



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-026

December 2, 2016

**Department of Health & Community Services
& Western Health**

Summary:

The Applicant requested substantially the same information from two public bodies, the Department of Health and Community Services (the “Department”) and Western Health. The requests included a Third Party’s correspondence with each, as well as a copy of its bid to tender and contract with Western Health. Both the Department and Western Health were prepared to release the information requested, The Third Party objected and filed two complaints with this Office, claiming that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). 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. The Third Party also argued that a portion of the responsive records in question were not “public records” and were not under the “custody and control” of either Public Body. The Commissioner found that both arguments lacked merit.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015,
S.N.L. 2015, c. A-1.2, ss. 2, 5, 39 and 43.

Authorities Relied On:

OIPC Reports [A-2016-007](#), [A-2016-008](#), [A-2016-006](#), [A-2016-002](#), [A-2015-005](#), [A-2015-002](#), [A-2014-012](#), [A-2014-008](#), and [A-2011-007](#) at <http://www.oipc.nl.ca>.

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 the Department of Health and Community Services (the “Department”) seeking disclosure of the following:

“I would like to obtain: 1 – all e-mails, meeting minutes, research, & other correspondence in any and all formats (briefing notes, studies, presentations) between [named individual], owner of [Third Party] (based in Corner Brook), and Dept of Health and Community Services. 2 – A copy of the contract, including funding model (as stated by [named individual]) between Western Health and [Third Party].”

- [2] Also pursuant to the *ATIPPA, 2015*, the same Applicant submitted an access to information request to Western Health seeking disclosure of the following:

“I am looking to obtain: 1 – All e-mails, meeting minutes, research, & other correspondence in any and all formats (briefing notes, studies, presentations) between [named individual], owner of [Third Party], and Western Health. 2 – A copy of all bids to the tender 0171-1615 “Supply of Non-Urgent Transport Services.” 3 – A copy of the contract between Western Health and [Third Party] (including winning tender bid).”

- [3] Both the Department and Western Health informed the Applicant that they each had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* both the Department and Western Health decided to notify the affected third party. The Third Party filed complaints with this Office, opposing the release of the records in both cases.

- [4] Attempts to resolve these Complaints by informal resolution were not successful, and the complaints were referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODIES POSITION

- [5] Both the Department and Western Health relied on the position that the requested information did not meet the three-part test outlined in section 39, and that they were prepared to release the information to the Applicant.

[6] Both believed that the Third Party had only met part one part of the three part test set out under section 39, namely that the information responsive to the requests included material that would reveal information described under section 39(1)(a)(ii).

III THIRD PARTY'S POSITION

[7] The Third Party provided the same detailed submission for each complaint during the informal resolution process. The Third Party took issue with the position of the Department and Western Health that section 39(1)(b) and (c) had not been met, stating;

- “the information provided was proprietary in nature;
- supplied at the request of Government officials;
 - made expressly “in confidence”;
 - includes, “information on pricing, equipment and training relative to the undertaking of the Third Party developed at the time and expense of the Third Party.” and,
 - that disclosure of the information in question would, “directly impact its competitive position with respect to current and future tender calls as it would be unable to recoup its business development costs in providing competitive bids.”

[8] The Third Party also made two separate arguments outside section 39. It objected to the release of the information maintaining that “it is not a public record and therefore is beyond the jurisdiction of the Office of the Information and Privacy Commissioner,” and “the documentation proposed to be supplied is not in the custody or control of a public body as defined in section 5 of the Act and is therefore beyond the jurisdiction of the Office of the Information and Privacy Commissioner to compel its release.”

IV DECISION

Section 39

[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,*
- (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] This is a three-part conjunctive test; failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information and the release of same.

[11] With respect to section 39(1)(a), I agree with both the Department and Western Health that there is commercial and financial information included in the requested records, so I find that this element of the test has been established.

[12] In respect to section 39(1)(b), the Third Party submits that “it is clear and conclusive on either a subjective or objective basis that the proposal was provided to government in confidence,” and referred to the express wording of the proposal at page four, which states;

“The document contains proprietary and confidential information. All data submitted to [the Public Bodies] is provided in reliance upon its consent not to

use or disclose any information contained herein except in the context of its business dealings with [Third Party].”

[13] While I acknowledge the express wording of the proposal, it is important to note that a Public Body cannot contract out of its obligations under the *ATIPPA, 2015*. As Western Health itself noted:

“We considered the Statement of Confidentiality and Non-Disclosure included at the front of the Proposal and Tender bid. Respectfully, we do not believe that inserting a confidentiality disclaimer in a document is sufficient to render it confidential and as a result, not subject to disclosure under the ATIPPA, 2015. Rather, when an Applicant makes an ATIPPA, 2015 request for this type of information, it is our position that we respond to it as an ATIPPA, 2015 request whereby third party notifications are distributed to the Third Parties.”

I agree with this statement. It is preferable that public bodies include clauses in tendering documents noting that any information provided is subject to the *ATIPPA, 2015*. The absence of that explicit proviso, however, does not relieve a public body of its legislative responsibilities. Further, third parties cannot, by simply incorporating a statement of confidentiality, exclude the application of the *ATIPPA, 2015*.

[14] As the Department noted in its submission, “simply stating something is confidential does not make it so.” As stated in Report A-2016-006, accepting all information provided to a public body as confidential based on simple assertions of confidentiality would be to head down a slippery slope towards frustrating the purpose and intent of the Act.

[15] Furthermore, even if I were to find that the information in question was provided in confidence, it cannot be said to have been “supplied.” In Report A-2014-008 this Office addressed the meaning of “supplied” noting that, “the requested information formed part of a contract, which is deemed in most cases to be “negotiated” information.

[16] The Third Party was the successful bidder, and the information provided was not immutable or subject to change. In this case the proposal was incorporated into a contract and therefore the information provided is properly seen as negotiated due to the fact that the other party, Western Health, agreed to it.

[17] Consequently, the elements of section 39(1)(b) have not been established by the Third Party who bears the burden of proof. As a result, section 39 cannot be applied to except the information from disclosure. 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 address section 39(1)(c) as I find that even if the second element of the test was established, the third element would not be satisfied.

[18] 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.”

[19] The Third Party focused its arguments on section 39(1)(c)(i) and (ii) in its submissions. Generally, the Third Party claimed that the release of the information could reasonably be expected to cause harm to its business interests and jeopardize its competitive advantage in its field of work. Beyond statements to this effect, suggesting that disclosure of the Third Party’s proposal would provide its blueprints or pricing strategy to other similar entities seeking to compete in this area of business, and that competitors knowing such details would put the Third Party at a competitive disadvantage, the Third Party has provided no clear evidence that disclosure of the information requested would harm its competitive position.

[20] In that regard, Report A-2016-002 noted:

“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.”

Without detailed and convincing evidence to support the argument of real (and not merely speculative) harm or establishing a reasonable expectation of probable harm, the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position under section 39(1)(c)(i).

[21] With respect to section 39(1)(c)(ii), the Third Party submits that disclosure of the records in question will “discourage any entrepreneur from submitting any such cost saving proposals to government in future,” and that “this in turn would harm the ability of government to assess and alter public expenditures to obtain the maximum utilization of public funds.”

[22] The Third Party’s argument on this point is purely speculative, and is accompanied by no supporting evidence. On the contrary, information of the type that is the subject of this Report has been disclosed through access to information requests since the original *ATIPPA* came into force in 2005, and no examples of the outcome described by the Third Party have emerged to date.

[23] As the Third Party has failed to meet parts two and three of the three-part test under section 39 of the *ATIPPA, 2015*, I find that section 39 does not apply to the information in question and the Third Party cannot rely on section 39 to require that the information be withheld from the Applicant.

Sections 2 and 5: “Public Record” and “Custody and Control”

[24] With respect to the Third Party’s argument that the information in question is not a “public record” and therefore beyond the scope of this Office’s jurisdiction, there is no merit to this claim. The *ATIPPA, 2015* only provides a definition of “record” and not “public record”. “Record” is defined as:

“2(y) “record” means a record of information in any form, and includes a dataset, information that is machine readable, written, photographed, recorded or stored in any manner, but does not include a computer program or a mechanism that produced records on any storage medium.”

[25] The responsive information in question meets this definition. Further, neither the Department nor Western Health questions whether the information responsive to the Applicant’s request is a record within the meaning of section 2(y).

[26] The Third Party also suggested that the responsive information in question is not in the “custody or control” of the Public Bodies under section 5 of the *ATIPPA, 2015* and therefore beyond the scope of this Office’s jurisdiction. The Public Bodies themselves are in this case in the best position to determine what is in their custody and control and neither the Department nor Western Health has raised any concerns as to whether the information responsive to the Applicant’s request is in their custody or control.

[27] Report A-2014-012 discussed the meaning of this phrase at length, highlighting numerous factors to consider in assessing custody and control. I am satisfied that the records in question are in the custody and control of both the Department and Western Health. Furthermore, the Public Bodies are reliant on the responsive records in question to enforce a contractual relationship between Western Health and the Third Party, which reinforces the conclusion that these records are in the custody and control of the Public Bodies.

[28] I conclude that the responsive information in question is both a record and in the custody and control of the Public Bodies such that the OIPC has jurisdiction to review this matter.

VI RECOMMENDATIONS

[29] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department and Western Health release the requested information to the Applicant.

[30] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department and Western Health must give written notice of his or her decision with respect to this recommendation to the Commissioner and any person who was sent a copy of this Report (in this case the Third Party) within 10 business days of receiving this Report.

[31] Please note that within 10 business days of receiving the decision of the Department and Western 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*. Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has served the Department and Western Health with notice of an appeal prior to that time.

[32] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of December 2016.



Donovan Molloy, Q.C.
Information and Privacy Commissioner
Newfoundland and Labrador

