



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-008

February, 10th, 2017

Eastern Health

Summary:

The Applicant requested detailed information regarding [named Personal Care Home], between January 1st, 2015 and the date of the request, in relation to the revocation of the personal care home's license. 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, [named Personal Care Home], subsequently filed a complaint 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.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, ss. 19, 39 and 43(3).

Authorities Relied On:

[Canada Packers v. Canada \(Minister of Agriculture\) 1988 CanLII 4121 \(FCA\)](#). Reports [A-2011-007](#), [A-2016-002](#), [A-2016-008](#), [A-2016-11](#), [A-2016-026](#); [A-2016-030](#) at www.oipc.nl.ca.

Other Resources:

[Business Interests of a Third Party \(Section 39\)](#).

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 the following:

Any and all records pertaining to [named Personal Care Home] having its license revoked, including the details of its non-compliance with Personal Care Home Operational Standards. Request includes records in any and all formats, including paper and electronic. Date range of request is January 1, 2015 – present.

- [2] Eastern Health informed the Applicant that it had decided to disclose the records, but relying on its interpretation of section 19 of the *ATIPPA, 2015*, Eastern Health notified the affected Third Party of its decision, who then filed the present complaint opposing the release of the records in question.

- [3] As attempts to resolve the complaint by informal resolution were not successful, the complaint was referred to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] Eastern Health determined that the requested information did not meet the three-part test outlined in section 39, and was prepared to release the information to the Applicant. Eastern Health submitted that the information meets part one of the test under section 39(1)(a), but found the information did not meet the tests under section 39(1)(b) and (c). With respect to section 39(1)(b), Eastern Health asserted that since the records in question relate to inspections and reports conducted either by Eastern Health or Service NL as part of the licensing program for personal care homes, “it cannot be stated that this information was ‘supplied in confidence’.” It went on to state that it did not believe the information met the requirements of section 39(1)(c) because it does not meet the test of “harming significantly the competitive position” of the [named Personal Care Home].

III THIRD PARTY'S POSITION

- [5] The Third Party submitted that the information in question meets the three-part test under section 39. Specifically in relation to section 39(1)(a), it noted that because it is in the process of establishing another business utilizing its building, the information in question could undermine a successful start-up. It also argued that the information contains “falsehoods which have not as yet been tested in a Court of Law,” and therefore could hurt any future legal action taken.
- [6] With respect to section 39(1)(b), the Third Party noted Eastern Health’s Operational Standards prohibit it from making public “any information regarding any resident,” suggesting the information in question must be kept in confidence. The Third Party acknowledged that Eastern Health had redacted resident names but suggested this was not sufficient to protect the confidentiality and privacy of residents.
- [7] Finally, under section 39(1)(c) the Third Party referenced a potential lawsuit and its future new business to suggest release of the information in question could harm its competitive position or interfere with its negotiating position.

IV DECISION

Section 39

- [8] At issue is the disclosure of a significant volume of responsive records. The records include quarterly and annual inspections conducted on the Third Party during the period from January 1st, 2015 to the date of the request, as well as inspection reports and correspondence between Eastern Health and [named Personal Care Home] in relation to these inspections, reports and their findings. The records note compliance and non-compliance with the Personal Care Home Operational Standards and highlight issues leading to the revocation of the [named Personal Care Home’s] license.

[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 test; failure to meet any part of the test will result in section 39 not applying. If it does not apply, a public body must disclose the requested information to the Applicant.

[11] Eastern Health provided limited details in its notice to the Third Party as to why it believed section 39 is not applicable to the requested information. Section 19(5)(a) of the *ATIPPA, 2015* requires that a public body provide some details that address how it arrived at this conclusion when sending third parties notice. This requirement is also referred to in detail in this Office's guidance document, "Business Interests of a Third Party." While this practice better facilitates a third party's understanding of the process and its purpose, the burden of proof lies with the Third Party in accordance with section 43(3), so it must demonstrate with evidence the applicability of the three-part harms test.

[12] With respect to section 39(1)(a), I find the Third Party fails 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 section. While the Third Party submitted representations suggesting the information meets this part of the test as it involves information that could harm its future business prospects, that argument does not address the requirements of this part of the test. Finding the Third Party failed to establish the applicability of part one of a three-part test is sufficient to determine that the Applicant is entitled to the records. I will however comment on section 39(1)(b), as I find that 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 the public body. The Third Party suggested the information involves residents and should therefore be confidential. However, I find that the reports in question focus on the personal care home itself and the licensing standards. Eastern Health has also redacted any personal information regarding residents contained in the inspection reports to protect their anonymity as it is obligated to do under the *Act*.

[14] Additionally, while the Third Party made representations that the information is “confidential,” a distinction should be drawn between that term and the notion of “supplied in confidence.” In Report A-2007-017, this Office previously addressed the notion of whether inspection reports generated as a result of government inspections can be considered “supplied” by a third party to a public body. That Report referred to the decision in *Canada Packers v. Canada (Minister of Agriculture)* 1988 CanLII 1421 (FCA), involving similar records:

[12] ...Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the

reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts...

As a result of the Court's analysis in the *Canada Packers* case, this Office held that this type of record could not be "supplied" within the meaning of the *ATIPPA* and therefore the second part of the test was not met. I find similarly in the present case: the inspection reports prepared by Eastern Health and Service NL as part of the Personal Care Homes Provincial Licensing program are not "supplied" within the meaning of the *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 except the information from disclosure. While unnecessary, I will briefly comment on section 39(1)(c) as I find that even if the first and second elements of the test were established, 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."

[16] With regard to section 39(1)(c), 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.

[17] As the Third Party has failed to meet all three parts 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.

Section 19

[18] Previous reports have addressed the operation of section 19 (third party notification), including Report A-2016-011. Despite this it is clearly necessary to address certain points that unnecessarily complicated processing of the Applicant's request.

[19] Section 19 of the *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 exempted 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.

[20] Report A-2016-011, also involving Eastern Health, commented upon this Office's then version of our guidance document entitled "Business Interests of a Third Party" and the process of notification of third parties under section 19(1):

A Section 19 notification ONLY comes into play when there is an intention to release because the Public Body is not certain that section 39 is applicable (those records in the "grey area"). These are records for which the public body does not believe it can discharge the burden of proof to withhold under section 39 but which hold enough of the characteristics of the three parts of the test that they "might" be excepted from disclosure.

[Emphasis in Original]

[21] The guidance document further discussed when there is no requirement to give notice under section 19(1), as follows:

Notification of a third party does not occur automatically or just because the requested information fits into one of the categories in section 39(1)(a). If a Public Body is satisfied that section 39 is not applicable the Public Body should release the information and notification to or consultation with the Third Party is not necessary. Likewise, if a Public Body is satisfied that section 39 is applicable, that information can be withheld without notification to the Third Party...

[22] A more recently updated version of this guidance document further emphasizes the importance of this latter point and adds the following sentence:

*If a Public Body is satisfied that section 39 **is not** applicable (i.e. one or more parts of the three part test cannot be met) it **must** release the information and notification to or consultation with the Third Party is not necessary.*

[Emphasis in Original]

[23] It has been made abundantly clear by this Office to this Public Body in guidance documents as well in a previous Report, that where a public body determines that section 39 clearly does not apply, it is not required by the Act to notify any third parties. To do so is a needless and unwarranted frustration of timely access to applicants who have their access to information delayed while the notice to and responses of the third parties are dealt with.

[24] In this case, Eastern Health made clear in its submission to this Office that it believed that section 39 was not applicable at the time of the request:

With respect to the Complaint in question, Eastern Health applied the principles of ATIPPA, 2015 and carefully analyzed S. 39 prior to making a decision to release the records in question. It is the firm belief of Eastern Health that the records in question do not meet the three part test set forth in S. 39 and therefore must be released. Eastern Health does not believe that these records can be said to have been “supplied in confidence”. Furthermore, Eastern Health does not believe that the records, if released, would result in placing the third party in an “unfair competitive position” or that “significant financial harm” would result from the release. We respectfully submit that the records in question are responsive to the request and must be released in accordance with ATIPPA, 2015 and are not subject to the exemption set out in S. 39 of the legislation.

[25] Given Eastern Health had determined that section 39 was not applicable, there was no basis under any provision of the 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.

V RECOMMENDATIONS

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

[27] 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 any person who was sent a copy of this Report (in this case the Third Party) within 10 business days of receiving this Report.

[28] 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*. **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has provided Eastern Health with a copy of a notice of appeal prior to that time.**

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 10th day of February 2017.

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