



REVIEW REPORT 195-2015 & 196-2015

Ministry of Central Services

January 28, 2016

Summary: The Applicant requested access to contracts involving two third parties and the Ministry of Central Services (Central Services). Central Services provided partial access to a number of contracts but withheld portions pursuant to subsections 19(1)(b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that Central Services did not appropriately apply subsections 19(1)(b) and (c) of FOIP to the hourly rates in the contracts. Further, the Commissioner found that subsection 29(1) of FOIP did not apply to the names of third party consultants. The Commissioner recommended release of the information.

I BACKGROUND

[1] On April 2, 2015, the Ministry of Central Services (Central Services) received two access to information requests from the Applicant for:

Access to information request #1 (Review file 195-2015):

All current active information technology service contracts, including attachments between the Ministry of Central Services and Paradigm Consulting Group, with a maximum value of over \$1 million.

Access to information request #2 (Review file 196-2015):

All current active information technology service contracts, including attachments, between the Ministry of Central Services and Solvera Solutions, with a maximum value of over \$1 million.

- [2] Central Services responded to the requests by letters dated August 19, 2015 and August 21, 2015 indicating that access was partially granted. Central Services advised the Applicant that portions of the records were being withheld pursuant to subsections 19(1)(b), (c) and 29(1) of *The Freedom of Information and Protection of Privacy Act* (FOIP).
- [3] On October 26, 2015, my office received two Requests for Review from the Applicant.
- [4] My office notified Central Services, the Applicant, Solvera Solutions and Paradigm Consulting Group Incorporated of our intention to undertake two reviews on November 3, 2015. Central Services provided my office with copies of the withheld records and its submissions for both reviews on December 16, 2015 and December 17, 2015. Submissions were also received from the Applicant and Solvera Solutions.

II RECORDS AT ISSUE

- [5] The record for Review file 195-2015 consists of copies of four agreements between Central Services and Paradigm Consulting Group Incorporated along with numerous amendments to the agreements. There are a total of 41 pages. 17 of those pages have information withheld.
- [6] The record for Review file 196-2015 consists of copies of three agreements between Central Services and Solvera Solutions along with numerous amendments to the agreements. There are a total of 70 pages. 35 of those pages have information withheld.

III DISCUSSION OF THE ISSUES

- [7] Central Services is a “government institution” pursuant to subsection 2(1)(d)(i) of FOIP.
- [8] Paradigm Consulting Group Incorporated is a “third party” pursuant to subsection 2(1)(j) of FOIP.

[9] Solvera Solutions is a “third party” pursuant to subsection 2(1)(j) of FOIP.

1. Did Central Services properly apply subsection 29(1) of FOIP to the withheld record?

[10] Central Services applied subsection 29(1) of FOIP to information in each of the records – 52 pages in total were severed. Central Services severed what it determined was personal information. From a review of what was withheld, it appears to fall into the following categories:

- Names of third party consultants that would be providing the services under contract to Central Services (i.e. names of resources);
- The telephone number of Solvera Solutions; and
- The signatures of the third parties at the end of the contracts.

[11] The Applicant indicated that he was only interested in the names of the third party consultants. Therefore, my focus will be on that information only.

[12] When dealing with information in a record that appears to be personal information, the first step is to confirm the information indeed qualifies as personal information pursuant to section 24 of FOIP. Once identified as personal information, a decision needs to be made whether to release it or not pursuant to section 29 of FOIP.

[13] Subsection 24(1) of FOIP provides a number of examples of the types of information that would qualify as personal information. However, this list is non-exhaustive. In order to qualify as personal information, two things are required:

- i. An identifiable individual; and
- ii. Information that is personal in nature.

[14] To have an *identifiable individual* means that it must be reasonable to expect that an individual may be identified, either directly or indirectly, if the information were disclosed.

- [15] Information that is *personal in nature* means that the information reveals something personal about the individual. If it relates to an individual's professional, official or business capacity it generally would not qualify as personal in nature. However, there are exceptions, such as information that relates to employment history.
- [16] Central Services indicated that it was withholding the consultant names because the names, along with knowledge of the company that they work for would be considered personal information as it would make them identifiable individuals. It has consistently been the position of this office that if the information relates to an individual's professional, official or business capacity it generally would not qualify as being personal in nature.
- [17] In its submission to our office, Solvera Solutions indicated that it objects to the release of its consultants names because a name is personal information. A name, by itself, is not personal information unless the name itself reveals something of a personal nature about the individual. For example, the name combined with a home address or a date of birth. This has been the position of this office in several previous Review Reports including most recently Review Report F-2014-005 at [10]. Therefore, I disagree with the reasoning that the name by itself is personal information.
- [18] In conclusion, I find that the names of the third parties consultants are not personal information. As such, subsection 29(1) of FOIP would not apply. I recommend the names be released to the Applicant. It should be noted that the Applicant had indicated he would be satisfied with even a portion of the name as his interest in the names is only to be able to match positions to hourly rates.

2. Did Central Services properly apply subsection 19(1)(b) of FOIP to the withheld record?

- [19] Subsection 19(1)(b) of FOIP is a mandatory exemption and provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

...

(b) financial, commercial, scientific, technical or labour relations information that is supplied in confidence, implicitly or explicitly, to a government institution by a third party;

[20] Section 19 of FOIP is designed to protect the confidential “informational assets” of private businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 19 serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace. There must, therefore, be a balance between granting access to information and protecting the interests of third parties in relation to some types of third party information.

[21] In order for subsection 19(1)(b) of FOIP to be found to apply, all three parts of the following test must be met:

- i. The information in question must qualify as financial, commercial, scientific, technical or labour relations information;
- ii. The information must have been supplied by the third party; and
- iii. The information must have been supplied in confidence either implicitly or explicitly.

[22] Central Services applied subsection 19(1)(b) of FOIP to the hourly rates which Central Services has agreed to pay the third parties for the contracted services.

i. Is the information in question financial, commercial, scientific, technical or labour relations information?

[23] In its submissions for both Review files, Central Services asserted that the hourly rates were the commercial information of the third parties. No submission was received by my office from Paradigm Consulting Group Incorporated. In its submission, Solvera Solutions did not address the test for subsection 19(1)(b) of FOIP. Its submission appears

to focus mainly on harm to Solvera Solutions which it asserts will occur if the hourly rates were disclosed. These points are relevant to the application of subsection 19(1)(c) of FOIP and will be considered later in this Review Report.

[24] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services.

[25] I agree with Central Services that the hourly rates are commercial information of the third parties. Therefore, the first part of the test has been met.

ii. Was the information supplied by the third parties to Central Services?

[26] Information may qualify as *supplied* if it was directly supplied to the public body by a third party, or where disclosure would reveal or permit the drawing of accurate inferences with respect to information supplied by a third party.

[27] Central Services asserted that the hourly rates were directly provided by the third parties via proposals in response to a Request for Proposal (RFP) and the information was then incorporated into the contractual agreements. The proposals were marked as confidential.

[28] The contents of a contract involving the public body and a third party will not normally qualify as having been supplied by a third party. The provisions of a contract, in general, are treated as *mutually generated*, rather than supplied by the third party, even where the contract is preceded by little or no negotiation or where the final agreement reflects information that originated from a single party.

[29] This approach has been upheld by several higher courts across the country including the Ontario Divisional Court in *Boeing C. v. Ontario (Ministry of Economic Development and Trade)*, [2005] O.J. 2851 and *Canadian Medical Protective Association v. John Doe*, [2008] O.J. No. 3475, and the British Columbia Supreme Court in *Canadian Pacific*

Railway v. British Columbia (Information and Privacy Commissioner), 2002 BCSC 603 (CanLII).

[30] I am aware of the Alberta Court of Appeal’s decision in *Imperial Oil v. Alberta (Information and Privacy Commissioner)*, 2014, ABCA 231 (CanLII). In this case, an Applicant sought access to a Remediation Agreement between a public body and a third party. One issue considered by the court was whether all information in an agreement between a third party and a public body was negotiated rather than supplied. The court stated at paragraph 83:

To suggest that information loses its protection just because it ends up “in an agreement that has been negotiated” is not one that is available on the facts and the laws. It cannot be the rule that only information that is of no use to the public body is “supplied”.

[31] *Imperial Oil* is distinguishable from the present case in that the information sought was fundamentally different in nature to the records considered here. The court was addressing five reports that were attached to the Remediation Agreement, which were created by external consultants and were not up for negotiation. In this case, I am considering whether hourly rates contained within a contract are negotiated.

[32] There are two exceptions to the general rule regarding information in contracts being *mutually generated*. If one of these exceptions apply, the information could be found to have been supplied by the third party:

- i. *Inferred disclosure* – where disclosure of the information in a contract would permit accurate inferences to be made with respect to underlying non-negotiated confidential information supplied by the third party to the public body; and
- ii. *Immutability* – information the third party provided that is immutable or not open or susceptible to change and was incorporated into the contract without change, such as the operating philosophy of a business, or a sample of its products.

[33] Neither Central Services nor the third parties provided any specific representations on whether the *inferred disclosure* or the *immutability* exceptions applied.

[34] Central Services is not bound to accept the hourly rates. If Central Services judges the rate to be unacceptable, it has the option of not entering into the agreement with the third party. In my view, this is part of the negotiation process. The acceptance or rejection of a third party's bid in response to an RFP is a form of negotiation. Even if a party feels compelled to accept a term, and does not believe it is in a position to argue in favour of a different term, the term is negotiated. A simple proposal and a response remains a negotiation, as mutual agreement is required for the term to become binding on the parties.

[35] Public access to information contained in government contracts is essential to government accountability for expenditure of public funds. There is a distinction that needs to be made here between the initial procurement phase, when proposals may be submitted on a confidential basis and the final stage when the contract is issued and public accountability considerations come to the forefront.

[36] Based on this reasoning, I find that the hourly rates do not qualify as having been supplied but are negotiated terms of the contract that both parties agreed to. Therefore, the second part of the test is not met.

[37] I find that subsection 19(1)(b) of FOIP does not apply to the hourly rates withheld in the record. This is consistent with the position of this office in previous Review Reports. Most recently, in Review Report 007-2015, I found that the hourly rates contained in a Statement of Work attached to an Agreement between Central Services and Solvera Solutions did not qualify as having been supplied.

[38] It should be noted that according to Central Services' submission at page 9, Paradigm Consulting did not have any objection to the disclosure of its hourly rates.

3. Did Central Services properly apply subsection 19(1)(c) of FOIP to the withheld record?

[39] Subsection 19(1)(c) of FOIP is a mandatory exemption and provides:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- ...
- (c) information, the disclosure of which could reasonably be expected to:
 - (i) result in financial loss or gain to;
 - (ii) prejudice the competitive position of; or
 - (iii) interfere with the contractual or other negotiations of;
- a third party;

[40] Central Services applied subsection 19(1)(c) of FOIP to the hourly rates in the contracts.

[41] For this provision to apply there must be objective grounds for believing that disclosing the information would result in the harm alleged. The parties do not have to prove that harm is probable, but need to show that there is a *reasonable expectation of harm* if the information were released.

[42] A harms test is a set of criteria used to determine whether disclosure of records or information could reasonably be expected to cause harm to a particular interest. The test is as follows:

- i. There must be a clear cause and effect relationship between the disclosure and the harm which is alleged;
- ii. The harm caused by the disclosure must be more than trivial or inconsequential; and
- iii. The likelihood of harm must be genuine and conceivable.

[43] Both Central Services and Solvera Solutions asserted that releasing the hourly rates could result in competitors having the ability to provide a lower rate for future contracts and result in undue loss to Solvera Solutions and prejudice its competitive position.

[44] Bids are evaluated based on a number of criteria. The RFP for a Master Resource Arrangement 2011 which impacted Solvera Solutions suggested that proposals were evaluated using three stages. Stage one rated the proposal's compliance with the RFP requirements. Stage two rated the written proposal on the supplier's experience,

proposed resource experience and the proposals clarity. Stage three involved reference checks. Any supplier receiving over 70% may have become part of a new Resource Arrangement. Further, proposals were also evaluated utilizing the following criteria:

- Resource qualifications, past performance, experience and suitability pertaining to the work requirement(s);
- Availability date of the submitted resource(s);
- Hourly and daily rate(s); and
- Additional criteria requested in the Request for Resources document.

[45] Therefore, selection is not based on price alone. So, I fail to see the harm in other bidders undercutting the hourly rates proposed by the third parties in this case. The RFP process is inherently competitive. Arguably, informed bidders are the best way to assure competitiveness in the RFP bid process. Keeping these rates from the public, including other future bidders, could jeopardize a competitive bidding process.

[46] I am not persuaded that the harm proposed by Central Services and Solvera Solutions meets the threshold established in the harms test. As noted earlier, Paradigm Consulting did not have any objection to the disclosure of its hourly rates.

[47] Therefore, I find that subsection 19(1)(c) of FOIP does not apply to the hourly rates withheld in the record. Again, this line of reasoning is consistent with my recent Review Report 007-2015 where I found that similar arguments to justify withholding hourly rate information in contracts were not persuasive.

[48] On January 13, 2016, my office shared its preliminary findings and recommendations with Central Services. On January 27, 2016, Central Services responded indicating that it would comply with the recommendations below.

IV FINDINGS

[49] I find that subsection 29(1) of FOIP does not apply to the names of the third party consultants.

[50] I find that subsections 19(1)(b) and (c) of FOIP do not apply to the hourly rates contained in the contracts.

V RECOMMENDATIONS

[51] I recommend that Central Services release the names, or a portion of the names, of the third party consultants to the Applicant.

[52] I recommend that Central Services release the hourly rates in the contracts to the Applicant.

Dated at Regina, in the Province of Saskatchewan, this 28th day of January, 2016.

Ronald J. Kruzeniski, Q.C.
Saskatchewan Information and Privacy
Commissioner