



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 236-2017

Water Security Agency

February 13, 2018

Summary:

The Applicant submitted an access to information request to the Water Security Agency (WSA). WSA responded to the Applicant's request releasing portions of the responsive records, withholding other portions pursuant to subsections 19(1)(b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). The Commissioner found WSA appropriately applied subsection 19(1)(b) of FOIP to some portions of the record and recommended WSA release other portions where the exemption was found not to apply. The Commissioner also recommended WSA create a policy regarding what information in the procurement process is considered confidential and include a clause in its Request for Quotation (RFQ) documents.

I BACKGROUND

[1] On August 16, 2017, the Water Security Agency (WSA) received an access to information request for:

As per the recent Request for Quotation, were refurbished products or products referred to as "Like New" acceptable for this bid and for use by Water Security Agency?

As per the Freedom of Information Act, I am seeking to access copies of the original report of the standing of each firm who submitted a bid to WSA. I am seeking to know details regarding the selected products including associated price, before and after the application of taxes, the type of tax and any associated shipping costs. I am also seeking a list of names of the disqualified vendors, their bid pricing and reasons for disqualification.

- [2] On September 15, 2017, WSA responded to the Applicant providing responses to the Applicant's questions posed, identifying the number of vendors that responded to the Request for Quotation (RFQ), the name of the winning bidder, and providing a table listing the unit prices of the computer equipment, shipping costs, recycling fees, PST, total price and delivery date. The table did not identify the names of the vendors associated with the quote information. In the response to the Applicant, WSA also indicated reasons why a bid may be disqualified, however it did not fully respond to all the information requested by the Applicant.
- [3] On September 25, 2017, the Applicant submitted a request for review to my office indicating he had been refused access to all or part of the record. WSA's September 15, 2017 response to the Applicant did not clearly indicate what portions of the responsive records were refused or what exemptions it was relying on to deny these portions of the records.
- [4] My office followed up with WSA regarding the issues identified with its response to the Applicant and received agreement from WSA that it would issue an amended response to the Applicant's request.
- [5] On October 6, 2017, WSA provided an amended response to the Applicant's request, which included the following:

"As per the recent Request for Quotations, were refurbished products or products referred to as "like new" acceptable for this bid and for use by Water Security Agency?"

The foregoing questions was answered on page 1 of our previous correspondence. To reiterate, refurbished products or products described as "like new" were not acceptable for the purpose of the Request for Quotations competition.

"As per the Freedom of Information Act, I am seeking access copies of the original report of the standings of each firm who submitted a bid to WSA"

A copy of the spreadsheet that was used during the evaluation process, which listed all of the substantially compliant bids organized from lowest to highest price, was provided to you in our previous correspondence with the names of the vendors redacted. No additional spreadsheets or reports were produced. In our view, the names of the vendors who submitted quotations and the association of the names of such

vendors with the information provided in the spreadsheet is not disclosed in accordance with paragraphs 19(1)(b) and (c) of the Act.

“I am seeking to know details regarding the selected products including associated price, before and after the application of taxes, the type of tax and any associated shipping costs.”

The foregoing information was provided in the spreadsheet that accompanied our previous correspondence.

“I am also seeking a list of the names of the disqualified vendors, their bid pricing and reasons for disqualification.”

The reasons for substantial non-compliance were provided on page 1 of our previous correspondence. To reiterate, seven responses were deemed to be substantially non-compliant. The reasons for non-compliance varied, but included: (i) shipping costs not provided, included, or could not be determined; (ii) no delivery date or month specified; (iii) environmental handling fees not provided or included; and (iv) incorrect product quoted. As a result of the missing or incorrect information, WSA could not duly evaluate the submissions and they were deemed to be non-compliant.

Given that non-compliant submissions are not evaluated, the information from such submissions was not included in the spreadsheet that was used during the evaluation process provided to you with our previous correspondence.

The names of the vendors whose quotations were deemed to be substantially non-compliant and the connection of any pricing with such names is not disclosable in accordance with paragraphs 19(1)(b) and (c) of the Act.

[6] On October 17, 2017, my office sent notification to the WSA and requested its submission supporting its application of subsections 19(1)(b) and (c) of *The Freedom of Information and Protection of Privacy Act* (FOIP). My office also provided notification of my review to the Applicant and the third parties inviting them to provide a submission for my consideration.

II RECORDS AT ISSUE

[7] The records responsive to the Applicant’s request consist of two tables. Table One contains the information of 13 quotes submitted by the third party vendors that WSA found were compliant with the RFQ requirements. The only column from this table that WSA withheld was the names of the third party vendors pursuant to subsections 19(1)(b) and (c) of FOIP.

[8] WSA withheld Table Two in full pursuant to subsections 19(1)(b) and (c) of FOIP. Table Two contains information of all 19 quotes submitted to WSA in response to the RFQ, those that were compliant and those that were non-compliant with the RFQ requirements. Above the table, WSA has recorded a date as well as the names of the employees responsible for evaluating the quotes. The columns for Table Two are as follows:

- Vendors;
- Location;
- Compliance – contains nine columns
- General notes on submission
- Components Itemized Cost – contains three columns
- Itemized Components – contains two columns
- Other Fees – contains four columns
- Total Cost – contains three columns
- Delivery Date – contains two columns
- Evaluations – contains two columns

III DISCUSSION OF THE ISSUES

[9] Subsection 2(1)(d)(ii) of FOIP provides that the definition of a government institution includes a body that is prescribed in *The Freedom of Information and Protection of Privacy Regulations* (FOIP Regulations). Subsection 3(a) of the FOIP Regulations indicates bodies listed in Part I of the Appendix are prescribed government institutions. WSA is one of the bodies listed in Part I of the Appendix, and as such qualifies as a government institution for purposes of FOIP.

[10] WSA also identified 19 third party vendors that submitted quotes in response to the RFQ. The third party vendors qualify as third parties pursuant to subsection 2(1)(f) of FOIP.

1. Does subsection 19(1)(c) of FOIP apply to the record?

[11] Subsection 19(1)(c) of FOIP provides as follows:

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;

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

[13] In WSA's submission, it provides that the information in the responsive record was drawn directly from the third party vendor's procurement proposals. WSA's submission provided the following arguments in support of its application of subsections 19(1)(c)(i), (ii) and (iii) of FOIP:

As found in Review Report 031-2015, if one proponent in a procurement competition has access to another's proposal or its sensitive third party information, it can use it to its advantage in its own submissions, which is likely to alter the outcome of subsequent procurement processes. The release of detailed proposals or their contents would otherwise develop, and ultimately to improve its business prospects without expenditure of time, expense, or risk...it is reasonable that release of information drawn from the third party proposals could result in financial loss for the third parties and gain for competitors... As such, subparagraphs 19(1)(c) (i) and (ii) are made out.

With respect to subparagraph 19(1)(c)(iii), as described earlier, if the names of the vendors and the pricing information associated with such vendors were to be disclosed, any competitor (including the applicant, [name of Applicant]) could attempt to use such information to interfere with the vendors' contractual relationships with equipment manufacturers. A competitor could use such information to attempt to obtain better pricing from such manufacturers or simply to frustrate the existing contractual relationships or negotiating ability of the third party vendors. Accordingly, in WSA's view, subparagraph 19(1)(c)(iii) is satisfied.

[14] My office asked the WSA for contact information of all 19 of the third party vendors that responded to the RFQ. My office contacted the third parties and invited them to provide

our office with representations regarding their position on the information in the responsive record.

[15] The winning vendor's name and total amount quoted was released to the Applicant. The remaining vendors, three indicated they had no objection to the release of the information at issue. Two other third parties responded requesting their information not be released to the Applicant. Our office did not receive any response from the other third party vendors.

[16] The representations provided by the two third party vendors indicated that they wished the information be withheld, but did not provide details regarding the harms that may result should the information be released.

[17] The Supreme Court of Canada set out the standard of proof for harms-based provisions in *Ontario (Community Safety and Correctional Service) v. Ontario (Information and Privacy Commissioner)*:

This Court in *Merck Frosst* adopted the "reasonable expectation of probable harm" formulation and it should be used wherever the "could reasonably be expected to" language is used in access to information statutes. As the Court in *Merck Frosst* emphasized, the statute tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence "well beyond" or "considerably above" a mere possibility of harm in order to reach that middle ground: Paras. 197 and 199. This inquiry of course is contextual and how much evidence and the quality of evidence needed to meet this standard will ultimately depend on the nature of the issue and "inherent probabilities or improbabilities or the seriousness of the allegations or consequences".

[18] As discussed in Review Report 052-2017, I adopt this same approach in establishing harm. To demonstrate the harm public bodies or in this case a third party, should not assume that the harms are self-evident. Particularity in describing the harm is needed to support the application of the provision.

[19] For each provision in subsection 19(1)(c) of FOIP there must be objective grounds for believing that disclosing the information could result in the harm identified.

[20] WSA's arguments to support the application of subsections 19(1)(c)(i) and (ii) of FOIP appear to be that if the information was released to the Applicant, this would result in financial loss for the third parties and result in a competitive advantage.

[21] However, as provided in the *IPC Guide to Exemptions*, Review Reports 007-2015, 195-2015 and 196-2015, found that the risk of being underbid by competitors for future contracts did not meet the threshold for this provision. Releasing costs will increase the chances that the public body will obtain fair bids and a competitive bidding process.

[22] As such, I do find that subsection 19(1)(c)(i) or (ii) of FOIP applies to the withheld information in the record.

[23] The *IPC Guide to Exemptions* also provided that subsection 19(1)(c)(iii) of FOIP could only apply to ongoing or future negotiations. Completed negotiations are not normally subject to the exemption unless there is a good probability that the particular strategies will be used in the future and the disclosure of the information relating to the completed negotiations would reveal these strategies.

[24] At the time WSA responded to the Applicant's request, it appears the RFQ had already been awarded to the successful vendor and delivery of the products would have concluded. As such, even if any negotiations would have occurred, it appears they would have been concluded at the time of the response to the Applicant. Nor, does it appear there were any further negotiations.

[25] As such, I do not find that subsection 19(1)(c)(iii) of FOIP applies to the record.

2. Does subsection 19(1)(b) of FOIP apply to the record?

[26] Subsection 19(1)(b) of FOIP 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;

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

1. Is the information financial, commercial, scientific, technical or labour relations information of a third party?
2. Was the information supplied by the third party to a public body?
3. Was the information supplied in confidence implicitly or explicitly?

[28] WSA applied subsection 19(1)(b) of FOIP to all of the information withheld from the responsive records. WSA withheld the names of the third party vendors in Table One. WSA withheld Table Two in full.

1. Is the information financial commercial, scientific, technical or labour relations information of a third party?

[29] In its submission, WSA asserted that the withheld information contained commercial information. The submission also referenced previous Reports issued by my office to support this. Commercial information is defined in the *IPC Guide to Exemptions* as follows:

Commercial information is information relating to the buying, selling or exchange of merchandise or services.

Types of information included in the definition of commercial information:

- offers of products and services a third-party business proposes to supply or perform;
- a third-party 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.

[30] In Review Report 229-2015, the Commissioner found that unit prices in a contract between Saskatchewan Government Insurance and a third party qualified as commercial information of the third party. This was later upheld by Justice Zarzeczny in *Canadian Bank Note Limited v. Saskatchewan Government Insurance, 2016 SKQB 362*.

[31] In Review Report 031-2015, the Commissioner found that a third party's entire proposal package in response to a public body's Request for Proposal constituted commercial information.

[32] WSA chose to release the quote information and withhold the names of the third party vendors in Table One. While the name of the third party vendor that was awarded the RFQ contract was severed from Table One, WSA did identify the winning vendor and the total quote amount in its response to the Applicant.

[33] For Table One, releasing the names of the third party vendors associated with the quote information WSA has already released to the Applicant would reveal the third parties' commercial information. As such, I find the vendor names withheld in Table One would reveal information that would qualify as commercial information.

[34] Table Two contains the same information as Table One, with the addition of the vendor names and quote information of those found non-compliant with the RFQ requirements and WSA's evaluation of the quotes. As well, above the table is a date and the names of the employees responsible for completing the evaluations of the quotes.

[35] From a review of the record and submission submitted by WSA it is not clear how the information in the following columns of Table Two would qualify as commercial information:

- Location;
- Compliance

- General notes on submission
- Total Cost – only the column containing notes regarding the quotes. The remaining Total Cost columns would qualify as commercial information.
- Evaluations
- Date of spreadsheet
- Employees responsible for evaluating quotes submitted

[36] As the information in the columns identified above does not qualify as commercial information and all three parts of the test must be met, subsection 19(1)(b) of FOIP does not apply to the information in these columns.

[37] I will consider the next part of the test for the remaining information.

2. Was the information supplied by the third party to a public body?

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

[39] WSA indicated in its submission to my office that the bids submitted by the third party vendors were used to compile the information in the responsive records. As such, I find that the information would qualify as supplied by the third parties to WSA.

3. Was the information supplied in confidence implicitly or explicitly?

[40] In confidence usually describes a situation of mutual trust in which private matters are relayed or reported. Information obtained in confidence means that the supplier of the information has stipulated how the information can be disseminated. In order for confidence to be found, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both the local authority and the third party providing the information.

[41] *Implicitly* means that the confidentiality is understood even though there is no actual statement of confidentiality, agreement or other physical evidence of the understanding that the information will be kept confidential.

[42] *Explicitly* means that the request for confidentiality has been clearly expressed, distinctly stated or made definite. There may be documentary evidence that shows that the information was supplied on the understanding that it would be kept confidential.

[43] WSA indicated in its submission that the bids were submitted both implicitly and explicitly in confidence.

[44] I will first consider if the information was supplied explicitly.

[45] In its submission, WSA provided that some of the bids submitted were labelled as “confidential” by the third party vendors.

[46] In the *IPC Guide to Exemptions* it provides that “simply labelling documents as ‘confidential’ does not, on its own, make the documents confidential... It is just one factor that we consider when determining whether the information was explicitly supplied in confidence.”

[47] The Guide further provides the following factors to consider when determining if a document was supplied in confidence explicitly:

- The existence of an express condition of confidentiality between the public body and the third party;
- The fact that the public body requested the information be supplied in a sealed envelope and/or outlined its confidentiality intentions to the third party prior to the information being supplied.

The above factors are not a test but rather guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting documents.

[48] My office requested WSA provide a copy of the RFQ that the third party vendors responded to.

- [49] In reviewing this document, there appears to be no statement regarding the confidentiality of the quotes submitted to WSA in response to the RFQ. It does provide there will be no public opening of the bids, there is no further detail regarding the confidentiality of the bids submitted to WSA. As it is not clear if the expectation of confidentiality is explicit, I will next consider implicitly in confidence.
- [50] In my office's Draft Review Report, my office recommended WSA develop a policy regarding what information in the procurement process would be considered confidential and include a clause in its RFP/RFQ requirement documents. WSA responded advising it was in the process of amending its procurement packages.
- [51] The *IPC Guide to Exemptions* provide the following factors to consider when determining implicit confidentiality:
- What is the nature of the information? Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the third party or public body?
 - Was the information treated consistently in a manner that indicated a concern for its protection by the third party and the public body from the point at which it was supplied until the present time?
 - Is the information available from sources which the public has access?
 - Does the public body have any internal policies or procedures that speak to how records such as the one in question are to be handled confidentiality?
 - Was there a mutual understanding that the information would be held in confidence?
- [52] These factors are not a test but provide guidance on factors to consider. It is not an exhaustive list. Each case will require different supporting arguments. The bare assertion that the information was supplied implicitly in confidence would not be sufficient.
- [53] WSA's submission provided that the name of the third party vendor combined with its submitted quote information would be information a reasonable person would regard as confidential. Further, it stated that the quote information submitted by the third parties is not available through any public source. WSA also stated in its submission that the quotes were submitted electronically and only certain employees had access to the email account.

[54] In Review Report 109-2015, my office found that the nature of the information submitted by third parties in response to an RFP would be regarded as confidential by a reasonable person.

[55] Based on the information provided in WSA's submission, I find that the information was supplied implicitly in confidence.

[56] While the recorded quote information in Table Two has met the three part test, WSA has already released some of this information in Table One. As mentioned earlier in this report, Table One compares the compliant quote information. WSA chose to withhold the names of the vendors pursuant to subsection 19(1)(b) of FOIP and release the actual quote amounts. It is unclear why WSA chose to redact portions of Table One to provide the Applicant with access to information but chose to completely redact all information found in Table Two, especially since some of the information in the two tables is the same. WSA should ensure it is severing records in response to access to information requests in a consistent manner. If information in one portion of the record is not subject to exemptions, then it is unlikely it would be subject to an exemption in another portion of the record.

[57] As such, I would recommend WSA apply the same redaction practice on Table Two as it had applied to Table One by redacting the names of the vendors and releasing the remaining information.

[58] In WSA's response to my office's Draft Review Report, it indicated it intended to comply with this recommendation.

IV FINDINGS

[59] I find that subsection 19(1)(b) of FOIP applies to some portions of the withheld record.

[60] I find that subsection 19(1)(c) of FOIP does not apply to any of the withheld portions of the record.

V RECOMMENDATIONS

- [61] I recommend WSA continue to withhold the names of the third party vendors recorded in Table One and Table Two pursuant to subsection 19(1)(b) of FOIP.
- [62] I recommend WSA release contents of Table Two, with the exception of the third party vendor names.
- [63] I recommend WSA develop a policy as to what information in an RFQ and/or RFP is confidential or not confidential and insert a standard clause in its RFQ and/or RFP document indicating the same.

Dated at Regina, in the Province of Saskatchewan, this 13th day of February, 2018.

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