



## **REVIEW REPORT 229-2015**

### **Saskatchewan Government Insurance**

**June 2, 2016**

**Summary:** The Applicant requested unit prices and lump sum prices from a contract between Saskatchewan Government Insurance (SGI) and Veridos Canada Limited. SGI provided partial access to records but withheld portions pursuant to subsections 19(1)(a), (b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). Upon review, the Commissioner found that subsections 19(1)(a), (b) and (c) of FOIP did not apply to the information withheld. The Commissioner recommended that SGI release the information to the Applicant.

#### **I BACKGROUND**

[1] On October 13, 2015, Saskatchewan Government Insurance (SGI) received an access to information request from the Applicant for:

“...a copy of the following documentation related to the contract resulting from RFP/45/14 for Centralized Driver License and Identification Card Production and Facial Recognition Services;

- Contract price, including:
  - Price per card components
  - Lump sum price components, if any
  - Other price components, if any
- Card volume forming the basis for contract price per card
- Contract term”

[2] SGI responded to the request by a letter dated October 14, 2015 indicating that it had received the access to information request and would respond within 30 days. SGI sent a follow-up letter dated October 29, 2015 indicating that the information requested contains

third party information and SGI has provided notice to the affected third party pursuant to section 34 of *The Freedom of Information and Protection of Privacy Act* (FOIP). SGI also extended the response period an additional 30 days pursuant to subsections 12(1)(b) and (c) of FOIP. In a letter dated November 26, 2015, SGI advised the Applicant that it had received representations from the third party and partial access to the records were being granted. However, portions were also being withheld pursuant to subsections 19(1)(a), (b) and (c) of FOIP.

- [3] On December 15, 2015, my office received a Request for Review from the Applicant. My office notified SGI, the Applicant and the third party of our intention to undertake a review on December 22, 2015. On January 25, 2016, SGI provided my office with a copy of the withheld record and its submission. A submission was also received from the Applicant and third party.
- [4] In its submission, the third party identified specific information in the withheld record that it asserted should be withheld pursuant to subsections 19(1)(a), (b) and (c) of FOIP. The third party provided a copy of the record in question with specific information “blacked out”. This did not match what was being withheld by SGI. SGI withheld the entire pages.
- [5] On May 6, 2016, my office contacted the third party via email inquiring if it objected to the release of the information it had not “blacked-out” on the record it provided my office. On May 13, 2016, the third party confirmed that it did not object. My office contacted SGI and asked if it would release the non-contested information to the Applicant. On May 24, 2016, SGI advised that if the third party did not object, SGI would release the information that was not blacked out by the third party. Where there is more of a record to be released, I encourage public bodies to do so without waiting till the issuing of the final Review Report.

## II RECORDS AT ISSUE

[6] The records at issue in this review total five pages which have been withheld in full. The pages form part of Schedule A of a contract between SGI and a third party. The pages are numbered P001 to P005.

[7] In February 2015, SGI issued a Request for Proposal (RFP) seeking to request proposed solutions for a Centralized Driver Licence. The third party involved in this review was the successful bidder in that process. A contract for services was signed between SGI and the third party. The Applicant in this review is one of the unsuccessful bidders.

## III DISCUSSION OF THE ISSUES

[8] SGI is a “government institution” pursuant to subsection 2(1)(d)(ii) of FOIP.

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

### 1. Did SGI properly apply subsection 19(1)(a) of FOIP to the withheld records?

[10] Subsection 19(1)(a) 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:

(a) trade secrets of a third party;

[11] SGI applied subsection 19(1)(a) of FOIP to all of the information on pages P001 to P005.

[12] A *trade secret* is defined as information, including a formula, pattern, compilation, program, device, product, method, technique or process:

i) that is used, or may be used, in business or for any commercial purpose;

- ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use;
- iii) that is the subject of reasonable efforts to prevent it from becoming generally known; and
- iv) the disclosure of which would result in significant harm or undue financial loss or gain.

[13] The information must meet all of the above criteria to be considered a trade secret. Further, the third party must also be able to prove ownership or a proprietary interest in the trade secret or prove a claim of legal right to the information (e.g. license agreement).

[14] SGI's submission did not explain how the information on the five pages qualified as trade secret information as outlined in the test above. SGI did indicate in its submission that it was relying on the third party to represent its interests to our office in its individual submission.

[15] The third party's submission also did not explain how the information on the five pages qualified as trade secret information as outlined in the test above.

[16] The Applicant's submission stated that "By definition, a per unit price or lump sum price is not a formula, pattern, compilation, device, product, method, technique or process."

[17] I agree with the Applicant that the unit prices and lump sum prices do not fit the definition of a trade secret as laid out. Therefore, I find that subsection 19(1)(a) of FOIP does not apply to the information on the five pages.

**2. Did SGI properly apply subsection 19(1)(b) of FOIP to the withheld records?**

[18] 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;

[19] The important goal of broad disclosure in FOIP must be balanced with the legitimate private interests of third parties and the public interest in promoting innovation and development. The purpose of subsection 19(1)(b) of FOIP is to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.

[20] All three parts of the following test must be met in order for subsection 19(1)(b) of FOIP to apply:

- 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

[21] SGI applied subsection 19(1)(b) of FOIP to all five pages of the record.

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

[22] In its submissions, SGI and the third party asserted that the information in question was the third party's financial and commercial information. The third party describes the information as "pricing information". The information severed from the record appears to be the amount per driver license/identification card over different time periods. In addition, the cost for camera towers and costs associated with them.

[23] *Financial information* relates to money and its use or distribution and must contain or refer to specific data. Examples of financial information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

[24] *Commercial information* is information relating to the buying, selling or exchange of merchandise or services. In British Columbia IPC Order F05-09, a number of types of information which its jurisdiction considered to be included in the definition of commercial information are as follows:

- Offers of products and services a third-party business proposes to supply or perform;
- A third-party's business experiences in commercial activities where this information has commercial value;
- Terms and conditions for providing services and products by a third party;
- Lists of customers, suppliers or sub-contractors compiled by a third-party business for its use in its commercial activities or enterprises; such lists may take time and effort to compile, if not skill;
- Methods a third-party business proposes to use to supply goods and services; and
- Number of hours a third-party business proposes to take to complete contracted work or tasks.

[25] The information in question relates to the pricing (per unit and lump sum prices) for goods or merchandise offered by the third party. In order to qualify as commercial information, it is sufficient if the information is associated with the buying, selling or exchange of the entity's goods or services. The information in the proposals relates to the third party's selling of goods or services. As such, I find that the information qualifies as commercial information of the third party.

**ii. *Was the information supplied by the third party to the government institution?***

[26] Information may qualify as "supplied" if it was directly supplied to a government institution 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] In its submission, SGI asserted that the information was provided to SGI as a result of a RFP.

- [28] The third party asserted that it supplied the information to SGI but did not elaborate any further.
- [29] It is my office's understanding that the information at issue forms part of Schedule A of a contract signed by SGI and the third party. Specifically, the Applicant is seeking access to the unit prices and lump sum prices contained within a contract between SGI and the third party.
- [30] The contents of a contract involving a 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 final agreement reflects information that originated from a single party.
- [31] 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).
- [32] 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".

[33] *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 unit prices and lump sum prices contained within a contract are negotiated.

[34] 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.

[35] Neither SGI nor the third party provided any specific representations on whether the inferred disclosure or the immutability exceptions applied.

[36] The unit prices and lump sum prices form part of the terms of the contract that has been agreed to. SGI was not bound to accept them. If SGI judged the prices to be unacceptable, it had the option of not entering into the contract with the third party. In my view, having accepted the pricing was part of the negotiation process. Even if SGI did not feel it could negotiate the price, by accepting it the price is agreed upon as mutual agreement is required for the term to become binding on the parties.

[37] 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.



[38] My office has previously considered unit prices and whether they qualify as third party information. In Review Report 054/2015 and 055/2015, the Commissioner considered unit prices that were contained in a Form of Tender. In that case, the public body had supplied bidders with a blank Form of Tender. Bidders entered their specific financial and commercial data in Schedule A of the form and returned the form to the public body as part of their bid package. This case is distinguishable in that the bidding process has concluded, the successful bidder has already been selected and a contract has been awarded.

[39] Based on this reasoning, I find that the unit prices and lump sum prices 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 has not been met and I find that subsection 19(1)(b) of FOIP does not apply to the information on the five pages.

**3. Did SGI properly apply subsection 19(1)(c) of FOIP to the withheld record in question?**

[40] 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;

[41] SGI applied subsection 19(1)(c) of FOIP to all five pages of the record.

[42] 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 any of the information were released.

[43] In its submission, the third party asserted that if the information were released it would result in harmful disclosure of sensitive commercial and financial information that belongs to the third party. It did not elaborate on what the harm would be.

[44] In its submission, SGI asserted that the third party had indicated in its submission to SGI that disclosure would result in irreparable harm if it was disclosed to the third party's competitor. Further, the third party asserted to SGI that release would compromise it in all upcoming procurements both in Canada and the United States.

[45] SGI provided a copy of the RFP. It indicates on page 5 at section 7.4 that the lowest price proposal will not necessarily be accepted. Therefore, selection is not based on price alone. The RFP process is inherently competitive. Arguably, informed bidders are the best way to assure competitiveness in the RFP bid process. Keeping the unit prices and lump sum prices from the public, including other future bidders, could jeopardize a competitive bidding process.

[46] Therefore, I find that subsection 19(1)(c) of FOIP does not apply to the information on the five pages.

#### **IV FINDINGS**

[47] I find that subsections 19(1)(a), (b) and (c) of FOIP do not apply to the unit prices and lump sum prices in the contract.

#### **V RECOMMENDATIONS**

[48] I recommend that SGI release the five pages of the contract.

Dated at Regina, in the Province of Saskatchewan, this 2<sup>nd</sup> day of June, 2016.

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