



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2022-031

December 19, 2022

Eastern Health

Summary:

The Complainant made an access to information request under the *Access to Information and Protection of Privacy Act, 2015* to Eastern Health for information related to a contract between Eastern Health and a third party. Eastern Health withheld some information from the contract, relying on section 39 (Disclosure harmful to business interests of a third party) and section 35 (Disclosure harmful to the financial or economic interests of a public body). The Complainant did not agree with the decision to withhold information and filed a complaint with this Office. The Commissioner found that Eastern Health had not met the standard to withhold information under section 39(1) but that the exceptions under section 35(1)(b) were properly applied. The Commissioner recommended that Eastern Health release information previously withheld under section 39(1) of *ATIPPA, 2015* and continue to withhold any information to which section 35(1)(b) applied.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), SNL 2015, c. A-1.2, sections 35 and 39

[Public Procurement Regulations](#) NLR 13/18, section 8

Authorities Relied On:

[R v. Ron Engineering and Construction \(Eastern\) Ltd.](#) [1981] 1 S.C.R. 11; [Miller Transit Limited v. Information and Privacy Commissioner of Ontario, et al](#) (2013) ONSC 7139; [Attorney General of Canada v. Calian Ltd. and Information Commissioner of Canada](#) 2017 FCA 135
NL OIPC Reports [A-2013-009](#), [A-2017-020](#), [A-2017-022](#), [A-2018-014](#), [A-2020-016](#), [A-2020-029](#).

BACKGROUND

- [1] The Complainant made an access to information request to Eastern Health, seeking a copy of the contract between a Third Party and Eastern Health for the management of support services. The Complainant also asked for the amounts paid to the Third Party and its affiliates for the last five years pursuant to current and past contracts.
- [2] Eastern Health responded to the request by providing the Complainant with information on amounts paid to the Third Party. Eastern Health also provided a copy of the contract with some information redacted on the basis of sections 35(1)(b) and 39(1) of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*”).
- [3] Over the course of the investigation by this Office, Eastern Health agreed to release additional information to the Complainant. After doing so, most of the information that remained withheld was withheld on the basis of section 39(1), while the remainder was redacted on the basis of section 35(1)(b). For some information, both sections 39(1) and 35(1)(b) were applied.
- [4] The Complainant is seeking an unredacted copy of the contract and is asking for a review of the exceptions to access claimed by Eastern Health.
- [5] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [6] Eastern Health’s position is that the disclosure of the information currently withheld under section 39(1) would unfairly undermine the Third Party’s competitiveness by providing information to its competitors about its operations. Eastern Health further argues that the disclosure of this information would impact the government’s ability to collaborate and partner with the private sector since assertions of privacy of information by the private sector would not be respected.

[7] With respect to section 35(1)(b), Eastern Health asserts that the disclosure of the information currently withheld will impact its ability to secure favourable contracts for services in the future. Eastern Health submits that this is particularly the case given the nature of the agreement with the Third Party, which is described as a “vested” contract and contains specific information on profit margins that are not usually included in a standard contract.

COMPLAINANT’S POSITION

[8] The Complainant argues that the contract should be released without redactions. The Complainant notes that this is a large, long-term contract where the Province has committed to spending tens of millions of dollars to an outside agency to provide important services in the health care sector.

ISSUES

[9] Whether the information withheld by Eastern Health meets the standards necessary to justify the exceptions set forth in section 39(1) and 35(1)(b) of *ATIPPA, 2015*.

DECISION

[10] Section 39(1) of *ATIPPA, 2015* is as follows:

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.*

[11] There is a three-part test to determine whether section 39(1) applies to withhold information. To be successful, all three parts of the test must be answered in the affirmative.

The test is as follows:

1. Does the document contain information that would reveal the trade secrets of a third party or commercial, financial, labour relations, scientific, or technical information of a third party?
2. Was the information supplied, implicitly or explicitly, in confidence?
3. Would the disclosure of the document result in significant harm to the competitive position or interfere significantly with the negotiating position of the third party or 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 or result in undue financial loss or gain to any person or reveal information used to resolve or inquire into a labour relations dispute.

[12] With respect to part one of the test, the information being withheld by Eastern Health is commercial and financial information of a third party.

[13] With respect to part two of the test, the information must have been supplied by the third party, implicitly or explicitly in confidence. First, we note that the agreement complies with sections 8(1)(g) and 8(2) of the *Public Procurement Regulations (PPR)*. Section 8(2) states:

- (2) *A bid received in response to an open call for bids shall identify any information that may qualify for an exemption from disclosure under section 39(1) of the Access to Information and Protection of Privacy Act, 2015.*

[14] At section 12.6 of Schedule J of the Agreement, it is stated that several aspects of the Third Party's business – costs and margins – are sensitive and could cause harm if disclosed. This statement is in alignment with section 8(2) of the *PPR*, though that section is clear that

the identified information “may” be exempted and whether it is exempted depends on satisfying all three parts of the test.

[15] The parties describe the agreement between Eastern Health and the Third Party as a “vested” contract. They submit that this is a new approach to commercial contracts developed at the Haslam College of Business, University of Tennessee. The Haslam College of Business’ research suggests that a traditional approach to contracts keeps buyers and suppliers at arm’s length, often with misaligned interests, and may fail in collaborative, innovative, and value-sharing complex multi-dimensional business relationships.

[16] Therefore, the parties submit, a vested contract focuses on clearly defined and measurable outcomes. Establishing a vested contract is not a straightforward process. As Eastern Health asserted in its submission: “Vested contractual relationships require a significant sharing of confidential business information, much more than which is shared in a traditional procurement model or contract.” In developing the vested contract, Eastern Health and the Third Party disclosed detailed financial information to each other to allow both parties to create reasonable expectations and goals in their collaboration.

[17] In general, contracts established through a tender process where there is little actual negotiation are still considered to be negotiated, not supplied. However, the Supreme Court of Canada in *R v. Ron Engineering and Construction (Eastern) Ltd.* (1981 1 S.C.R. 111) stated that there are two types of contracts arising from a tender: the contract that crystalizes upon acceptance of a tender, and then the subsequent contract agreed upon by the parties. This case revolved around a contractor who sought to get out of a tender for which it was selected because the tender proved to be incorrect. In the case the court wrote:

...Contract A (being the contract arising forthwith upon the submission of the tender) comes into being forthwith and without further formality upon the submission of the tender.

...

...The principal term of contract A was the irrevocability of the bid and the corollary term is the obligation in both parties to enter into a construction contract (contract B) upon acceptance of the tender. Other terms include the qualified obligations of the owner to accept the lowest tender, and the degree

of this obligation is controlled by the terms and conditions established in the call for tenders.

...

For a mutual contract such as contract B to arise, there must of course be a meeting of the minds, a share animus contrahendi. [Emphasis added]

[18] The contract between Eastern Health and the Third Party was established on the basis of a Request for Partner (“RFP”) in 2019. On December 18, 2020, the parties entered into a general agreement to start services with the intention of establishing a vested agreement. Thus, the Third Party’s selection as part of the RFP process formed Contract A (tendering) and the vested agreement is Contract B (services). In this case, Contract B is much different from Contract A. The vested contract is negotiated, but its terms are the product of significant disclosure of immutable financial information from which the final terms are reached.

[19] Vested contracts are a new way of doing business. It is the first time that this Office has addressed this sort of contract and we have found no decisions from other jurisdictions on this issue. In a traditional contract, for example for the purchase of pencils, only the price paid by the purchaser is known and the margin that the seller receives remains unknown. In a vested contract that is not the case. The parties work collaboratively on understanding the costs involved, on a satisfactory margin for the vendor, and on a process to meet or exceed that margin. Some of the information contained in the agreement reflects this open process. In the case of a vested contract, it is important to understand how the information that is included in the contract was arrived at, as it is far more detailed and reflective of the overall financial position of both parties.

[20] This Office has held on several occasions that a contract, or parts thereof, are considered to be negotiated, not supplied in confidence (see, for example, A-2017-0720; A-2018-014; A-2020-016). There are two exceptions to this position that this Office has adopted in A-2017-022 and A-2020-029. These exceptions are inferred disclosure and immutability. These two exceptions were explained in Ontario Report PO-3598 at paragraph 19:

[19] There are two exceptions to this general rule [contracts are negotiated, not supplied] which are described as “the inferred disclosure” and “immutability” exceptions. The “inferred disclosure” exception applies where disclosure of the

information contained in a contract document would permit the making of accurate inferences with respect to underlying non-negotiated confidential information supplied by a third party to the institution. The “immutability” exception applied 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.

- [21] The inferred disclosure exception was further elaborated upon in *Miller Transit Limited v. Information and Privacy Commissioner of Ontario et al (Miller Transit)* (2013 ONSC 7139), where at paragraph 39 of the decision the Ontario Divisional Court stated:

The inferred disclosure exception arises where information actually supplied does not appear on the face of the contract but may be inferred from its disclosure. The onus is on the party to show “convincing evidence that disclosure of the information... would permit an accurate inference to be made of underlying non-negotiated confidential information supplied by the affected party.”

- [22] The question that needs to be addressed in this second part of the test is whether the detailed information included in the vested contract between Eastern Health and the Third Party could be used to make an accurate inference about the underlying-non-negotiated information used in establishing this contract.

- [23] In this instance, after considering the submissions of the Public Body and carefully examining the contract itself, this Office concludes that we have insufficient evidence to determine that the release of the information in the vested contract would allow for an accurate inference of the underlying non-negotiated information upon which the vested contract is based. However, even if we did, and we accepted that the second part of the test had been met, the section 39(1) claim would fail on the third part of the test.

- [24] The third part of the section 39(1) test involves assessing the harm that could result if the information was disclosed. In *Attorney General of Canada v. Calian Ltd. and Information Commissioner of Canada* (2017 FCA 135), the Federal Court of Appeal opined on the quality of information needed to establish harm in cases involving third parties. The Court stated at paragraph 50:

...As frequently mentioned in those cases, there is an element of forecasting and speculation inherent to establishing a reasonable expectation of probable harm. As long as the prediction is grounded in ascertainable facts, credible inferences and relevant experiences, it is unassailable.

[25] This Office contacted Eastern Health and requested that the Third Party make its own submission on this file. The Third Party did not do so. Instead, Eastern Health made further representations elaborating on its claims under sections (39)(1)(c)(i) to (iii). With respect to 39(1)(c)(i), Eastern Health made an assertion as to how the disclosure of the information would undercut the Third Party in future bids. Eastern Health also argued that the disclosure would create an unfair competitive environment for the Third Party, as competitors would have more information on the Third Party. These assertions were made without evidence. Moreover, this Office addressed competitive harm in A-2013-009:

...I interpret “harm” to competitive position” to mean actions or harm which would place other bidders at an unfair competitive, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process...Contracts with public bodies require greater transparency than those with private sector entities, this is simply a “cost of doing business” with public sector bodies.

From the submissions given by Eastern Health, we have insufficient evidence to discern whether the Third Party would actually be at an unfair disadvantage or whether the information, if released, would merely provide a more level playing field.

[26] Regarding section 39(1)(c)(ii), Eastern Health asserted that disclosure of the information would cause the Third Party and other companies to re-think doing business with Eastern Health if it is shown that it cannot protect confidential financial and commercial information. Eastern Health could have provided evidence of this assertion by disclosing past examples where possible disclosure of information resulted in a company backing away from a contract, or even reliable evidence that this has occurred under similar circumstances with other public bodies or in other jurisdictions. This was not provided. There was no evidence in support of this assertion.

[27] Eastern Health has also argued that, pursuant to section 39(1)(c)(iii), the release of the information would result in undue financial loss to the Third Party and gain for a competitor. In support of this assertion, Eastern Health submitted that the Third Party could lose future bids if this information were released and acquired by a competitor. The Third Party could lose a bid on a tender for any number of reasons and there is no evidence to suggest that it has happened in the past due to the disclosure of such information or that the Third Party could reasonably expect to lose a bid if the information under consideration was disclosed. As such, we are not convinced that Eastern Health has established that harm would result from the disclosure of this information, as is required by the third part of the test.

[28] Eastern Health has also cited section 35(1)(b) to justify withholding some information from its agreement with the Third Party. Section 35(1)(b) states:

35.(1) The head of a public body may refuse to disclose to an applicant information which could reasonably be expected to disclose:

...

(b) financial, commercial, scientific, or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;

Unlike section 39, there is no requirement to show a reasonable expectation of harm if the information is disclosed. The threshold for section 35(1)(b) to apply is lower and the test for section 35(1)(b) is as follows:

1. The information is financial, commercial, or scientific.
2. The information belongs to a public body or to the government of the province.
3. The information has, or is reasonably likely to have, monetary value.

All three parts of the test must be answered in the affirmative for the exemption to apply.

[29] With respect to part one of the test, the information for which the exclusion applies is financial and commercial. With regard to the second part of the test, Eastern Health entered into the agreement for its own business administration. To create the agreement, it expended money and effort to negotiate and gather the information for the vested contract, and it has an interest in not seeing this information released. As such, Eastern Health has a clear interest at stake in the contents of the agreement.

[30] The third part of the test requires consideration as to whether the information has, or is reasonably likely to have, monetary value. The intrinsic value of the agreement with the Third Party for Eastern Health is that it details contributions and margins that Eastern Health is willing to make and accept. This is not typical contract information. If it were disclosed, the possibility exists that these contributions and margins would become the next starting point in future negotiations, and not the end point. Thus, Eastern Health will be deprived of part of the value of the current contract. To be clear, Eastern Health's success under this part of the test is not overwhelming and this Office would benefit in the future from more robust submissions from public bodies. However, we do conclude that the information withheld by Eastern Health is properly withheld under section 35.

RECOMMENDATIONS

[31] Under the authority of section 47 of *ATIPPA, 2015* I recommend that Eastern Health release information currently being withheld under a claim of section 39(1). I recommend that Eastern Health continue to withhold the remaining information that is claimed under section 35(1)(b). This second recommendation shall also apply to information being withheld pursuant to both section 39(1) and section 35(1)(b).

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

[33] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of December 2022.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador