



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2015-001

March 11, 2015

### Eastern Health

**Summary:**

The Applicant requested from Eastern Health copies of all medical waste disposal contracts in place between the province and other delegated authorities (if applicable) and third party contractors. Eastern Health was prepared to release the information requested, however a Third Party objected and filed a Request for Review with this Office. With respect to both section 22 and section 27, the Commissioner found that the burden of proof under subsection 64(2) had not been met by the Third Party and recommended that the information be released.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as amended, s. 27(1)(b) and (c), s.64.

**Authorities Cited:**

*Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107. Newfoundland and Labrador OIPC Reports A-2014-013, A-2013-008, A-2014-008, 2008-002 and 2007-003; Saskatchewan OIPC Report 2005-003.

## I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act* (the “*ATIPPA*”) the Applicant submitted an access to information request dated June 12, 2014 to Eastern Health seeking disclosure of records as follows:

*...copies of all Medical Waste Disposal Contracts that are currently in place between the Province of Newfoundland (including Crown Corporation(s) and other delegated authorities if applicable) and third party contractors...*

- [2] On July 23, 2014, Eastern Health informed the Applicant that it had decided to disclose the records to the Applicant, but in accordance with section 28 of the *ATIPPA*, Eastern Health notified the affected Third Party (the company with whom it had contracted). The Third party did not consent and it filed a Request for Review with this Office on July 24, 2014 asking that this Office review Eastern Health’s decision to disclose the information to the Applicant.

- [3] Attempts to resolve this Request for Review by informal resolution were not successful, although through informal resolution efforts, the Applicant modified its request to include only the “short form” contract, and not the full length contract, which was estimated to contain over 700 pages. By letters dated January 15, 2015 the Applicant, Eastern Health and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

## II PUBLIC BODY’S SUBMISSION

- [4] Eastern Health reiterated its position that the requested information did not qualify for exemption under section 27, and that it was prepared to release the information to the Applicant.

### III APPLICANT'S SUBMISSION

- [5] The Applicant did not make a submission.

### IV THIRD PARTY'S SUBMISSION

- [6] The Third Party submitted its representations to this Office on February 6, 2015. At that time, it advised this Office that subsequent to the Applicant's request, they have been informed that legal proceedings have been commenced (by a party not involved with this Review) against Eastern Health (and others) in relation to the awarding of the contract to the Third Party. The Third party is of the understanding that the contract will be released as a part of the legal proceedings. In addition to its continued reliance on section 27 to withhold the requested information, the Third Party also now argues that disclosure of the contract could harm the conduct of existing legal proceedings in accordance with section 22(1)(p) of the *ATIPPA*.

- [7] With respect to section 27, the Third Party states:

*...the Record contains a detailed pricing schedule outlining the per kilogram cost applicable for the disposal of different types of medical waste. Pricing schedules such as this one are consistently treated by [Third Party] as confidential and the information contained therein is are [sic] considered by [Third Party] as highly sensitive the release of which would be damaging.*

- [8] The Third Party notes that the RFP process was "strictly confidential and [Third Party] was required to sign a Privacy/confidentiality Oath or Affirmation as an Appendix to its submission". Further, The Third Party submits that in any RFP there is implicit expectation that the information tendered be kept confidential.

- [9] With respect to the harm the Third Party is alleging it would suffer, it states that it is able to offer favourable pricing because of the volumes of waste involved and certain economies of scale that can be achieved. The Third Party states that disclosure of the pricing information will negatively affect its competitive position as "the information could be used by other provinces and private

sector companies negotiating with the Third Party as a low benchmark price for any given disposal service.”

- [10] Finally the Third Party states that it is a party to other contracts which contain “competitive pricing provisions” such that in the event the fees charged by the Third Party are determined to be not ‘market competitive’, the Third Party is required to reduce its pricing and refund the amount by which the price paid exceeds the market price (which is the price being charged to other purchasers for substantially similar services). Therefore, the Third Party submits that disclosure of the pricing schedule could result in financial harm in this manner as well.

## V DISCUSSION

- [11] Under normal circumstances, a late claim of an additional exception to disclosure would not be considered by the Office, but since it is a circumstance that has arisen only very recently, I will consider the late claim of section 22(1)(p). This section states as follows:

*22. (1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to...*

*(p) harm the conduct of existing or imminent legal proceedings.*

- [12] In Report 2007-003 and Report 2008-002, it was stated that a public body relying on section 22(1)(p) must prove that releasing the records would result in a reasonable expectation of probable harm to the conduct of the legal proceedings and to do so must present clear and convincing evidence over and above the mere fact that a legal proceeding exists.

- [13] In this case, the Third Party has offered evidence that such a proceeding exists, however it has presented no evidence with respect to how the release of the requested information could harm the legal proceedings. Thus, my consideration of the applicability of section 22(1)(p) ends here. The Third Party has not met the burden of proving that section 22(1)(p) is applicable to the requested information.

[14] The Third Party also argues that the requested information should be withheld under sections 27(1)(b) and (c) which read as follows:

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

*[...]*

*(b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is 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 or interfere with the negotiating position of the third party,*

*(ii) 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,*

*(iii) result in significant financial loss or gain to any person or organization, or*

*(iv) 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.*

[15] With respect to section 27(1)(b), one must consider whether the information was “supplied in confidence”. The meaning of “supplied” was considered at length most recently in Report A-2014-008. Essentially, contracts with public bodies for the supply of goods are not considered to be information that is “supplied”. Rather, they are negotiated agreements, even where there has been little or even no change between the bid and the accepted contract. In that Report, the request was also for tender documents, and it was my finding that the tender documents could not be said to have been “supplied”.

[16] Further, the Privacy/Confidentiality Oath or Affirmation that the Third Party signed was with respect to the “...confidential and/or private and/or personal and/or personal health information...concerning patients/clients/residents, staff or the business of **Eastern Health.**” [emphasis added] This document also goes on to state that the parties agree to comply with the obligations imposed under the *ATIPPA*, as such apply to the collection, use, disclosure, storage, retention and transfer of information. In this province, the *ATIPPA* has been interpreted consistently to allow for the disclosure of such contracts.

[17] Given the foregoing, I find that the contract was not supplied in confidence and thus, it is my conclusion that section 27(1)(b) is not applicable to the information in issue.

[18] With respect to section 27(1)(c), as most recently fully canvassed in Reports A-2013-008 and A-2014-008, in order to satisfy the burden of proof when claiming section 27(1)(c) to withhold information, there must be a reasonable expectation that the consequence alleged will occur. Detailed and convincing evidence is required in order to prove this reasonable expectation. This means that when there is a claim of section 27(1)(c)(i), the evidence must establish a reasonable expectation of probable harm, which requires a risk of harm that is beyond merely possible or speculative. Further, following the test used in Saskatchewan in Report 2005-003, there must be a clear cause and effect relationship between the disclosure and the alleged harm, the harm must be more than trivial or inconsequential, and the likelihood of harm must be genuine and conceivable. Similarly, if a claim of section 27(1)(c)(ii), (iii) or (iv) were made, there would also need to be detailed and convincing evidence that shows that results contemplated by these subsections is more than merely possible or speculative.

[19] In Report A-2014-003, I set out (at length) a portion of Justice Whelan's decision in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107 with respect to the burden of proof. It need not be repeated here, but suffice to say that it is my opinion that the Third Party has not met the burden of proof of probable harm. The statements made were vague and only very generally spoke of the harm that might possibly befall the Third Party's competitive position. As stated by Justice Whelan at paragraph 52 of his judgment:

*[51] When consideration is given to the evidentiary standard set out in the jurisprudence, I find the Applicant's evidence not sufficiently detailed or convincing to substantiate either that its competitive position will be harmed or that the release of Requested Information will cause it significant financial loss. The Applicant's evidence falls more into the category of mere possibility and speculation.*

[20] In the present case, the Third Party has stated, in very general terms, that this information, if disclosed, could be used by a competitor "as a low benchmark price", which will seriously compromise its negotiating position in the future. No further evidence was offered. As in past cases,

this type of general statement, which only speaks of a “mere possibility or speculation” is not sufficient to meet the burden of proof.

[21] The Third Party went on to state that some of the contracts to which it is a party contain “competitive pricing provisions”, as described above. However, the contract at issue here does not contain such a clause. Each case must be examined on its merits, and disclosure in one case does not necessarily mean disclosure in another case. In the present case, there is not even the possibility of this harm, as the contract does not contain such a provision. Therefore, again, the burden of proof has not been met.

## VI CONCLUSION

[22] The Third Party has not met the burden of proof to show there is a reasonable likelihood of probable harm in this case, either with respect to section 22(1)(p) or section 27(1)(c). The evidence was neither detailed nor convincing. Further, I find that the information was not supplied in confidence, meaning that section 27(1)(b) is also not applicable to the record at issue. Therefore, it is my finding that neither section 22 nor section 27 is applicable to the requested information, and it should be released to the Applicant.

## VII RECOMMENDATIONS

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

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

[25] Please note that within 30 days of receiving the decision of Eastern Health under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be**

disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11<sup>th</sup> day of March 2015.

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

