



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

**Report A-2013-012**

**August 19, 2013**

**Eastern Health**

**Summary:**

Eastern Health received an access to information request for the successful bidder vendor name and successful bidder price (net & extended) on bids submitted over a period of six months for oxygen equipment and supplies. Eastern Health decided to grant access to the records, but first had to notify two affected third parties, as the information might affect their business interests if released. Both third parties filed Requests for Review with this Office, stating that section 27 (business interests of a third party) applied to the information and that the records should not be released. The Commissioner found that as neither third party had met the burden of proving that section 27 applies, the information should be released.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, s. 27, s. 64(2).

**Authorities Cited:**

Newfoundland and Labrador OIPC Report A-2013-008.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) an access to information request was received by Eastern Health on November 20, 2012 seeking disclosure of records as follows:

*...the successful bidder vendor name and successful bidder price (net & extended) on bids submitted as summarized on Schedule A attached...*

The request encompassed 50 bids for oxygen equipment and supplies over a period of 6 months. These bids were made under Eastern Health’s Special Assistance Program which is described as follows on Eastern Health’s website:

*The Special Assistance Program (SAP) provides basic medical supplies and equipment to assist with activities of daily living for individuals living in the community. To qualify, the individual must first meet financial eligibility and have a clinical assessment completed by a nurse or social worker.*

- [2] By letter dated December 21, 2012, the person who made the request (the “Requestor”) was notified that the records requested may contain information that, if released, might affect the business interests of a third party as set out in section 27 of the *ATIPPA*. As such, Eastern Health had to give notice to the third parties, who then had a period of 20 days from the date of receipt of notice in which to respond to Eastern Health with their position on the release of the requested information. Eastern Health then had to make a decision with respect to the release of information.
- [3] On January 11 and 14, 2013, the two Third Parties advised that they objected to the release of the requested information. Nevertheless, on January 17, 2013, Eastern Health issued letters to the requestor and both third parties stating that it did not believe that the requested information met the harms test under section 27, and as such were going to provide access to the requested information to the Applicant. However, under the *ATIPPA*, Eastern Health could not do so for an additional 20 days, as the third parties had the right, under section 43(2) of the *ATIPPA*, to ask the Commissioner to conduct a review of Eastern Health’s decision to release the information. On February 7, this Office received a Request for Review from Third Party 1 and on February 8, 2013, we received a Request for Review from Third Party 2.

[4] Attempts to resolve these Requests for Review by informal resolution were not successful, and by letters dated June 5, 2013, the Applicant third parties, Eastern Health and the Requestor were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *Access to information and Protection of Privacy Act* (“*ATIPPA*”). As part of the formal investigation process, these parties were all given the opportunity to provide written submissions to this Office in accordance with section 47. Despite the fact that we received two separate Requests for Review, the information and issues at hand are the same and therefore, I am issuing one report that will dispose of both of these Requests for Review.

## II PUBLIC BODY’S SUBMISSION

[5] Eastern Health provided a short submission again confirming its position that section 27 is not applicable to the requested information.

## III APPLICANT’S SUBMISSION

[6] The applicants in this case are Third Party 1 and Third Party 2, neither of which made a formal submission. However, they both made it clear that they were concerned that release of the information would negatively affect their competitive position, thus resulting in a significant negative financial impact on the company.

## IV REQUESTOR’S SUBMISSION

[7] The Requestor also provided a short submission stating that his position was that the information should be disclosed because “successful bid information has historically been available. ..[t]here has never been an issue regarding hidden awards/pricing in the past.... [t]his is public funds and transparency is extremely important to maintain bid openness and fairness....[o]ther RHA’s offer successful bidder information as routine practice.”

## V DISCUSSION

[8] While neither Third Party specifically stated which subsection of section 27 it was relying on, based on their comments in their Request for Review forms, I have assumed they are relying on section 27(1)(c)(i) and (iii), as the requested information does not contain any trade secrets (as per section 27(1)(a)), nor did either third party express any concerns about the confidentiality of the requested information (as per section 27(1)(b)). Section 27(1)(c)(i) and (iii) state as follows:

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

*[...]*

- (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 or interfere with the negotiating position of the third party,*
- (iii) result in significant financial loss or gain to any person or organization, or ...*

[9] Section 64 of the *ATIPPA* states as follows:

*64 (2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

[10] In the case at hand, Eastern Health, as the public body, decided that section 27 was not applicable to the requested information and decided it would provide access to the Requestor. However, before it could do so, it was required pursuant to section 28, to provide notice to Third Party 1 and Third Party 2, so that one or both of these third parties could be given the opportunity to file a Request for Review with this Office. As set out above, both third parties chose to do so, and as a result, information has yet to be released to the Requestor. Section 64(2) clearly states above that in a situation such as this, the burden of proving that section 27 is applicable to the requested information rests with the third party. Neither Third Party 1 nor Third Party 2 made a submission to this Office as part of the formal investigation process, and discussions between this Office and the involved parties during the informal investigation process are confidential and remain so during the formal investigation.

[11] It is our understanding that under the Special Assistance Program, each time a patient requires services, a new bidding process is undertaken. This explains why, in a period of only six months, there are over 50 bids in issue. Both third parties are concerned about the harm that will befall their respective companies should the information be released. It should be noted, however, that based on the above numbers, there are a rough average of 8 of these contracts per month, and the dollar value of each is relatively low. This means that there are ample opportunities to bid on these contracts each month and potentially win. Loss of one or two contracts also would not significantly impact a company's bottom line, and could possibly even be made up the next month. Further, the contracts that come under the Special Assistance Program are only a part of each Third Party's business. Contracts with private individuals or businesses do not factor into my review. We are also of the understanding that up until June 25, 2012, it was common practice for Eastern Health to reveal the successful bidder and the amount of the bid for oxygen equipment and supplies, and that other health authorities in the province continue to do so to this day. These points and arguments were all presented to each third party prior to the formal investigation phase, yet neither company addressed any of them in a formal submission.

[12] Therefore, it is my opinion that given the above arguments, which neither third party refuted in a formal submission to this Office, that both third parties have failed to satisfy the burden of proof. As most recently set out in Report A-2013-008, in order to successfully claim section 27, there must be detailed and convincing evidence to establish a reasonable expectation of probable harm. The standard of proof was thoroughly discussed in that report and need not be re-examined here. In the absence of any formal submission presenting any evidence at all, it is very clear that the required standard has not been met.

[13] Further, if harm to the third parties was a reasonable likelihood, given the recent past practice in Eastern Health and the current practice of revealing bids in other jurisdictions where the parties do business, it should have been fairly easy for the third parties to show how the release of the information in the past and in these other jurisdictions currently has harmed them and how it would continue to do so in the future.

## V CONCLUSION

[14] As stated in Report A-2013-008, two of the main underpinnings of the *ATIPPA* are accountability and transparency. Absent the requisite detailed and convincing evidence, I cannot find that section 27 applies to shield the requested information from disclosure. As such, I am in agreement with Eastern Health that the information should be released to the Requestor.

## VI RECOMMENDATIONS

[15] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Eastern Health release the requested information to the Requestor.

[16] Under the authority of section 50 of the *ATIPPA*, I direct the head of Eastern Health to write to this Office and to both Third Party Applicants within 15 days after receiving this Report to indicate the final decision of Eastern Health with respect to this Report.

[17] Please note that within 30 days of receiving the decision of Eastern Health under section 50, either Third Party Applicant may appeal that decision (as it pertains to them) to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No information should be released pending the expiration of the 30 day period.**

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19<sup>th</sup> day of August 2013.

E. P. Ring  
Information and Privacy Commissioner  
Newfoundland and Labrador