22(1) of the *Act* as being commercial, financial scientific and/or technical; however, as stated above, paragraph 22(3)(c) of the *Act* states that the mandatory exception to disclosure found at subsection (1) does not apply where another Act of the Legislature, in this case being the *Public Purchasing Act*, expressly authorizes or requires the disclosure of the requested information.
42. As a result, we find that FacilicorpNB cannot withhold the name, total bid price and results of evaluation criteria of the successful bidder under subsection 22(1) of the *Act* as subsections 22(1) and (2) of Regulation 94-157 of the *Public Purchasing Act* expressly authorizes or requires such disclosure to an unsuccessful bidder (the Applicant) making the request pursuant to that statute.

FINDINGS AND RECOMMENDATION

43. FacilicorpNB performed an adequate search of all records responsive to the Request and overall, it met its obligations pursuant to subsection 14(1) of the *Act* when responding to the Applicant.
44. We find, however, that FacilicorpNB did not respond fully in accordance with the *Act* by failing to undertake the third party process and ask bidders for their consent which might have provided access to the Applicant to more information in relation to the other bidders' proposals, specifically:
- a) FacilicorpNB failed to ask the other unsuccessful bidders whether they consented to the release of their RFP proposals, evaluation ranking and pricing, as it was required to do pursuant to section 34 and subsection 22(3)(a) of the *Act*; and,
 - b) FacilicorpNB failed to provide the name, total bid price and results of the evaluation criteria of the successful bidder that the Applicant was entitled to receive under the *Public Purchasing Act*.
45. Given our findings above, we recommend that FacilicorpNB provide a lawful response to the Applicant's Request after having contacted the other unsuccessful bidders in the RFP process relevant to this complaint to ask whether they consent to the release of their respective RFP proposals. The content of the lawful response should be as follows:
- Of those bidders who have consented to the disclosure, FacilicorpNB is to provide the Applicant with all of the information contained in their RFP proposal, evaluations, ranking, etc. to which the bidders have consented for release;
 - Of those bidders who have not consented to the disclosure, FacilicorpNB is to provide the Applicant an explanation that those RFP proposals remain protected as confidential business information and cannot be disclosed pursuant to subsection 22(1) of the *Act*; and,



- FacilicorpNB must provide the name of the successful bidder, the successful bidder's total bid price, and the results of the evaluation of all criteria (other than price) used to compare the RFP, to permit the Applicant to compare the Applicant's bid price and evaluation criteria to those of the successful bidder, as per the *Public Purchasing Act*.
46. In accordance with section 74 of the *Act*, FacilicorpNB has 15 days by which it must notify both the Applicant and our Office of whether FacilicorpNB accepts our recommendations and will comply with them, or whether it will not accept our recommendations.

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

Anne E. Bertrand, Q.C.
Access to Information and Privacy Commissioner