OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

# Report A-2017-014

## May 9, 2017

## Memorial University of Newfoundland

**Summary:** The Applicant made a request to Memorial University for information relating to network services. Memorial decided to grant access to the records, but also decided to notify third parties, ultimately resulting in a complaint from one of the third parties which is the subject of this Report. In its complaint, the Third Party objected to the disclosure pursuant to section 39 of the *ATIPPA, 2015* (disclosure harmful to the business interests of a third party). The Third Party also objected to the disclosure of signatures of its employees which were found on some of the records, on the basis that such a disclosure would be an unreasonable invasion of privacy pursuant to section 40 (disclosure harmful to personal privacy). The Commissioner determined that neither section 39 nor section 40 applied, and recommended that the information be disclosed. The Commissioner also addressed Memorial's decision to notify third parties despite having concluded that section 39 did not apply.

**Statutes Cited:** *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c.A1.2, sections 19, 39.

**Authorities Relied On:** OIPC Alberta Order F2009-009

**Other Resources:** *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603;

*Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski*, 2014 NLTD(G)107;

OIPC NL Reports A-2015-005; A-2016-001; A-2016-002; A-2016-027; A-2016-028; A-2017-005;

OIPC Alberta Order F2015-12

OIPC Guidance Document: Business Interests of a Third Party (Section 39)

*File # 0020-062-17-045*

## I BACKGROUND

[1] On January 24, 2017 the Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the *"ATIPPA, 2015"*) to Memorial University ("Memorial") as follows:

> *MUN wide-area network contract/information including supplier, network capacity, subsidies from government, etc.*

[2] Memorial processed the request and located a number of responsive records. Some of those records contained the business information of a number of third parties – companies that had been given contracts to provide different portions of the services referred to in the access request. Memorial reviewed the records and determined that the information contained in them could not be withheld under the provisions of section 39 of the *ATIPPA, 2015* (disclosures harmful to the business interests of a third party) because it could not meet the three-part test in section 39. Accordingly Memorial decided to grant access to those records to the Applicant.

[3] Despite this conclusion, Memorial issued notification letters to the third parties advising them that they could make a complaint to the Commissioner. As a result, two third parties filed complaints with this Office.

[4] In one case, the complaint was resolved informally when the company involved abandoned its complaint after discussions with this Office.

[5] As the other complaint could not be resolved informally it was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Written submissions in support of their positions were provided by both Memorial and the Third Party.

## II MEMORIAL'S POSITION

[6] The submission received from Memorial, in its entirety, reads as follows:

> *As indicated in our correspondence to the third parties on 21 February, our view is the information does not meet the three-part harms test in section 39 of the ATIPPA, 2015 because the records in question are contracts that are considered to have been negotiated, not supplied. Memorial determined in this situation that it was appropriate to notify the third parties of its decision pursuant to s.19.*

## III THIRD PARTY'S POSITION

[7] The Third Party provided a lengthy submission arguing that the information in question constitutes its commercial, financial, technical or proprietary information. It further argued that it was explicitly provided in confidence pursuant to the terms of a request for proposals, and that the information was "objectively confidential." The Third Party also argued that disclosure of the information could reasonably be expected to harm its competitive position, or result in undue financial loss or gain to it or other parties. Finally, the Third Party argued that certain information was also exempt from disclosure under the federal *Privacy Act* and the *Personal Information Protection and Electronic Documents Act* ("*PIPEDA"*).

## IV DECISION

[8] Two issues arise from this matter. The first issue is whether the information in dispute ought to be disclosed to the Applicant. The second issue is whether notification to the third parties was appropriate.

### Whether the Information Should Be Disclosed

[9] Section 39 of the *ATIPPA, 2015* governs the disclosure of information that may be harmful to third party business interests, 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.*

[10] This provision contains a three-part test, and all three parts of the test must be met in order to withhold the information. If any one of the parts of the test is not met, the information must be disclosed.

[11] Furthermore, section 43(3) of the *Act* provides that where a third party wishes to object to the disclosure of information other than personal information (in this case, information relating to business interests), the burden is on the third party to prove that the applicant has no right of access to the information.

[12] The 13 pages of records in this case consist of a Master Agreement between Memorial and the Third Party for the provision of wide area network services, and a number of schedules to the Agreement. The Third Party argues that some of the information in those records ought to be redacted, namely, unit prices, details of the services to be provided and performance standards or metrics.

[13] It is clear that the Master Agreement and Schedules are commercial, financial or technical information of the Third Party. The first part of the test has therefore been met.

[14] The second part of the test requires that the information in dispute be "supplied in confidence" by the third party. To meet this part of the test it is first necessary that the information be "supplied." With very few exceptions, where the disputed information is part of the terms of a signed agreement for the provision of goods or services between a public body and a third party, that information is deemed to have been negotiated, not supplied. As such, the second part of the test cannot be met.

[15] This is the case even if the specific information (for example, unit prices) was initially provided by the third party as part of its offer, and was accepted unaltered by the public body. If the public body accepted the offer, and the offer and acceptance were made part of a contract, then the contract is deemed to have been the product of a negotiation process.

[16] In the present case the unit prices and performance metrics in dispute are typical elements of a negotiated agreement: they describe what the third party has agreed to provide and what the public body has agreed to pay. This information is precisely what the *ATIPPA, 2015* was designed to make available to the public. Nothing is more central to the goals of accountability and transparency than the right to information about what public bodies are spending public money on, and what they are receiving in return.

[17] Our letter to the Third Party in response to its complaint specifically referenced the "supplied or negotiated" issue in the following terms:

> *I have reviewed the letter from Memorial to* [the Third Party] *dated February 21, 2017, and the 13 pages of records (Master Agreement and Schedules) both of which you enclosed with your complaint. It appears to me that those records taken together constitute an agreement between MUN and* [the Third Party] *for the provision of internet services. In my view it is settled jurisprudence that the information in such a contract is deemed to be negotiated, not supplied, and therefore the three-part test for withholding such information in section 39 of the ATIPPA, 2015 cannot be met. That would include the information, including unit prices and some performance metrics, that you have proposed should be withheld.*
>
> *Any representations you wish to make should provide your position regarding the applicability of section 39 of the Act to the information at issue.*

[18] The Third Party responded with a five-page submission, which argued that the information is its financial, commercial or technical information, that the information was provided in confidence, and that disclosure would cause harm to its future competitive position. The submission did not, however, address the critical issue: whether the information was supplied or negotiated.

[19] This failure to address the most important issue is fatal to the Third Party's position, bearing in mind its onus of proof. I conclude that the information in dispute was negotiated, not supplied and the information must be disclosed.

[20] The Third Party also raised the issue of whether certain information, specifically, signatures of Third Party employees, ought to be withheld because they constitute personal information under either the federal *Privacy Act* or *PIPEDA*. It must be noted that neither of those statutes applies to information in the custody of provincial public bodies in Newfoundland and Labrador. I must therefore determine whether section 40 of the *ATIPPA, 2015* applies to any personal information that may be contained in the records at issue in this Report.

[21] Report F2009-009 issued by the Alberta OIPC directly addresses the issue of signatures, including signatures of individuals employed by private businesses and other entities which are not public bodies. In that Report, beginning at paragraph 63, it was determined that the individuals whose names and signatures were at issue were acting in their professional capacities on behalf of their employers, rather than in a personal capacity. In the employment context the information was not "about" them, but rather about their work. Furthermore, it was found that in any event no harm would likely come from release of such information:

> *... individuals generally have no reasonable expectation of confidentiality with respect to their identities in the context of performing their work-related activities, and there will usually be no unfair harm or damage to reputation if the identifying information is disclosed.*

The Report also found that while it would not be impossible that different circumstances might exist to support withholding such information, that those circumstances would be the

exception rather than the norm. I agree with those conclusions and adopt that analysis with respect to names of employees of Third Party businesses. I therefore agree with the decision by Memorial to release the names and signatures.

### Whether Memorial Ought to Have Notified the Third Party

[22] Section 19 of the *ATIPPA, 2015* governs notifications that a public body may make to third parties 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.*

[23] Our Guideline regarding section 39 states:

> *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 only 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.***
>
> *. . .*
>
> *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.*
>
> *. . .*
>
> ***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").***
>
> (Emphasis in the original)

[24] Memorial, by its own account, reviewed the responsive records and determined that the information in question "…does not meet the three-part harms test in section 39 of the *ATIPPA, 2015* because the records in question are contracts that are considered to have been negotiated, not supplied." At that point, the records ought to have been disclosed immediately to the Applicant. Instead Memorial chose to notify the third parties.

[25] As a result of third party notifications and the complaints to this Office that followed, two periods of unnecessary delay were injected into the process. Consequently, the Applicant's right of timely access to information has been obstructed. Instead of obtaining the records within four weeks or less, the Applicant has already had to wait fourteen weeks.

[26] Public bodies, upon determining that section 39 does not apply to records, must proceed to release the records to the Applicant. This point was recently made in Report A-2017-007:

> *Given Eastern Health had determined that 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.*

[27] I conclude that Memorial misapplied section 19 of the *ATIPPA, 2015* when it decided to notify the third parties despite having concluded that section 39 did not apply. When no exceptions apply, this undermines timely disclosure, one of the essential purposes of the *Act*.

[28] Notice to third parties will comply with the *ATIPPA, 2015* if, and only if, a public body is genuinely uncertain whether the section 39 test applies (the "grey area" scenario). That being said, we are not naïve in regards to the realities of doing business and acknowledge them in our Guidance Document:

> *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.*

## V RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that Memorial University of Newfoundland disclose the requested information to the Applicant.

[30] I further recommend that Memorial University of Newfoundland review its access to information practices and procedures with respect to section 39 of the *ATIPPA, 2015*, with a view to ensuring that all future decisions to provide notification to third parties under section 19 are made in compliance with the *Act*.

[31] As set out in section 49 of the *ATIPPA, 2015*, the head of Memorial University of Newfoundland 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.

[32] Please note that within 10 business days of receiving the decision of Memorial University of Newfoundland 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 Memorial University of Newfoundland with a copy of a notice of appeal prior to that time.**

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 9th day of May, 2017.

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