



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-029

December 14, 2016

Western Health

Summary:

Western Health received an access request seeking disclosure of all correspondence between Western Health and a named company, all tender bids in relation to a specific tender and a copy of a contract between Western Health and a named company. Western Health was prepared to provide partial access to the information, however, a Third Party objected to its tender bid information being disclosed and filed a complaint with this Office. Under section 43(3) the Third Party bears the burden of proving that the Applicant has no right of access. As the Third Party provided no evidence in support of its position, it failed to meet its burden of proof and therefore the Commissioner recommends that the Third Party's tender bid be released.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015,
S.N.L. 2015, c. A-1.2, s.39 and s.43.

Authorities Relied On:

Halifax (Regional Municipality) (Re), 2016 NSOIPC 7 (CanLII).

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) Western Health received an access request seeking disclosure as follows:

1 – All emails, meeting minutes, research, & other correspondence in any and all formats (briefing notes, studies, presentations) between [named individual], owner of [named company], and Western Health.

2 – A copy of all bids to the tender 0171-1615 “Supply of Non-Urgent Transport Services”

3 – A copy of the contract between Western Health and [named company] (including winning tender bid).

[2] Following receipt of the access request, Western Health informed the Applicant that it intended to provide partial access to the information, but in accordance with section 19 of the *ATIPPA, 2015*, Western Health determined it was necessary to notify the Third Party who then filed the present complaint opposing the release of its tender bid information (item #2 above).

[3] Attempts to resolve the complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

[4] Western Health relied on the position that the requested information does not meet all three parts of the test outlined in section 39 of the *ATIPPA, 2015*. While Western Health believed that the tender bid information of the Third Party met part one of the test, namely section 39(1)(a)(ii), it did not believe that the information met parts two or three of the test. Western Health was prepared to release the information, with some personal information redacted.

III THIRD PARTY'S POSITION

- [5] The Third Party filed a complaint with this Office requesting that the access request be denied, stating that disclosure of the information would release financial information of the Third Party and cause an invasion of individual and corporate privacy. However, the Third Party did not provide a submission, argument or evidence regarding the applicability of section 39 of the *ATIPPA, 2015* to the records. Two opportunities to do so were available to the Third Party (during the informal resolution and/or formal investigation process).

IV DECISION

- [6] The records requested by the Applicant include the Third Party's tender bid information with respect to Tender 0171-1615 "Supply of Non-Urgent Transport Services".
- [7] Under section 43(3) of the *ATIPPA, 2015* the burden of proof is on the Third Party to prove that an Applicant has no right of access to the records. This recognizes that third parties are in the best position to demonstrate with evidence the application of the three-part harms test to their own information. Third parties must establish that all three parts of the test apply.
- [8] In this instance, the Third Party did not provide a submission, evidence or any comments regarding the applicability of section 39 of the *ATIPPA, 2015* to the records. In the absence of such material I find that the Third Party has not met its burden of proof. As such, it cannot invoke section 39 in order to require that Western Health withhold the records in question from the Applicant.
- [9] In the context of section 39, failure by a third party to provide any evidence will generally lead to a foregone conclusion, namely, the records in question will be provided to the Applicant. This is not a unique position and is shared by many Canadian commissioners, including Nova Scotia's, who dismissed a third party complaint for much the same reasons in *Halifax (Regional Municipality) (Re)*, 2016 NSOIPC 7 (CanLII).

V RECOMMENDATIONS

- [10] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Western Health release the Third Party's tender bid information with respect to Tender 0171-1615 to the Applicant.
- [11] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Western Health must give written notice of his or her decision with respect to this recommendation to the Commissioner and to any person who was sent a copy of this Report (in this case the Third Party) within 10 business days of receiving this Report.
- [12] Please note that within 10 business days of receiving the decision of Western Health under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has provided Western Health with a copy of its notice of appeal prior to that time.**
- [13] Dated at St. John's, in the Province of Newfoundland and Labrador, this 14th day of December, 2016.

Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador