Business Interests of a Third Party
(Section 39)

Overview

Section 39 is a mandatory exception, meaning that information that falls into this exception must be withheld. The Commissioner has interpreted this section many times and this document is intended to:

- assist Public Bodies with determining if information is protected from disclosure by this section;
- assist Public Bodies with determining when notice to Third Parties is required pursuant to sections 39 and 19 of the *ATIPPA, 2015*;
- assist Public Bodies with preparing notices to Third Parties when required pursuant to sections 39 and 19 of the *ATIPPA, 2015*;
- assist Third Parties in understanding and preparing submissions objecting to decisions of Public Bodies to disclose third party business information; and,
- to educate the public and others who may seek Third Party business information from Public Bodies.

Section 39 states as follows:

39. (1) The head of a public body shall refuse to disclose to an applicant information

(a) that would reveal

(i) trade secrets of a third party, or

(ii) commercial, financial, labour relations, scientific or technical information of a third party;

(b) that is supplied, implicitly or explicitly, in confidence; and

(c) the disclosure of which could reasonably be expected to

(i) harm significantly the competitive position or interfere significantly 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 undue financial loss or gain to any person, 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.

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(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

In order for section 39(1) to apply, all three parts of the "test" must be met, meaning that the information must:

a) be of a type set out in section 39(1)(a);
b) have been **supplied in confidence**; **and**,
c) there must be a **reasonable expectation** that one of the outcomes identified in section 39(1)(c) will probably occur if the information is disclosed.

While the first part of the test is often easy to assess, parts (b) and (c) can be more difficult. The burden of proving that the exception applies rests with the party relying upon the exception. A Public Body relying on section 39 to withhold information or a Third Party objecting to a Public Body's decision to disclose must be able to "make the case". This means (as discussed more fully below) presenting detailed and convincing evidence that the exception applies.

The first step requires the Public Body to assess the requested records to determine whether, in its opinion, section 39 (or any other exception) applies. If a Public Body determines that section 39 does not apply, the Applicant is entitled to disclosure of the records without the delays associated with the notification of a Third Party. Notice is unnecessary when section 39 clearly does not apply.

If, and <u>only</u> if, the Public Body is uncertain as to whether section 39 might apply to the records is the Public Body required by the *ATIPPA, 2015* to notify a Third Party in the manner set out in section 19.

Supplied in Confidence

British Columbia Order 03-02 extensively addressed the interpretation of whether information is "supplied". The interpretation in that report is consistently applied across Canada. Our Office adopted this interpretation (see Report A-2014-008) and will generally only consider such information to be supplied where the information is immutable and not subject to change. Examples of this might include research and development information, fixed costs incurred by the Third Party or where disclosure of information in the contract will permit an Applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the *Act*.

This means that generally speaking, the contents of a contract between a Public Body and a Third Party will not qualify as having been "supplied". This is due to the fact that contracts, by their very nature, are negotiated. Even a contract that has been preceded by very little or no negotiation (i.e. a proposal that has been incorporated into a contract without change) will still usually be seen as "negotiated" due to the fact that the other party agreed to it.

Information of a proprietary nature that is not subject to negotiation between a Third Party and a Public Body is generally considered to be supplied (see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner),* 2002 BCSC 603 starting at paragraph 69).

Assessment of confidentiality is addressed in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42:

> *[…] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
>
> *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
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> *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.*

In order for section 39(1)(b) to apply, the information must not only have been "supplied" by the Third Party as described above, but also supplied in confidence.

Reasonable Expectation

Section 39(1)(b) uses the phrase "could reasonably be expected to." This refers to the standard of proof that must be met in order to rely on the exception. Report A-2013-008 canvasses the interpretation of this phrase by the Supreme Court of Canada and by other Canadian authorities. The consensus is that there must be detailed and convincing evidence that logically explains why and how the disclosure could lead to a particular identifiable outcome or harm. The potential occurrence of an alleged outcome must be established as being considerably more than merely possible or speculative. It need not, however, be proven on a balance of probabilities. The likelihood of the occurrence of the outcome alleged must be considerably higher than a mere possibility, but somewhat lower than more likely than not. In *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, that the Court stated "A third party… must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur."

Harm

This Office adopted the test used in Saskatchewan as set out in Report 2005-003 to provide clarity to the concept of harm:

> *1) there must be a clear cause and effect relationship between the disclosure and the alleged harm,*
> *2) the harm must be more than trivial or inconsequential (in fact, the ATIPPA, 2015 uses the term "significant harm"), and*
> *3) the likelihood of harm must be genuine and conceivable.*

Report A-2013-008 stated that given the importance of the principle of accountability, heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources; this is not possible if bid details are protected from disclosure in the absence of detailed and convincing evidence requiring such details to be withheld.

Knowing the bid details of the successful bid may give an Applicant some insight with respect to competitive pricing, but it does not automatically ensure that a competitor will be successful the next

time tenders are called. Pricing is influenced by several factors, which may vary from company to company and these factors are not static and can change from year to year.

As a result, on numerous occasions, this Office has found that prices contained in bids, proposals and contracts are not subject to being withheld pursuant to section 39. This includes the aggregate contract price as well as unit prices and copies of full bids (see Report A-2013-008 and Report A-2013-009).

That being said, it is important to remember that certain kinds of information are protected by section 39. In Report A-2013-009, the Commissioner stated:

> *Asking a third party to disclose, for example, how much it pays to obtain the goods they sell, how they decide what price(s) to bid or how it produces or manufacture its products would be unfair. These are some types of third party information that I believe section 27* [now section 39] *is intended to protect, not the prices paid by a public body to procure goods and services.*

Interference with Contractual or Other Negotiations

The Federal Court interpreted this provision in *Societe Gamma Inc. v. Canada (Department of the Secretary of State),* (April 27, 1994), T -1587-93, T-1588-93 (F.CT.D.) as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the Third Party which might flow from disclosure".

Harm to Competitive Position

In Report A-2013-009, this phrase was interpreted to mean:

> *…actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process which is transparent to the public and supports the accountability function that underlies the purpose of the ATIPPA. Contracts with public bodies require greater transparency than those with private sector entities, this is simply a "cost of doing business" with public sector entities.*

The Newfoundland and Labrador Court of Appeal also commented on this issue in *Corporate Express Canada Inc*. v. *Memorial University of Newfoundland*, 2015 NLCA 52. In that case, the request was for information about the cost of office supplies Memorial purchased from Staples under the tender contract and also supplies purchased outside the contract. The court stated:

> *[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples' competitive position or result in significant financial loss to it.* ***While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples' competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder's loss of exclusive knowledge of MUN's contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a risk of harm considerably above a mere possibility, or a real risk of financial loss. More specifically, disclosure of MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples' bidding strategy, without more, is not evidence from which harm to Staples' competitive position and significant financial loss to it can be reasonably inferred.***
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> *[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples' competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.* [emphasis added]

Report A-2011-007 addressed circumstances in which harm was assessed as being more than speculative where information with respect to video lottery machines was requested. Specifically, the request was for PAR sheets, which are design documents created by slot machine manufacturers to illustrate the math, probabilities and computer algorithms used in each of their slot machine games. The Third Party was able to show that development of these games involved considerable investment of both time and monetary resources and disclosure of the requested information would enable competitors to create and manufacture market-proven successful games on an on-going basis without incurring the same research or development costs, which can be significant. Thus, a competitor, armed with this information, could offer these games to market for substantially less cost than the original creator, so much so that the original creator would no longer be competitive at all. The Commissioner

accepted that this type of harm was one of the harms that the exception for Third Party business interest was designed to protect against.

Undue Financial Loss or Gain

Report A-2008-013 considered the notion of "undue financial loss" and quoted at length from British Columbia Order 00-10, pages 16-18. In that case, an Applicant brewery sought records containing sales data for two competing breweries who both opposed the release of the data:

> *Molson argued that disclosure of this information could, within the meaning of s. 21(1)(c)(iii), reasonably be expected to "result in undue financial loss or gain to any person or organization". Labatt agreed with this. Molson submitted that disclosure of the information would cause loss to it because the information would hurt its competitive position, thus causing a loss of revenue. Molson also said it would allow Pacific Western or another competitor to make profits without having invested any capital to do that…*
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> *When is a financial gain or loss "undue"? As is the case with the significant harm test under s.21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation. See Order 99-018. The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation. See, for example, the judgement of Cartwright J. (as he then was) in Howard Smith Paper Mills Ltd. v. The Queen (1957), 29 C.P.R. 6 (S.C.C.), at p. 29.*
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> *In my view, this financial gain to Pacific Western, and others, would be undue. It would not be undue because the gain would be large. The evidence does not permit me to make any finding on the costs saved by Pacific Western if it were to obtain information that it would otherwise have to pay for. Nor does it allow me to decide what price Pacific Western would pay to buy such information if it were available. But the information doubtless has value to Pacific Western and to others. The gain to Pacific Western from having that information would be undue because it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive windfall. . . .* [emphasis in original]

An undue financial loss or gain is not "undue" merely because it is large. In Report A-2008-013 and Report A-2009-006, the loss and/or gain was found to be undue because disclosure of the requested information, which was developed by a Third Party (likely at considerable cost) through many years of research, experience and expertise, would enable a competitor to produce a competing product that could be put on the market for a significantly lower cost (as the competitor would not have to incur the

development costs). In addition, it is likely that the Third Party would then be unable to offer similar developed processes or products to current or prospective clients (due to the competitor's significantly lower prices) with the result being that the Third Party would then have to incur considerable costs (that it would not have had to incur otherwise) to develop other products and processes to offer to clients.

Notification under Section 19

Notification of a Third Party does not occur automatically or just because the requested information fits into one of the categories in section 39(1)(a). If a Public Body is satisfied that section 39 **is not** applicable (i.e. one or more parts of the three part test cannot be met) it **must** release the information and notification to or consultation with the Third Party is not necessary.

While unnecessary and not recommended by the Office of the Information and Privacy Commissioner, there is nothing in *ATIPPA, 2015* prohibiting Public Bodies from informally notifying Third Parties (outside of section 19) of the release of records concurrently with release to the Applicant. If given, any such informal notice must not imply or state that the Third Party has a right pursuant to *ATIPPA, 2015* to file a complaint with the Commissioner or an Appeal with the Trial Division.

Likewise, if a Public Body is satisfied that section 39 **is** applicable, that information can be withheld without notification to the Third Party.

However, Public Bodies may need assistance and input from the affected Third Party in order to effectively determine whether the requirements of section 39(1)(c) can be met. If required, this consultation should be done informally, without any section 19 notification. **A Section 19 notification ONLY comes into play when there is an intention to release and the Public Body is uncertain regarding the application of section 39 (those records in the "grey area").** These are records for which the Public Body does not believe it can discharge the burden of proof to withhold under section 39 but which hold enough of the characteristics of **all** three parts of the test that they "might" be excepted from disclosure.

Public Bodies act contrary to *ATIPPA, 2015* when they frustrate an Applicant's right to timely access by providing unnecessary notifications to Third Parties. Public Bodies sometimes notify Third Parties despite determining that the records in question clearly fall outside of section 39. The most commonly

cited reasons for these gratuitous notices is the desire to preserve long standing business relationships or perceived ethical issues associated with 'blind siding' business partners. While understandable, these reasons are clearly irrelevant in the *ATIPPA, 2015* context, and such notices unacceptably deny timely access to information.

If, after reviewing all the records a Public Body is **unable** to decide if the records (or a portion of them) are within section 39, the Public Body should notify the Third Party of its intention to release these grey area records as set out in section 19(1). To ensure meaningful notice, it should be accompanied by the grey area records only (those the Public Body is unsure about). There is no need to send the entire package of records to the Third Party if section 39 is assessed as potentially applying to only a portion of the records. The notice should seek the Third Party's consent to release the grey area information and should also include a deadline by which the Third Party should respond, as the Public Body's 20 business day timeline for responding to the Applicant is not suspended during the section 19(1) notification process. If the Third Party does not consent and/or does not offer any additional evidence with respect to the applicability of section 39, the Public Body must decide to release the information, thus triggering the section 19(5) notification to the Third Party.

Section 19(5) lists the mandatory contents of this notice, including the reasons for the decision and the provision of the *Act* upon which the decision was based. Simply stating that it was determined that section 39 did not apply is inadequate. Sufficient detail **must** be provided to allow the Third Party to understand the reasoning behind that determination. **At a minimum**, the reasons should summarize what the Public Body's submissions to the Office of the Information and Privacy Commissioner will be if a complaint is made by the Third Party.

Upon receipt of notification the Third Party must decide whether to file a complaint, and if it does, it bears the onus of establishing the applicability of section 39. Third Parties are generally in a better position to present the evidence required to meet the burden of proof, as they know their business best.

We note above that the Public Body must review all of the records prior to sending them to the Third Party (in order to determine which records may be subject to section 39 and which are clearly not) and that the entire set of records should not be sent to the Third Party, unless, after reviewing them, it has been determined that the entire set of records may be subject to section 39. This is the ideal scenario,

but we recognize that in all cases this may not possible. In some situations, the volume of records and the tight timelines for response will preclude a thorough review of the records by the Public Body prior to sending them to the Third Party. Other times, the involvement of a Third Party will not become apparent until late in the game. These situations may require modifications to the process such as sending the entire package of records to the Third Party or having a very informal section 19(1) notification that may not include records at all or simply a detailed description of the records at issue. However, it is important that Public Bodies make every effort to review the entire set of records first and only send the Third Party the grey area information. This will allow the Third Party to do a more focused and efficient review of the information, thus enabling them to respond to the Public Body or prepare a Complaint to the OIPC in a complete and timely manner.

Further, it is the expectation of the OIPC that all records not impacted by the potential application of section 39 will be sent to the Applicant within the original response timeline, subject of course to any other exceptions that may apply.

Releasing Records

Once the Public Body has made a decision regarding the release of records, it must notify the Third Party, who then has a specific time period in which to file a complaint with the Commissioner or go to court. Public Bodies should be sending these notices by express or registered mail so that they can track the delivery of the notice and ensure they are aware of when the notice was received by the Third Party. This will ensure accuracy of timelines and eliminate any uncertainty regarding the date upon which it is appropriate to release records.

Authorities Cited

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