OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

# Report A-2016-007

## June 10, 2016

## Eastern Health


**Summary:** The Applicant submitted a request to Eastern Health for records related to the provision of food and environmental services at Eastern Health. Eastern Health notified a Third Party that intended to disclose the records, and the Third Party filed a complaint with this Office, arguing that the information ought to be withheld on the basis of section 39 of the *ATIPPA, 2015* (disclosure harmful to the business interests of a third party). The Commissioner found that the Third Party had not met the requirements of section 39, and therefore recommended that Eastern Health disclose the responsive records.


**Statutes Cited:** *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, ss.19, 39.

**Authorities Relied On:** *Corporate Express Canada Inc.* v. *Memorial University of Newfoundland,* 2015 NLCA 52; *Corporate Express Canada Inc.* v. *The President and Vice Chancellor of Memorial University, Gary Kachanoski,* 2014 NLTD(G)107; British Columbia OIPC Order F15-53; Saskatchewan IPC Review Reports 195-2015 & 196-2015; Nova Scotia OIPC Review Reports FI-13-28 and 16-01; Newfoundland and Labrador OIPC Reports A- 2016-001, A-2016-002, A-2015-006, A-2015-005, A-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, 2008-002 and 2007-003.

*File # 0015-060-16-030*

## I BACKGROUND

[1] Under the provisions of the *Access to Information and Protection of Privacy Act, 2015* ("*ATIPPA, 2015*" or "the *Act*") the Applicant submitted a request to Eastern Health for records related to the provision of food and environmental services at Eastern Health, including a Food Services Management Agreement dated December 11, 2007, an Amending Agreement dated December 1, 2008, and a Management Services Agreement dated October 1, 2013, all three of which were made between Eastern Health and the same Third Party corporation.

[2] Eastern Health notified the Third Party that, pursuant to subsection 19(5) of the *ATIPPA, 2015,* that it had decided to give the Applicant access to the records unless the Third Party asked the Information and Privacy Commissioner or the Trial Division to review the decision. The Third Party filed a complaint with our Office.

[3] The complaint could not be resolved informally, and so the Complainant Third Party and Eastern Health were notified that the file had been referred to formal investigation in accordance with subsection 44(4) of the *Act*. The Complainant provided written submissions in support of its position, which will be referred to below. Eastern Health provided no submissions.

## II THE COMPLAINANT'S POSITION

[4] The Complainant argued, first, that Eastern Health was in breach of the *Act* by failing to give the Complainant notice, under subsection 19(1) of the *Act,* of its intention to disclose the responsive records, instead of moving directly, as it did, to a notice under subsection 19(5) of its decision to disclose the records. The Complainant argued that it had been prejudiced by not having the opportunity to make its arguments to Eastern Health.

[5] The Complainant in addition argued that Eastern Health had not provided sufficient reasons for its decision to grant access to the records, contrary to the provisions of

subsection 15(5). The Complainant's position was that the provision of reasons is a fundamental requirement of procedural fairness, and that Eastern Health's failure to do so prejudiced the Complainant in its ability to respond to Eastern Health's decision.

[6] Finally, the Complainant submits that the records contain information that would reveal commercial, financial and technical information, that they contain information that was supplied in confidence, and that disclosing the records could reasonably be expected to cause harm to the Complainant within the meaning of section 39 of the *Act.* I will deal with each of the Complainant's arguments in turn in the following sections of this Report.

## III DECISION

### *Procedural Fairness – section 19 Notice*

[7] The relevant portion of section 19 of the *ATIPPA, 2015,* reads as follows:

> *19. (1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40 , the head shall make every reasonable effort to notify the third party.*
>
> *(2) The time to notify a third party does not suspend the period of time referred to in subsection 16 (1).*
>
> *(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.*
>
> *(4) The third party may consent to the disclosure of the record or part of the record.*
>
> *(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing*
>
> *(a) of the reasons for the decision and the provision of this Act on which the decision is based;*

> *(b) of the content of the record or part of the record for which access is to be given;*
>
> *(c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 ; and*
>
> *(d) how to file a complaint or pursue an appeal.*

[8] I have concluded that it is not a breach of the *Act* for a public body to skip subsection 19(1) and go directly to subsection 19(5). A public body faced with a request for information that might possibly fall into a category covered by paragraph 39(1)(a) of the *ATIPPA, 2015* has a number of choices it may make, all of which the *Act,* in section 19, leaves to the exercise of the public body's own judgment. The public body might decide that the information is clearly excepted from disclosure by section 39, and refuse the request. Alternatively, the public body might decide that disclosure of the information is clearly not prohibited by section 39, and grant the request. In either of those cases, the public body may act without notifying the third party at all.

[9] Section 19 provides for other possible scenarios. Under subsection 19(1), if the public body is uncertain about the applicability of section 39, it may consult with the affected third party in order to obtain additional information that could assist in making its decision, or to obtain consent to disclose the information. This is simply a process of consultation, and may be done even without formally invoking subsection 19(1).

[10] Ultimately, however, the public body must make a decision. If it reaches the conclusion that the section 39 test has not been met, it notifies the third party under subsection 19(5) that it has decided to disclose the information. The purpose of the subsection 19(5) notification is to allow the third party, if it chooses, to ask either this Office or Trial Division for a review.

[11] There is nothing in the language of section 19 that requires a public body to give a third party both a subsection 19(1) notice and a 19(5) notice in every case. In some cases the public body may decide to conduct a full consultation. In others, such as the present case, the public body may conclude that section 39 is not applicable but, out of an abundance of caution, decides to give the third party a subsection 19(5) notice of its decision. In other cases, as outlined above, the public body may conclude that the applicability or inapplicability of section 39 is so clear that no notice at all needs to be given.

[12] In all instances it is the responsibility of the public body to make a section 19 decision based on its own interpretation of the facts of the case. The *ATIPPA, 2015* is intended to provide for timely and expeditious access to information, and section 19 provides the public body with the flexibility to deal expeditiously with requests while safeguarding the rights of affected third parties. In cases like the present, there is no prejudice to the interests of the third party, since the complaint review process conducted by this Office gives ample consideration to the position of the third party, and the third party has the right of further appeal to Trial Division before any records are disclosed to the applicant.

*Procedural Fairness – Right to Reasons*

[13] In the present case the subsection 19(5) notification letter from Eastern Health to the Third Party stated as follows:

> *Please be advised that after careful consideration, Eastern Health has decided that this information does not meet the three-part test outlined in section 39 and has decided to grant access to the information as attached.*

[14] Section 19 simply requires that a public body give the third party notice of "the reasons for the decision and the provision of the *Act* on which the decision is based." In the present case, Eastern Health has done both. In some cases, especially if the public body's decision involves the application of several different provisions of the *Act* or a complex fact situation, it might be better to give more detailed reasons. However, in the present case there is only one legal test at issue, that of section 39. The OIPC (or Trial Division in the event of an appeal) applies that test in a fresh review of the record, not simply a review of the reasons

given by the public body. The third party has the burden of proving that the section 39 test applies, but has ample opportunity to make submissions in support of its position prior to any records being disclosed. I have concluded that the Third Party has not been prejudiced by the brevity of Eastern Health's reasons for its decision in the present case.

*Section 39 – Business Interests of a Third Party*

[15] The relevant portion of section 39 of the *ATIPPA, 2015* reads 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.*

[16] This provision of the *Act,* which protects important business information of third parties from disclosure, is identical to, or substantially similar to, the provisions of other access to information legislation in most other Canadian jurisdictions, and has been consistently interpreted many times both by Information and Privacy Commissioners and by the courts. The test contained in section 39 consists of three separate parts, in subsections (a), (b) and

(c), and all three parts of the test must be met to allow a public body to refuse to disclose the requested information. If any one part of the test is not met, the public body must disclose the information. The process followed by the public body in initially deciding whether to disclose such information is set out in section 19. However, on a complaint by a third party to this Office or an appeal to Trial Division, it is the third party, not the public body, that bears the burden of proving that section 39 applies so as to prevent the disclosure.

[17] In the present case, the responsive records (the Food Services Management Agreement, the Amending Agreement and the Management Services Agreement) are all commercial contracts to provide services, made between Eastern Health and the Third Party. It is quite clear that these records consist of or contain commercial or financial information of the Third Party. Therefore the first part of the test has been met.

[18] The second part of the test requires that the information in question must have been "supplied in confidence" by the Third Party. However, it has long been held that most or all of the information contained in a contract or agreement for the provision of goods or services, regardless of whether the information originated with one party, must be treated as having been negotiated, not "supplied", once that information has been incorporated into the document and agreed to by both parties. That is precisely the case with the information contained in the responsive records in the present case. There are exceptions to that general rule, but those exceptions are not applicable to the present case. Since the information has not been "supplied", the issue of confidentiality does not arise. I conclude therefore that the second part of the test has not been met.

[19] On the first page of this Report I have referred the reader to numerous Reports from this Office and from other Commissioners, and to decisions of the Trial Division and Court of Appeal. Notably, I have included a recent decision of a BC Information and Privacy Adjudicator in Order F15-53, dated September 30, 2015, involving a food services agreement, in which the facts and conclusions to be drawn from them are substantially the same as in the present case.

[20] The present case is a classic illustration of the simple and straightforward situation in which the responsive record consists entirely of a negotiated, signed contract between a public body and a third party business for the provision of goods or services. The principle of transparency in, and accountability for, the expenditure of public funds, which is a cornerstone of the statement of purpose in section 3 of the *ATIPPA, 2015*, requires that the details of such contracts be disclosed. It is now more than a year since the present *Act* came into force, and the underlying principles of the three-part test have been settled for decades. Perhaps it is time that both public bodies and the businesses that contract with them should recognize the inevitability that those contracts will be disclosed. Indeed, perhaps public bodies in Newfoundland and Labrador might consider adopting the principle of "open contracting" under which ordinary contracts for the provision of goods and services are routinely published without the need for an access request.

[21] In many third party business cases the result turns on the issue of whether or not the information in a negotiated agreement has been "supplied." Some of those decisions, for completeness, also deal with the third part of the test, and often find that the third party has not provided "detailed and convincing evidence" of a "reasonable expectation of harm." That is the conclusion I have reached here, on the third part of the test, as well.

[22] In the result, I conclude that neither the second nor the third parts of the three-part test in section 39 have been met, and therefore the information should be disclosed.

## IV RECOMMENDATIONS

[23] Under the authority of section 47 of the *ATIPPA, 2015* it is my recommendation that Eastern Health disclose the responsive records to the Applicant.

[24] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Eastern Health must give written notice of his or her decision with respect to these recommendations to the Commissioner and to any person who was sent a copy of this Report within 10 business days of receiving this Report.

[25] Please note that within 10 business days of receiving the decision of Eastern 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*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of June, 2016.

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