



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

Report A-2019-026

September 26, 2019

Office of the Chief Information Officer

**Summary:**

The Office of the Chief Information Officer (OCIO) received a request for active contracts or expired contracts for internet services with a named company (the Third Party) within the last 5 years. In accordance with section 19 of *ATIPPA, 2015* the OCIO notified the Third Party of its intention to release the records to the applicant. The Third Party objected to the disclosure of records and filed a complaint with this Office. The Third Party argued that certain portions of the records met the three-part test under section 39 (Disclosure harmful to business interests of a third party) of *ATIPPA, 2015* and therefore the records should not be disclosed by OCIO. 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, sections 19, 39 and 40.

**Authorities Relied On:**

NL OIPC Reports [A-2016-001](#), [A-2016-007](#), [A-2016-011](#), [A-2017-007](#), [A-2017-014](#); OIPC Guidance [Business Interests of a Third Party \(Section 39\)](#) and [The Public Procurement Act and ATIPPA, 2015](#)

## I BACKGROUND

- [1] The Office of the Chief Information Officer (OCIO) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* seeking disclosure as follows:

*Active government contract(s) with [named company] for Internet services or any contracts that expired in the last 5 years.*

- [2] Following receipt of the request, in accordance with section 19 of *ATIPPA, 2015*, the OCIO determined it was necessary to notify the Third Party of its intention to release the requested records. The Third Party filed a complaint with this Office opposing OCIO's decision.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

## II PUBLIC BODY'S POSITION

- [4] The OCIO's position is that the requested information does not meet the three-part test outlined in section 39 of *ATIPPA, 2015*. The OCIO stated that with respect to section 39(1)(b) contracts with public bodies for the supply of goods or services are not considered to be information that is "supplied", therefore the OCIO is obligated under *ATIPPA, 2015* to disclose this information.

## III COMPLAINANT'S POSITION

- [5] The Third Party proposed that some information should be withheld under section 39(1) of *ATIPPA, 2015* as, in its opinion, that information meets the three-part test.
- [6] The Third Party argued that the information in question meets part one of the test as it is commercial, financial, technical and proprietary in nature.

- [7] Part two of the test requires that the information must have been supplied, implicitly or explicitly, in confidence. The Third Party argued that even though the information forms part of a negotiated agreement, there are exceptions to the “supplied vs. negotiated” principle, and information can be withheld if the disclosure would compromise the security of other confidential information and allow the reader to “draw accurate inferences about underlying confidential information that was not part of the negotiated agreement.” As this other information is clearly not negotiated, it should be protected as it would potentially reveal unique strategies of the Third Party.
- [8] The Third Party also stated that the information was originally submitted in confidence through a Request for Proposal (RFP) and it was its understanding that the RFP was to be kept confidential.
- [9] For part three of the test, the Third Party argued that the Third Party’s competitive position would be prejudiced in bidding for work in the future and that disclosure would cause material financial loss to the Third Party, prejudice the Third Party’s competitive position and interfere with negotiations in which the Third Party is engaged.
- [10] The Third Party also argued that personal contact information (email addresses and phone numbers) of past and present Third Party employees should be withheld under section 40 of *ATIPPA, 2015*.

#### IV DECISION

- [11] Section 39(1) of *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.*

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

[13] With respect to section 39(1)(a), this Office is satisfied that the information at issue would reveal commercial or financial information of the Third Party and concludes that this part of the test has been established.

[14] The contract(s) is signed by the Third Party and the Government of Newfoundland and Labrador and the disputed information is included in the schedules attached to the contract. As contracts are considered to be negotiated, not supplied, the “supplied” portion of section 39(1)(b) fails.

[15] As stated in many previous reports from this Office, contracts with public bodies for the supply of goods or services are generally not considered to be information that is “supplied”. Report 2016-007 stated, in part:

*[18]...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...*

[16] While the Third Party has argued that there is an exception to the “supplied vs. negotiated” principle, no such exception is found in these contracts because the disputed information is incorporated into the schedules attached to the contracts. As well, this information mainly speaks to pricing. The contracts also state that the RFPs form part of the contract. Since all information is included, this means that it is deemed to have been negotiated rather than supplied.

[17] There are three records that are not part of the signed contract or attached to the contract as a schedule. These are records of correspondence between the OCIO and the Third Party regarding the extension of the contracts.

[18] Report A-2016-001 dealt with a similar issue:

*[12] With respect to the two letters regarding the extension of the contract between the OCIO and the Third Party, the only information at issue in these letters is the costs and rate card information as the OCIO disclosed the remainder of the letters to the Applicant initially. It is my opinion that the costs and rate card information in these letters are considered to be negotiated and not supplied. Furthermore there is no evidence that these letters were provided or received with an expectation of confidentiality, therefore, I find that these letters were not supplied in confidence for the purpose of section 39(1)(b).*

[19] The disputed records are attached to the contracts and consist of correspondence extending the contracts. Given this fact, and in light of the analysis above, this Office finds that the second part of the test in section 39 has not been met as it fails on the “supplied” portion of the test set out in section 39(1)(b) for the contracts and the “confidentiality” portion of the test set out in section 39(1)(b) for the correspondence. As part two of the three part test has not been met and all three parts of the test must be met in order for the exception to apply, this Office does not need to continue with the section 39 analysis, however, section 39(1)(c) will be discussed briefly.

[20] Claims under section 39(1)(c) require detailed and convincing evidence that the likelihood of harm is more than speculative. Such claims should establish a reasonable expectation of probable harm.

[21] The evidence of the Third Party does not establish a reasonable expectation of probable harm. The Third Party argued mainly that, should the information be disclosed, its competitive position would be harmed. This Office has discussed competitive advantage in previous reports and concluded that heightened competition should not be interpreted as significant harm. Absent a reasonable likelihood of significant harm to a third party's competitive position or an undue financial gain or loss to any person, competition is not unfair and ensures that public bodies are making the best possible use of public resources. The Third Party has not met the onus in part three of the test.

[22] As the Third Party has failed to meet parts two and three of the three-part test under section 39 of *ATIPPA, 2015*, section 39 does not apply to the information at issue and it must be disclosed to the Applicant.

[23] The information the Third Party has requested to be redacted regarding employee information is considered business contact information and would not be an unreasonable invasion of privacy under section 40 of *ATIPPA, 2015*. It should therefore be disclosed.

[24] Section 19(5) of *ATIPPA, 2015* is as follows:

*19 (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.*

- [25] This Office discussed the notification procedure under section 19 in depth in Report A-2016-011 and in subsequent reports, such as Reports A-2017-007 and A-2017-014. Report A-2017-007 stated at paragraphs 22 and 23 as follows:

*[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.*

- [26] Report A-2017-014 also dealt with a contract and stated at paragraphs 24 and 25:

*[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.*

- [27] The OCIO's notification to the Third Party stated:

...

*In our view, this information does not meet the three-part test outlined in section 39...*

...

*With respect to section 39(1)(b) contracts with public bodies for the supply of goods and services are not considered to be information that is “supplied”, therefore the OCIO is obligated under ATIPPA, 2015 to disclose this information.*

[28] Based on the OCIO’s conclusion that the three-part test was not met, notification was unnecessary and a misapplication of section 19 of *ATIPPA, 2015*.

[29] Notice to third parties must comply with *ATIPPA, 2015* meaning that if, and only if, a public body is genuinely uncertain whether the section 39 test applies then notice should be given. If the public body has determined that section 39 clearly does not apply then notice should not be provided, as third party complaints arising from these situations delay the applicant’s right to timely access to information.

## V CONCLUSIONS

[30] The Third Party failed to discharge its burden of proof in establishing that all three parts of the test under section 39(1) of *ATIPPA, 2015* apply to the requested information. The Third Party has also failed to show how release of employee contact information would be an unreasonable invasion of privacy under section 40 of *ATIPPA, 2015*.

[31] Public bodies must only notify third parties in accordance with *ATIPPA, 2015*, and only when there is genuine uncertainty whether section 39 applies to the information.

[32] While, in this instance, the RFP and original contract was signed prior to the current version of the *Public Procurement Act* coming into force, we must note that the provisions of the new *Public Procurement Regulations* affect current bidders. Pursuant to section 8(2), all bidders must review their bid documents prior to submitting them and identify any information in their bids that might qualify for exemption under section 39 in the event of an access to information request.



[33] This Office has produced a guidance piece, “*The Public Procurement Act and ATIPPA, 2015*” and it should be noted that the responsibility is on the bidders to identify information that could be exempted under section 39.

## VI RECOMMENDATIONS

[34] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the OCIO release the responsive records to the Applicant subject to any relevant redactions which the OCIO has determined must be applied.

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

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

[37] Dated at St. John’s, in the Province of Newfoundland and Labrador, this 26<sup>th</sup> day of September 2019.



Michael Harvey  
Information and Privacy Commissioner  
Newfoundland and Labrador