



Office of the
Saskatchewan Information
and Privacy Commissioner

REVIEW REPORT 211-2017

The Board of Education of the Regina Roman Catholic Separate School Division No. 81

November 23, 2017

Summary:

The Applicant submitted an access to information request to the Board of Education of the Regina Roman Catholic Separate School Division No. 81 (the School Division). The School Division denied access to portions of the record pursuant to subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP). During the course of the review, the School Division also raised the application of section 21 of LA FOIP to a portion of the record. The IPC found that none of the exemptions raised applied to the withheld portions of the record. The IPC recommended the School Division release the responsive record to the Applicant in full and recommended the School Division update its policies to ensure records responsive to access to information requests are processed appropriately.

I BACKGROUND

- [1] The Commissioner, in prior years, sat as a trustee on the Board of Education of the Regina Roman Catholic Separate School Division No. 81 (the School Division). Although no conflict exists today, the Commissioner has taken no part in this review and has delegated the Director of Compliance to make all decisions related to this review. The only thing that has occurred is that the Report has gone out under the Commissioner's name after being reviewed and approved by the Director of Compliance.
- [2] On June 9, 2017, the Applicant submitted an access to information request to the School Division requesting:

RFQ T0617COMPU Vender Evaluation Documents, Lists of Vendors evaluation documents, List of Venders evaluated, point score, Vender Bid amount, product selected, shipping costs

- [3] On June 30, 2017, the School Division responded to the Applicant's request and indicated access to portions of the record was refused pursuant to subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of *The Local Authority Freedom of Information and Protection of Privacy Act* (LA FOIP).
- [4] On August 18, 2017, the Applicant submitted a request for review to my office.
- [5] On August 23, 2017, my office notified the Applicant and the School Division of my intention to review the matter.
- [6] On August 30, 2017, my office also issued notification to the third parties involved in this review.
- [7] On October 3, 2017, my office received the School Division's submission. My office also received submissions from three of the identified third parties.

II RECORDS AT ISSUE

- [8] The record at issue is a table the School Division used to record quote information submitted by vendors in response to a Request for Quotation (RFQ) for three specific computer equipment items for a total of 1950 units. The table also outlines points the School Division has awarded each vendor based on the prices and delivery of products the vendors submitted quotes sheets in response to the RFQ.
- [9] In its response to the Applicant, the School Division identified that of the nine vendors that submitted quotes in response to the RFQ, one is the Applicant in this review. The School Division also provided the Applicant with a prototype of the table that identified the table's fields but withheld any content regarding this RFQ. Three of the fields in the table refer to point scores, although the actual point scores were not revealed to the

Applicant, the School Division did include an explanation for how those scores would be calculated. The table the School Division provided to the Applicant identifies the following fields and explanation for the calculation of point scores are as follows:

- Price of Each
- Extension [Price of each x quantity]
- Warranty
- # ready to ship
- Delivery date for remaining
- Price – 75 points
- Delivery – 25 points
- Total Score

Price score is determined by giving the lowest compliant price full marks (75 points). The difference from all other quotes prices and the lowest will be subtracted from the 75 available points. (price - lowest price = difference. 75 points – difference = vendor points)

Vendors are given full marks for complying with delivery requests. Vendors will be scored 0 if delivery terms were not identified.

[10] As noted, the table provided to the Applicant was blank; as such, this review will consider the exemptions the School Division has applied to the contents of the table that contain information regarding the RFQ.

[11] In the submission, index of records and copy of the record provided to my office, the School Division did not indicate which exemptions applied to each portion of the record. My office requested the School Division indicate which exemptions it was relying on for each field identified in the table. The School Division replied indicating the following exemptions applied to each identified field of the table:

- **Price Each:** subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of LA FOIP;
- **Extension:** subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of LA FOIP;
- **Warranty:** subsections 16(1)(a), (b) and (c) of LA FOIP;
- **# ready to ship:** subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of LA FOIP;
- **Delivery date for remaining:** subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b) and (c) of LA FOIP;
- **Price – 75 points:** subsections 16(1)(a), (b), (c), 17(1)(d), (e) and (f) of LA FOIP;

- **Delivery – 25 points:** subsections 16(1)(a), (b), (c), 17(1)(d), (e) and (f) of LA FOIP; and
- **Total Score:** subsections 16(1)(a), (b), (c), 17(1)(d), (e) and (f) of LA FOIP.

[12] The Warranty field of this table did not contain any information. The School Division advised my office that the RFQ requested a one year warranty which is standard manufacturer's warranty which is why the field is empty. Although the School Division applied subsection 16(1)(a), (b) and (c) of LA FOIP to the contents of this field, there is no information for my office to consider. As such, that portion of the record will not be considered in this review.

III DISCUSSION OF THE ISSUES

[13] The School Division is a "local authority" as defined by subsection 2(f)(viii) of LA FOIP.

[14] As noted earlier, the School Division identified the nine vendors that submitted quotes in response to the RFQ. One of the vendors is also the Applicant in this request for review. The other eight vendors would qualify as a "third party" as defined at subsection 2(k) of LA FOIP.

1. Did the School Division properly apply section 16 of LA FOIP, specifically subsections 16(1)(a), (b) and (c) of LA FOIP?

[15] The School Division applied subsections 16(1)(a), (b), and (c) of LA FOIP to all of the withheld portions of the record at issue.

[16] Subsections 16(1)(a), (b) and (c) of LA FOIP provide as follows:

16(1) Subject to subsection (2), a head may refuse to give access to a record that could reasonably be expected to disclose:

- (a) advice, proposals, recommendations, analyses or policy options developed by or for the local authority;

(b) consultations or deliberations involving officers or employees of the local authority;

(c) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;

16(1)(a) of LA FOIP

[17] This exemption is meant to allow for candor during the policy-making process, rather than providing for the non-disclosure of all forms of advice or all records related to the advice.

[18] In order for 16(1)(a) of LA FOIP to apply, all three parts of the following test must be met:

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

2. The advice, recommendations, proposals, analyses and/or policy options must:

i) be either sought, expected or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, for example, taking an action or making a decision; and

iii) involve or be intended for someone who can take or implement the action.

3. Was the advice, recommendations, analyses and/or policy options developed by or for the public body?

1. Does the information qualify as advice, proposals, recommendations, analyses or policy options?

[19] *Advice* includes the analysis of a situation or issue that may require action and the presentation of options for future action, but not the presentation of facts. *Advice* has a broader meaning than recommendations.

- [20] *Recommendations* relate to a suggested course of action as well as the rationale for a suggested course of action. Recommendations are generally more explicit and pointed than advice.
- [21] *Proposals, analyses* and *policy options* are closely related to advice and recommendations and refer to the concise setting out of the advantages and disadvantages of particular courses of action.
- [22] Therefore, advice is the course of action put forward, while analyses refers to the examination and evaluation of relevant information that forms, or will form, the basis of the advice, recommendations, proposals, and policy options as to a course of action.
- [23] The information withheld from the table includes information provided by the third party vendors from their quotes submitted in response to the RFQ and the point scores awarded to the third party vendors.
- [24] The price each, extension, # ready to ship and delivery date for the remaining fields of the table record information from the third parties' quotes. The contents include the unit price of the computer equipment, the total price of the computer equipment based on the unit price and the number of units requested, the number of units available at the time of the RFQ and when the remainder of the units could be delivered. Hereafter, the information recorded in these fields will be referred to as 'quote information.'
- [25] The price – 75 points, warranty – 25 points, and total score fields of the table record the awarded point scores for each third party vendor. The point scores are based on the prices quoted by the third parties and whether or not the units could be delivered by the deadline date provided in the RFQ. The total score is the total of the points awarded in the price and warranty categories. Hereafter, the information recorded in these fields will be referred to as 'point scores.'
- [26] The School Division's submission provided that the application of subsection 16(1)(a) of LA FOIP to the withheld information was appropriate as the Purchasing Supervisor used

the table to “analyse, cross-compare and make a recommendations [sic] on the advantages and disadvantages of each quote.”

[27] The quote information in the table is recited from the quotes submitted from the third party vendors in response to the RFQ. It is not clear how the School Division came to the conclusion that information extracted from a submitted quote would meet any of the definitions provided in the first part of the test.

[28] The point scores are calculated from the quote information. There is no other information considered in the calculation of these scores. Based on the record released to the Applicant, the method of calculating the point scores has already been disclosed to the Applicant. It does not appear the point scores reveal any additional information that would not have already been provided in the quote information. In fact, it appears the point scores are just another variation of relaying the same information in the quote information. I do not find the information withheld consists of advice, recommendations, proposals, analyses or policy options.

[29] As the first part of this test is not met, I do not find that subsection 16(1)(a) of LA FOIP applies to the withheld portions of the record.

16(1)(b) of LA FOIP

[30] This exemption is meant to permit public bodies to consider options and act without constant public scrutiny.

[31] In order for withheld information to qualify for exemption under subsection 16(1)(b) of LA FOIP, the opinions solicited during a consultation or deliberation must:

i) be either sought, expected or be part of the responsibility of the person who prepared the record; and

ii) be prepared for the purpose of doing something, such as taking an action, making a decision or a choice.

[32] The *IPC Guide to Exemptions* also provides the following definitions for consultation and deliberation:

A consultation occurs when the views of one or more officers or employees of a public body are sought to the appropriateness of a particular proposal or suggested action.

A deliberation is a discussion or consideration, by the persons described in the section, of the reasons for and against an action. It refers to discussions conducted with a view towards making a decision.

[33] The School Division indicated in its submission to my office that the table was “prepared for deliberations or decision-making related to the RFQ involving employees of the local authority.”

[34] In the *IPC Guide to Exemptions* it provides that this “provision is not meant to protect the bare recitation of facts, without anything further.”

[35] As discussed earlier in this report, the contents of the report contain two types of information, quote information and point scores. The quote information is recorded from the quote sheets submitted by the third parties in response to the RFQ. It is not clear how this information copied from the submitted quotes would contain views or discussions of the School Division. As such, I do not find that the quote information would qualify as consultation or deliberation.

[36] As noted in the previous section, the point scores are calculated from the quote information. There is no other information considered in the calculation of these scores. Based on the content of the record released to the Applicant, the method of calculating the point scores has already been disclosed to the Applicant.

[37] The School Division’s Purchasing Supervisor was responsible for calculating the point scores for each of the third party vendors’ based on the submitted quote information. The point scores do not appear to be reflective of the Supervisor’s views of the appropriateness of a quote or discussion regarding the quote. The point scores instead

appear to merely relay the same information as the quote information. As such, I do not find the point scores to constitute consultations or deliberations.

[38] I do not find that subsection 16(1)(b) of LA FOIP applies to the withheld portions of the record.

16(1)(c) of LA FOIP

[39] This exemption covers positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the public body. It also covers considerations related to the negotiations.

[40] In order for this exemption to apply all three parts of the following test must be met:

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?
2. Were they developed for the purpose of contractual or other negotiations?
3. Were the contractual or other negotiations being conducted by or on behalf of a public body?

1. Does the record contain positions, plans, procedures, criteria, instructions or considerations that relate to the contractual or other negotiations?

[41] A *plan* is a formulated and especially detailed method by which a thing is to be done; a design or scheme.

[42] *Positions* and *plans* refer to information that may be used in the course of negotiations.

[43] *Procedures, criteria, instructions* and *considerations* are much broader in scope, covering information relating to the factors involved in developing a particular negotiating position or plan.

[44] In its submission, the School Division provided that the table “was created specifically for the purpose of contractual negotiations by or on behalf of [the School Division] or considerations related to those negotiations.”

[45] As noted in previous sections of this report, the contents of the report contain two types of information, quote information and point scores. The quote information is recorded from the quote sheets submitted by the third parties in response to the RFQ. It is not clear how information copied from the submitted quotes would contain any plans, positions, procedures, criteria, instructions or considerations of the School Division. As such, I do not find that the quote information would meet the definitions for the first part of the test.

[46] I will next consider the point scores. As noted in other sections of this report, the point scores are calculated from the quote information. There is no other information considered in the calculation of these scores. In the RFQ document, the School Division had also provided the vendors with the following regarding evaluation and award of tenders:

Each criterion has been assigned a weight according to their importance as follows:

- Total price of equipment including delivery costs – 75%
- Availability to equipment – 25%

[47] The School Division’s Purchasing Supervisor was responsible for calculating the point scores for each of the third party vendors’ based on the submitted quote information. Based on the affidavit provided by the School Division, the Purchasing Supervisor used the calculated point scores to provide a recommendation to the IT Supervisor along with a recommendation for award. Based on the information provided in the affidavit, it appears the calculated point scores were used for internal discussions to award the successful vendor. It does not appear this information was used for the purposes of any negotiations. As such, it does not appear the point scores would meet any of the definitions provided in the first part of the test.

[48] As the first part of the test has not been met, I find that subsection 16(1)(c) of LA FOIP does not apply to the withheld portions of the record.

2. Did the School Division properly apply section 17 of LA FOIP, specifically subsections 17(1)(d), (e) and (f) of LA FOIP?

[49] The School Division also applied subsections 17(1)(d), (e), and (f) of LA FOIP to all of the withheld portions of the record at issue.

[50] Subsections 17(1)(d), (e) and (f) of LA FOIP provide as follows:

17(1) Subject to subsection (3), a head may refuse to give access to a record that could reasonably be expected to disclose:

...

(d) information, the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of the local authority;

(e) positions, plans, procedures, criteria or instructions developed for the purpose of contractual or other negotiations by or on behalf of the local authority, or considerations that relate to those negotiations;

(f) information, the disclosure of which could reasonably be expected to result in an undue benefit or loss to a person;

17(1)(d) of LA FOIP

[51] In order for this exemption to apply, both parts of the following test must be met:

1. Are there contractual or other negotiations occurring?
2. Could release of the record reasonably be expected to interfere with the contractual or other negotiation(s)?

[52] The *IPC Guide to Exemptions* also provides that “prospective or future negotiations could be included within this exemption, as long as they are foreseeable. Once a contract is executed, negotiation is concluded. The exemption would generally not apply.”

- [53] The School Division provided in its submission that the timing of the Applicant's request caused the School Division to be concerned that the release of the information may interfere with the delivery and installation process of the computer equipment to prepare for the 2017-2018 school year.
- [54] The School Division's affidavit provided that the bid closing date was June 2, 2017 with a deadline date for the successful vendor to deliver the computer equipment of July 4, 2017. As well, the affidavit provided that on June 8, 2017 all vendors were notified by email of who the successful third party vendors were for each piece of equipment listed in the RFQ.
- [55] At the time of the Applicant's request, the School Division had already awarded the contracts to the successful vendors. As such, even if any negotiations would have occurred, it appears they would have been concluded at the time of the request. Nor, does it appear there were any further negotiations.
- [56] Therefore, I do not find that subsection 17(1)(d) of LA FOIP would apply to the responsive record.

17(1)(e) of LA FOIP

- [57] This provision is meant to protect positions, plans, procedures, criteria, instructions and/or considerations developed for contractual or other negotiations. Examples of information that could be covered by this exemption are various positions developed by public body negotiators in relation to labour, financial and commercial contracts.
- [58] In order for this exemption to apply, all three parts of the following test must be met:
1. Does the record contain positions, plans, procedures, criteria, instructions or considerations?
 2. Were they developed for the purpose of contractual or other negotiations?
 3. Were they developed by or on behalf of the public body?

[59] When examining the application of subsection 16(1)(c) of LA FOIP, I considered the same definitions provided in part one of this test. I found that none of the withheld information fit the definitions provided.

[60] Accordingly, I do not find that subsection 17(1)(e) of LA FOIP applies to the withheld information.

17(1)(f) of LA FOIP

[61] For this provision to apply, there must be objective grounds for believing that disclosing the information could result in a prejudice. The public body does not have to prove that prejudice is probable, but needs to show that there is a “reasonable expectation” of prejudice if any of the information were to be released. All three parts of the following test must be met:

1. Is there a clear cause and effect relationship between the disclosure and the prejudice which is alleged?
2. Is the prejudice caused by the disclosure more than trivial or inconsequential?
3. Is the likelihood of prejudice genuine and conceivable?

[62] The School Division provided in its submission that it did not want to prejudice its economic and operational interests. However, it did not elaborate on how the release of the withheld information could result in this.

[63] I do not find that subsection 17(1)(f) of LA FOIP applies to the withheld information in this record.

3. Did the School Division properly apply section 18 of LA FOIP, specifically subsections 18(1)(b), (c) and 18(2) of LA FOIP?

[64] The School Division applied subsections 18(1)(b) and (c) of LA FOIP to the contents of the following fields in the table: Price each, Extension, # ready to ship, and Delivery date for remaining.

[65] Subsections 18(1)(b), (c) and 18(2) of LAFOIP provide as follows:

18(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 the local authority by a third party;

(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;

the third party;

...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

[66] The *IPC Guide to Exemptions* provides the following regarding section 18 of LA FOIP:

Section 18 [of LA FOIP] is intended to protect the business interests of third parties and to ensure that public bodies are able to maintain the confidentiality necessary to effectively carry on business with the private sector. Although public bodies need to be open and accountable, they also need to conduct business and enter into business relationships and in doing so they must be able to assure their private partners that their trade secrets are commercial and financial secrets will not be readily disclosed to competitors and the general public (NT IPC Review Report 04-043). However, this is balanced against the need for public accountability in the expenditure of public funds. Third parties must understand that certain information regarding how the public body meets its financial obligations will be made public.

18(1)(b) of LA FOIP

[67] In order for subsection 18(1)(b) of LA FOIP to apply, the following test must be met:

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?

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

[68] In its submission, the School Division asserted that the information in the identified fields contained commercial and financial information. The submission also referenced previous Reports issued by my office regarding the application of 18(1)(b) of LA FOIP and 19(1)(b) of *The Freedom of Information and Protection of Privacy Act* (FOIP).

[69] Financial information and commercial information is defined in the *IPC Guide to Exemptions* as follows:

Financial information is information regarding monetary resources, such as financial capabilities, assets and liabilities, past or present. Common examples are financial forecasts, investments strategies, budgets and profit and loss statements. The financial information must be specific to a particular party that must demonstrate a proprietary interest or right of use of the financial information.

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 complete contracted work or tasks.

[70] As well, 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*.

[71] 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, as well as evaluation scores of the third party's proposal, qualified as third party commercial information.

[72] As noted in previous sections of this Report, the contents of the table contain two types of information, quote information and point scores. The quote information is recorded from the quote sheets submitted by the third parties in response to the RFQ. The point scores are calculated from the quote information. It is my understanding that no other information is considered in the calculation of these scores.

[73] While the School Division did not apply subsection 18(1)(b) of LA FOIP to the Price – 75 points, Delivery – 25 points and Total Score fields, 18(1)(b) of LA FOIP is a mandatory exemption and as such must be considered.

[74] Consistent with past findings by this office, I find that the withheld information in all fields of this table qualifies as financial and commercial information of the third parties.

2. Was the information supplied by the third party to the local authority?

[75] Information may qualify as “supplied” if it was directly supplied to a local authority 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.

- [76] The contents of the records can still be considered to have been supplied by a third party even when the records originate with the public body, for example when the record contains or repeats information extracted from documents supplied by the third party. In this case, that is what has occurred.
- [77] The School Division has indicated that the quote information was directly extracted from the quotes submitted by the third parties. As such, this information would qualify as “supplied” by a third party.
- [78] The point scores, however, were not directly supplied in the quotes submitted by the third parties. Nonetheless, it can qualify as “supplied” if the disclosure of the information would reveal information supplied by a third party.
- [79] In other jurisdictions, evaluations scores awarded to companies in response to its bids based on criteria established by the public body did not qualify as supplied. It was also found that the disclosure of the scores could not reasonably be expected to permit the drawing of accurate inferences as to the information actually supplied. (British Columbia Order F15-37; Ontario Order MO-3264)
- [80] In this case, as discussed in the records at issue section of this report, the School Division has divulged to the Applicant the criteria used to evaluate the scores and how it calculates these scores.
- [81] As noted earlier, the School Division identified nine third party vendors that submitted quotes in response to the RFQ. One of the vendors is also the Applicant in this request for review and as such would have knowledge of their quote submitted in response to this RFQ. As well, the affidavit indicated that on June 8, 2017 all the vendors, including the Applicant, received an email identifying the winning vendors for three computer equipment products identified in the RFQ. Further, the affidavit provided that prior to the Applicant submitting an access to information request, the School Division responded to an inquiry from the Applicant advising that it: “does not disclose the awarded price but

there was a greater than 10% discrepancy from your price. The delivery terms were acceptable to the tender.”

[82] If the point scores were to be released to the Applicant, combined with their knowledge of their own submitted quote and other details of the RFQ, it would be possible for the Applicant to determine the other quotes submitted.

[83] Further, in Review Report 109-2015, my office had found the evaluations scores qualified as being supplied by a third party.

[84] Therefore, I find the point scores to qualify as “supplied” as it would permit the drawing of accurate inferences with respect to the pricing information provided in the third parties’ proposals.

[85] I find that all the withheld information to qualify as “supplied.”

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

[86] 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.

[87] In the School Division’s submission, it provides that the RFQ contains both implicit and explicit references to confidentiality.

[88] *Implicitly* means 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.

[89] *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.

[90] The *IPC Guide to Exemptions* provides that the following factors are to be considered when determining whether a document was supplied in confidence implicitly (not exhaustive):

- 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 to 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 confidentially?
- Was there a mutual understanding that the information would be held in confidence? Mutual understanding means that the public body and the third party both had the same understanding regarding the confidentiality of the information at the time it was supplied. If one party intends the information to be kept confidential but the other does not, the information is not considered to have been supplied in confidence. However, mutual understanding alone is not sufficient. Additional factors must exist in addition.

[91] In my office's Review Report 109-2015, it was found that the nature of the information contained in a third party's proposal in response to an RFQ and evaluation scoring would be regarded as confidential.

[92] In Order PO-2859, the Ontario Information and Privacy Commissioner found that the point score assigned to net present values on their own did not meet the supplied test. However, it found that because the point scores contained information derived from a record supplied in confidence, it concluded that the point scores also qualified as supplied in confidence.

[93] Our office notified the identified third parties of the review and invited submissions for my office's consideration. As the Applicant was one of the third party vendors, the quote

information could be provided by the School Division to the Applicant as it should be his information. However, the School Division continues to withhold this information.

[94] Of the remaining eight third parties, three chose to provide submissions to my office. Third Party A responded to the School Division providing consent to release its third party information. However, the School Division has not released the quote information submitted by Third Party A, nor is it my understanding that it intends to release this information.

[95] Third Party B provided that “it is not commonplace for an award to be published except for the name of the recipient of the award in some communication. Any responses that [name of Third Party B] provides in a tender response are private.” Third Party C provided “while we appreciated that you have received an inquiry in regard to portions of this information we believed that our [intellectual property] was submitted in confidence in order for us to provide the strongest response and greatest value to the [the School Division] who is our customer.”

[96] The School Division’s Purchasing Supervisor stated in the affidavit that “as part of RCSD’s standard procurement practice, I include explicit confidentiality clauses in RCSD’s RFQ. As part of the Division’s procurement practices, I do not disclose the winning bids’ pricing to other competitors because of concerns regarding the confidential nature in which the bids are prepared. I treat each bidder’s response as it contains proprietary information to that bidder.”

[97] The affidavit also provides that the School Division’s “standard protocol with all tenders is that there is no public opening.” The School Division explained that a public opening is “the process of opening and reading bids at the time and place specified in the tender document and in the presence of anyone who wishes to attend.”

[98] My office received submissions from three of the identified third parties. Of those three, two of the third parties, as well as the Purchasing Supervisor, claimed there was a mutual understanding that the information submitted would be kept confidential.

[99] In addition, the School Division also quoted the portions of its RFQ document to show that there was explicit expectation of confidentiality:

- *Freedom of Information and Protection of Privacy Act* heading at the bottom of p. 4 and how documents “will be received and held in confidence by the school division and the information will not be disclosed, except to the extent necessary for carrying out the school division’s purposes or as required by law.”
- CONFIDENTIALITY head at the top of p. 5: “Information about the school division obtained by a respondent must not be disclosed unless authorized by the school division in writing. By submitting a response, the respondent agrees that this obligation of confidentiality will survive the termination of the tender and any contract that might arise between the parties.”
- Clause 3.1.2 on p. 8 describes “Information contained in the bid submission will be kept confidential by all parties until the evaluations and awarding process has been completed and all bidders notified of awards.”

[100] While the School Division has included clauses relating to confidentiality in its RFQ document, there appears to be a few issues that warrant further consideration.

[101] The first bullet references FOIP. However, the School Division is governed by LA FOIP, not FOIP. In the future, the School Division should ensure that legislation referenced in its documents refers to the access and privacy legislation that applies.

[102] The second bullet regarding confidentiality appears to be referring to the obligation of the third parties in ensuring confidentiality of information received regarding the School Division, rather than the other way around.

[103] The third bullet appears to provide that the information will be kept confidential *until the completion of the evaluations and awarding process*. It is my understanding that the evaluation and awarding process was concluded at the time of the Applicant’s request. It appears this clause of the School Division’s RFQ document is providing that the quote information would no longer be considered confidential once the successful vendor(s) was selected.

[104] In the 2017 Federal Court of Appeal decision, *Canada (Office of the Information Commissioner) v. Calian Ltd.*, 2017 FCA 135, the interplay between contractual law and

the statutory regime governing access to information in Canada is considered. In this decision, it was found that a disclosure clause in a contract constitutes consent to disclosure of information that may be otherwise exempt under the Act as follows:

[65]... the correct interpretation of the Disclosure Clause, consistent not only with its clear wording but also with the general scheme and purpose of the Act together with basic principles of administrative law, must be to permit disclosure...

[76]... The Disclosure Clause merely stipulates that the Offeror is agreeing to disclosure of certain information which may otherwise be treated as exempt under the Act... the clause's impact is not that the exemptions found under subsection 20(1) do not apply; rather, it is that despite them applying, the third party nonetheless agrees to disclosure.

[105] As noted earlier, the RFQ document inviting potential vendors to submit quotes provided that the information submitted would be held confidential "until the evaluations and awarding process have been completed and all bidders notified of award." As well, Third Party A responded to the School Division providing written consent to release its information. As the vendors should have reviewed the RFQ document and been fully aware of the terms and conditions of submitting a quote in response to the RFQ, I find that this clause of the RFQ provides the School Division with consent to release this information.

[106] As noted earlier, the point scores would only reveal the information submitted in the quotes by the third parties. As I have found that the clause in the RFQ provides the School Division with consent to release the Third Party's quote information, I do not find the release of the point scores to reveal any information that was provided in confidence.

[107] Based on the clause in the RFQ, I find that the third party vendors that responded to the School Division's RFQ have provided consent to the School Division pursuant to subsection 18(2) of LA FOIP, and as such subsection 18(1)(b) of LA FOIP does not apply to the withheld information.

[108] As my office has found that the clause in the RFQ to provide the School Division with consent to release the quote information submitted by the third party, there is no need to

consider the application of 18(1)(c) of LA FOIP. The consent provided in the RFQ would apply to all provisions of section 18 of LA FOIP. However, even if my office was to consider the application of subsection 18(1)(c) of LA FOIP, the School Division, nor the third parties provided sufficient evidence to show a “reasonable expectation of harm” if any of the information were to be released.

4. Did the School Division appropriately apply subsection 21 of LA FOIP?

[109] Upon review of the record the School Division provided to my office, it was found that the explanation regarding how point scores were calculated appeared to provide the same conclusion but differed slightly in wording from what was already provided to the Applicant.

[110] My office asked the School Division about the differences. The School Division indicated that the document provided to the Applicant was a prototype evaluation document and added an explanation for the Applicant’s benefit. The document provided to my office was a copy of the original internal document. This document did not contain any explanation regarding how point scores were calculated. The explanation was added in June 2017 to provide information to the School Division’s legal counsel and the access/privacy officer. The School Division also asserted that the explanation on the original internal document constituted solicitor-client privilege within the meaning of section 21 of LA FOIP.

[111] Section 21 of LA FOIP provides as follows:

21 A head may refuse to give access to a record that:

- (a) contains information that is subject to solicitor-client privilege;
- (b) was prepared by or for legal counsel for the local authority in relation to a matter involving the provision of advice or other services by legal counsel; or
- (c) contains correspondence between legal counsel for the local authority and any other person in relation to a matter involving the provision of advice or other services by legal counsel.

[112] As noted earlier, the wording between the two documents differs very slightly. The School Division has already provided the Applicant with an explanation for how it calculates the point scores. Based on my review of the two explanations, it does not appear that the explanation on the original internal document discloses anything additional to the one already provided to the Applicant. Further, based on my review of the record, it does not appear to qualify as legal advice or a legal service. As such, I do not see how solicitor-client privilege would apply, nor did the School Division provide any further explanation to support this exemption.

[113] I do not find that section 21 of LA FOIP applies to the explanation provided regarding the point scores.

5. Did the School Division appropriately process the records for this request?

[114] When the School Division replied to the Applicant's access to information on June 30, 2017, indicating it would provide "the School Division's Vender Evaluation document in its original form as it existed prior to the opening of the bids."

[115] The Applicant emailed the School Division on July 5, 2017 indicating the document referenced in its letter was not attached.

[116] The School Division responded on July 27, 2017 providing a copy of the table indicating it had inadvertently not attached the document and apologized for the oversight.

[117] As discussed earlier in this report, the Applicant was provided a copy of the table identifying all the fields but none of the content was released. The School Division also identified the nine third parties that had submitted bids in its June 30, 2017 letter to the Applicant.

[118] As noted in the records at issue section of this report, all the fields of the table were identified. As well, the School Division identified the three pieces of computer equipment involved in this RFQ.

- [119] As well, the table provided to the Applicant had three columns labeled COMPANY A, COMPANY B, COMPANY C. The fields were empty and did not show any severing or identify which of the exemptions raised in the June 30, 2017 letter applied to each portion of the table.
- [120] Upon commencing a review of this matter, the School Division provided its submission, index of records and a copy of the unredacted record.
- [121] The unredacted copy of this table labels the columns with each of the vendors that had submitted quotes in response to the RFQ. The table contents records the third party vendors' quote information and evaluation point scores.
- [122] As noted earlier, upon review of the record provided to my office, it was found that the explanation regarding how point scores were calculated appeared to provide the same conclusion but differed slightly in wording from the record provided to the Applicant.
- [123] The School Division indicated in its submission that the Applicant was provided a prototype of the requested record. My office was provided with a copy of the original record. The School Division also explained that the explanation for how the point scores are calculated did not exist on either version of the record. The explanations were added to the records at the time of the Applicant's request.
- [124] In the future, the School Division should ensure when responding to an Applicant's request that a copy of the actual record is provided. The record should clearly show what portions of the record have been redacted and indicate the exemptions relied on for each redacted item.
- [125] In earlier Reports from this office, such as Review Report F-2012-006, the following advice was provided to public bodies regarding severing of records:

If any information has been withheld, the institution or authority could submit the record in one of two ways:

1. Reproducing the withheld portion of the record in red ink, leaving the disclosed portion in black ink, and clearly indicating, beside or near the withheld portion in black ink, and clearly indicating, beside or near the withheld portion, the applicable section(s) of the relevant Act; or

2. Alternatively, by providing a copy of the record with:

a. The withheld information outlined or highlighted, and

b. The relevant section number(s) of the Act clearly indicated beside or near that withheld information.

...If the exemptions are clearly marked beside the severed line items/sections, it will be clear upon review which of the multiple exemptions applies to the severed items in question. The same procedure should be utilized when providing severed records to an Applicant even though the Applicant is not provided with the information that has been severed. This would remove any doubt as to which exemption applied to which line item.

[126] In a webinar recently developed by my office, *Modern Age Severing*, it encourages public bodies to conduct a line by line review to give an applicant an idea of how much information is being withheld. As well, it recommends that public bodies clearly identify exemptions that apply to each severed segment.

[127] I recommend the School Division update its policies and procedures for responding to access to information requests to ensure responsive records are processed appropriately.

IV FINDING

[128] I find subsections 16(1)(a), (b), (c), 17(1)(d), (e), (f), 18(1)(b), (c) and section 21 of LA FOIP do not apply to the withheld portions of the record.

V RECOMMENDATIONS

[129] I recommend the School Division provide the Applicant an original copy of the responsive record in full.

[130] I recommend the School Division ensure its policies and procedures for responding to access to information requests provides the following:

- that responsive records provided to the Applicant, in full or in part, are copies of the original record,
- that the School Division shows what portions of the record have been redacted, and
- that the School Division clearly indicates what exemption(s) apply to each line or portion of the record.

Dated at Regina, in the Province of Saskatchewan, this 23rd day of November, 2017.

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