

Office of the Access
to Information and
Privacy Commissioner

New Brunswick



Commissariat à l'accès
à l'information et à la
protection de la vie privée

Nouveau-Brunswick

REPORT OF THE COMMISSIONER'S FINDINGS

Right to Information and Protection of Privacy Act

Complaint Matter: 2013-1343-AP-689

Date: June 13, 2014

Case about unsuccessful bidder's access to the tendering information

Dossier concernant la demande de la part d'un vendeur dont la soumission n'a pas été retenue pour des renseignements portant sur les soumissions et le processus suivi

INTRODUCTION and BACKGROUND

1. The present Report of the Commissioner's Findings is made pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). The Applicant asked that the Commissioner carry out an investigation after receiving an unsatisfactory response to a request for access to information filed under Part 2 of the Act.
2. The Applicant in the present case was an unsuccessful bidder in a tender process (referred to as the "Request for Proposal") that was publicly advertised by the New Brunswick Liquor Corporation ("NB Liquor").
3. After being informed by NB Liquor that it was not the successful bidder, the Applicant requested a debriefing meeting with NB Liquor officials to discuss the matter. At that meeting, the Applicant was provided with a review of its own submission and how it was evaluated. The Applicant did not receive any information about its submission in relation to that of the successful bidder, including information regarding the scores that had been attributed to the successful bidder.
4. As the Applicant was not satisfied with the amount of information provided by NB Liquor at this meeting, the Applicant continued with its efforts to obtain more information by making an access request to NB Liquor on February 14, 2013 under the Act. The request was for copies of "all documents received and sent from/to any and all parties in regards to the Request for Proposals" for a specified publicly advertised tender. The Applicant was seeking information for time period between the publication of the Request for Proposal and the date upon which NB Liquor communicated its decision at the end of that process.

("the Request")
5. Having informed the Applicant that it was self-extending the time limit to respond to the Request, NB Liquor issued a response on April 22, 2013, granting access to the Applicant's own bid submission and other records, namely redacted copies of:
 - forms used at the public opening of the request for proposals;
 - emails among NB Liquor staff;
 - NB Liquor Board of Directors' meeting minutes; and,
 - NB Liquor's notice of decision letters to the Applicant and the successful bidder.

6. NB Liquor also refused access to other unspecified information on the basis of several provisions of the *Act*, including paragraphs 22(1)(b) and (c) (*disclosure harmful to a third party's business or financial interests*), paragraph 26(1)(a) (*advice to a public body*), paragraph 26(1)(b) (*positions, plans, procedures, criteria or instructions developed for the purposes of contractual negotiations*), paragraphs 27(1)(a), (b), and (c) (*solicitor-client privilege*), and subsections 43(1) and 46(1) (*personal information*). NB Liquor did not provide any further explanation as to the nature of the refused records or why the cited provisions applied to them.

(“the Response”)

7. The Applicant was not satisfied with the Response and filed a complaint with our Office on April 24, 2013. In doing so, the Applicant indicated that the purpose behind the Request was to allow it to determine and understand the results of the evaluation of its request for proposal in relation to that of the successful bidder. The Applicant noted that the *New Brunswick Liquor Corporation Act* points to by-laws that direct NB Liquor to conform, as far as possible, with the spirit and intent of the *Public Purchasing Act*, adding that this entitles an unsuccessful bidder in a tender process to know the results of its own evaluation and that of the successful bidder. The Applicant believed it was entitled to receive the scoring of both, along with the evaluation criteria used, the evaluation report, and other information of this nature, that it perceived had been improperly refused by NB Liquor.

(“the Complaint”)

INVESTIGATION

Approach to complaint investigation in two phases

8. As with any complaint under investigation by the Commissioner's Office, we first seek to resolve the matter without having to issue a Report of Findings that contains recommendations.
9. In essence, this complaint investigation approach has two phases: an interactive component that will seek to resolve the matter by ensuring that the rules of the legislation are applied properly; and where unable to resolve the matter, we move to publish a Report of our findings that describe the proper application of those same rules.
10. As the Commissioner and her Office are tasked with the interpretation of the *Act*, we use the complaint resolution process to share our interpretation of the rules, to receive

- input, and assist both public bodies and those who seek the information in better understanding this legislation.
11. We seek neither a negotiated nor bargained outcome of the case.
 12. Our goal is to apply the proper interpretation of the law by recommending what information ought to be provided to the applicant, the individual who sought access (referred to as the applicant). Where we are successful in doing so, our process allows the applicant to receive the information to which he or she was entitled under the *Act*.
 13. The most important distinction in having this approach is that we spend time and effort during the first phase to impart upon the public body:
 - our interpretation of rules of the *Act* that are applicable to the case;
 - our recommended course of action:
 - that provides the applicant the information to which entitled; and,
 - the proper content of a revised response:
 - containing the information not initially provided to the applicant by the public body.
 14. In this regard, our complaint resolution process is intended to produce the proper and lawful outcome of the case through a revised response that is in conformity with the *Act* and that the applicant states is satisfactory.
 15. Where we are unable to effect a resolution of the complaint in this fashion, we conclude our investigation with a Report of Findings, such as this one, that encapsulates the same recommended course of action that we first provided to the public body; this time, the recommended course of action is expressed as formal recommendations issued under section 73 of the *Act*.
 16. A full description of all the steps involved in the Commissioner's complaint resolution process can be found on our website at <http://info-priv-nb.ca/>.
 17. In the present case, NB Liquor undertook the necessary steps to try to resolve the Complaint but the Applicant provided comments to the effect that the revised response issued was not satisfactory. As a result, we issue the present Report of Findings and include all elements of our investigation and speak to the information that was subsequently released to the Applicant during the complaint resolution process. This Report also addresses the issues surrounding access to bidders' information and the applicable law.

Phase one to resolve the present complaint case

18. During our investigation, NB Liquor provided us with copies of all of the relevant records for review; more importantly, we were also given explanations as to why NB Liquor had refused access to some of the requested information.
19. We summarized those explanations in the table below to provide a clearer sense of the processing of the Applicant's Request in this case:

Type of record	Access	Reasons for refusing access
Bid documents: RFP Opening Form Submission Assessment Forms for each bid submission	Partial access granted, with redactions	Names redacted as personal information Quoted bids redacted as third party business information
Applicant's bid submission	Granted in full	N/A
Successful bidder's submission	Refused in full	22(1)(b), (c) of the <i>Act</i>
Request for Proposal document	Granted in full	N/A
Emails among NB Liquor employees	Partial access granted, with redactions	Names and contact info of employees redacted Information about other tendering processes redacted as not relevant
NB Liquor Board of Directors' Minutes of Meeting	Partial access granted, with redactions	Names of NB Liquor officials redacted
Letters from NB Liquor to bidders (Applicant and successful bidder)	Partial access granted, with redactions	Names and contact information of NB Liquor employee and successful bidder employee information redacted
Memo from NB Liquor employee to President about a potential breach of RFP protocols	Refused in full	26(1)(a)
Evaluation Report	Refused in full	26(1)(a), 22(1)(b), 22(1)(c)
Memo from NB Liquor employee to President re: recommendation for award	Refused in full	26(1)(a)
Emails between NB Liquor employee and Office of the Attorney General solicitor	Refused in full	27(1)(b), (c)

20. We then reviewed the applicable provisions of the *Act*, as well as those found in the *New Brunswick Liquor Corporation Act* and the *Public Purchasing Act*.

21. Based on our research and review of all of the above, we did not find that NB Liquor had provided to the Applicant a meaningful response to the Request and had failed to provide all of the information to which the Applicant was entitled to receive under the *Act*, albeit that NB Liquor was correct in protecting some of the requested information regarding the request for proposals when it first responded to the Applicant's Request.

Issues uncovered during our investigation

Response not in conformity

22. NB Liquor's response should have been more helpful by including a list of all the relevant records held by NB Liquor, along with explanations as to whether access was being granted, and if not, why not.
23. As a result, the Applicant was not given the full picture of what records were held by NB Liquor in relation to this case; moreover, the Applicant could not sort out the specific reasons why access to some of the information, including the comparative evaluation information, was refused. A list of records is an essential component of a well constituted response and has been recognized as a requirement in recent court cases.
24. NB Liquor is aware of the requirement to provide a response that is in conformity with section 14 of the *Act* and recognized during this investigation that it had failed to do so. As a result, NB Liquor agreed to take the necessary steps to try to resolve the Complaint by providing the Applicant a revised response that would include all of the information to which the Applicant was entitled under the law.
25. This required NB Liquor to provide a list of all relevant records with explanations as to why some of the information had been improperly refused.

Referring to personal information as an exception

26. NB Liquor had improperly refused access to the names of its employees and officials, all of whom acted in their professional capacity. This kind of information is not regarded by the *Act* as an unreasonable invasion of privacy if requested and disclosed, as in section 21. NB Liquor had in fact erroneously relied on subsections 43(1) and 46(1) that are found under Part 3 of the *Act*, a section of the statute that governs how a public body protects personal information in the course of its duties and functions. Part 3, however, cannot be used when responding to an access to information request made under Part 2 of the *Act*.

27. In that regard, the names and contact information of officials of NB Liquor had to be released, including the name of the former President, names of members of the Board of Directors and NB Liquor employees.

Adequacy of search for relevant records

28. In identifying all relevant records, we found that NB Liquor officials took a broad approach to what should be considered as relevant and its search was adequate in that it included correspondences with the Applicant, the successful bidder, the external consultant hired to conduct the evaluation of the submissions, and internal correspondences among NB Liquor officials, Board of Directors Minutes of Meetings, and communications between NB Liquor and its solicitor at the Office of the Attorney General.

Access regarding the successful bidder's information

29. The principle regarding access to but also the protection of bidder's information is reflected in the *Right to Information and Protection of Privacy Act*, the statute that oversees access to information held by all public bodies, including NB Liquor.
30. Private companies that conduct business with public bodies can and should expect that some of their information will be made publicly available (for example, where a contract has been awarded, the fact that it was awarded the contract, the nature of the work to be performed and total value of the contract can and should be made publicly known).
31. This does not mean that all private business information is subject to public disclosure.
32. As a general principle, the *Act* protects certain kinds of private company information, the kind of information that if released could harm the company's business interests. Not all business information is protected, such the commercial name and contact information of the company whereas trade secrets would be. Again, the focus is only on the type of the company's information that could harm its business if released. This is stipulated in subsection 22(1) of this *Act*:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

- (a) a trade secret of a third party,
- (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party, or
- (c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to
 - (i) harm the competitive position of a third party,

- (ii) interfere with contractual or other negotiations of a third party,
 - (iii) result in significant financial loss or gain to a third party,
 - (iv) result in similar information no longer being supplied to the public body when it is in the public interest that similar information continue to be supplied, or
 - (v) reveal information supplied to, or the report of, an arbitrator, mediator, labour relations officer or other person or body appointed to resolve or inquire into a labour relations dispute.
33. The matter does not end there. Even with the type of business information that is viewed as harmful if released, there are circumstances in which that same information can be disclosed without issue.
34. We find this in subsection 22(3):
- 22(3) Subsections (1) and (2) do not apply if
- (a) the third party consents to the disclosure,
 - (b) the information is publicly available,
 - (c) an Act of the Legislature or an Act of the Parliament of Canada expressly authorizes or requires the disclosure, or
 - (d) the information discloses the final results of an environmental test conducted by or for the public body unless the test was done for a fee paid by the third party.
- (Emphasis added)
35. As we observe from the full operation of section 22, the *Act* protects private company business information unless there are circumstances at play to negate or override the requirement to protect that information. For example, where a private company consents to the disclosure of its information or where the information in question is already publicly available, there is no need to continue to protect the private company's information and access to that information cannot be refused.
36. There is another important aspect to section 22 that is directly on point in this case.
37. Paragraph 22(3)(c) recognizes that the *Act* does not exist in isolation to other legislation. If another law requires the release of third party business information, then the protection of the private company's business interests is no longer a factor to be considered and access to the information cannot be refused in such a case.
38. It is in this regard that we now discuss the public procurement process as it relates to the protection and release of business information.

39. The public procurement process that includes submissions or proposals in response to bids or requests for proposals by public bodies is governed by the *Public Purchasing Act*, S.N.B. c. 212.
40. That statute's *Regulation 94-157* contains clear language for the release of some private business information in some circumstances and in our view illustrates the correct and necessary interplay between the *Right to Information and Protection of Privacy Act* and the *Public Purchasing Act* in demonstrating how the legislation as a whole protects private information while permitting access to some of it in limited circumstances.
41. This approach is in line with the appropriate level of transparency that is required of government in its purchasing procedures.
42. We caution, however, that the right of access is not absolute in that access will not be permitted to the actual bid submission or proposal information but instead, access will be limited to the information derived from the public body's evaluation of the bid or proposal.
43. This is evidenced in section 22 of *Regulation 94-157*:
- 22(1) Within a reasonable period of time after the awarding of the contract, the Minister or the government funded body shall, on request from any vendor who has submitted a tender, disclose information pertaining to the successful tender and the tender submitted by the vendor making the request such that the vendor may determine the results of the evaluation of his tender relative to that of the successful tender.
- 22(2) The information referred to in subsection (1) shall contain the price as well as the results of the evaluation on all criteria other than price used to compare the tenders, for both the successful vendor and the vendor making the request.
44. As we can denote from the above, a person operating a business or a private company that is an unsuccessful bidder in a public procurement process is entitled to ask and receive information about the successful bidder's evaluation scores. In other words, if a request is made by an unsuccessful bidder after the awarding of a contract, the unsuccessful bidder is entitled to receive information pertaining to the public body's assessment of the successful bid. This is intended to allow the unsuccessful bidder to better understand the results of the evaluation of its bid relative to that of the successful one.

45. This means that an unsuccessful bidder has a right to obtain access to not only its own evaluation results but also those of the successful bidder in order to get a better understanding of:
- how the selection was made;
 - how the bid not retained compared to the successful bid; and more importantly,
 - how the unsuccessful bidder can use this information to improve its business so that it is better suited to submit successful bids in the future.
46. This does not mean that the information is to be made available to the general public; rather, this is in special circumstances only as access is limited to *unsuccessful bidders* that have specifically requested it.
47. Therefore, an unsuccessful bidder has a right of access to evaluation scores of the successful bidder under both section 22 of Regulation 94-157 of the *Public Purchasing Act* and by virtue of paragraph 22(3)(c) of the *Right to Information and Protection of Privacy Act*. This demonstrates that the applicable provisions of both statutes protect private information while permitting access to some of it in limited circumstances.
48. We further mention that this limited access to evaluation scores of the successful bidder does not extend to the successful bidder's submission. The *Public Purchasing Act* and its *Regulation* do not authorize or require the disclosure of the successful bidder's submission or proposal. Those records may include business plans, financial statements, commercial designs, trade secrets, all of which is regarded by the *Right to Information and Protection of Privacy Act* as protected third party information, if disclosed could harm private business interests.
49. For these reasons, a company's business information remains protected within the purview of the rules to protect third party information under the *Right to Information and Protection of Privacy Act* under section 22.
50. There are exceptions to that rule, however, and as mentioned above, access to the successful bidder's information may take place where:
- the successful bidder consents to the release of its bid information;
 - the information is already public.
51. Consent of the successful bidder is regarded as an important permission to override the protection of its business information. For this reason, it is good practice to seek the

consent of the private company if a request is made to have access to its bid information. Where the private company agrees, there is no further need to protect the information and it can be disclosed. Likewise, where the private business does not agree to the disclosure, the public body has no choice but to protect the information and refuse access. Access rights are respected in either case.

Application to the present case

52. In applying the above to the circumstances of the present case, we first address the question of access as requested by the Applicant. The Applicant, an unsuccessful bidder of a request for proposals public procurement process, sought access to the entirety of the successful bidder's information, including the proposal itself and the evaluations scores.
53. As explained above, NB Liquor was not at liberty to simply disclose the other bidder's proposal contents to the Applicant; having said this, however, NB Liquor was equally required to make all reasonable efforts to ensure that the Applicant's access rights were respected to the fullest, including in NB Liquor's respect of the *Public Purchasing Act*.
54. Prior to the Applicant's Request, NB Liquor held a debriefing meeting with the Applicant as an unsuccessful bidder as evidence of NB Liquor's commitment to respect the rules found under the *Public Purchasing Act*. NB Liquor provided the Applicant the evaluations scores of its own proposal.
55. What NB Liquor failed to appreciate at that time is that the *Public Purchasing Act* requires more disclosure than simply that of the unsuccessful bidder. As indicated above, *Regulation 94-157* of the *Public Purchasing Act* grants an unsuccessful bidder a right of access to the evaluation results of the successful bidder as well. This same information was refused by NB Liquor when the Applicant filed a request for access to this information under the *Right to Information and Protection of Privacy Act*.
56. We found that NB Liquor had not respected the *Public Purchasing Act* by failing to provide the Applicant with access to the results of the evaluation of the successful bidder by not taking into account the provisions of the *Public Purchasing Act* in processing the Applicant's Request under the *Right to Information and Protection of Privacy Act*, and in refusing access to this information under paragraphs 22(1)(b) and (c).

57. Based on our discussions with NB Liquor during our investigation process, NB Liquor recognized that its prior practice was incorrect and agreed to provide the Applicant with the evaluation results for the successful bidder, which were contained in a record entitled the *Evaluation Report*. NB Liquor provided this information to the Applicant in its revised response.
58. As for the Applicant's request to access all of the successful bidder's proposal contents, we find that NB Liquor failed to seek the successful bidder's consent as to whether or not the contents of its proposal could be released. Instead, NB Liquor sought legal advice on this point given its general understanding that the submissions made during a public procurement process are confidential.
59. Based on legal advice obtained, NB Liquor did not undertake to contact the successful bidder and for that reason it did not have the benefit of the bidder's view and possible consent on the question of disclosure of its proposal in this case. We had good discussions with NB Liquor officials on this point, and NB Liquor agreed that it had not followed the process required of section 22 in asking for the successful bidder's consent and was prepared to do so as part of the resolution of this Complaint. The successful bidder was asked for but did not agree to provide consent to NB Liquor for the disclosure of its information. As a result, NB Liquor remained bound by paragraph 22(1)(b) of the *Act* to protect the successful bidder's business and financial information found in its proposal, and to advised the Applicant accordingly.
60. In the end, and while NB Liquor was not incorrect in refusing access to the successful bidder's submission when having initially responded to the Applicant's Request, NB Liquor had nevertheless the statutory obligation to establish that the Applicant did not have a right of access to this information by determining the successful bidder's consent, or lack thereof, when first processing the Request. Given the fact that this process was undertaken and the successful bidder did not provide consent, it is now properly established under the *Act* that the Applicant is not entitled to have access to this information.

Evaluation Report

61. In its Response in this case, NB Liquor refused access in full to the Evaluation Report, a record prepared by NB Liquor at the completion of the evaluation process of the proposals received. Refusal was based the exception regarding *advice to a public body and disclosure being harmful to third party business interests*.

62. We point out that the Evaluation Report contained factual and background information about the process of the Request for Proposals, as well as the evaluation criteria used, the results of the review of the submissions, scores assigned to each bidder, and other information related to the evaluation. In our view, none of the information contained in the Evaluation Report falls within the scope of advice (paragraph 26(1)(a)).
63. Furthermore, the Evaluation Report contained information about the Applicant's own submission and its own scores and the Applicant had a right to access as per *Regulation 94-157* of the *Public Purchasing Act* in tandem with paragraph 22(3)(c) of the *Act* (*where access to third party information of this kind is permitted by another statute*). Thus, access to the Applicant's own information could not be refused under paragraphs 26(1)(a), 22(1)(b), or 22(1)(c) as being advice or third party information.
64. The Evaluation Report did contain third party information in the form of a summary of the successful bidder's submission in relation to each of the evaluation criteria, along with the scores assigned to the successful bidder for each evaluation criteria. Again, the Applicant was an unsuccessful bidder in the same request for proposal process and as such, had a right of access to the scoring information of the successful bidder under *Regulation 94-157* of the *Public Purchasing Act*, and NB Liquor could not refuse access to that information, although it technically constituted third party information.
65. As for the remainder of the successful bidder's information in the Evaluation Report, as it consists of a summary of the successful bidder's submission on each of the evaluation criteria, the same principles as described above for the submission itself apply. As the successful bidder did not agree to the disclosure of this information, NB Liquor was not permitted under the *Act* to grant access to this information, as it is protected from disclosure under paragraph 22(1)(b).
66. While NB Liquor did not initially grant access to the Evaluation Report, NB Liquor was able to correct this during phase one of our complaint resolution process by providing most of the information in the Evaluation Report, except for the successful bidder's submission on each of the evaluation used because consent was not obtained for that information. This information was included in the revised response package provided to the Applicant as a means to resolve this Complaint.

Forms completed at the public opening of the bid submissions

67. These records consist of the Request for Proposal Opening Form and Submission Assessment Forms.
68. The Request for Proposal Opening Form is a standard form used to record the number of submissions received and rejected upon the opening of the submissions. This Opening Form records names of Committee Members of their signatures, the number of proposals received, the number of proposals rejected, the person who is in charge of the process, and the names of the persons and their associated company names who attended the public opening.
69. NB Liquor initially refused access to all the names of the individuals recorded on this Opening Form, including the names of NB Liquor employees, and those who attended the opening, on the basis that their names were *personal information* that had to be protected under the *Act* (unreasonable invasion of privacy). The company names of those who attended were not redacted.
70. The Submission Assessment Form is also a standard form used to record each of the bid submissions received, and include the name of the bidder, the quoted bid, whether the submission was properly submitted (that it contains all of the required documents and payment of the fee). One Form is completed per bidder. NB Liquor initially refused access to the quoted bid for each submission.
71. During our investigation, NB Liquor confirmed that all of these Forms were in fact filled in by staff during the public opening of the proposals such that anyone in attendance was made aware of which company had submitted a bid, the bid quote, and whether the bid contained all of the necessary items to be considered further. In other words, all of the redacted information had been made public at the opening of the bids, and there was no need to protect this information.
72. As a result, NB Liquor's initial decision to provide copies of these same Forms with redactions was not proper; however, NB Liquor corrected this by providing the Applicant with unredacted copies of these records in the revised response package.

Memoranda to the President

73. There were two other relevant records, the Memoranda to the President, both of which were refused in full.
74. The first Memo was for the recommendation to award the contract and it contained a brief summary of the contract, factual and background information about the request for proposal process, and an attachment that was the summary of the scoring of all the proposals evaluated (this latter summary being the same as that found in the Evaluation Report since disclosed to the Applicant in the revised response package). When the Request was submitted to NB Liquor, however, the decision regarding the awarding of the contract had already been made and publicly announced so that there was no basis in the *Act* to continue to protect this record.
75. The second Memo concerned a potential breach in relation to the actual process undertaken during the request for proposals. This document served as a briefing note for the President on the facts as to what had transpired. Contrary to NB Liquor's view, we found that this Memo did not contain advice or opinions that would qualify this record to be protected under paragraph 26(1)(a). As such, we found that this information should have been disclosed to the Applicant.
76. During our complaint resolution process, NB Liquor agreed to correct this improper refusal of access to relevant information by providing the Applicant with full copies of these records in the revised response package.

Board of Directors Meeting Minutes

77. NB Liquor initially provided the Applicant with a copy of the Board of Directors meeting minutes that documented the Board's approval of the recommendation for the award of the contract. Attachments to the meeting minutes included: the Memorandum to the President recommending the successful bidder for the award, the Evaluation Report.
78. NB Liquor had improperly redacted the names of the Board of Directors' names as personal information but it understood that names of employees and officials acting in their professional capacity cannot be protected information and should be disclosed.
79. Again, NB Liquor corrected this by providing an unredacted copy of the minutes in the revised response package. In addition, NB Liquor confirmed to us that there was no other information presented to the Board of Directors in making this decision.

NB Liquor correspondence and internal emails

80. Other relevant records identified were in the form of internal emails among NB Liquor employees regarding the request for proposals in question, but also other procurement processes not related to this case, and letters advising the Applicant of the outcome of the request for proposal process. NB Liquor issued copies of those but with redactions for the information regarding other tendering processes not relevant to the Request. Again, names of NB Liquor employees were improperly redacted but this was to be corrected in the revised response package.

Solicitor-client privileged information

81. NB Liquor appropriately identified as relevant records in the form of emails between one of its employees and legal counsel with the Office of the Attorney General on a specific legal issue in regards to the request for proposal process in this case. Access was refused on the basis that information was subject to legal privilege and we reviewed these records and also found that they fall within that exception as the communications were made for the purpose of seeking and obtain legal advice (paragraphs 27(b) and (c) of the Act). We asked but NB Liquor was not willing to waive its privilege to disclose these records, as NB Liquor is fully entitled to do. Therefore, we find these records were properly refused in this case.

Revised response package issued to the Applicant

82. Given this work during our complaint resolution process, NB Liquor prepared a revised response package that included a list and all of the relevant records held by NB Liquor, and providing copies of the following for the Applicant's review:
- Evaluation report, with redactions only to protect the successful bidder's business and financial information;
 - Unredacted copies of the request for proposals Opening Form and the Submission Assessment Forms;
 - Unredacted copy of the Memo to the President containing the recommendation for award;
 - Unredacted copy of the Memo to the President regarding a potential breach of the request for proposals protocols;
 - Unredacted copy of Board of Directors' meeting minutes; and,
 - Emails among NB Liquor employees (with approved redactions for information regarding other tendering processes not relevant to the

Request) and letters advising the Applicant of the outcome of the process, but removing the redactions for names of NB Liquor employees.

83. The revised response letter by NB Liquor also indicated that access to some records was still being refused in full but adding the proper explanations for the Applicant to understand why:
- that emails between NB Liquor employees and the Office of the Attorney General were privileged information; and,
 - that the successful bidder's submission was third party business information that the successful bidder had not consented to disclose.
84. All of this additional disclosure of information and explanations were issued to the Applicant by NB Liquor and as per our complaint process, the Applicant was invited to review same and provide us with its comments.
85. The Applicant was not satisfied with this outcome, indicating that it was entitled to full disclosure of all of the information, including the contents of the successful bidder's submission and the successful bidder's information contained in the Evaluation Report. The Applicant believed this third party information could not be withheld and should be disclosed in keeping with the spirit and intent of the *Public Purchasing Act*.
86. The Applicant also questioned whether it had received all of the enclosed records identified in the revised response package and whether there existed additional emails and information presented to the Board of Directors.
87. The Applicant asked our Office to conclude the investigation with a Report of Findings.
88. Therefore, we proceeded to **Phase two** of our complaint investigation process, verified whether the revised response package had been complete and if there existed any other emails and information presented to the Board of Directors.
89. We found that the staff at NB Liquor tasked with putting all of the copies together for the revised response package did not realize that one record was not copied, i.e., the unredacted copy of the Memo to the President regarding a potential breach of the request for proposals protocols. The Applicant noted for the record that this record had been previously provided in a separate process. Nevertheless, access was not refused but this document was part of the package that we had approved for release.

90. Also, one email that accompanied that Memo had been missed by staff. That email was sent to us for review and it spoke only to the Memo being approved by senior staff to be sent to the President. No new information was contained in this email.
91. Staff also reported a final record missed, that referred to as the "Submission to Board of Directors Meeting" and it contained the proposed resolution for the Board's consideration, but that proposed resolution was the same resolution as that passed by the Board and recorded in the meeting minutes released to the Applicant. As such, there was no new information in that record.
92. We therefore will recommend that NB Liquor issue those records to the Applicant as part of this present Report of Findings under section 73.

LAW AND ANALYSIS

Public Purchasing Act and the Right to Information and Protection of Privacy Act

93. The *Public Purchasing Act* and its Regulations establish standardized criteria to promote fairness, accountability, and transparency in government entities contracting with the private sector for goods and services.
94. As indicated earlier in this Report, one of the ways that the legislation promotes fairness and accountability in tendering processes is found in *Regulation 94-157* to the *Public Purchasing Act*, by allowing unsuccessful bidders in a tender process the right to access certain kinds of information to understand how their submissions were evaluated relative to the successful bidder, often referred to in the industry as the "debriefing meeting". Notwithstanding a procedure that seeks to follow the rules regarding the tendering process under the *Public Purchasing Act* to govern what information can be released to bidders after the bid has been awarded, a public body cannot lose sight of the fact that the *Right to Information and Protection of Privacy Act* will still apply to that same information where a request for access has been submitted.
95. In that regard, even bid information that is confidential as it belongs to the bidder can still be released if the bidder consents to it being released. This respects the public's right of access to protected information where the owner of the information consents to it being released. The *Act* is set up in that way: a public body is required to make all reasonable efforts to ensure that access rights are respected to the fullest when a request is made.

96. In summary, the bid information is protected or released in the following fashion:
- all bidders can expect their bid information to remain confidential as part of a public tendering process;
 - an unsuccessful bidder has the right to access its own evaluation results (scoring) but not that of other unsuccessful bidders;
 - an unsuccessful bidder has the right to access the successful bidder's scoring;
 - the successful bidder can expect to be asked for its consent to release its bid information as part of an access to information request (the identity of the individual who or company that makes the request is never made known):
 - if the successful bidder consents, then the public body must release that bid information (or the part that the bidder has agreed can be released);
 - if the successful bidder does not consent, then the public cannot release the bid information and must inform the individual who requested the information that the bid information remains protected as consent was not given in that case.
97. The Applicant indicated that it is of the view that it was entitled to receive all of the successful bidder's business information, including its submission and the information contained in the Evaluation Report, in keeping with the spirit and intent of the *Public Purchasing Act*. For the reasons explained above, we respectfully disagree with the Applicant's comments that it is entitled to further disclosure and find that NB Liquor has taken the appropriate steps to ensure that the Applicant has received all of the information it can disclose.
98. In this case, the successful bidder did not consent to the disclosure of its business information and as such, we find that NB Liquor had no choice but to refuse access, given that this information falls within the exceptions to disclosure found in paragraphs 22(1)(b) and (c) of the *Act*.

RECOMMENDATION

99. Based on all of the above, we are satisfied that NB Liquor has provided the Applicant with a full and frank disclosure of all of the information to which the Applicant is entitled to receive under the *Act* in relation to the Request, except for three relevant records that should have been copied and included in the revised response package, as described above in paragraphs 89-92 of this Report.

100. We recommend that NB Liquor provide those three records to the Applicant.
101. Otherwise, given all of the findings of this Report, there is no further recommendation regarding disclosure of relevant information to be issued by the Commissioner in this matter.

Dated at Fredericton, New Brunswick, this _____ day of June, 2014.

Anne E. Bertrand, Q.C.
Commissioner