OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-006

February, 10th, 2017

Central Health

Summary: The Applicant requested detailed information from Central Health regarding all personal care homes not in compliance with the Personal Care Home Operational Standards between January 2015 and the date of the request. The requested information included details of the orders breached, as well as the repercussions of non-compliance. Central Health intended to release the information requested, but decided to notify all third parties operating personal care homes (within its jurisdiction) of its decision. Nine Third Parties filed complaints with this Office, claiming that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof under subsection 43(3) had not been met by the Third Parties and recommended that the information be released.

Statutes Cited: *Access to Information and Protection of Privacy Act*, 2015, S.N.L. 2015, c. A-1.2, ss. 19, 39 and 43(3).

Authorities Relied On: *Canada Packers v. Canada (Minister of Agriculture)* 1988 CanLII 1421 (FCA). Reports: A-2011-007, A-2016-002, A-2016-008, A-2016-012, A-2016-026; A-2016-030 at www.oipc.nl.ca.

Other Resources: Business Interests of a Third Party (Section 39).

File #'s: 0015-064-16-041, 0015-064-16-042, 0015-064-16-043, 0015-064-16-044, 0015-064-16-045, 0015-064-16-046, 0015-064-16-047, 0015-064-16-049 and 0015-064-16-050

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*"), the Applicant submitted an access to information request to Central Health seeking disclosure of the following:

> *A list of personal care homes that were not in compliance with Personal Care Home Operational Standards, as well as any details of the orders that were breached and any details of repercussions felt as a result of non-compliance.*

[2] Central Health later clarified the request with the Applicant and it was narrowed to the timeframe of January 1st, 2015 to the date of the request.

[3] Central Health informed the Applicant that it had decided to disclose the records, but relying on its interpretation of section 19 of the *ATIPPA, 2015*, Central Health notified potentially affected third parties of its decision, including the Third Parties who filed the present complaints opposing release of the records in question.

[4] As attempts to resolve the complaints by informal resolution were not successful, the complaints were referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015.*

II PUBLIC BODY'S POSITION

[5] Central Health determined that the requested information did not meet the three-part test outlined in section 39, and was prepared to release the information to the Applicant. Central Health submitted that the records responsive to the request do not meet the three-part test as the records relate to inspections conducted by Central Health and/or Service NL as part of the Personal Care Homes Provincial Licensing Program and are therefore not subject to the exception outlined in section 39 of the *ATIPPA, 2015*.

III POSITIONS OF THIRD PARTIES

[6] The majority of the Third Parties did not make submissions representing why the records in question met the three-part test in section 39 and therefore should not be released to the Applicant. Among those offering any comment at all it was simply asserted that this information should remain confidential between the Public Body and the Third Parties.

[7] One Third Party added that the records contained instances of non-compliance that had since been rectified within a timely manner. It went on to note that releasing these records to the Applicant, who might not understand the standards and how they work in practice, could create unnecessary harm to its business and operation.

IV DECISION

Section 39

[8] At issue is the disclosure of approximately thirty pages of responsive records. The records include quarterly and annual inspections conducted on each of the Third Parties during the period from January 1st, 2015 to the date of the request, compiled in table form. The records note compliance and non-compliance with the Personal Care Home Operational Standards at each inspection and highlight items requiring attention by each Third Party, including (but not limited to) staffing and hiring issues, fire and safety concerns, resident feedback processes, and records management practices.

[9] Section 39(1) of the *ATIPPA, 2015* states:

> *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.

[10] This is a three-part test; failure to meet any part of the test will result in section 39 not applying. If it does not apply, a public body must disclose the requested information to the Applicant.

[11] Central Health provided limited details in its notice to the Third Parties as to why it decided section 39 was not applicable to the requested information. Section 19(5)(a) of the *ATIPPA, 2015* requires that public bodies provide some details that address how they arrived at their conclusions when giving notice to third parties. This requirement is also referred to in detail in the OIPC's guidance document, "Business Interests of a Third Party." While this practice better facilitates a third party's understanding of the process and its purpose, ultimately the burden of proof lies with the Third Parties in accordance with section 43(3) to demonstrate with evidence the applicability of the three-part harms test.

[12] With respect to section 39(1)(a), I find the Third Parties fail to meet even this first part of the three-part test as the information in question, inspections related to licensing standards, cannot be said to reveal any of the types of information set out in parts (i) and

(ii) of this section. Additionally none of the Third Parties submitted representations demonstrating why the information is captured by this section. Finding the Third Parties failed to establish the applicability of part one of a three-part test is sufficient to determine that the Applicant is entitled to the records. I will however comment on section 39(1)(b), as I find that even if the first element of the test had been established, the second element could not be satisfied.

[13] Section 39(1)(b) has two aspects: the information must be "supplied" and it must be supplied "in confidence". Again, the Third Parties provided no representations demonstrating how section 39(1)(b) applies to the information in question. It is difficult to conceive how the Third Parties could meet this part of the test, given that the information in question was not supplied and could not have been supplied by them to the public body. The information was gathered during inspections conducted by Central Health and/or Service NL.

[14] In Report A-2007-017, this Office previously addressed the notion of whether inspection reports generated as a result of government inspections can be considered "supplied" by a third party to a public body. That Report referred to the decision in *Canada Packers v. Canada (Minister of Agriculture)* 1988 CanLII 1421 (FCA), involving similar records:

> *[12] …Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts…*

As a result of the Court's analysis in the *Canada Packers* case, this Office held that this type of record could not be "supplied" within the meaning of the *ATIPPA* and therefore the second part of the test was not met. I find similarly in the present case: the inspection reports conducted by Central Health and Service NL as part of the Personal Care Homes Provincial Licensing program are not "supplied" within the meaning of the *ATIPPA, 2015*

and therefore the second part of the section 39 test has not been met. As a result, section 39 cannot be applied to except the information from disclosure. While unnecessary, I will briefly comment on section 39(1)(c) as I find that even if the first and second elements of the test were established, the third element could not be satisfied.

[15] A claim under section 39(1)(c) requires detailed and convincing evidence and, as noted in Report A-2011-007, "[t]he assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm."

[16] With regard to section 39(1)(c), the Third Parties provided no representations beyond mere speculation by one of the Third Parties. Without evidence of any of the types of harms outlined in section 39(1)(c) I cannot find that disclosure of the requested information would lead to that conclusion.

[17] As the Third Parties have failed to meet all three parts of the three-part test under section 39 of the *ATIPPA, 2015*, I find that section 39 does not apply to the information in question and the Third Parties cannot rely on section 39 to require that the information be withheld from the Applicant.

Section 19

[18] Previous reports have addressed the operation of section 19 (third party notification), including Report A-2016-012. Despite this it is clearly necessary to address certain points that unnecessarily complicated processing the Applicant's request.

[19] Section 19 of the *ATIPPA, 2015* states:

> *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.

(6) Where the head of a public body decides to grant access and the third party does not consent to the disclosure, the head shall, in a final response to an applicant, state that the applicant will be given access to the record or part of the record on the completion of the period of 15 business days referred to in subsection (5), unless a third party files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53.

(7) The head of the public body shall not give access to the record or part of the record until

(a) he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under this Act or has decided not to file a complaint or commence an appeal; or

(b) a court order has been issued confirming the decision of the public body.

> *(8) The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.*
>
> *(9) The third party and the head of the public body shall communicate with one another under this Part through the coordinator.*

[20] Report A-2016-012, also involving Central Health, commented upon this Office's then version of our guidance document entitled "Business Interests of a Third Party" and the process of notification of third parties under section 19(1):

> ***A Section 19 notification ONLY comes into play when there is <u>an intention to release</u> because the Public Body is not certain that section 39 is applicable (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 the three parts of the test that they "might" be excepted from disclosure.*
>
> *[Emphasis in Original]*

[21] The guidance document further discussed when there is no requirement to give notice under section 19(1):

> *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 the Public Body should release the information and notification to or consultation with the Third Party is not necessary…*

[22] A recently updated version of this guidance document further emphasizes the importance of this latter point and adds the following sentence:

> *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.*
>
> *[Emphasis in Original]*

[23] It has been made abundantly clear by this Office to this Public Body in guidance documents as well in a previous Report, that where a public body determines that section

39 clearly does not apply, it is not required by the *Act* to notify any third parties. To do so is a needless and unwarranted frustration of timely access to applicants who have their access to information delayed while the notices to and responses of the third parties are dealt with.

[24] In this case, Central Health made clear in its submission to this Office that it believed that section 39 was not applicable at the time of the request:

> *It was Central Health's view at that time that the requested information did not meet the three part test as outlined in Section 39 of the legislation; however, felt that due to the business relationship with the personal care homes, it would be transparent and provide third party notice.*

[25] Given Central Health had determined section 39 was not applicable, there was no authority under any provision of the *ATIPPA, 2015* to notify the Third Parties under section 19. Furthermore, there is no option or requirement under the legislation to notify simply due to an existing business relationship between a public body and third parties. Does this mean that a third party that only had one transaction with the Public Body would not have been afforded this unauthorized courtesy? Is the courtesy more likely to be extended in situations where third parties occupy positions of power or influence? Correct and consistent application of the *ATIPPA, 2015* eliminates any potential for such suspicion.

[26] Using section 19 in conjunction with section 39 in this circumstance ignores the right of applicants to timely disclosure under the *Act*. Public bodies have other means available to them to maintain relationships, including those discussed in the revised guidance document.

[27] Additionally, I find that the inappropriate decision to notify third parties in this case was mishandled by Central Health under section 19(5)(b), which requires public bodies to provide the content of or part of the records in question impacting each third party when it sends notification under the provision. The initial notice sent by Central Health under section 19(5) was done before Central Health had even reviewed the records in question

and therefore was not in compliance with the section as required. After discussions with this Office, I advised Central Health that while it should never have notified them to begin with, since it had made the decision to do so and had commenced that process, it was required to at least do it correctly. I therefore recommended Central Health make a second notice that complied with section 19(5) by including the records in question.

[28] The need for the second notice further unnecessarily delayed and lengthened the access process for the Applicant. It also underscored the importance of adhering to the requirements of section 19(5)(b). Prior to the second notice being issued, this Office received a complaint from a personal care home that had received Central Health's initial notice, without the responsive records for it to review. The Third Party understandably believed it was impacted by the Applicant's request. Once Central Health received and reviewed the records as part of its second notice process, it discovered that this Third Party was fully compliant with the Personal Care Home Operational Standards during the timeframe in question. Putting third parties to needless stress and effort ignores the requirements of the *Act* and ironically had the potential to undermine business relationships.

V RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Central Health release the requested information to the Applicant.

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

[31] Please note that within 10 business days of receiving the decision of Central Health under section 49, the Third Parties 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 except for the records of Third Parties that have provided Central Health with a copy of their notice of appeal prior to that time.**

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of February 2017.

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