

To: Access to Information and Protection of Privacy Statutory Review 2020

5th Floor, Suite 502
Beothuck Building
20 Crosbie Place
St. John's, NL A1B 3Y8
Telephone: 709-729-7589
Toll Free: 1-833-667-0679
Fax: 709-729-5618
Email: admin@nlatippareview.ca

November 27, 2020

**Re: Statutory Review 2020 of Access to Information and Protection of Privacy Act, 2015;
Specifically, as it relates to the release of Contractor Unit pricing and Sub-Contractor Invoicing.**

I am writing this letter to voice the opinion of our Industry regarding the Interpretation of the Act as it relates to the release of Contractor Unit pricing and Sub-Contractor Invoicing when said contractors bid on work through the Public Tender Process.

Our Industry has no issue with the Freedom of Information Act (FOI) in general and understand the benefits of open and transparent government business dealings.

Over the past several years, when requests have been made to government for the release of contractor tender responses, contractors have argued that the unit pricing component and Sub-Contractor Invoicing should to be withheld under section 39 (disclosure would be harmful to business interest of a third party). Under the 2015 FOI Act the Privacy Commissioner has determined (through a subjective process based on a lack of objective data) that the burden of proof has not been met by the third parties and that the noted information should be disclosed.

Historically public tenders have been opened in a public forum and all total bid prices are released to the general public. The process is open and transparent and provides the price for all bidders for a given job. It is the opinion of the Industry that publicizing individual item unit prices and Sub-Contractor Invoicing would reveal proprietary trade secrets that have taken years of experience, education and software knowledge to obtain. Unit pricing in this industry is not the same as a pen or sheet of paper. Contractors make large financial investments in software, specific equipment, experienced personnel and accounting advice in the development of proprietary unit pricing. This significant investment leads to the establishment of business models which are effective and efficient, which in turn results in lower prices for contractor clients including government and hence taxpayers. We would argue that the current interpretation of the new FOI Act in the long run will inhibit this ongoing industry tendency towards continuous improvement (Don't bother improving your model, just look at what your competitor is doing) There are guidelines as to when information will not be given out, (Freedom of Information Act section 39.1(a), 39.1(c),(i) and 39.1(c)(iii)), but these guidelines, as outlined below, are objectively focused, must all be met and require definitive examples of harm to the third party for a future outcome.

- 1) There must be a clear cause and effect relationship between the disclosure and the alleged harm,
- 2) The harm must be more than trivial or inconsequential (in fact, the ATIPPA, 2015 uses the term “significant harm”), and
- 3) The likelihood of harm must be genuine and conceivable"

To summarize. A third-party contractor whose unit pricing is being requested, needs to be able to objectively prove that a specific negative harmful outcome is sure to happen, based on a subjective determination of a future circumstance.

To the best of our Knowledge, the Privacy Commissioner has ruled against any company arguing that the release of unit pricing will cause their company harm. The rulings have been based on third parties not being able to satisfy all three conditions according to a subjective overview? We would argue that, intuitively, the release of this information would / could have a negative impact on the third-party company. Most provincial and municipal tenders are unit price tables and the open release of this sensitive information will impede future competitive investment in materials and ingenuity if “trade secrets” are open to all.

While all contractor **total** prices need to be released to ensure openness and transparency, the HCANL Board and other members cannot envision a circumstance within the general public realm where the unit pricing would be of particular interest to anyone. So, who would be requesting industry specific unit price information? If it is being requested by other industry companies then this just reinforces the concept that this information has value. Again, intuitively, disclosure would be harmful to business interests of a third party and should fall under the sections within the Act which are there to protect proprietary information.

The HCANL believes that the legislation has gone from very little information being released (Bill 29) to the current situation of commercially sensitive competitive details being released. The pendulum has swung too far the other way. We are not suggesting the Act should be changed or altered, just that the interpretation of “Harm” be adjusted to protect Valuable Proprietary Company Information.

If deemed appropriate members of the HCANL Board would be available, for any additional discussion or clarifications. Your Attention and response, based on the current review of the Act, would be appreciated.

Yours Truly,

Jim Organ

Executive Director

Heavy Civil Association of Newfoundland and Labrador (HCANL)

Mail: P.O. Box 23038, St. John's, NL, A1B 4J9

Office: 25 Kenmount Road, St. John's, Suite 208

Email: jorgan.hcanl@gmail.com

Tel: 709 364 8811

Cell: 709 682 7141

Fax: 709 364 8812

www.heavycivilnl.ca