



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-032

July 29, 2021

Department of Health and Community Services

Summary:

The Department of Health and Community Services (the Department) received an access to information request which sought contracts with a Third Party. On a previous occasion, the same records had been sought by an applicant, leading to Report A-2020-029. The Department 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. The Third Party filed a complaint with this Office, advising that it objected to the release of the records due to the financial nature of the records and the risk of harm if they were disclosed to an unknown applicant. The Third Party further argued that the records were supplied in confidence to the Department. 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](#), SNL 2015, c. A-1.2, sections 19 and 39.

Authorities Relied On:

NL OIPC Report [A-2020-029](#); [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#).

I BACKGROUND

- [1] The Department of Health and Community Services (“the Department”) received an access to information request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) seeking “Provincial government contracts with [Third Party].”
- [2] On a previous occasion, an applicant made a similar request under *ATIPPA, 2015* to the Department for many of the same records, including government contracts with the Third Party. The Third Party consented to the release of most of the records but objected to the release of one section, which was addressed in Report A-2020-029. In that report, this Office recommended the Department release the records withheld from the Applicant. The Third Party Complainant disagreed with the recommendations and appealed the matter to the Supreme Court of Newfoundland and Labrador. That matter is still before the Court.
- [3] Following receipt of the present request, due to the matter being before the Court and in accordance with section 19 of *ATIPPA, 2015*, the Department determined that it was necessary to notify the Third Party of its decision to release the requested records. The Third Party filed a complaint with this Office opposing the Department’s decision to release these records.
- [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] It is the position of the Department that the responsive records, being contracts between the Third Party and the Department dating back to 2009, do not meet the three-part test outlined at section 39(1), per the decision in previous reports from this Office, including A-2020-029. In its submissions to this Office, the Department noted that:

It was determined, section 39 did not apply; in particular, the information did not meet section 39(b) which mandates that proprietary information be

“supplied implicitly or explicitly, in confidence.” Costs were negotiated between the Department and [the Third Party]. Therefore, it was the Department’s interpretation that the three part harm’s test of section 39 has not been met.

- [6] The Department also noted that it had previously fully accepted the recommendation of the Commissioner in Report A-2020-029 to disclose information of Third Party. The Department notes that it still accepts those recommendations. It is on this basis that the Department believes the information ought to be disclosed.

III COMPLAINANT’S POSITION

- [7] In its initial submissions accompanying the complaint, the Third Party stated that it had not been provided the wording of the request by the Applicant and was therefore “unable to confirm whether the records identified by the Department are in fact responsive to the access to information request.” The Third Party states that without knowing the nature of the access to information request, it “is unable to verify whether in fact the records identified by the Department are, in whole or in part, responsive or extraneous to the request.”
- [8] The Third Party submits that in the event that the records are responsive, such disclosure would meet the three-part test as outlined at section 39(1). Specifically, the Third Party submits that the responsive records comprise of a service agreement between the Third Party and the Province of Newfoundland and Labrador, which outlines financial details for services provided by the Third Party.
- [9] The Third Party further asserts that it has an expectation of confidentiality respecting the financial information contained in the records and understood that the Province would not openly publish the financial information. The Third Party notes that the Province has not published this information, nor is it required to do so by the *Financial Administration Act*. Due to the highly sensitive nature of the financial information, the Third Party understood that a “breach of confidentiality” would only occur where serious circumstance warranted it. The Third Party is of the opinion that it is unaware of such circumstances warranting publication.

[10] The Third Party argues that disclosure of the responsive records could be reasonably expected to cause significant harm to the competitive position of the Third Party or result in undue financial loss. The Third Party claims that the information is highly sensitive and notes that the identity and intentions of the requestor is unknown. The Third Party further asserts that caution must be used in the event that the requestor chooses to use the information for “harmful purposes, including fraudulent or criminal purposes, to the detriment of [the Third Party]”. The Third Party claims that it is reasonable to expect such harm to occur.

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] The Complainant has noted that the information contained within the agreement consisted of financial information of the Third Party. The Department does not dispute this.

As the information relates to payments to the Third Party by the Department, the first part of the test is met.

[14] With regards to the second part of the test, the Complainant states that it understood that the information was confidential in nature and would not be published. It is well established, from this jurisdiction and others across the country, that contracts and agreements with public bodies are not considered to be supplied in confidence, as the terms and conditions are negotiated by the parties involved. As with Report A-2020-029, which addressed a portion of the same records, the Third Party offered no evidence that there was an expectation, either implicitly or explicitly, of confidentiality, nor that the information was supplied by it to the Department, other than to say that the Third Party understood this to be the case.

[15] However, the contract itself acknowledges at paragraph 17.2 that the agreement is subject to access to information legislation:

Notwithstanding the foregoing, Agency acknowledges that all information relating to this agreement that is in the custody or control of DHCS is subject to ATIPPA. Agency understands and agrees that DHCS may be required to disclose certain information pursuant to ATIPPA, Financial Administration Act RSNL 1990, c. F-8, or other proceeding of the House of the Assembly.

[16] As such, the second part of the test is not met.

[17] As all three parts of the test must be met, and the Third Party has failed on the second part, it is therefore unnecessary to consider the third part of the test.

[18] However, I would like to comment on the Third Party's submission that it did not receive the wording of the request, and that it does not know who the requestor is or what the requestor's intentions are regarding the information.

[19] In its response to the complaint, the Department provided the OIPC with the wording of the request, as quoted above. Although the request is not lengthy, it is sufficient for the Department to search for and gather the responsive records. It is not the role of the Third Party to determine whether the records are responsive to the request.

[20] Furthermore, the Third Party's submission that not knowing the requestor or their intentions is cause for specific concern or caution is not consistent with *ATIPPA, 2015*. The purpose of *ATIPPA, 2015* is to provide transparency and accountability with regards to government decisions and spending. It is irrelevant who the requestor is or what their intentions are for the use of the information.

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.

[22] While we acknowledge that this issue is before the Court at present and remain deferent to the Court's decisions, the *ATIPPA, 2015* does not provide a mechanism for this Office to make such recommendations other than to release or withhold records.

VI RECOMMENDATIONS

[23] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department release the records to the Applicant.

[24] 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.

[25] 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.

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of July 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador