



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-029

December 11, 2020

Department of Health and Community Services

Summary:

The Department of Health and Community Services (HCS) received an access to information request which sought contracts and other documents related to the 811 HealthLine service. HCS released most records to the Applicant, advising that approximately a third of the records were withheld per sections 27(cabinet confidences), 29 (policy advice), 30 (legal advice), 31 (harmful disclosure to law enforcement), 35 (disclosure harmful to the financial interests of a public body), 39 (disclosure harmful to the financial interests of a third party), and 40 (disclosure harmful to personal privacy) of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. HCS gave notice subject to section 19(1) to the Third Party that it intended to disclose information that might contain information that might be exempted under section 39. Despite consultations with HCS, the issue could not be resolved. The Third Party filed a complaint with this Office, advising that it objected to the release of a table that would release the “Costs per Call.” The Third Party Complainant argued that the records were supplied in confidence to the HCS. The Commissioner determined the Third Party did not meet the three-part test under section 39 and recommended the 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 and 39.

Authorities Relied On:

NL OIPC Reports [A-2017-022](#); [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#); [Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 CanLII 55800 \(NL SC\)](#)

I BACKGROUND

- [1] The Department of Health and Community Services (“the Department” or “HCS”) received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (*ATIPPA, 2015*), seeking:

Any contract(s) related to the 811 HealthLine service and app. Contracts, documents, correspondence, briefing notes and/or emails having to do with, in whole or in part, 811 HealthLine and: nurse practitioners; virtual appointment(s); and virtual walk-in clinic(s).

- [2] The Department conducted a search for records, locating 575 records. Of these records, 135 were deemed to be related to the Third Party.
- [3] Following receipt of the request, in accordance with section 19(1) of *ATIPPA, 2015*, the Department determined it was necessary to notify the Third Party of its decision to release the requested records, advising the Third Party that it needed to conduct consultations to ensure no information of a proprietary nature was disclosed. After the consultations, only one piece of information remained at issue. The Third Party filed a complaint with this Office opposing the Department’s decision.
- [4] 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

- [5] The Department submits that the three-part test outlined in section 39 of *ATIPPA, 2015* is not met – specifically, the second part at section 39(b) which requires information be “*supplied, implicitly or explicitly, in confidence.*” HCS states that as the “costs per call” were negotiated between the Department and the Third Party, the second part of the test is not met.

III COMPLAINANT'S POSITION

- [6] It is the Third Party's position that the information at issue meets the definition of financial or commercial information, as the information consists of what the Department pays the Third Party per call.
- [7] It is also the Third Party's position that it had an expectation that financial or commercial information in the Department's possession would be kept strictly confidential. They submit that the Office of the Information and Privacy Commissioner's interpretation of section 39, especially 39(b) "is arbitrary and not supported by any evidence that this was the proper legislative intent when the word was used in enacting section 39." The Third Party contends that supplied merely means provided, and the information was certainly supplied to the Department in confidence,
- [8] With regards to the third part of the test, the Third Party states that it does not need to prove on the "balance of probabilities" that disclosure of the information could result in harm to its competitive position, but that the disclosure could reasonably be expected to result in harm. The Third Party argues that it is reasonable to expect that competitors will use the information to their advantage when bidding on government contracts.

IV DECISION

- [9] 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.

[10] 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.

[11] It must be noted that the information contained within the contract at present was agreed upon prior to the enactment of the *Public Procurement Regulations, NLR 13/18* under the *Public Procurement Act*. Under section 8(2) of those regulations, third parties are required to identify what information they expect the public bodies to keep confidential and might be exempt under section 39 of *ATIPPA, 2015*.

[12] The information at issue consists of the “costs per call” charged by the Third Party and paid by the Government of Newfoundland and Labrador. This information is contained within the contract between the parties. As the information is the amount of money charged by the Third Party providing the service, it is clear that the information falls within the meaning of “financial or commercial information” of the Third Party. This is distinct from information which discloses a third party’s own expenses, such as hourly wages paid to its employees or money paid to its own suppliers. Such immutable information would indeed constitute information that is supplied within the meaning of section 39(1)(b) and would meet the second part of the test.

[13] The Third Party submits that the information meets the second part of the test as the information was supplied in confidence. It argues that previous interpretations by this Office as to the meaning of “supplied, implicitly or explicitly, in confidence” are too strict and not in the spirit of the legislative intent; therefore, the meaning should be interpreted in ordinary

parlance – that is, “provided.” Further, the Third Party contends that it expects the Department to keep information strictly confidential.

[14] The Third Party disagrees with the OIPC’s interpretation of the meaning of the term “supplied” as previously determined in Reports from this Office and suggests that it was not meant to be interpreted in such a manner.

[15] The OIPC’s interpretation of the meaning of the term supplied is not arbitrary, as the Third Party suggests, but is consistent with reports and orders in other jurisdictions across the country. This interpretation has also been confirmed by the Supreme Court of Newfoundland and Labrador. In Report 2017-022, the Commissioner stated:

[4] The application of section 39 is straightforward. It is a three-part test that places the burden on the third parties to meet all parts of the test if they receive notice of and oppose the release of their information by public bodies. Generally, third parties must present clear and convincing evidence that the information is their commercial or financial information under section 39(1)(a), that it was supplied to the public body in confidence under section 39(1)(b) and that there is a reasonable expectation of ‘significant’ harm or ‘undue gain or loss’ under section 39(1)(c) if the information is disclosed. Mere assertions or speculation as to harm are insufficient.

[5] Third parties should understand, and it is the responsibility of public bodies to explain to them, that it is now generally settled law that a contract for the purchase of goods or services by a public body is considered to be negotiated, not supplied, and therefore the test in section 39(1)(b) cannot be met. The ATIPPA, 2015 presumes the right of access to information, subject only to its specific exceptions.

[6] Clear and convincing evidence of particular circumstances may, on occasion, result in a conclusion that the disclosure of some information contained in a contract document would meet the section 39 test, therefore justifying its redaction. Examples include the inferred disclosure and immutability exceptions, described in Ontario Report PO-3598 at paragraph 19:

There are two exceptions to this general rule which are described as the “inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the information in a contract would permit the making of accurate inferences with respect to underlying non-negotiated confidential information supplied by the third party to the institution. The “immutability” exception applies

where a contract contains information supplied by a third party that is not susceptible to negotiation. Examples are financial statements, underlying fixed costs and product samples or designs.

[16] The Third Party offered no evidence to suggest inferred disclosure of other information not subject to disclosure nor to suggest that the information was immutable.

[17] The contract in which the information is contained includes the following clause:

Notwithstanding the foregoing, the Service Provider acknowledges that all information relating to this Agreement that is in the custody or control of the Client is subject to ATIPPA. The Service Provider understands and agrees that the Client may be required to disclose certain information pursuant to ATIPPA, the Financial Administration Act RSNL 1990, c. F-8, or other legislation.

[18] However, the Third Party noted in its formal submissions that this clause “does not somehow tip the scales in favour of disclosure in this case. It was simply a recognition by us that there was the potential for disclosure as a result of the application of the Act.”

[19] It is not sufficient to state that the information is inherently expected to be kept confidential because it is supplied by one party to another. As outlined by Justice Whalen in *Corporate Express*, at para. 34:

[34] If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate the intent of the Act by adding such an endorsement to the information supplied.

[20] The Third Party also offered no evidence that there was an expectation, either implicitly or explicitly, of confidentiality regarding this information between the Department and the Third Party. Therefore, the second part of the test cannot be met. As all three parts of the test at section 39 must be met by the Third Party, consideration of the third part is not necessary.

V CONCLUSIONS

[21] In conclusion, we find that no compelling evidence has been provided by the Third Party to support their position or to satisfy the burden of proof outlined in section 39. Therefore, the requested information cannot be withheld from the Applicant.

VI RECOMMENDATIONS

[22] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Health and Community Services disclose the withheld records to the Applicant.

[23] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Health and Community Services 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.

[24] Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainants provide the Department with a copy of their notices of appeal prior to that time.

[25] Dated at St. John's, in the Province of Newfoundland and Labrador, this 11th day of December 2020.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador