

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: 2013-1516-AP-803

Date: July 21, 2014

"Case about failure to disclose public procurement information"

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"). This Report stems from a Complaint filed with this Office in which the Applicant requested that the Commissioner carry out an investigation into this matter.
2. On April 23, 2013, the Applicant sought access from Horizon Health Network ("Horizon") to records relating to a procurement process for the award of a contract to Marchese Hospital Solutions ("Marchese") to supply pre-mixed IV solutions of cyclophosphamide and gemcitabine in 2012, including the contract itself and the label information on the pre-mixed IV solutions of cyclophosphamide and gemcitabine prepared by Marchese. As a second part of the request, the Applicant sought access to records related to other contracts for compounding services with certain companies, as well as records showing the amount of these supplies ordered and what they were used for (the "Request").
3. After receiving the Request, Horizon acknowledged receipt of it and asked the Applicant to provide any further details explaining the information the Applicant was requesting. The Applicant responded by informing Horizon that she now had the following documents in her possession and would no longer be requiring them as part of the Request:
 - The contract with Marchese Hospital Solutions to supply pre-mixed IV solutions of cyclophosphamide and gemcitabine;
 - Label information on the pre-mixed IV solutions of cyclophosphamide and gemcitabine prepared by Marchese Hospital Solutions;
 - Marchese Hospital Solutions' Request for Proposal ("RFP"); and
 - The grid used to score the three bidders and decide on the winner.
4. The Applicant further clarified that she was, however, still interested in receiving the following information:
 - The scores received by each of the three bidders;
 - All other notes, emails, letters or other documentation related to the competitive procurement process, including correspondence between Medbuy and Horizon, Medbuy and the three bidders, and the three bidders and Horizon; and

- The records mentioned in the second part of the Request, including records showing the amount of supplies ordered from the compounding companies, what products/materials were compounded together in the hospitals, why the compounding was done and the size of batches of compounded products made with these supplies.
5. On June 10, 2013, Horizon informed the Applicant that it was extending its deadline to provide a response pursuant to subsection 11(3) of the *Act* for an additional 30 days as Horizon needed to retrieve a large number of records, and to notify and receive representations from third parties before deciding whether to grant access to the contracts still being sought as requested in the second part of the Request.
 6. Horizon issued a response to the Applicant on August 6, 2013, granting access in full to certain records, and granting partial access to other records by redacting some information. Horizon redacted information for two reasons: because it was deemed by Horizon not to be relevant to the Request and because, pursuant to paragraph 22(1)(b) and (c) of the *Act*, the disclosure of this information could be harmful to a third party's business or financial interests (the "Response").
 7. The Applicant subsequently filed a Complaint with our Office on August 22, 2013, and stated that she was seeking the full and unredacted release of all records related to the procurement process for a contract to provide sterile compounding services to a number of hospitals that was ultimately awarded to Marchese. The Applicant also clarified that Horizon's Response in relation to the second part of her Request did not form part of the Complaint filed at our Office.

INFORMAL RESOLUTION PROCESS

8. As in all complaint investigations, our Office first seeks to resolve the matter informally, to the satisfaction of both parties, and in accordance with the rights and obligations set out in the *Act*. For all intents and purposes, in both the informal resolution process and the formal investigation, the Commissioner's work remains the same: assessing the merits of the complaint and achieving a resolution that is in accordance with the *Act*.
9. When the complaint cannot be informally resolved, the Commissioner concludes her work with a formal investigation and publishes her Report of Findings.

10. In this matter, we investigated and submitted our preliminary findings to Horizon, explaining the reasons why Horizon should have granted the Applicant access to certain information. We invited Horizon to inform our Office as to whether it was amenable to our comments and provide a revised response with additional information to the Applicant, in accordance with our approach to resolve this Complaint. Horizon, however, was not amenable and we therefore proceeded to complete our investigation and issue the present Report of Findings.

INVESTIGATION

11. We proceeded with our investigation of this Complaint by meeting with Horizon's officials in order to establish how the Request was processed and how the search for the relevant records was done, and to obtain facts and reasons why exceptions to disclosure were applied to the records in this case. We also reviewed all of the records relevant to the entire Request.
12. As the Applicant informed our Office that her Complaint only focused on the first part of her Request, being the RFP information, our investigation only focused on that part of the Request; however, we refer to the Request in its entirety in this Report of Findings only with regards to the timeliness of Horizon's Response.

Adequate search for relevant records

13. Given the nature of the requested information, Horizon's Right to Information Coordinator communicated with its Vice-President of Professional Services and the Regional Director of Pharmacy because the Coordinator believed that these branches would have custody of the records relevant to the RFP information.
14. During our review of the identified relevant records, we raised concerns as to whether all of the relevant records had been retrieved, given that there appeared to be records missing in relation to the procurement process, *i.e.*, information regarding the evaluation score given to each bidder by each committee member appointed to evaluate the bidders' submissions, along with emails, notes, and correspondence between the committee members regarding the procurement process.
15. Horizon explained that it did not have all of the records relating to the RFP process as Horizon had contracted an organization by the name of Medbuy to oversee the RFP process relevant to this case. Medbuy is a healthcare purchasing organization that

partners with health service providers to deliver medical supplies, services and pharmaceuticals. Medbuy is not a public body, but a private company that is a healthcare sourcing organization. It was selected by Horizon and FacilicorpNB as its Group Purchasing Organization in relation to pharmaceutical products.

16. In November 2011, both Regional Health Authorities of New Brunswick and FacilicorpNB selected Medbuy as the Province's healthcare Group Purchasing Organization. As such, Horizon contracted Medbuy to oversee the procurement process relevant to this case. For that reason, Horizon did not have all of the records relevant to the procurement process requested in this matter, but we understand that Horizon directed the Applicant to communicate directly with Medbuy for any additional records specific to the procurement process.
17. Given these facts, we are satisfied that an adequate search for the records relevant to the Request was performed by Horizon in relation to the records it has in its custody or under its control, and that the Applicant was directed to the source for any additional information.

Timeliness of Response

18. As stated above, the Applicant made a request for information to Horizon dated April 23, 2013 but that was received by Horizon on May 6, 2013.
19. Horizon requested clarifications, which the Applicant provided to Horizon on May 9, 2013. Horizon erroneously believed that the 30-day time limit to process the Request started on May 9, 2013.
20. On June 10th, 2013, being the 35th day after receiving the Request, Horizon notified the Applicant that it was extending the deadline to provide a response by an additional 30 days. As a result, Horizon mistakenly believed that the new deadline to issue the Response was July 8, 2013, being 60 days from May 9, 2013. Horizon, however, only issued the Response to the Applicant on August 6, 2013, being 92 days after receiving the Request on May 6, 2013.
21. We point out that Horizon did not provide a timely response in this matter, nor did it self-extend the deadline in a timely manner on June 10, 2013. We understand, however, that there were reasons for the delay. To better explain these reasons, we have prepared a useful chart of the timelines employed by Horizon in this case.

Processing date	Processing Action undertaken
May 6, 2013	Horizon receives Request dated April 23, 2013 Deadline to respond is 30 days after having received the Request: June 5, 2013
May 7, 2013	Clarifications asked of Applicant; Request on hold pending receipt of clarifications, which are received quickly on May 9, 2013 Horizon resumed processing of Request
May 27, 2013	Horizon notifies third parties affected by 2 nd part of Request (contracts)
June 5, 2013	This is the 30-day deadline to issue Response or latest date to notify the Applicant that Horizon is extending the deadline
June 10, 2013	Horizon notifies Applicant that it is extending the deadline to respond to Request for an additional 30 day to retrieve large number of records and notify and receive representations from third parties affected by 2 nd part of Request. Horizon erroneously that self-extended new deadline is July 4, 2013
June 5-10, 2013	Horizon receives third party representations from 4 out of the 5 third parties
June 17, 2013	Deadline for third parties to provide their input (21 days from date of notice) – still awaiting 5th third party input
July 3, 2013	Horizon makes an application to the Commissioner to be granted more time (another 30 days) to review the details of the records before issuing a Response Horizon incorrectly believed <u>July 8</u> was the self-extended deadline
July 4, 2013	This is the self-extended new deadline to provide a response Commissioner has no choice but to deny time extension application as we did not have sufficient details to make a decision
July 2, 2013	Horizon receives third party representation from 5 th party
August 6, 2013	Horizon provides full Response to Applicant

22. As we can note from the chart above, many factors contributed to Horizon issuing a late Response to the Applicant, from mistakenly believing the processing of the Request only started once it received clarifications, to being put in a difficult situation by not having received the input of all the third parties on time. There was also an error in the calculation of the extended deadline to respond.
23. We have produced a second chart, found on Page 9 that shows how a few simple adjustments to the processing of the Request in this case would have made an important difference in complying with timelines, not to mention that third parties would have been better informed in recognizing their obligations to provide input to Horizon on time.

Horizon's request for clarification and extension of time-subsections 11(3) and 11(4)

24. We understand that Horizon asked for clarifications from the Applicant on May 7, 2013, and received them on May 9, 2013 and Horizon mistakenly believed that the timeline started on that day. We therefore believe it useful to explain the steps that are involved when seeking clarification from an Applicant under the Act.
25. When a public body requires clarifications after receiving an access request, it is prudent for the public body to wait for the applicant's reply for clarification to avoid any unnecessary work in cases where the scope of the request may be reduced. This does not mean, however, that the deadline to provide a response is put on hold pending the receipt of clarifications.
26. A public body may extend the deadline to respond as per paragraph 11(3)(b) only where the applicant does not respond to a request for clarifications as soon as practicable. In such a case, the public body is required to notify the applicant that more time will be needed to provide a response given that the clarifications were not provided as soon as practicable by the applicant. It is important to note, however, that this does not change the initial date of receipt from which the public body must calculate its timeline, but rather allows the public body more time from the date of receipt where necessary.
27. In addition, awaiting clarification from an applicant under paragraph 11(3)(b) does not allow a public body to go beyond the maximum 60-day time limit, being 60 days after having received the request. In those cases, the Act recognizes that an applicant may be difficult to reach or may choose not to respond to a question for clarification. If an applicant does not reply to a request for clarification made to him or her in writing

within 30 days, the public body can consider the request abandoned as per section 12 of the *Act* and notify the applicant of such as per subsection 12(2). It is then up to the applicant to file a complaint with the Commissioner, allowing our Office to find out why the applicant did not reply to the request for clarification.

28. For those reasons, the 30-day period to provide a Response to the Applicant in this case pursuant to subsection 11(1) remained June 5, 2013, and not June 8, 2013, as believed by Horizon.
29. Albeit late in doing so, Horizon self-extended in lawful circumstances, i.e., because it needed to retrieve a large number of records (paragraph 11(3)(c)) and needed to notify and receive representations from third parties before deciding whether to grant access to their requested contracts (paragraph 11(3)(d)).

Third party intervention process

30. Before rendering a decision on access to the third parties' contracts (as per the second part of the Applicant's Request), Horizon issued notices to these third parties on May 27, 2013, to seek their consent and/or representations. According to paragraph 35(1)(c) of the *Act*, once a third party receives such a notice, it has 21 days to either consent to the disclosure, or make representations explaining why the information should not be disclosed.
31. In this case, the 21 days expired on June 17, 2013, and we understand that 4 out of the 5 third parties had provided their representations to Horizon well before that date. The 5th third party, however, only provided its representations to Horizon on July 2, 2013.
32. As most of the third parties had provided their representations to Horizon before June 17, 2013, Horizon could have made a decision regarding the disclosure of their information and issued a partial response to the Applicant by the extended deadline of July 4, 2013. Moreover, Horizon should have insisted that the 5th third party honor the timeline and made a decision on disclosure despite not having received the 5th third party's input.
33. Even if Horizon would not, or could not, provide a partial response, it could have provided a full and complete Response to the Applicant on time had it begun its third party process earlier. It then would not have had to seek an extension of time beyond

60 days through an application for a time extension under subsection 11(4) with the Commissioner.

34. We therefore find that Horizon should have instead followed the timelines below in its processing of the Request, which are not very different overall, but which would have ensured that Horizon remained compliant with the *Act*.

Processing Date	Processing Action that should have been undertaken
May 6, 2013	Horizon receives Request dated April 23, 2013 Deadline set to respond is 30 days -Enter June 5, 2013 correctly as the deadline
May 7, 2013	Clarifications asked quickly of Applicant Processing of request on hold pending receipt of clarifications but the 30-day timeline still continues (unless clarifications are not received within the initial 30 days) Clarifications received quickly on May 9, 2013 Horizon resumes processing quickly
Between May 7 and 15, 2013	Horizon should have begun its third party notification during this time, as waiting until May 27 to do so caused delays at the end of the process
June 5, 2013	This is the 30-day deadline Where Horizon could not issue a response, it should have notified Applicant at this time. Extending the deadline under subsection 11(3) of the <i>Act</i> for an additional 30 days to retrieve large number of records and notify and receive representations from third parties was proper Self-extended new deadline should have been July 4, 2013 instead of July 8, 2013. New deadline should have been adhered to given the size and scope of the Request in this case
Late May 2013 or Early June 2013	Horizon would have received third party representations by late May Also, Horizon could have prepared a partial response based on input available at that time.

	<p>Then, 5th third party should have been notified by email to provide input without delay, or decision to be made in absence thereof</p> <p>Third parties do not dictate to public bodies when and what should be done regarding the public's access to information. Horizon could have made a decision without 5th third party representations.</p> <p>Third parties were required to conform to the timelines to provide input</p>
June 21, 2013	<p>Horizon should have set this date to finalize its response</p> <p>If issues surrounding 5th third party input still in effect, Horizon should have proceeded to render decision regardless of input, as per its obligations to do so under sections 34-36</p>
July 4, 2013	<p>Last day. Horizon should have issued its final partial response or its single full response to the Applicant – on time</p> <p>No need to spend the effort and time to prepare an application for a time extension to the Commissioner</p>

35. With these helpful comments, we are confident that Horizon can adjust its process to ensure that the issue of timeliness is corrected in the future.

Contents of the Response

36. On the matter of the format of the Response, we find that Horizon provided a very detailed Response to the Applicant's Request, including:
- an index of the relevant records which identified the request topic and the relevant records,
 - the number of pages of each record, and
 - indications of whether access was being granted or denied, along with explanations for why access to some of the requested information was not being granted.
37. Some information was redacted in certain records released to the Applicant and it was not identified in the Response, namely financial information redacted in the May 17-19, 2011 Pharmacy Committee Minutes, the Fall 2011 Pharmacy Committee Meeting, and the April –December Pharmacy Committee Minutes.

38. We point out that whenever access to information is refused, it is important that the explanation provided be as specific as possible in order to assist the applicant in understanding the reasons for the refusal, so that the response is meaningful.
39. Nevertheless, we find that overall the content of the Response was in compliance with the requirements of a proper response found at subsection 14(1) of the *Act*.

Exceptions to disclosure

1) Redacted names and scores of unsuccessful bidders

40. One of the records that contained redactions was found in a Briefing Note prepared by Medbuy and presented to Horizon. The Briefing Note consists of an internally generated memorandum on the procurement process, which reflects the background information, award, and contract negotiations in the context of choosing a supplier for the Sterile Preparations Compounding Services.
41. Horizon redacted the names of the unsuccessful bidders found in the Briefing Note, as well as all the scores attributed to these unsuccessful bidders, as reproduced in the following chart:

Scoring Results		25	30	15	30
Supplier	Average Overall Score	Financial Score	Pharmaceutical Score	Business Score	Label Score
Redacted Name of Unsuccessful bidder	redacted	redacted	redacted	redacted	redacted
Redacted Name of Unsuccessful bidder	redacted	redacted	redacted	redacted	redacted
Name of Successful Bidder	85.46	23.46	23.47	25.00	13.53

42. Horizon believed that the redacted information consisted of third party business information that required protection pursuant to paragraphs 22(1)(b) and (c) of the *Act*.
43. As we explain below, we find that Horizon properly withheld the names of the unsuccessful bidders, but improperly redacted the Average Overall Score of these bidders.

44. A business' trade secrets, as well as its commercial, financial, scientific, technical or labour relations information, is considered confidential information if it meets the criteria set out in subsection 22(1) of the *Act*. Even where it meets these criteria, however, the information will not require protection from disclosure in the instances stipulated at subsection 22(3), as, in those instances, the disclosure of the information is not deemed to be harmful to a third party's business interest. Such instances include when the third party business consents to the disclosure, or where another law requires or authorizes the disclosure.
45. Public bodies, such as Horizon, are governed by the New Brunswick *Public Purchasing Act* and its Regulation 94-157 when purchasing services or supplies for the transaction of its business and affairs. When a public body contracts with an organization that is not a public body to oversee the procurement process, the *Public Purchasing Act* applies to that organization, even if the organization is located outside of New Brunswick. In this case, Horizon contracted the procurement process to Medbuy, being an organization located in Ontario.
46. The *Public Purchasing Act* and its Regulation set out the tendering rules and process that public bodies, which are subject to the *Act*, must follow, from preparing the request for tenders, to debriefing any unsuccessful bidder.
47. The *Public Purchasing Act's* Regulation stipulates that the bids are to be opened publicly on the date of the closing of tenders, where possible. At the opening of the bids, the bidders' names found in the accepted bids are required to be read to the public; however, the *Public Purchasing Act* and its Regulation do not require that the names of unsuccessful bidders be disclosed after the evaluation process is completed.
48. As a result, we find that the *Public Purchasing Act* and its Regulation do not expressly authorize or require the disclosure of the names of unsuccessful bidders once the procurement process is completed. We must therefore determine whether the disclosure of their names would be harmful to their business interests as per subsection 22(1) of the *Act*.
49. There is no doubt that a business' name constitutes commercial information; however, the disclosure of a business' name only, without any other information, is not considered confidential information warranting protection under the *Act* as stipulated at paragraph 21(3)(e). Where the name of the business, however, can be linked to the

- business' commercial, financial, etc. information, the disclosure of the name of the business may be harmful to the business' interests.
50. In this case, and as explained below, we find that the unsuccessful bidders' Average Overall Scores should be disclosed to the Applicant as it does not warrant that level of protection under the *Act*.
51. With this in mind, however, we do not find that the unsuccessful bidders should be identified in relation to their Average Overall score as its disclosure could reveal or permit the drawing of accurate inference with respect to the bidders' financial and/or commercial activities, which could harm the bidders' business interests.
52. For these reasons, we therefore find that Horizon properly redacted the names of the unsuccessful bidders found in the Briefing Note.
53. As for the redacted scores attributed to the unsuccessful bidders, we apply the same analysis as above, i.e., whether the disclosure of any of the unsuccessful bidders' scores would be harmful to their business interests and whether the *Public Purchasing Act* and its Regulation authorizes or requires the disclosure of this information.
54. Subsections 22(1) and (2) of *Regulation 94-157* of the *Public Purchasing Act* stipulates what information an unsuccessful bidder is entitled to receive vis-à-vis that of the successful bidder once the procurement contract has been awarded. The unsuccessful bidder is entitled to receive information about the results of the evaluation on all criteria used to compare the proposals of both the unsuccessful bidder and the successful bidder:

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 successful vendor and the vendor making the request.

[Our emphasis]



55. It is important to note that the above provision applies only to unsuccessful bidders, not to a member of the public that is not an unsuccessful bidder. Additionally, these provisions limit the release of information only to the information about the successful bidder; in other words, an unsuccessful bidder cannot obtain any information about another unsuccessful bidder. The *Public Purchasing Act* and its Regulation does not expressly authorize or require the disclosure of the unsuccessful bidder's scores.
56. We then analyze whether paragraphs 22(1)(b) or (c) of the *Act* can be applied to these scores in order to withhold the information from the Applicant. In order to properly rely on paragraph 22(1)(b) of the *Act* to withhold information in this case, Horizon must demonstrate that the redacted scores:
- a. are commercial, financial, labour relations, scientific or technical information of the third parties, being the unsuccessful bidders;
 - b. must have been supplied to Horizon by the third parties, explicitly or implicitly, on a confidential basis; and,
 - c. must have been treated consistently as confidential information by the third parties.
57. As for paragraph 22(1)(c), Horizon must demonstrate that the disclosure of the information could reasonably harm the unsuccessful bidders' business and financial interests. The scores given to each bidder were based on a review of the bidders' RFP submissions, which contain its business and financial information. Given the nature of bidders' submissions, these records are required to be protected under paragraph 22(1)(b) and (c), unless the bidders' consent to their disclosure.
58. We are satisfied that the scores attributed to the unsuccessful bidders in relation to each of the four criteria used by Horizon (listed in the chart above) have been derived from the bidders' own commercial, financial or technical information, information that they provided to Horizon (or Medbuy) and is therefore considered confidential information. If each of the individual score for each criterion is released, the score could reveal or permit the drawing of accurate inferences with respect to the bidders' business activities in such a way that could reasonably harm their business interests.
59. As a result, we find that Horizon properly redacted the unsuccessful bidders' Financial, Pharmaceutical, Business and Label scores found in the Briefing Note pursuant to paragraphs 22(1)(b) and (c) of the *Act*.

60. Our findings are not the same, however, with regards to the Average Overall score attributed to the unsuccessful bidders.
61. By applying the test found in paragraph 22(1)(b), we do not find the Average Overall score to consist of the unsuccessful bidders' commercial, financial, technical, scientific or labour relations. The Average Overall Score attributed to the bidders are not only derived from the bidders' information; rather, these scores are tabulated pursuant to the entire evaluation process and they are the information (scores) by which the contract is awarded. For sake of transparency, it is therefore essential that Horizon disclose those scores to in fact demonstrate that the highest bidder received the contract.
62. Further, we do not find that the release of this information could reasonably harm the bidders' business interests. By itself, the Average Overall Score does not reveal specifics that would point to a third party's business aspects, positive or negative. It is simply a total score, but an important one to demonstrate to the public, in full transparency, that only the successful bidder had the highest score and, for that reason, was awarded the contract.
63. Although a public body relies on the bidders' submissions to evaluate the criteria and issue scores, the Average Overall score on all criteria combined does not reveal or permit the drawing of accurate inference with respect to information supplied by the third parties, because it does not reveal how the individual criteria were scored.
64. Therefore, Horizon was not correct to rely on paragraph 22(1)(b) or (c) of the *Act* to withhold the Average Overall Score for each unsuccessful bidder. We find that Horizon should disclose this information to the Applicant. We point out that Horizon had agreed to release this information during the informal resolution process (although it did not want to release the names of bidders).

2) Redacted information in Pharmacy Committee Minutes

65. Horizon redacted the names of the Pharmacy Committee members found in minutes of the Pharmacy Committee meetings, but released the remainder of the minutes to the Applicant. During our investigation, Horizon informed us that the reason for the redaction was because it did not deem the names of the members to be relevant to the Applicant's Request.

66. Having reviewed the Request and these specific records, we find that the names of the Pharmacy Committee members are relevant to the procurement process as they were the individuals tasked with evaluating certain parts of the bidders' submissions, along with Medbuy staff. We find that all of the information contained in the minutes is relevant, including the names of the Pharmacy Committee members. As such, we must determine whether their names were properly withheld pursuant to the *Act*.
67. The Committee members tasked with evaluation of the bidders' submissions in this case comprised of one employee of Horizon, as well as other employees or representatives of other health authorities across Canada. As Medbuy was contracted by Horizon to oversee the procurement process, Medbuy also selected all the members of the Committee.
68. There is no doubt that the Committee members' names are considered to be those members' personal information, as defined in the *Act*. Additionally, the Committee members are third parties as defined in the *Act*. Section 21 is a mandatory exception to disclosure, meaning that if the public body can show that the disclosure of the third party's personal information would be an unreasonable invasion of his or her privacy, the public body must protect that information.
69. As a result, Horizon must establish that the Committee members' names, if disclosed to the Applicant, would be an unreasonable invasion of the individual's privacy. Horizon was not willing to release the names of the Committee members, as it believed the members were acting in their roles as members of a committee and not as officers or employees of a public body. Horizon treated the members of the Committee as third parties, and third party information would be protected in its view. Additionally, Horizon contacted Medbuy in order to seek consent to release the members' names, but Medbuy did not consent. As a result, Horizon decided not to release this information due to third party privacy considerations.
70. Subsection 21(2) lists the instances where the third party's personal information, if disclosed, could be an unreasonable invasion of his or her privacy. By contrast, however, subsection 21(3), lists the instances where the disclosure of a third party's personal information would not be deemed to be an unreasonable invasion of the third party's privacy. One such instance is where the personal information is about a public body employee's job classification, salary range, benefits, employment responsibilities or travel expenses:

21(3) Despite subsection (2), disclosure of personal information is not an unreasonable invasion of a third party's privacy if

...

(f) the information is about the third party's job classification, salary range, benefit, employment responsibilities or travel expenses

(i) as an officer or employee of a public body, ...

71. In other words, it is not considered unreasonable to disclose private information of employees or officers of a public body when that information relates to their work.
72. The same can be said for third party privacy. Horizon ought to have continued its consideration and ask itself whether it is an unreasonable invasion of privacy to release names of those who have been tasked by a public body to evaluate requests for proposals for a contract to be awarded by the public body, a contract for the expenditure of public funds. In our view, this is where Horizon made an error.
73. Horizon delegated its authority to Medbuy to oversee the procurement process in order to select a supplier of pre-mixed IV solutions to be purchased by Horizon and to be delivered to hospitals under the umbrella of Horizon.
74. Medbuy was acting as agent, but more importantly, was acting for a public body, Horizon, in undertaking the procurement process. Medbuy selected the Committee members who did this work, and there is no facts that would lead us to believe that making the members' names public would constitute an unreasonable invasion of their privacy. The members were acting only in that delegated authority, in their professional capacity, and therefore, they were acting on behalf of Horizon, like employees or officers, to fulfill that role.
75. The Committee members' names do not qualify as personal information that can be withheld under section 21 because to release their names will not cause an intrusion into their private lives. Serving as evaluators of the RFP submissions meant they were acting in their professional, and not personal, capacities (see Order MO-1609, Information and Privacy Commissioner of Ontario, Jan. 31, 2003).
76. Therefore, the names of the Committee members cannot be protected under the *Act* and must be disclosed to the Applicant.

77. During our review of other Minutes of meetings, we noted that other information had been redacted: the name of the previous supplier contracted with Medbuy to supply pre-mixed IV solutions. Medbuy's baseline amount of money spent on the previous supplier was also redacted. Additionally, one record contained Medbuy's overview of the Marchese contract, being the annual projected value and percentage of rebate value.
78. Horizon did not identify this redacted information in its Response, nor did it explain why the information was being withheld. When we invited Horizon to provide further explanations as to why this financial information should be withheld from the Applicant, we were advised that it was purely based on third party considerations and the lack of consent on the part of Medbuy.
79. With respect, this information is not third party information, as it does not belong to Medbuy. It is information that has been gathered for Horizon as part of Horizon's procurement process. Horizon had the burden (section 84) to show that this information ought not be disclosed based on other considerations, such as those found in the exceptions found in sections 17 to 33, excepting sections 21 and 22, and it failed to do so in this case.

FINDINGS AND RECOMMENDATIONS

80. We find that Horizon conducted an adequate and thorough search for all of the relevant records in its custody or under its control in relation to the Request and that the Applicant was directed to Medbuy for any additional information. The timeliness of the Response was a result of an incorrect calculation of timelines. We are confident, however, that the comments and guidance provided in this Report of Findings will help Horizon avoid similar situations in the future.
81. The content of the Response was in conformity with the requirements of a proper response as per subsection 14(1) of the *Act* as we found that Horizon provided an index of the relevant records which identified the request topic and the relevant records, number of pages in each record, and indicated whether access was granted or denied, along with explanations for why access to some of the requested information was not being provided.
82. We find that Horizon was correct in relying on paragraphs 22(1)(b) and (c) of the *Act* to refuse the Applicant access to the unsuccessful bidders' names and respective scores

attributed on the four criteria of the RFP as found in the Briefing Note record. We find, however, that Horizon was incorrect in refusing to grant access to the Applicant to the unsuccessful bidders' Average Overall scores pursuant to paragraphs 22(1)(b) and (c) of the *Act*.

83. We also find that it was not proper to refuse access to the names of the evaluation Committee members on the basis that this information constituted third party privacy.
84. As for the remainder of the redactions, information that is not third party Medbuy information, we find that Horizon did not meet its burden to show that this information ought not be disclosed based on other considerations, such as those found in the exceptions found in sections 17 to 33, except for sections 21 and 22.
85. Based on all of the above, we recommend, pursuant to sub-paragraph 73(1)(a)(i) of the *Act* that:
 - a. Horizon provide the Average Overall scores of the unsuccessful bidders to the Applicant;
 - b. Horizon provide the Committee members' names to the Applicant; and,
 - c. Horizon release the remainder of the redactions in the relevant records, namely the name of the previous supplier contracted with Medbuy to supply pre-mixed IV solutions, Medbuy's baseline amount of money spent on the previous supplier, Medbuy's overview of the Marchese contract (the annual projected value and percentage of rebate value).

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

Anne E. Bertrand, Q.C.
Commissioner