OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-029

November 18th, 2019

Western Health

Summary: Western Health received a request for copies of all contracts between itself and a supplier (Supplier). In accordance with section 19 of the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*) Western Health notified the Third Party and the Supplier of its decision 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 the records met the three-part test under section 39 of *ATIPPA, 2015* (Disclosure harmful to business interests of a third party) and therefore the records should not be disclosed by Western Health. The Commissioner found that the Third Party did not meet the burden of proof and therefore the records may not be withheld under section 39. Additionally, the Commissioner noted that 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.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 19 and 39; *Freedom of Information and Protection of Privacy Act*, RSBC 1996, c. 165 section 21(1).

Authorities Relied On: NL OIPC Reports A-2016-007, A-2017-007, A-2017-014, A-2019-026 and A-2019-027; OIPC Guidance Business Interests of a Third Party (Section 39); British Columbia OIPC Order F17-14; *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52.

File #: 0015-066-19-017

I BACKGROUND

[1] Western Health received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*). The request sought copies of "all contracts between [Supplier] and the Western Regional Health Authority."

[2] Following receipt of the request, in accordance with section 19 of *ATIPPA, 2015*, Western Health determined it was necessary to notify the Third Party and the Supplier of its decision to release the requested records. The Third Party is not the Supplier referenced in the request, but rather a group purchasing organization. The Third Party filed a complaint with this Office opposing Western Health'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] Western Health initially was of the opinion that the only element of the three-part test in section 39 the responsive records met was subsection 39(1)(a)(ii), as it was satisfied the responsive records included financial information. Western Health noted that the second part of the section 39 test did not apply as it was not satisfied the information in question could be deemed "supplied in confidence" given the responsive records pertain to a negotiated contract between Western Health and the Supplier. Furthermore, it noted that "based on our review and understanding of the records, it did not appear that any of the conditions set out in subsection 39(1)(c) were applicable."

[5] Western Health acknowledged to this Office that while it was not required by *ATIPPA, 2015*, it decided to provide informal notification to the Third Party of its decision to disclose the responsive records. The Third Party then insisted on receiving formal notice under section 19. Western noted that it then reconsidered its decision and decided to issue formal third party notice to the Third Party and the Supplier. Its rationale was "based on the repeated argument by [the Third Party] that Western Health was unable to fully assess harm (set out in

subsection 39(1)(c)(i)) to the Third Party's competitive position and decided it best to afford them the opportunity to put forth their position in this regard."

[6] In its formal notice to the Third Party, Western stated that the responsive records do "not meet the three-part test as set out in section 39 of the *Act*." More specifically it noted that:

> *…given that contracts such as these are typically negotiated with the public body, we have difficulty understanding the assertion that the responsive records were supplied to Western Health in confidence and hence, meet the second part of the test in accordance with section 39(1)(b) of the* Act*. Furthermore, we do not believe that the fact that the document includes a watermark indicating "Confidential Not for Distribution" satisfies the second part of the three-part test. We are also of the opinion that part 3 of the test has not been met in keeping with 39(1)(c) given that pricing information is subject to disclosure and has been the subject of many Commissioner's reports.*

[7] However, it went on to state to the Third Party that

> *…our reason for issuing this formal third party notice under the* Act *has to do with the fact that you indicated in our recent email exchange that 'information about supplier's processes' is included in the records. As this may be relevant to meeting the conditions of the three-part test and has introduced a degree of uncertainty, we are providing this opportunity for you to have our decision reviewed.*

[8] Finally, Western Health submitted to this Office that it had "seriously considered its duty to assist the Applicant and provide timely access to records/information" noting that it had "struggled with the decision to issue third party notice knowing that disclosure to the Applicant may be delayed as a result."

III COMPLAINANT'S POSITION

[9] The Third Party submitted that it is a Group Purchasing Organization (GPO) which seeks out and enters into contracts with suppliers of products and services related to healthcare on behalf of its members, who are Canadian public hospitals, health authorities and healthcare shared services organizations across Canada. Western Health is a member of this GPO. As a GPO, the Third Party stated it is able to obtain advantageous contract terms, including pricing, from its suppliers, which can translate into significant savings for its members. These

members are provided the opportunity to participate in these contracts, and the Third Party instructs the supplier to supply the member in accordance with the terms of the contract. This provides the member with access to the pricing in the contract by means of access to the Third Party's proprietary contract management system, and provides the member with a document entitled, "Contract Information Sheet" (CIS), which sets out the particulars of the contract (supplier, contract period, payment terms, price escalation provisions, particulars of the product or services, etc.). The Third Party argues that the responsive records, which include the CIS and pricing information, are therefore clearly commercial and financial in nature.

[10] The Third Party also believes the records in question were supplied, not negotiated. It submitted that members do not participate in the creation of the contracts with suppliers, all negotiation with suppliers is conducted by the Third Party, and therefore there is no negotiation between the member and a supplier or the Third Party and a member as to the terms of a contract. Its position is that Western Health did not negotiate any terms of the subject contract, but rather merely elected to participate in a pre-existing contract with the Supplier. Additionally, it noted that the terms of this contract were not susceptible to change as it deemed the process a "take-it-or-leave-it decision for the member." As such, the Third Party's position is that the information at issue was immutable (i.e. not subject to change through negotiation), and therefore supplied. It went on to note that the responsive records contain operating process information which is proprietary to both itself and the Supplier. It further argued that this information was supplied in confidence with the expectation that it would be kept confidential, noting "in fact, each page of the CIS is water-marked with that restriction." Additionally, the Third Party submitted that the information "is not generally available to the public nor would it be available to the public by means of observation or independent study of its own," and there is "no contrary public interest to preventing the requested disclosure."

[11] Finally, the Third Party argued that the responsive records contain competitive information and disclosure to a competitor would necessarily result in the harms anticipated by section 39(1)(c) and could "reasonably be expected to harm significantly the competitive position of

the [Third Party], interfere significantly with its negotiating position, and would result in similar information no longer being supplied to Western Health, contrary to the public interest."

[12] More specifically, the Third Party argued that fundamental to its existence is its ability to get the very best value for its members through the achievement of advantageous contract terms. It believes that the information contained in the CIS and pricing sheet would be useful to the Supplier's competitors and that, if made public, its ability to achieve its objective would be compromised, leading to "less attractive contract terms being offered as a result of the pressure from lower volume suppliers to match the Third Party contract terms." The Third Party also argued that were the CIS and pricing sheet to be disclosed along with the identity of the Supplier, the Supplier might be less likely in future to agree to participate in this or similar contracts, and if this were to happen, the Third Party's ability to achieve the most advantageous contract terms would be compromised, and its members less likely to get the potential benefits which would have been available without such disclosure. Additionally, citing *Merck Frosst v. Canada (Health)*, [2012] 1 S.C.R. 23, the Third Party argued that none of the subject information is in the public domain and "it is logical and reasonable to expect that its disclosure would result in each of (i) interference with [the Third Party's] negotiating position, and (ii) result in similar information no longer being supplied to the public body contrary to the public interest."

[13] The Third Party went on to state that "the harm caused by disclosure is of greater significance given that its members are all publicly owned hospitals, healthcare authorities and their shared services organizations because, following such disclosure, these entities, funded by public funds, would be less likely to get the potential benefits in future supplier contracts which would have been available without such disclosure."

IV ISSUES

[14] The issues to be determined include:

1. Application of Section 39
2. Notification Under Section 19

V DECISION

Application of Section 39

[15] 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.*

[16] 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.

[17] The information at issue involves a six page CIS and pricing sheet setting out details of a contract between Western Health and the Supplier. With respect to the first part of the test in section 39(1)(a), this Office is satisfied that the information at issue would reveal commercial and financial information, however it has not been established that this commercial and financial information is "of" the Third Party. At paragraph 26 of its decision in *Corporate Express Canada Inc.* v. *Memorial University of Newfoundland*, the Court of Appeal found as follows:

> *Whether the requested information is the confidential information of a third party requires that the contents of the requested information be examined with a view to identifying the origin and ownership of the information.*

[18] *Corporate Express* was decided under an earlier version of *ATIPPA* in which section 39(1)(a)(ii) was combined with 39(1)(b), so the Court's comments about both are addressed in the same part of its analysis. Although the provision is organized differently under *ATIPPA, 2015*, the same elements are present and the same interpretation must be applied. In its decision, the Court ascribed meaning to the word "of" in stating that the origin and ownership of the information must be established. If the information is not "of" the Third Party, it will fail to meet the first part of the three-part test.

[19] The Court of Appeal in Corporate Express found at paragraph 37 that:

> *…The prices MUN paid for the specific products set out in the tender might have been Staples' confidential information when Staples bid on the tender, but once MUN actually purchased and paid for the items the information became MUN's. Accordingly, the information in the contract usage reports identifying the quantities and prices of specific items MUN purchased and paid for is not Staples' information, and I cannot see how its disclosure would reveal any of Staples' information which Staples had supplied in confidence and treated confidentially.*

[20] In the current matter, Western Health has entered into a contact through its participation in the GPO. Both the terms of its contract with the Supplier and of its arrangement with the Third Party were initially information "of" those parties, but following the analysis in *Corporate Express*, once Western Health entered into contracts with those parties the information was no longer exclusive to the Third Party or the Supplier but became Western Health's. On that basis, the Third Party has not demonstrated that it meets the first part of the three-part test.

[21] I will now turn to the second part of the three-part test. As a GPO, the Third Party acted on behalf of its members in negotiating this contract. Western Health, as a member of the Third Party group purchasing agreement, entered into a contract with the Supplier. The records associated with that contract are responsive to the Applicant's access request. Many previous reports from this Office have reiterated the point that 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…*

[22] The British Columbia Information and Privacy Commissioner elaborated on an almost duplicate scenario involving its own near identical version of section 39(1) of *ATIPPA, 2015*, section 21(1) of its *Freedom of Information and Protection of Privacy Act*. British Columbia OIPC Order F17-14, sets out as follows:

> *[16] Information sheet – HealthPRO said that it enters into contracts with suppliers of products and services related to healthcare on behalf of its members, which include Canadian hospitals and health authorities, such as the PHSA. HealthPRO said it is able to obtain "advantageous contract terms, including pricing, from these suppliers" which "translate into significant savings" for its members. HealthPRO said it conducts the negotiations with the suppliers and that its members do not participate in the negotiations with the suppliers or with HealthPRO itself. HealthPRO said that the PHSA did not negotiate any terms of the contract with Stericycle. Rather, HealthPRO said, the PHSA elected to participate in the contract on a "take it or leave it basis", upon which HealthPRO provided the PHSA with a copy of the information sheet. HealthPRO argued that the terms of the contract, as set out in the information sheet, are immutable and not "susceptible to change". Thus, HealthPRO argued, the information in the information sheet was "supplied" for the purposes of s. 21(1)(b). The applicant disputed HealthPRO's argument on this point.*
>
> *[17] Previous orders that have considered contract terms under s. 21(1) have usually concerned the contracts themselves. By contrast, in this case, the record before me is not the actual contract but an information sheet that summarizes the terms of the contract.*
>
> *[18] I acknowledge that the PHSA is a member of HealthPRO and that it benefits from the contract pricing. HealthPRO's evidence was that it does not ask its members for changes to its supplier contracts and does not permit its members to make changes to those contracts. However, the PHSA could have conducted the contract negotiations with Stericycle, either on its own or in concert with its fellow healthcare organizations. The fact that it chose to assign this task to HealthPRO does not mean the information sheet contains "supplied" information. Moreover, HealthPRO admitted that it conducted the negotiations with Stericycle. In negotiating the contract, HealthPRO was clearly acting for, or in place of, its members. Thus, while HealthPRO provided the information sheet to the PHSA, in my view, the information sheet contains a summary of a contract negotiated on the PHSA's behalf. I therefore reject*

> *HealthPRO's argument that the information in the information sheet was not "susceptible to change" by the PHSA and was not negotiated. I also note that the PHSA did not support HealthPRO's position on the "supply" issue. I find that the information in the information sheet was not "supplied" to the PHSA for the purposes of s. 21(1)(b).*

[23] As with the above matter, Western Health could have conducted the contract negotiations with the Supplier, either on its own or in concert with its fellow healthcare organizations. Its membership in the Third Party's group purchasing agreement is solely to engage the Third Party to negotiate on its behalf and, the fact it chose to assign this task to the Third Party does not mean the information sheet contains "supplied" information. Additionally, as with the BC matter, the Third Party admitted that it conducted the negotiations with Supplier, and in doing so was clearly acting for, or in place of, its members. Given this, the CIS and pricing sheet constitute merely a summary of a contract negotiated on Western Health's behalf, and this Office rejects the argument that the information contained therein is not susceptible to change by Western Health and was not negotiated. It is also worth noting that similar to the BC matter, Western Health does not support the Third Party's position on the "supplied" issue and instead has argued the records in question involve a negotiated contract.

[24] If a public body can essentially outsource its procurement to another entity and thereby escape accountability and transparency, the result would subvert the spirit and intent of *ATIPPA, 2015* and would create an untenable and unreasonable outcome. The legislative aims of transparency and accountability of public bodies cannot be thwarted merely by engaging a third party organization to contract on one's behalf.

[25] This Office also rejects the notion that the information in question was provided in confidence because the pages contain a watermark stating "confidential not for distribution." We also note that as part of the Shareholder Agreement between the Third Party and Western Health, submitted by the Third Party, a clause of the agreement directs that confidentiality of information between the parties would occur "unless required by law." As previously stated by this Office in numerous reports, public bodies cannot contract out of *ATIPPA, 2015*, and the presence of notices of confidentiality alone will not suffice to prohibit disclosure. Moreover,

the agreement between the parties contemplated this very notion, acknowledging that laws requiring disclosure would take precedence.

[26] As to the third part of the test, 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.

[27] 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 and it would 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.

[28] Here again, the finding of the British Columbia Information and Privacy Commissioner in Order F17-14 is worth reviewing:

> *[27] Significant harm to competitive or negotiating position – HealthPRO said that the information sheet would be a "useful guide" for Stericycle's competitors (i.e., other suppliers). Its evidence continued as follows:*
>
> > *… According, if the results of HealthPRO's efforts were made public its ability to achieve its objective (achieving the very best value for its members) would be compromised. It is my opinion that this would lead to less attractive contract terms being offered to HealthPRO as suppliers would seek to mitigate their loss of overall margin as a result of pressure from lower volume suppliers to match the HealthPRO contract terms.*
>
> *[28] HealthPRO did not explain what it meant by "less attractive contract terms" nor to whom they would be "less attractive": HealthPRO, Stericycle or its competitors. HealthPRO also did not explain the nature of the competitive environment in which Stericycle operates, for example, who Stericycle's competitors are, the services and contract terms they offer or how they differ from those that Stericycle offers.*
>
> *[29] HealthPRO may be arguing that Stericycle and its competitors would offer HealthPRO less advantageous (i.e., higher) prices in future. If so, I am not persuaded by this argument. It is more likely, in my view, that Stericycle's competitors could use the information at issue to offer HealthPRO lower prices. This might in turn encourage Stericycle to offer lower prices, or other better terms, to compete. This does not, however, translate into significant harm to Stericycle's competitive or negotiating position. As previous orders have said,*

> *putting contractors in a position of having to price their services competitively is not a circumstance of significant harm to, or interference with, contractors' competitive or negotiating positions under s. 21(1)(c)(i).*
>
> *[30] I would add that Stericycle and its competitors are not obliged to agree to terms that are to their disadvantage. I also note that the information sheet does not include any pricing information for Stericycle's services. In my view, this limits its potential usefulness to Stericycle's competitors. Moreover, although Stericycle was aware from the notice of inquiry and the fact report that the information sheet was a record in dispute in this inquiry, it expressed no concern about disclosure of the information sheet.*

[29] This Office finds similarly, that the arguments and evidence provided by the Third Party are not sufficient to demonstrate a significant harm to its competitive or negotiating position will occur were the CIS and pricing sheet to be disclosed. The analysis set out by the above BC Order is persuasive that it is more likely disclosure would lead to lower prices from competitors and encourage suppliers to offer lower prices or better terms as well in order to compete. 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.

[30] It is worth noting that a distinction between the BC records and the responsive records in this matter is that some limited pricing information of the Supplier is included in the pricing sheet. However, this Office has found that pricing information is part of the contract, rejecting the idea that there could be harm from its disclosure. Additionally, the Supplier was notified by Western Health of the request for information and intention to disclose the CIS and pricing information yet it chose not to file a complaint with this Office. Similar to the supplier in the BC matter, the Supplier also did not express any concern about the disclosure of the CIS or pricing sheet.

[31] Order F17-14 also speaks to the Third Party's argument that disclosure of the responsive records may lead to suppliers being less likely in future to participate in similar supplier contracts:

> *[31] HealthPRO also argued that, if the information sheet were disclosed, Stericycle "may be less likely in the future to agree to participate in a Supplier Contract". HealthPRO said that, if this happened, its ability to achieve the most advantageous contract terms would be compromised.*
>
> *[32] Neither HealthPRO nor Stericycle said explicitly that Stericycle would refuse to participate in a future supplier contract, if the information sheet were disclosed. Even if Stericycle did refuse to participate, HealthPRO did not explain how this would harm Stericycle's competitive or negotiating position, significantly or otherwise. HealthPRO also did not explain how this would compromise HealthPRO's ability to achieve advantageous terms in a future contract with another supplier. HealthPRO did not say that no other companies provide the same services as Stericycle. Thus, as above, if Stericycle chose not to participate in future contracts, Stericycle's competitors could step in, possibly offering lower prices or other terms advantageous to HealthPRO.*
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> *[34] HealthPRO has not persuaded me that disclosure of the information could reasonably be expected to result in significant harm to Stericycle's competitive or negotiating position for the purposes of s. 21(1)(c)(i). Its argument and evidence on these points are vague and amount to little more than assertions. They also do not make a link between disclosure and the anticipated harm, as is required to show that s. 21(1)(c)(i) applies.*

[32] Similar to the BC Commissioner's determination, this Office is likewise not persuaded by the Third Party's vague evidence and assertions and does not find an association can be drawn between disclosure and the anticipated harm.

[33] Order F17-14 also examined the argument that similar information would no longer be supplied if the records were disclosed:

> *[35] <u>Information no longer supplied</u> – HealthPRO argued that disclosure could result in it not receiving "similar information" (i.e., advantageous contract offers) in future. Its evidence on this point was as follows:*
>
> > *The harm caused by disclosure is of greater significance given that HealthPRO members are all publicly owned hospitals, healthcare authorities and their shared services organizations because, following such disclosure, these entities, funded by public funds, would be less likely to get the potential benefits in future Supplier Contracts which would have been available without such disclosure.*
>
> *[36] HealthPRO's evidence appears to relate more to potential harm to its competitive and negotiating position. In any case, HealthPRO did not explain why it would not likely get these "potential benefits", if the information sheet*

> *were disclosed. Moreover, as discussed above and contrary to what HealthPRO appears to be arguing here, disclosure of the information sheet could, in my view, be to HealthPRO's advantage, as it might promote competition among HealthPRO's suppliers. This in turn would assist HealthPRO in achieving "very best value" from suppliers for its members, which it says is a "fundamental reason" for its existence. As above, HealthPRO's evidence on this point is vague and does not link disclosure to the anticipated harm.*
>
> *Conclusion on s. 21(1)(c)*
>
> *[37] HealthPRO has not, in my view, provided objective evidence that is well beyond or considerably above a mere possibility of harm, which is necessary to establish a reasonable expectation of harm under s. 21(1)(c). It has not demonstrated a clear and direct connection between disclosing the information in dispute and the alleged harm. HealthPRO has not met its burden of proof in this case. I find that s. 21(1)(c) does not apply to the information in the information sheet.*

[34] This Office concurs with the BC analysis in drawing the same conclusion. As the Third Party has failed to meet the requirements 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.

Notification Under Section 19

[35] 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, 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.*

[36] This Office discussed the notification procedure under section 19 in depth in Report A-2016-007 and in subsequent reports, such as A-2017-014, and highlighted this again more recently in Reports A-2019-026 and A-2019-027. Report A-2017-007 stated 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.*

[37] Report A-2017-014 stated:

> *[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.*

[38] While Western Health later stated "a degree of uncertainty" was raised by the Third Party leading it to issue formal notification, it maintained, as it had in its initial informal notification to the Third Party, that in its view the responsive records did not meet the three-part section 39 test, and more specifically parts 2 and 3 of the test were not applicable. Based on this

conclusion, initial notification was unnecessary and sending it was a misapplication of section 19 of *ATIPPA, 2015*.

[39] Notice to third parties must comply with *ATIPPA, 2015*. 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, as Western Health itself acknowledged in its submission to this Office.

VI CONCLUSIONS

[40] 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.

[41] 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.

VII RECOMMENDATIONS

[42] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Western Health release the responsive records to the Applicant.

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

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

[45] Dated at St. John's, in the Province of Newfoundland and Labrador, this 18th day of November 2019.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador