OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-008

June 16, 2016

Eastern Health

Summary: The Applicant submitted a request to Eastern Health for records related to the provision of security services at Eastern Health. Eastern Health notified a Third Party in accordance with section 19 of the *ATIPPA, 2015,* that it intended to disclose the records. The Third Party filed a complaint with this Office, arguing that the information ought to be withheld on the basis of section 39 (disclosure harmful to the business interests of a third party) and also sections 31 (law enforcement) and 37 (individual or public safety). It was found that the Third Party had not met the requirements of section 39, and therefore it was recommended that Eastern Health disclose the responsive records. It was further found that the Third Party had no basis under the *ATIPPA, 2015* to rely on exceptions other than section 39, about which it had received notice under section 19.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, ss.19, 31, 37, 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; Ontario OIPC Order PO-3617; 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-2016-007, A-2016-002, A- 2016-001, 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.

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 security services at Eastern Health, including a Security Services Agreement dated November 18, 2014 and a Contract Amendment Agreement dated June 30, 2015, both of which were made between Eastern Health and the same Third Party business corporation.

[2] Eastern Health notified the Third Party, 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 was referred to formal investigation in accordance with subsection 44(4) of the *Act*. The Third Party Complainant provided written submissions in support of its position, which will be referred to below. Eastern Health provided no submissions.

II THE THIRD PARTY COMPLAINANT'S POSITION

[4] The Third Party argued that the responsive records should not be disclosed under section 39 of the *Act* – that all three parts of the test under section 39 had been met.

[5] The Third Party also argued that disclosure of the records would be harmful to law enforcement, because it could "…reveal arrangements for the security of property or a system…" under section 31(1) of the *Act,* since it outlined detailed security staffing levels and times, and the location of security technology such as alarms and cameras.

[6] The Third Party also argued that disclosure of the records would be harmful to individual or public safety under section 37 of the *Act,* because an individual who wished to harm an employee, patient or visitor could learn how to do so without being subject to security.

III DECISION

[7] The responsive records constitute a comprehensive contract for the provision of alarm monitoring and security patrol services at Eastern Health facilities. They include provisions covering the engagement, qualifications, duties and authority of security personnel, reporting relationships, and payment for services provided. Of the 60+ pages, 40 pages consist of a schedule of requirements for security services, which was clearly created as part of the tender issued by Eastern Health. That schedule has been incorporated by reference into the contract.

[8] The relevant portions of sections 31 (disclosure harmful to law enforcement) and 37 (disclosure harmful to individual or public safety) of the *ATIPPA, 2015* read as follows:

> ***31.*** *(1) The head of a public body may refuse to disclose information to an applicant where the disclosure could reasonably be expected to*
>
> > *(l) reveal the arrangements for the security of property or a system, including a building, a vehicle, a computer system or a communications system;*
>
> ***37.*** *(1) The head of a public body may refuse to disclose to an applicant information, including personal information about the applicant, where the disclosure could reasonably be expected to*
>
> > *(a) threaten the safety or mental or physical health of a person other than the applicant; or*
> >
> > *(b) interfere with public safety.*

First, under section 43 of the *Act,* the burden of proof is on the third party to prove only that section 39 of the *Act* requires the information be withheld. For all other exceptions in Division 2 of the *Act,* including sections 31 and 37, the burden is on the public body, not on a third party, to prove that the information must be withheld. The Third Party argues,

nonetheless, that irrespective of where the burden of proof lies, I should accept its submissions and recommend that the information be withheld.

[9] That is not, however, the way the *ATIPPA, 2015* is designed. Section 42 is instructive. In subsection (1) it provides that "a person who makes a request" (an applicant) may file a complaint with this Office respecting a decision, act or failure to act, of the head of the public body, that relates to the request. However, in subsection (3) it provides only that "a third party informed under section 19 of a decision" may file a complaint respecting that decision.

[10] The scope of "that decision" is much narrower for a third party complainant. Section 19 is entirely concerned with a public body's notification to a third party that it intends, or has decided, to disclose information "that might be excepted from disclosure under section 39 or 40." My conclusion is that under the *ATIPPA, 2015* a third party has a right to file a complaint to this Office only with respect to disclosures which might be harmful under section 39 (in the case of business information) or section 40 (in the case of personal information) and of which they have been notified under section 19.

[11] A similar conclusion was reached by the Ontario Information and Privacy Adjudicator in a recent case (Order PO-3617, June 1, 2016). The Adjudicator was not satisfied that this was one of the rare cases where the affected party should be permitted to rely on another discretionary exception where the public body has chosen not to do so.

[12] I am further reinforced in my conclusion by noting that sections 31 (law enforcement) and 37 (individual or public safety) are discretionary exceptions. The public body in such cases not only has the burden of proving that information should be withheld, but also has the responsibility of making that decision, in the exercise of its own informed judgment. It is possible that a public body, in making such a decision, might wish to consult with an involved third party, for example, but the decision to disclose or withhold is for the public body to make. In the present case Eastern Health has not indicated to me that it has any concerns about the application of either section 31 or section 37. Should Eastern Health

apply those or any other exceptions in order to withhold information from the Applicant, the Applicant will have the right to file a complaint with this Office.

[13] Section 39 of the *ATIPPA, 2015* reads, in part, 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.*

[14] This provision of the *Act* is identical to, or substantially similar to, provisions about third party business information found in access to information legislation in most other Canadian jurisdictions, and the language 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). 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.

[15] The responsive records in the present case, the Security Services Agreement and the Contract Amendment, are a contract between Eastern Health and the Third Party for the provision of security services. The records clearly consist of commercial information, so the first part of the test has been met.

[16] The second part of the test requires that the information in question has been "supplied in confidence" by the Third Party. However, it has long been held that information in a signed, executed contract or agreement for the provision of goods or services is deemed to have been negotiated, not "supplied", regardless of whether or not the information originated with the third party. Once that information has been incorporated into the document and agreed to by the parties, it must be treated as having been negotiated, not "supplied." That is the case with the responsive records at issue here. While there are exceptions to the general rule, they do not apply in this case. Therefore the second part of the test has not been met.

[17] The third part of the test requires that the third party must provide "detailed and convincing evidence" of a "reasonable expectation of harm." This was the test in the decisions referred to by the Third Party in its submissions. However, in those decisions the test was explicitly met by the evidence provided by the third party. Given the conclusion I have reached on the second part of the test, I do not need to evaluate the applicability of the third part. However, for the sake of completeness, I have reached the conclusion that the Third Party has not provided sufficient evidence to meet it.

[18] Our most recent Report A-2016-007 was also a case involving a third party contract with Eastern Health, and the circumstances were so similar to the present case that I wish to reiterate the observations made in that Report:

> *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.*

[19] In the present case, I have concluded 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

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

[21] 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 any person who was sent a copy of this Report within 10 business days of receiving this Report.

[22] 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.**

[23] Dated at St. John's, in the Province of Newfoundland and Labrador, this 16th day of June, 2016.

Sean Murray
Director of Special Projects