



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2018-023

September 26, 2018

## Newfoundland Labrador Liquor Corporation

**Summary:**

The Newfoundland Labrador Liquor Corporation (“NLC”) received a request for responses submitted to a Request for Proposals. The NLC was prepared to release the records but a Third Party objected to the disclosure and filed a complaint with this Office. The Third Party asserted that the records sought were required to be withheld under section 39 (disclosure harmful to business interests of a third party), but failed to provide any arguments or evidence to support its position. The Commissioner found that the Third Party did not meet the burden of proof and recommended release of the records.

**Statutes Cited:**

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, section 39.

**Other Resources:**

OIPC Guidance [Business Interests of a Third Party \(Section 39\)](#).

## I BACKGROUND

- [1] The Newfoundland Labrador Liquor Corporation (the “NLC”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the *ATIPPA, 2015*) seeking disclosure as follows:

*All proposals submitted under T18-1184-Licensed Cannabis Retailer RFP. If all records are not available immediately at the same time, a staged release would also be appreciated.*

- [2] After subsequent exchanges, the Applicant amended the request to include proposals from several named third parties, including the Third Party complainant in this matter.
- [3] In accordance with section 19 of the *ATIPPA, 2015*, the NLC determined it was necessary to notify the affected third parties. Upon notification, several filed complaints with this Office.
- [4] We achieved informal resolution of all of the other complaints, with the third parties agreeing to disclosure of some or all of the responsive records. This matter was not resolved informally and proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

- [5] The NLC advised that it issued a Request for Proposals (the “RFP”) seeking Proponents interested in obtaining a license for the retail sale of cannabis in this Province. It later received a request for information about proposals from certain third parties as noted above.
- [6] The NLC decided to notify all third parties affected by the access request, seeking their position with respect to release of the responsive records in terms of the three-part test outlined in section 39(1) of the *ATIPPA, 2015*.

[7] The Third Party did not provide the NLC with sufficient feedback before its statutory deadline to respond to the request. The NLC determined the responsive records failed to meet the elements of the test set out in subsections 39(1)(a) and 39(1)(c), and it was required to release the records to the Applicant.

### III COMPLAINANT'S POSITION

[8] The Third Party responded to the NLC's initial request for feedback to state it, "strongly object[s] due to Proprietary reasons."

[9] It initially provided this Office the same submission in making its complaint on the matter, and later indicated it, "vehemently object[s] to any release of information pertaining to its cannabis retail application," citing that its "application contains proprietary information and confidential information regarding programs and service offered by [it]." It also challenged this Office's jurisdiction to "release information" pertaining to it, indicating that it is an entity subject to federal regulation.

### IV DECISION

[10] 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.

[11] Section 39 is a mandatory exception to the right of access under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third parties bear the onus of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[12] As noted above, the Third Party provided only general statements without corroborating arguments or evidence as its submissions for this Complaint. During the informal resolution process, we sought a detailed submission and provided the Third Party with our guidance documents, *Business Interests of a Third Party (Section 39)* and *Third Party Guidelines for Preparing for an Access Complaint*. We also offered the Third Party additional time when it had not submitted a sufficient submission by the initial deadline. Ultimately the Third Party declined, stating, “we have reviewed the regulatory context and given the prospects of success is remote we will not be making a submission.”

[13] Under section 43(3) of the *ATIPPA, 2015* the burden of proof is on the Third Party to prove that an Applicant has no right of access to the records. The Third Party declined the opportunity to provide evidence regarding the applicability of section 39 of the *ATIPPA, 2015* to the records in question. With no evidence to consider, the Third Party has not met the burden of proof.

[14] Given this finding, there is no need to proceed with an analysis of section 39 of the *ATIPPA, 2015*. As section 39 is a mandatory exemption, we reviewed the responsive records. We concur with NLC’s assessment that they are not exempt from disclosure pursuant to section 39.

[15] The only other argument put forward by the Third Party was that this Office cannot “release information” pertaining to it because the Third Party is an entity subject to federal regulation. Our jurisdiction is to review the decision of the public body (here the NLC) to release or withhold information resulting from an access request made under the *ATIPPA, 2015*. The standing of the Third Party to which the information relates has no impact on our authority or jurisdiction. Further, we do not “release” information, we make recommendations, and it is up to public bodies to follow those recommendations or apply to the Supreme Court, Trial Division.

## V CONCLUSIONS

[16] The Third Party failed to discharge its burden of proof in establishing that all three parts of the test under section 39(1) of the *ATTIPA, 2015* apply to the requested information. NLC must provide the records to the Applicant.

## VI RECOMMENDATIONS

[17] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that the NLC release the Third Party’s proposal (with redactions pursuant to sections 35 and 40), to the Applicant.

[18] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the NLC 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.

[19] Records shall be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party provides the NLC with a copy of its notice of appeal prior to that time.

[20] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26<sup>th</sup> day of September 2018.

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