OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-017

October 29, 2013

Eastern Health

Summary: The Applicant requested from Eastern Health several pieces of information regarding a contract for service Eastern Health had with a Third Party. Eastern Health was prepared to release the information requested, however the Third Party objected and filed a Request for Review with this Office. With respect to section 27, the Commissioner found that the burden of proof under subsection 64(2) 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*, S.N.L. 2002, c. A–1.1, as amended, s. 27.

Authorities Cited: Newfoundland and Labrador OIPC Reports A-2013-008 and 2006-005.

File #: 0015-060-13-012

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request on February 14, 2013 to Eastern Health. The request was modified after discussions with Eastern Health and by February 28, 2013 the Applicant sought disclosure of records as follows:

1. *Number of calls in the past year* [the Third Party] *responded to outside their service area for the time frame April 1, 2012 – December 23, 2013, excluding St. John's.*

2. *Number of calls to (1) Ocean pond (2) Mahers (3) Tilton (4) New Harbour for the time frame April 1, 2012 – December 23, 2013.*

3. *Number of complaints filed with your Division for the timeframe April 1, 2012 - March 31, 2013.*

4. *Number of calls responded where an overlapping Operator exist*[s] *for the timeframe April 1, 2012 – December 23, 2013.*

[2] On that same day, Eastern Health notified the Third Party of the information they intended to release in response to this access request. There were some errors found in the notification to the Third Party and the information to be released was revised and notice sent to the Third Party by Eastern Health on March 20. On March 21, 2013 the Third Party replied that they felt the information would fall within the exception in paragraph 27(1)(c) of the *ATIPPA*.

[3] On March 27, 2013 Eastern Health advised the Third Party that they had reviewed their position and had reached a decision to release the information in spite of the Third Party's objection unless the Third Party filed a Request for Review with this Office. The Third Party Request for Review was filed on April 15, 2013.

[4] The informal resolution process was not successful and by letters dated August 16, 2013, the Applicant, Eastern Health and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, all parties were given the opportunity to provide written submissions to this Office in accordance with section 47 of the *ATIPPA*.

II PUBLIC BODY'S SUBMISSION

[5] Eastern Health provided this Office with a brief formal written submission on August 26, 2013. In its submission, Eastern Health states that its position is that the "information does not qualify for exemption under Section 27."

[6] The Applicant made the following submission:

> *The question regarding section 27 is disclosure harmful to the business interest of a third party? The Ambulance Industry Business is unlike most private Companies who use a guided plan or some catchy gimmick to attract customers. We operate to provide patient care and transport under Provincial Legislation, policies and standards. Registrants under Provincial Medical Control follow protocols and are under the License of two Medical Control Doctors while on shift, they do not take instructions from the employer for patient care. The Motor Carrier Act and Provincial Policy give each Ambulance Operator a defined area to operate in along with payment for mileage, block funding for the number of units required with a rebate on fuel depending on pump prices for each trip. The Operator can also be placed on a rotation list for cross Island transfers when required. The funding is the same for all Operators per unit, so is the mileage, attendant fees, rebates, equipment required per unit and all other aspects of Ambulance Operations. To express concern that this information would somehow affect the business or revenue through competition is completely wrong. The request was made to review an area to see how many trips were completed in a given time frame because of an overlap in areas and response times. When an Operator violates another Operators area without permission a report is filed with the RHA to investigate the complaint and measures are taken to ensure this does not happen again. There is no competition between Operators and no other Company can start an Ambulance Company without applying to Government and the PUB for a Certificate and funding to Operate. Funding for Ambulance Operations is by public money this information can be requested by anyone who would like to know how much is being paid out and for what purpose. Through Contract agreements we are all aware how much each unit is funded, dispatch funding, garage funding, fuel rebates, mileage and attendants fees and block funding. Most of the information is available on request from Government, except the information we are requesting. This information will in no way effect* [sic] [the Third Party's] *Operation of their Ambulance Service when done as per contract and Motor Carrier Certificate.*

IV THIRD PARTY'S SUBMISSION

[7] The Third Party acknowledged the burden of proof to establish that the information should not be disclosed rested with them under subsection 64(2) of the *ATIPPA*. They referenced this Office's recent decision in Report A-2013-008 and the test set out therein regarding how to meet this burden of proof.

[8] After stating their case for why this information met the definition of "commercial information", the Third Party went on to set out their evidence that it would be reasonable to expect that disclosure of this information could significantly harm their competitive position or interfere with their negotiating position:

> *The commercial market for ambulance services on the area of the Avalon Peninsula that* [we serve] *is a competitive one, and which* [we have] *held a strong position for the past fifteen (15) years.*
>
> *Competitor ambulance service providers in the area of the Avalon Peninsula would be able to use the information to undermine* [our] *competitive position vis-a-vis* [our] *supplying ambulance services to Eastern Health, specifically by lobbying the Department, and negotiating with the Department, to alter the existing provincial ambulance program such that the number of calls to which* [we respond] *outside* [our] *license service area, the number of calls to which* [we respond] *to certain communities, and the number of calls to which* [we respond] *where an overlapping operator exists, would be reduced.*
>
> *In addition, competitors would be able to use the requested information to interfere with* [our] *own negotiating position with the Department vis-à-vis ambulance operator negotiations and the existing provincial ambulance program.*
>
> *Ambulance Operator negotiations with the Department were placed on hold in early 2013 pending completion of a review of the provincial ambulance program by Fitch and Associates (the "Consultant"), a consulting firm retained by the Government of Newfoundland and Labrador. Government received the Consultant's report on August 20, 2013 and it is expected that negotiations will resume in the near future.*
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> *Competitor ambulance service providers would therefore be able to use the information as part of their lobbying of, and negotiations with, the Department, and thereby conceivably result in a significant financial loss to* [us]*, and a significant financial gain to* [our] *competitors, by altering the existing provincial ambulance program to their benefit.*

V DISCUSSION

[9] Section 27, as recently amended by Bill 29, which came into force June 27, 2012, reads as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal*
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> *(a) trade secrets of a third party;*

> *(b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party; or*
> *(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to*
>
> *(i) harm the competitive position of a third party or interfere 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 significant financial loss or gain to any person or organization, 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] I have recently dealt with the application of this new version of section 27 in Report A-2013-008, so I will not repeat the history of that section in this Report. I will however reference my conclusions there, in particular:

> *[12] Given that one of the main purposes of the ATIPPA is to promote accountability by, among other things, giving individuals a right of access to records in the custody or control of a public body subject to limited and specified exceptions, it is my opinion that the standard of proof under the amended section 27 still requires detailed and convincing evidence to establish a reasonable expectation of probable harm. This is the same standard that existed under the old section 27.*

[11] Further, in Report 2006-005, my predecessor stated as follows:

> *[41] The necessity for "detailed and convincing" evidence is well established in the case law. The decision of the Ontario Court of Appeal in Ontario (Worker's Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) 1998 CarswellOnt 3445 simply states, "if the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed."*
>
> *[42] Third Party 3 addresses the issue of harm briefly in its submission, stating that the Department is not authorized to disclose the information at issue because "this information, in the hands of a competitor, could be used to set wholesale prices for compatible pharmaceutical products which could reasonably be expected to undercut [Third Party 3's] prices and displace the Products on the Formulary." Additionally, in the brief notation accompanying each appendix of the record of which it objects to disclosure, Third Party 3 says that such disclosure "could reasonably be expected to be harmful to its business interests, specifically the competitive pricing of the Products relative to its competitors." As noted above, the Department presented no evidence in relation to harm, and the case put forward by Third Party 3 is neither detailed nor convincing regarding the nature or severity of the harm which it anticipates from the release of this information…*

[12] In this case, beyond the bare statement that it would harm and/or interfere, there was no evidence before me as to specifically how the release of the information could reasonably be expected to lead to harm to the Third Party's competitive position or interfere with their negotiating position. The mere statement that it would harm or interfere does not meet the requirement for "detailed and convincing" evidence. Furthermore, as stated in Report A-2013-008:

> *[29] Given the importance of the principle of accountability, it is also my opinion that heightened competition should not be interpreted as harm. Heightened competition ensures that public bodies are making the best possible use of public resources*

VI CONCLUSION

[13] Given the standard of evidence required to show harm as established by the case law, it is my opinion that the Third Party has not met the burden of proof to show there is a reasonable likelihood of probable harm in this case. Further, there is not enough evidence to support a claim of interference with their negotiating position. The evidence presented was neither detailed nor convincing. Thus, it is my conclusion that section 27 is not applicable in the present case and the requested information should be released to the Applicant.

VII RECOMMENDATIONS

[14] Under the authority of section 49(1) of the *ATIPPA*, I recommend that Eastern Health release to the Applicant the information that was withheld under section 27.

[15] Under the authority of section 50 of the *ATIPPA*, I direct the head of Eastern Health to write to this Office, the Applicant and the Third Party within 15 days after receiving this Report to indicate their final decision with respect to this Report.

[16] Please note that within 30 days of receiving the decision of the Eastern Health under section 50, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[17] Dated at St. John's, in the Province of Newfoundland and Labrador, this 29th day of October, 2013.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador