



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-009

November 10, 2015

Eastern Health

Summary:

The Applicant requested from Eastern Health information, both financial and otherwise, in relation to [a computer system upgrade] at Eastern Health. Eastern Health was prepared to release the information requested, however a Third Party objected and filed a Complaint with this Office. The Third Party claimed that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). With respect to section 39, the Commissioner found that the burden of proof under subsection 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, S.N.L. 2015, c. A-1.2, ss.39, and 114(1)(a)

Authorities Relied On:

Corporate Express Canada Inc. v Memorial University of Newfoundland, 2015 NLCA 52; *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University*, Gary Kachanoski, 2014 NLTD(G)107. Newfoundland and Labrador OIPC Reports A-2015-006, A-2015-005, A-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, 2008-002 and 2007-003.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to Eastern Health seeking disclosure of financial information (budget and actual expenditures), documentation and correspondence between Eastern Health and the Department of Health and Community Services relating to a computer system upgrade at Eastern Health.
- [2] Following receipt of the request, Eastern Health informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* Eastern Health notified the affected Third Parties. Upon notification, a Third Party filed a complaint with this Office opposing the release of the information.
- [3] Attempts to resolve this Complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] Eastern Health relied on its position that the requested information did not meet the three-part test outlined in section 39, and that it was prepared to release the information to the Applicant.

III THIRD PARTY’S POSITION

- [5] The Third Party has submitted that the information is commercial and financial information the release of which could reasonably be expected to significantly harm the competitive or negotiating position of the Third Party.
- [6] The Third Party has indicated that pricing to Canadian public sector customers differs from commercial customers and therefore, the release of the information will impede future negotiations in that regard.

[7] The Third Party has claimed that there is a legal risk in releasing the information as the agreement under which the information was provided to Eastern Health states that all information of the Third Party is confidential and proprietary and cannot be disclosed without the Third Party's consent. The Third Party did not elaborate on the nature of this risk.

[8] The Third Party has also indicated that it is the sole provider of this particular service and, consequently, previous Reports from this Office which deal with competitive contracts and tenders are inapplicable.

IV DECISION

[9] Section 39(1) of the *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, [...]*

[10] This is a three-part test; failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information.

[11] In respect of section 39(1)(a), the information in this matter is not a trade secret; however, I accept that it is commercial and financial information. It is my opinion that this element of test has been established.

[12] In respect of section 39(1)(b), as I have stated in earlier Reports, including recently in Report 2015-005, contracts with public bodies for the supply of goods or services are not considered to be information that is "supplied". I find that the information in this case is similar to a tender bid in the sense that it is the amount proposed for goods and services, albeit in a non-competitive

circumstance. As with tender bids, it was necessary for the information to be accepted and agreed upon by the public body in order to accept the Third Party's services. Consequently, the elements of section 39(1)(b) have not been established and section 39 cannot be applied to protect the information from disclosure.

[13] Given that I have found that the second element of section 39 has not been established I need not go any further in my analysis, however, I will elaborate on section 39(1)(c) as it is my finding that even if the second element of the test was established, the third element would not be satisfied.

[14] A claim under section 39(1)(c) requires detailed and convincing evidence and, as established 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.”

[15] The information which the Third Party presented to this Office does not establish a reasonable expectation of probable harm. In Report 2013-009 I stated:

[...] I interpret “harm to competitive position” to mean actions or harm which would place other bidders at an unfair competitive advantage, 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 entities.

[16] Furthermore, this was a sole source contract (i.e. non-competitive), so I am unable to conclude that there would be any harm to the Third Party's competitive position given that only the Third Party can provide these services. Additionally, given that the Third Party has admitted that it currently operates with two distinct pricing strategies, one for public sector customers and another for commercial customers, I fail to see how the release of this information could harm the Third Party's negotiating position. The two pricing strategies would continue as before.

[17] In respect of the Third Party's claim that there may be legal ramifications if the information is released, I would first remind the Third Party that the *ATIPPA, 2015* is a provincial statute which applies in this situation, and no contractual language can supersede a law passed by the legislature of the province.

[18] I would also note section 114(1)(a) of the *ATIPPA, 2015*:

114. (1) An action does not lie against the government of the province, a public body, the head of a public body, an elected or appointed official of a local public body or a person acting for or under the direction of the head of a public body for damages resulting from

(a) the disclosure of or a failure to disclose, in good faith, a record or part of a record or information under this Act or a consequence of that disclosure or failure to disclose; or
[...]

V RECOMMENDATIONS

[19] The Third Party has not met the burden of proof with respect to section 39. Therefore, it is my finding that section 39 does not apply to the requested information, and under the authority of section 47 of the *ATIPPA, 2015* I recommend that Eastern Health release the requested information to the Applicant.

[20] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Eastern Health must give written notice of his or her decision with respect to this recommendation to the Commissioner and the Third Party within 10 business days of receiving this Report.

[21] Please note that within 10 business days of receiving the decision of Eastern Health under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of November 2015.

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