OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

March 4, 2021

ATIPPA Statutory Review
Hon. David Orsborn, Chair
3rd Floor, Beothuck Building
20 Crosbie Place
St. John's, NL

By Email: admin@nlatippareview.ca

Dear Chair Orsborn:

OIPC Comments in Response to Hypothetical Amendment to Section 39

Thank you for your letter of February 9, 2021. We have responded to your questions below, however, we have also taken the opportunity, on the presumption that this particular model may be under consideration as a potential recommendation, to make other comments about the hypothetical amendments.

The access to information provisions in *ATIPPA, 2015*, and indeed all similar statutes in Canada, begin with the proposition that there is a public right of access to records in the control or custody of public bodies, with limited and specific exceptions. If there is consideration being given to broadening those exceptions, we are of the view that there must be clear and substantial evidence that it is necessary to take that action, because it amounts to a reduction in the public right of access. When it comes to section 33, for example, that evidence is readily apparent that an amendment is required. To date, nothing that we have seen in written submissions, nor in oral presentations, nor in our many years of carrying out our oversight role, constitutes evidence that section 39 is not adequate to the job, and that Newfoundlanders and Labradorians should accept less than our current standard of access to information.

Background

The vast majority of requests to public bodies for information that requires consideration of sections 19 and 39 are for disclosure of the financial and other details relating to contracts to supply goods or services to a public body.

As a matter of policy, it is accepted across the country that most of the information contained in such contracts should be disclosed, to further the goals of accountability and transparency. Our Court of Appeal recognized this in the *Corporate Express* decision:

P. O. Box 13004, Station "A", St. John's, NL A1B 3V8
Telephone: (709) 729-6309 • Facsimile: (709) 729-6500
E-mail: commissioner@oipc.nl.ca • www.oipc.nl.ca

[35] Also, see the comments of Strayer J. in his earlier decision of **Société Gamma Inc. v. Canada (Department of Secretary of State)** (1994), 47 A.C.W.S. (3d) 898, 56 C.P.R. (3d) 58. In that case, when considering whether information supplied in the course of public procurement was confidential in the context of subsection 20(1) of the *Access to Information Act* (the "*Federal Act*") being equivalent to subsection 27(1) of *ATIPPA*, Strayer J. wrote:

> ***One must keep in mind that these Proposals are put together for the purpose of obtaining a government contract, with payment to come from public funds. While there may be much to be said for proposals or tenders being treated as confidential until a contract is granted, once the contract is either granted or withheld there would not, except in special cases, appear to be a need for keeping tenders secret. In other words, when a would-be contractor sets out to win a government contract, he should not expect that the terms upon which he is prepared to contract, including the capacities his firm brings to the task, are to be kept fully insulated from the disclosure obligations of the Government of Canada as part of its accountability.*** *The onus as has been well established is always on the person claiming an exemption from disclosure to show that the material in question comes within one of the criteria of subsection 20(1) and I do not think that the claimant here has adequately demonstrated that, tested objectively, this material is of a confidential nature.*
> ***[Emphasis mine]***

It is not because the disclosure of the information in such contracts cannot affect confidentiality, or the competitive position of suppliers – sometimes it will. Rather, it is fundamentally because government procurement must be done on the basis of "open contracts, openly arrived at." Some loss of confidentiality, or intensification of competition, is to be regarded as a necessary effect of doing business with public bodies.

Supplied in Confidence – the Lynchpin of Section 39

The key to the predictable, smooth and efficient operation of this provision of the *Act* is not the harms test, or even the confidentiality test. It is the "supplied" test. It neatly and clearly encapsulates the distinction between the terms of a negotiated agreement, on the one hand, and other background information that may be provided by the third party to support its position, on the other hand. That is the distinction between what is "negotiated" and what is "supplied."

The former is the subject, and the result, of the negotiation between the parties that led to an agreement. It must be disclosed so that the public can scrutinize how much a public body is paying, to whom, and for what. These are the specifications, unit prices and quantities that are the core of every procurement contract. This is the essence of accountability, and there is no more important measure of the effectiveness of an access to information statute than the mechanisms through which it makes available information about how and on what public money is spent.

The "supplied" information is different. It has sometimes been referred to as "immutable" not merely because it cannot change, but because it was not and could not have been arrived at in the course of negotiating the agreement, but outside and prior to it. For example, the details of a third party's insurance coverage, or its audited financial statements; details of its arrangements for security or protection of a worksite; details of its proprietary data-management software; details of the experience and professional qualifications of its personnel. This information may have to be provided

to the public body as a requirement of a contract, but it was not created by the negotiation of the contract.

The great value of this "supplied" test is that it clearly and easily distinguishes between the two kinds of commercial or financial information. If the information does not meet the "supplied" test, then the analysis is over. This means that public bodies and third parties proposing to enter into contracts with them can easily and quickly determine what information can be kept confidential (if the harm test is also met) and what cannot. Everyone can be clear from the beginning about what information may be subject to disclosure through an access request.

For clarity, certainty and ease of operation the "negotiated or supplied" distinction should be kept as a component of section 39. Without it, we lose the clarity we now have, and along with it, thirty or more years of Canadian case law.

There are other practical considerations for the ATIPP system as a whole. Under the hypothetical formulation, lacking the relatively clear cut "supplied" test, it would be in the interest of third parties to appeal every time, and the decision will come down to harm, which is a more nebulous concept to grapple with than supplied in confidence. Certainly, we would be much less likely to see public bodies claim the hypothetical version of section 39 without needing to notify third parties, because the main thing public bodies have identified as being difficult about section 39 as it currently exists is the assessment of harm. As it currently exists in the three-part test, they need only concern themselves with the harm portion if they believe that "supplied in confidence" has been met. By removing the "supplied in confidence" requirement, every request involving a third party will require a harm assessment, which will likely result in a large number of complaints and subsequent court appeals.

One of the key features of the Bill 29 review was a keen focus on "user-friendliness" in the Act. Certainly, while the "supplied in confidence" concept might be new to third parties when they first encounter it, there are ample guidance documents and case law available to explain it. Harm, on the other hand, is an often misunderstood concept, and a more nebulous one to explain. The other important user here is the public body coordinator. It is worthwhile to briefly scan the ATIPPA Guide for Municipalities to get a flavour for the level that most municipal coordinators, and therefore most coordinators, are operating from. Clarity and consistency are necessary for these public servants, who often perform coordinator duties from the proverbial "corner of the desk" along with many other duties. The more straightforward we can make the decision-making process, with the clearest guard rails, the more we will contribute to the user-friendliness of this provision from their perspective.

Another important rationale for retaining the current three-part test with the "supplied in confidence" threshold which is common to several jurisdictions across Canada, is that it facilitates informal resolution of complaints. When we have a well-established, clear threshold in the statute, we have the ability to walk through the guidance and case law with third parties to resolve cases that would otherwise absorb the resources of public bodies and third parties, and potentially delay access for applicants unnecessarily. It will be much more difficult to resolve those cases when they revolve around proof of harm. Our experience is that the mere idea of disclosing information that references them has at times resulted in third party appeals. Harm is often asserted by third parties but is much less often supported by evidence.

The hypothetical section 39, if implemented, might result in roughly the same level of transparency, or it might result in less. It will certainly result in a great deal more difficulty to administer, and a much

higher investment on the part of public bodies, applicants and third parties in the complaint and appeal process.

Trade Secrets

British Columbia's *FIPPA* contains a definition of "trade secret". Ontario's Commissioner adopted its own definition in an early Order (M-29). After reviewing dozens of decisions from these and other jurisdictions, it is apparent that cases where information was found to actually meet the definition are extremely rare. As expressed in our earlier oral presentation, we suspect this is likely because it would be extremely rare for a third party to provide its trade secrets to a public body.

In **Société** Gamma Inc. v. Canada (Secretary of State) Strayer J. held:

> *In the absence of authoritative jurisprudence on what is a "trade secret" for the purposes of s. 20(1), the Court held that "trade secrets" must have a reasonably narrow interpretation, since one would assume that they do not overlap the other categories: in particular, they can be contrasted to "commercial ... confidential information supplied to a government institution ... treated consistently in a confidential manner ..." which is protected under s. 20(1)(b). In respect of neither (a) nor (b) is there a need for any harm to be demonstrated from disclosure for it to be protected. There must be some difference between a trade secret and something which is merely "confidential" and supplied to a government institution. **A trade secret must be something, probably of a technical nature, which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure.***

Effectively, the definition of "trade secret" is such that if a record were to be encountered to which the label "trade secret" could be correctly applied, by its very definition the disclosure of it would likely meet the harm threshold. Alberta's statutory definition, for example, even includes harm as one of its essential elements:

> *1(s) "trade secret" means information, including a formula, pattern, compilation, program, device, product, method, technique or process*
>
> *(i) that is used, or may be used, in business or for any commercial purpose,*
>
> *(ii) that derives independent economic value, actual or potential, from not being generally known to anyone who can obtain economic value from its disclosure or use,*
>
> *(iii) that is the subject of reasonable efforts to prevent it from becoming generally known, and*
>
> *(iv) the disclosure of which would result in significant harm or undue financial loss or gain.*

The only question, then is whether such information could be deemed to be "supplied in confidence" even in the procurement context. After searching dozens of decisions from several different jurisdictions, it has been very difficult to even find an instance where the trade secret of a third party has been included within a set of responsive records that is subject to a complaint. Decisions which find that the responsive information *does not* meet the definition of "trade secret" are not particularly rare, however. Alberta Order F2011-011 appears to be one exception. The Adjudicator in that case found the information to be a trade secret, and also that it met all three parts of the test, despite the procurement context.

Given the foregoing, redesigning a statutory provision in *ATIPPA, 2015* by carving out a special place for trade secrets seems unnecessary because

(a) the jurisprudence from ours and other Commissioner's offices indicates that it is extremely unlikely that trade secrets will be subject to access to information requests because of the apparent rarity of such information actually being disclosed to public bodies by third parties; and
(b) in the exceedingly rare event that such information is disclosed to public bodies, Alberta Order F2011-011 demonstrates that the statute is capable of supporting information being withheld when warranted.

Alternatively, if the status of trade secrets within section 39 is of particular concern, given the rarity of its appearance in access to information complaints, Commissioner's Reports, and court decisions, one option might be to incorporate within *ATIPPA, 2015* the definition of trade secrets in Alberta's *FIPPA*, and carve trade secrets out as a standalone exception, leaving the remainder of section 39 as is.

Of or About

We note that in the hypothetical revised draft of section 39, the language in section 39(1)(b) is changed from "of a third party" to "of or about a third party." The only instance in which we have encountered an issue with this language began with our Report A-2017-004, which resulted in *Atlantic Lottery Corporation Inc. v. Newfoundland and Labrador (Finance)* 2018 NLSC 133 and subsequently *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222. The latter decision is now before the Court of Appeal. We anticipate that the Court of Appeal will rule on the meaning and scope of the term "of a third party," and whether or not it should include parties that are not the primary owners of the information, but perhaps have some lesser degree of proprietary interest. Our position is that clarity is to be preferred, regardless of the outcome, and the clearer the outcome the better, for reasons cited above regarding user-friendliness of the *Act*. In *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, the Court of Appeal has already commented on the objective nature of the present test in section 27(1)(b) (now 39(1)(b)):

> *[26] **Whether the requested information is the confidential information of a third party requires that the contents of the requested information be examined with a view to identifying the origin and ownership of the information**. This is an essential part of the test for exemption set out in section 27(1)(b), along with whether the information was supplied by the third party explicitly or implicitly in confidence and whether it was treated consistently as confidential information by the third party. Application of the test involves fact finding, the application of legal principles and interpretation of the legislative provision. It is an objective determination, made in the context of the purpose of the legislation. Accordingly, I do not agree with Staples that the Judge erred in saying that the test under section 27(1)(b) is an objective one.* **[Emphasis added.]**

Our concern regarding the notion of "of our about" is that it runs the risk of inserting a fuzziness in the process that could be challenging for public bodies to administer. This will particularly impact administration of the notification regime in section 19. It is usually clear cut which third parties are implicated in a record for the purposes of section 39. Oftentimes, many of the responsive records

derive from a direct business relationship between the public body and the third party. It does not frequently arise that there may be records about a third party that is not involved in some sort of direct relationship with the public body. In our experience, the above matter appears to be a unique situation, which will itself be resolved by the Court of Appeal. To address an apparently unique circumstance through a statutory amendment would appear to be unnecessary, and the hypothetical solution is one which could add to the burden of public bodies when attempting to determine whether notification is necessary, and with public bodies likely erring on the side of caution, ultimately result in a greater number of notifications, resulting in more complaints and appeals.

Response to Questions

The starting assumption and questions you posed are as follows:

> *Assuming the above statutory provision I would ask you to:*
> *1. Assume that*
> *(i) The OIPC is satisfied that the information is a trade secret, or*
> *(ii) The OIPC is satisfied that one of the harms in paragraph (l)(b) has been proven.*
> *2. Assume also that the (4) public interest override is not satisfied.*

Your two questions are as follows:

> *A) In these circumstances, should disclosure be refused or granted?*
> *B) Somewhat related, should it be made explicit that the OIPC can recommend granting access on the basis of the public interest override?*

Our combined response to both questions follows, along with additional comments:

On review, the Commissioner would recommend that disclosure should be refused. The assumption you provided indicates that we have found that the exception applies. The language in the hypothetical section 39(4) is different from the language that currently exists in section 9. Section 9 says the exception "shall not apply" where the conditions are met for the override. The hypothetical draft of 39(4) appears to simply give the public body the discretion to release information that is otherwise subject to a mandatory exception, because it says "the head of a public body *may* disclose." The Commissioner does not have the authority to recommend disclosure of a record to which a public body is authorized to refuse disclosure. Conceivably, we could recommend reconsideration of the decision under section 47(b), but that would be the extent of our authority. The answer to your second question, then, is that the provision would need to be formulated differently in order for the OIPC to recommend that access be granted on the basis of the public interest provision as currently proposed.

There are also other considerations for the statute in light of such a hypothetical provision. In terms of the burden of proof, the public body in section 43(1) has to prove that the applicant has no right of access. Functionally that means that the public body must prove that the exception applies, which as noted, we are presumed to have concluded.

If hypothetical section 39(4) were to be contemplated for inclusion in the statute, consideration would need to be given to the declaration provision in section 50(2), which is currently divided into (a) and (b) for circumstances where refusal is either authorized or required. In either case, if we have already made a finding that the exception applies, yet recommended disclosure based on consideration of

the hypothetical 39(4), a Court must grant a declaration that the public body need not follow the recommendation to disclose.

Section 50(5) says that sections 57 to 60 apply to a declaration application. We should therefore turn to section 60(2), where again, we encounter statutory language which has been customized for the present section 9, but is not a good fit for the hypothetical section 39(4).

It is our view that the hypothetical section 39(4) could not result in a recommendation for disclosure once we have concluded that the exception applies as such a recommendation would likely not survive a declaration application, or for that matter, an appeal by a third party.

Furthermore, and most importantly, the hypothetical section 39(4) is unlikely to be used. For one, our experience is that when public bodies find that a discretionary exception applies, they claim it. Whether or not the claim is valid is the matter under consideration upon review by the OIPC or in a Court Appeal, rather than the exercise of discretion. To convert section 39 to a discretionary exception under the conditions outlined in section 39(4) is unlikely to result in greater transparency to any significant degree. Even section 9 itself is a very high threshold, however it at least has the advantage that once the threshold is met, the exception no longer applies. Functionally, the hypothetical section 39 cannot be considered to be an "over-ride" provision because it does not actually over-ride the exception. It merely inserts an additional decision point where the public body has an opportunity to exercise discretion. Based on what we have heard and what we know from our experience with public bodies, there is a strong orientation towards maintaining positive working relationships with third parties, which we believe would certainly militate against a public body exercising its discretion to disclose information to which the exception has been found to apply. An alternative may simply be to list section 39 in section 9(2).

We appreciate your efforts to improve this section of the *Act* that has generated so much discussion. With respect to the submissions made by other parties, just because there is dissatisfaction with the section does not mean that it is not is not achieving the public policy purpose for which it was intended. Certainly, we have not heard any dissatisfaction from the public, who are largely absent but essential stakeholders whose voice we attempt to represent in addition to our own. As we noted above, the policy purpose of the section as we understand it was to provide greater transparency and accountability in how public bodies do business and spend public money. Such transparency may indeed place a higher level of competitive pressure on commercial third parties who do business with government. This is not a flaw of the provision; it is an essential byproduct. We believe the present level of disclosure is desirable and in the public interest. And so we reiterate that, with the greatest of respect to your efforts to improve this section, it is our view that the evidence is not present to demonstrate that the provision requires amendment or that it does not work well as it is currently designed.

Yours truly,

Michael Harvey
Information and Privacy Commissioner