



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2021-042

October 15, 2021

Heritage Foundation of Newfoundland and Labrador

Summary:

The Heritage Foundation of Newfoundland and Labrador (“Heritage NL”) received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”) for records relating to a development project. Heritage NL notified a Third Party under section 19 of *ATIPPA, 2015* that it intended to disclose the information. The Third Party filed a complaint with our Office objecting to the disclosure under section 39 of the Act (disclosure harmful to business interests of a third party). The Commissioner found that the Third Party had not met the required burden of proof to show that all three parts of the test under section 39 had been met, and recommended that Heritage NL disclose the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 19, 39, and 43.

Authorities Relied On:

NL OIPC Reports [A-2017-004](#) and [A-2020-009](#)

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

I BACKGROUND

- [1] The Heritage Foundation of Newfoundland and Labrador (“Heritage NL”) is a not-for-profit Crown agency of the Department of Tourism, Culture, Arts and Recreation and constituted and operating under the authority of the *Historic Resource Act*. Heritage NL received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* for records relating to a development project in St. John’s. The records responsive to the request consist of responses to a survey soliciting public input on the development project, and correspondence related to the survey.
- [2] Following receipt of the request, Heritage NL determined that it was appropriate, in accordance with section 19 of *ATIPPA, 2015*, to notify a Third Party of its decision to release the requested information. The Third Party filed a complaint with this Office opposing the decision of Heritage NL to release the requested information.
- [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] Heritage NL states that, in its view, the information in question does not meet the three-part test in section 39 and therefore cannot be withheld from the Applicant. However, out of caution, it provided a section 19 notification to the Third Party that it intended to disclose the information.

III COMPLAINANT’S POSITION

- [5] The Third Party argues that there are people who are opposed to the development project and who would be able to use the responses of some of the survey respondents to harm the project. Therefore, some or all of the survey responses should be withheld from the Applicant.

IV DECISION

[6] 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.

[7] 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.

[8] The records subject to the section 19 notification are spreadsheets containing the responses to a public survey, as well as some emails discussing the formulation of the survey questions or the use of the information in future meetings. Some information has been withheld by Heritage NL, but those redactions are not at issue in the present complaint. The Third Party wants the survey information withheld. From our review of the responsive records and the submissions of the Third Party, it is difficult to see how any of the three parts of the test can be met.

[9] With respect to the first part of the three-part test, it is not clear that the information in dispute is actually the “information of” the Third Party, that is, its proprietary information (for a discussion of this requirement, see our Reports A-2017-004 and A-2020-009). The survey

was conducted, and the information collected, by another organization, together with Heritage NL. There was some input into the formulation of the survey questions, and some funding for the survey, provided by the Third Party. However, the Third Party has not given us any information (for example, contract language) to show that the provision of some funding for the survey created a proprietary interest, in favour of the Third Party, in the information collected from survey respondents.

[10] With respect to the second part of the test, it is hard to see how the information can be said to have been “supplied” to Heritage NL by the Third Party. Rather, it was created and supplied to both the Third Party and Heritage NL by the organisation that conducted the survey. The Third Party has not addressed whether the information was provided “in confidence”.

[11] Finally, with respect to the third part of the test, the central objection of the Third Party is that there are people opposed to the project who would be able to use the responses of some of the survey respondents to harm the project. However, the Third Party has provided no actual evidence to support this assertion, or to show how the disclosure of this information could reasonably be expected to harm the Third Party’s competitive position, or be expected to result in undue financial loss or gain to anyone.

V CONCLUSION

[12] *ATIPPA, 2015* in section 43(3) provides that in the case of a complaint by a Third Party, the burden of proof is on the Third Party to show that all three parts of the test in section 39 have been met. The Third Party has failed to meet the burden of proof, and therefore the records should be disclosed.

VI RECOMMENDATIONS

[13] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Heritage Foundation of Newfoundland and Labrador disclose the disputed information to the Applicant.

[14] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Heritage Foundation of Newfoundland and Labrador 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.

[15] 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 Heritage Foundation of Newfoundland and Labrador with a copy of a Notice of Appeal prior to that time.

[16] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of October, 2021.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador