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Legislative Assembly Assemblée législative

Information and
Privacy Commissioner
PO Box 2000, Charlottetown PE
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Commissaire à l'information et
à la protection de la vie privée
C.P. 2000, Charlottetown PE
Canada C1A 7N8

PRIVATE AND CONFIDENTIAL



July 9, 2024

VIA EMAIL

Dear

Re: Request for review under the *Freedom of Information and Protection of Privacy Act*
Public Body: Department of Social Development and Housing
Public Body's reference: SDH 2022-255
Our file reference: c/24/00099 (formerly FI-23-511)

An Applicant requested access to records from the Department of Social Development and Housing (the "Public Body"), and the Public Body consulted your company as a third party whose business information may be affected by disclosure of records responsive to the request, pursuant to subsection 14(1) of the *Freedom of Information and Protection of Privacy Act* (the "FOIPP Act"). After the Public Body considered your position and made a decision on disclosure and notified you of their decision, your company requested a review by our office.

As we set out in previous correspondence to you in this matter, and as was previously explained to you in the Public Body's consultation letter, in order for the Public Body to have authority to withhold information about your business under subsection 14(1), there is a three-part test that must be satisfied. If all three parts of this test are not satisfied, the Public Body is not authorized to refuse to disclose the information.

Under section 64.1 of the *FOIPP Act*, I have the discretion to refuse to conduct an inquiry if, in my opinion, the circumstances warrant refusing to conduct an inquiry. Before I initiate a review, I need to have a reasonable basis to believe that a review is warranted. To assist us with considering whether a review was warranted, we asked for your submissions on clause 14(1)(a) and 14(1)(b). We did not request your submissions on clause 14(1)(c), but you provided some comments.

After having reviewed the processing file and your submissions, it is my opinion that, on the face of it, your business has no reasonable possibility of success in establishing that all three parts of the three-part test of subsection 14(1) can be satisfied. Therefore, in my opinion, a review is not warranted. My reasons are set out on the following pages.

Analysis

The information at issue is comprised of two rates displayed on pages 68 and 75 (of the pdf/pages 187 and 194 of 202 of the responsive records), described as fixed rate disbursement and expense handling rates.

(i) 14(1)(a) of the FOIPP Act – will reveal business information

Subsection 14(1) applies to a few types of business information. You claim this information is your business's commercial and financial information and disclosing it would reveal your company's pricing structure by providing details on the composition of your pricing, which would in turn provide information on your company's financial capabilities.

While I do not agree the information at issue is your financial information or that if the Public Body were to disclose this information it would reveal your business's financial capabilities, I am satisfied that the information you describe as fixed rate disbursement and expense handling rates is your business's commercial information because it relates to the selling of a service. However, this is only one aspect of the first part of the test.

As we mentioned in previous correspondence, satisfying clause 14(1)(a) also requires that you show that disclosing the information would reveal it. This means that it would not be generally known or accessible unless it is disclosed by the Public Body. A cursory internet search shows that some of your company's contracts with other entities are available on the internet, and that the same information as the information at issue here is contained in some of the documents that are available online.

I accept that the information at issue is your business's commercial information. However, because the information at issue is already available publicly, it would not be "revealed" if the Public Body disclosed it. For this reason, I am not persuaded that there is a reasonable possibility that your company can demonstrate that clause 14(1)(a) of the FOIPP Act would be satisfied.

(ii) Clause 14(1)(b) – submitted in confidence

In the records provided, we note that your business's proposal was signed as accepted and the work contemplated therein was provided, so we are satisfied that your business's proposal was incorporated into a contract. It is your position that the information at issue was provided implicitly or explicitly in confidence, and that clause 14(1)(b) has been met.

As with clause 14(1)(a), clause 14(1)(b) of the FOIPP Act has two components: the information must have been "supplied", and it must have been supplied in confidence. I am not persuaded that your company has a reasonable chance of satisfying either component of clause 14(1)(b).

With respect to contracts, previous decisions have held that contractual terms are generally not considered "supplied" if they are negotiated, even where there is little or no actual negotiation preceding the contract. Because the information at issue was a term of the contract, it would not be considered "supplied". Therefore the "supplied" component of clause 14(1)(b) cannot be met.

Further, to support your position that your business supplied the information in confidence, you refer us to one of your standard terms and conditions, which states that the document may not be used for any purpose other than for the project unless your business approves. Respectfully, this condition would not apply in the present circumstance.

Public bodies within the Province of PEI are subject to the *FOIPP Act* and must follow the legal authorities and obligations set out therein. Applicants have a statutory right to access information in the custody and control of public bodies, subject to the limited and specific exceptions set out in the legislation. One of the limited and specific exceptions is subsection 14(1), which gives public bodies the parameters around when the exception applies. Public bodies must ensure those parameters are met before they can apply the exception.

In making a decision about access to information, the Public Body is not contemplating "using the document for another purpose". They are complying with a legal obligation under statute. Public bodies can neither contract out of their statutory obligations nor waive a citizen's statutory right through contract with a third party. Similarly, a public body cannot fetter their ability to comply with a statutory obligation or a citizen's statutory right by agreeing to require the approval of a third-party contractor before complying. The standard term and condition you rely upon to claim the information at issue was submitted in confidence holds no force or effect against the Public Body complying with its statutory obligations.

- (iii) Clause 14(1)(c) -- disclosure could reasonably be expected to result in one of the enumerated harms

As all three parts of subsection 14(1) of the *FOIPP Act* must be met in order for a public body to be authorized to refuse disclosure, and I am not persuaded that there is any reasonable possibility that you are able to establish that either clause 14(1)(a) or 14(1)(b) can be met, I do not need to address clause 14(1)(c).

Conclusion

As you have not provided a sufficient basis to demonstrate that there is a reasonable possibility that your business would be able to satisfy either of the first two parts of the three-part test, and all three parts are required to be met, there is no reasonable possibility that your business can demonstrate that subsection 14(1) of the *FOIPP Act* applies and that the Public Body is authorized to refuse disclosure of the information at issue.

As your company does not appear to have any reasonable chance of success, in my opinion there is no reasonable basis to believe that a review is warranted. Therefore, I am exercising my discretion under 64.1 of the *FOIPP Act* and am refusing to conduct a review in this matter.

We note that in their decision letter of February 1, 2023, the Public Body decided to refuse disclosure of some information pertaining to your company under subsection 14(1) of the *FOIPP Act*. We made no assessment about whether the Public Body appropriately applied subsection 14(1) to the withheld information as it was not information at issue in your request for review. However, it is possible that the Applicant may request a review of the Public Body's authority to withhold that information once the Public Body discloses the records to them. If this occurs, we will decide at that time whether to conduct a review into the Public Body's decision to withhold that information. If we do conduct a review, the Public Body will bear the burden of proof to establish they were authorized to withhold the information, but we will give you the opportunity to provide us with your position for our consideration.

In 30 days from the date of this letter, once the judicial review period has passed, the Public Body is free to act on their decision communicated to you in their letter of February 1, 2023.

Sincerely,



Denise N. Doiron
Information and Privacy Commissioner

c: APSO