



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2023-006

February 10, 2023

Eastern Health

Summary:

The Applicant requested Operational Standards Compliance Reports completed by Eastern Health regarding the Third Party Complainant's long-term care and personal care home for the years 2018-2020. The requested information included details of its non-compliance with the Personal Care Home Operational Standards. Eastern Health intended to release the information requested, but decided to notify the Third Party of this decision. The Third Party Complainant subsequently filed a complaint with this Office, claiming that the information must be withheld from the Applicant pursuant to section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof under section 43(3) had not been met by the Third Party and recommended that the information be released.

Statutes Cited:

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

Authorities Relied On:

[Canada Packers v. Canada \(Minister of Agriculture\) 1988 CanLII 4121 \(FCA\)](#); NL OIPC Reports [A-2019-029](#), [A-2017-006](#), [A-2017-007](#), [A-2017-008](#), [A-2007-017](#), [A-2011-007](#); [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#).

BACKGROUND

- [1] Eastern Health received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or the “*Act*”) for the following information;

Operational Standards Compliance Reports completed for long term care and personal care homes for 2018-2020 at [named Personal Care Homes], St. John’s

- [2] Following receipt of the request, Eastern Health determined it was necessary to notify the third parties of its decision to release the requested records, in accordance with section 19 of *ATIPPA, 2015*. Upon receiving notice of Eastern Health’s intention to release records related to its operations, the Third Party filed a complaint with this Office opposing Eastern Health’s decision.
- [3] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

PUBLIC BODY’S POSITION

- [4] Eastern Health provided the Applicant some responsive records, but advised that some of the responsive records “might affect the business interests of a third party,” and notified the Third Party about the request. However, in its notification to the Third Party, and in its subsequent submissions to this Office, Eastern Health acknowledged that it did not believe section 39 was applicable:

Here are the reasons why we have decided to provide the records to the requestor:

- *This request was received under the Access to Information and Protection of Privacy Act. As a public body we are subject to this Act and in accordance with the legislation had to search for the responsive records and review for possible exceptions to disclosure. As you may have noticed in the copy provided to you, information that can be withheld has been redacted (You may have noticed we redacted information under Section 31, 40, 29 and the Personal Health Information Act.)*

- *In our view, there are no other exceptions to access that we could use to redact more information and we have redacted as much information as possible. While Section 39 permits a public body to refuse access of disclosures harmful to business interests of a third party we did not believe the disclosure could be reasonably expected to meet the criteria as outlined in Section 39 of the Act for refusal. Section 39 is attached for your reference.*

[5] Further regarding the application of section 39, Eastern Health went on to note to the Third Party and subsequently this Office:

In our view, this information does not meet the three-part test outlined in section 39, and therefore, cannot be withheld from the applicant.

- *We did not believe there was a risk to harm significantly the competitive position or interfere significantly with the negotiating position of the third party*
- *We did not believe that the disclosure would reasonably 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,*
- *We did not believe that the disclosure would reasonably result in undue financial loss or gain to any person*

COMPLAINANT'S POSITION

[6] The Third Party argued that Eastern Health had failed to apply redactions to the responsive records that are justified based on section 39(1) of the *ATIPPA, 2015* (disclosure harmful to business interests of a third party). Specifically, the Third Party made the following submission:

Subsection 39(1) of the ATIPPA, 2015 requires [Third Party] to satisfy all three branches of the provision, namely, in this context, that disclosure of the records: (i) would reveal [Third Party's] commercial information; (ii) that such information was supplied to Eastern Health, implicitly or explicitly, in confidence; and (iii) that disclosure of such information would be reasonably expected to significantly harm [Third Party's] competitive position, or interfere significantly with [Third Party's] negotiating position, or result in undue financial loss or gain to [Third Party]. [Third Party] claims that all three branches of subsection 39(1) are satisfied in this instance, and intends to make a detailed written submission in support of this complaint in due course.

[7] No additional submissions were provided.

DECISION

Section 39

[8] At issue is the disclosure of approximately twenty pages of responsive records that include quarterly and annual inspections conducted by Eastern Health regarding the Third Party's operations between 2018 and 2020, as well as correspondence between Eastern Health and the Third Party in relation to these inspections, reports and findings. The records note the Third Party's compliance and non-compliance with the Personal Care Home Operational Standards and note issues resulting in Eastern Health's conditional licensing and holds on admissions of the Third Party's facilities. The records highlight items requiring attention, including (but not limited to) complaints about fire and safety; medications and procedures for administering medications; prevention and control of infections; nutrition and food service; resident health needs; and resident services.

[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(3). Failure to meet any part of the test will result in disclosure of the requested records.

[11] This Office has covered almost identical third party complaints in reports [A-2017-006](#), [A-2017-007](#) and [A-2017-008](#) with Eastern and Central Health – where the applicants were looking for the same type of information (Operational Standards Compliance Reports for a specific period of time for specific personal care homes) and the third parties objected to disclosure pursuant to section 39. All three are useful to note here for what we highlighted then regarding this type of information (long-term and personal care home inspection reports and compliance or non-compliance with standards) pursuant to section 39, as well as in relation to the application of section 19.

[12] With respect to section 39(1)(a), this Office finds the Third Party failed to meet even this first part of the three-part test as the information in question – inspections, reports, and correspondence related to licensing standards – cannot be said to reveal any of the types of information set out in parts (i) and (ii) of this subsection. While the Third Party asserted the information meets this part of the test as it involves information that would reveal its commercial information, it failed to provide any arguments or evidence to support this assertion. Finding the Third Party failed to establish the applicability of part one of the three-part test is sufficient to determine that the Applicant is entitled to the records. However, this Office will comment as well on section 39(1)(b), as even if the first element of the test had been established, the second element could not be satisfied.

[13] Section 39(1)(b) has two aspects: the information must be “supplied” and it must be supplied “in confidence”. It is difficult to conceive how the Third Party could meet this part of the test, given that the information in question was not supplied, and could not have been supplied, by it to Eastern Health. The records in question document inspections of the personal care home itself and its adherence to licensing standards. Eastern Health has already redacted any personal information regarding residents contained in the inspection reports to protect their anonymity as it is obligated to do under the Act. Additionally, in the Reports noted above as well as report A-2007-017, this Office previously looked to *Canada Packers v. Canada (Minister of Agriculture)* 1988 CanLII 1421 (FCA), and concluded that

inspection reports generated as a result of government inspections cannot be considered “supplied” by a third party to a public body.

[14] This Office finds similarly in the present case: the inspection reports prepared as part of the Personal Care Homes Provincial Licensing program are not “supplied” within the meaning of *ATIPPA, 2015* and therefore the second part of the section 39 test has not been met. As a result, section 39 cannot be applied to withhold the information from disclosure. While unnecessary, I will briefly comment on section 39(1)(c) as even if the first and second elements of the test were established, this Office finds the third element could not be satisfied.

[15] A claim under section 39(1)(c) requires detailed and convincing evidence and, as noted in Report A-2011-007, “[t]he assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.” With regard to section 39(1)(c) in the present complaint, the Third Party provided no representations beyond mere speculation. Without evidence establishing probable harm outlined in section 39(1)(c), I cannot find that disclosure of the requested information would lead to that result.

[16] As the Third Party has failed to meet all three parts of the three-part test under section 39 of *ATIPPA, 2015*, I find that section 39 does not apply to the information and it cannot be withheld from the Applicant.

Section 19

[17] Previous reports of this Office have addressed the operation of section 19 (third party notification), including most recently in A-2019-029. The three reports specifically mentioned above also addressed the operation of section 19 with regard to requests for Operational Standards Compliance Reports for personal care homes. In those previous reports, this Office found that the public bodies had improperly notified the third parties pursuant to section 19. The Third Party in the present complaint was also improperly notified when it should not have been. It is therefore necessary to highlight this commentary again to avoid unnecessarily complicating an access to information request, as has again occurred here.

[18] Section 19 of ATIPPA, 2015 states:

19. (1) *Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40, the head shall make every reasonable effort to notify the third party.*
- (2) *The time to notify a third party does not suspend the period of time referred to in subsection 16 (1).*
- (3) *The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.*
- (4) *The third party may consent to the disclosure of the record or part of the record.*
- (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, state 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.*
- (7) *The head of the public body shall not give access to the record or part of the record until*
- (a) *he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under this Act or has decided not to file a complaint or commence an appeal;*
or
- (b) *a court order has been issued confirming the decision of the public body.*
- (8) *The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.*
- (9) *The third party and the head of the public body shall communicate with one another under this Part through the coordinator.*

[19] This Office has made it abundantly clear to Eastern Health in previous Reports A-2016-011, A-2017-007, and A-2017-008, and through our guidance documents, that where a public body determines that section 39 clearly does not apply, it is not required by *ATIPPA, 2015* to notify any third parties and it should not do so. To do so needlessly interferes with of timely access to information as processing of requests is delayed while third parties are notified and their complaints are addressed.

[20] As outlined in its above submissions to this Office, Eastern Health made clear that it believed section 39 was not applicable at the time of the request. Given Eastern Health had determined that section 39 was not applicable, there was no basis under any provision of *ATIPPA, 2015* to notify the Third Party under section 19. Using section 19 in conjunction with section 39 in this circumstance ignores the right of applicants to timely disclosure under the *Act*.

[21] This seems particularly egregious as the same type of records were previously the subject of the above-noted reports where this was clearly articulated. Eastern Health ought to have known it should not have notified the Third Party in relation to this request for information given it was previously the subject of these similar reports.

CONCLUSIONS

[22] As noted above, the Third Party has failed to meet all three parts of the three-part test under section 39(1) of *ATIPPA, 2015* and, therefore, the records cannot be withheld from the Applicant. Further, Eastern Health should refrain from notifying third parties in future when it has concluded that section 39 does not apply.

RECOMMENDATIONS

[23] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that Eastern Health release the requested information to the Applicant.

[24] Further under the authority of section 47 of ATIPPA, 2015, I recommend that Eastern Health review its policies and procedures regarding notices under section 19 and adapt policies, or update its existing policies, as necessary to ensure that its practices are in compliance with section 19.

[25] 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.

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

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of February 2023.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador