



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A -2017-009

March 10, 2017

Department of Health and Community Services

Summary:

The Applicant requested copies of correspondence from the Department of Health and Community Services between ambulance operators and the Department relating to the payment of wage subsidies. The Department gave notice to the Third Party and other affected third parties that it intended to disclose some of the information. The Third Party was the only ambulance operator to object to disclosure. After consulting with the Third Party, the Department severed some information pursuant to section 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015* and determined that the remainder should be released. The Third Party complained to this Office, arguing that the information should be withheld pursuant to sections 3 (purpose), 21 (disregarding a request), 39 (business interests of a third party) and 40. The Commissioner found that the Third Party was not entitled to rely on sections 3, 21 or 40 and had not met the test for section 39. The Commissioner recommended that the requested information be disclosed.

Statutes Cited:

Newfoundland and Labrador *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A- 1.2, ss.2, 3, 19, 21, 39, 40, 43, 44.

Authorities Relied On:

Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 27 F.T.R. 194; Reports [A-2013-04](#); [A-2016-016](#); [A-2016-030](#); [A-2017-004](#) at www.oipc.nl.ca.

I BACKGROUND

- [1] On November 1, 2016, the Applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (the “ATIPPA, 2015”) to the Department of Health and Community Services (the “Department”) as follows:

Please provide all or any responsive records for memorandum COR-2016-060935, this includes but not limited to, paper, email, snail mail, any documentation, the monies paid or if paid at all?

- [2] The Department, in conjunction with the regional health authorities, provides funding to ambulance operators in this province. Part of this funding for 2014 to 2017 includes a retroactive wage increase for ambulance staff. The memorandum referenced in the access request is a notice from the Department requiring ambulance operators in receipt of such retroactive wage increase funding to submit to the Department proof that such funding had been paid to employees and former employees. Operators were required to provide the Department with the names and contact information of employees and former employees; payroll records; and amounts of retroactive wages paid or owed to employees by October 31, 2016.
- [3] The Third Party is an ambulance operator in receipt of retroactive wage increase funding from the Department and it complied with the requirements of the memorandum, submitting a total of 56 pages of information to the Department on October 29, 2016.
- [4] The Department determined that all information received from the Third Party was responsive to the Applicant’s request and notified ambulance operators, including the Third Party, to solicit their views regarding whether the records contained information that might be exempted from disclosure under section 39.
- [5] The Third Party was the only ambulance operator to raise concerns about the disclosure of the records and make submissions to the Department. After reviewing the submissions, the Department concluded that the Third Party had not provided detailed and convincing

evidence of a reasonable expectation of harm and had not satisfied the three-part test established by section 39 of the *ATIPPA, 2015*.

[6] The Department then re-examined the records and severed personal information of individual employees under section 40 due to the risk of re-identification. As a result, the Department intended to release a total of six pages of records received from the Third Party, being:

- (a) The cover letter addressed to the Department dated October 29, 2016 (the “Cover Letter”) (2 pages);
- (b) A copy of the Block Funding Tables provided by Eastern Health, detailing block funding received by the Third Party (the “Block Funding Tables”) (2 pages); and
- (c) A copy of Workplace Health Safety and Compensation Commission (now WorkplaceNL) payment arrangement schedules for the Third Party for 2014 and 2015 (the “Payment Schedule”) (2 pages).

[7] The Third Party filed a complaint with this Office seeking to block the disclosure of all records provided by the Third Party to the Department, or, in the alternative, to only release records once all ambulance operators had complied with the directions in the memorandum.

[8] The complaint could not be resolved informally and was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Written submissions in support of its position were provided by the Third Party.

II PUBLIC BODY’S POSITION

[9] The Department received and considered the submissions of the Third Party after providing it with informal notice of its intention to release information. After considering the submissions of the Third Party, the Department takes the position that the responsive records of the Third Party which the Department proposes to release do not satisfy the three-part test under section 39 of the *ATIPPA, 2015* and furthermore disclosure of the

information is not an unreasonable invasion of personal privacy under section 40. The Department determined that the records must therefore be disclosed.

III THIRD PARTY'S POSITION

[10] The Third Party objects to the disclosure of its information in response to the Applicant's request, stating that such disclosure would be harmful to its business interests and would result in similar information not being provided to the Department in the future.

[11] The Third Party has also raised ancillary concerns that the Applicant's request was contrary to the purposes of the *ATIPPA, 2015* as stated at section 3, and that the request was frivolous, vexatious and made in bad faith and should be disregarded under section 21.

IV DECISION

[12] The Department proposes to release three documents provided to it by the Third Party, which contain the following:

- (a) The Cover Letter disclosing the amounts received by the Third Party from the Department for wage increase funding; the amounts paid to its employees in wages; the amounts paid by the Third Party for EI and CPP premiums; and the number of ambulance staff employed by the Third Party;
- (b) The Block Funding Tables also disclosing wage increase funding received and overall block funding received under the 2014-2017 Service Agreement. They also disclose the number of ambulance units operated by the Third Party and full-time equivalent staff positions; and
- (c) The Payment Schedule disclosing total payments by the Third Party to WorkplaceNL for assessments under the *Workplace Health, Safety and Compensation Act*, RSNL 1990, c W-11 for the years 2014 and 2015.

[13] In order to establish that the responsive information must be withheld, the Third Party must meet the three-part test set out at section 39 of the *ATIPPA, 2015*:

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.*

[14] All three parts of the above test must be met. If any part is not met, the records must be disclosed. Pursuant to subsection 43(3) the burden is on the Third Party to establish that the test under section 39 has been met.

[15] First, the Third Party must establish that the records contain “trade secrets of a third party” or “commercial, financial, labour relations, scientific or technical information of a third party”. I am satisfied that all three documents disclose commercial or financial information of the Third Party.

[16] Second, the Third Party must establish that the records were “supplied”, and that they were supplied “implicitly or explicitly, in confidence”. Information that relates to a third party which was created by a public body, or information which is the result of negotiations between a third party and a public body, is not “supplied” within the established meaning of that term. Moreover, the information must have been supplied with an expectation of

confidentiality. The Block Funding Tables and the Payment Schedule are documents which were generated by public bodies: Eastern Health and WorkplaceNL, respectively. They cannot be said to have been “supplied” by the Third Party. The Cover Letter and the information it contains was produced solely by the Third Party and is therefore supplied by it. This Office has held in its past Reports, relying on *Air Atonabee Ltd. v. Canada (Minister of Transport)*, that confidentiality depends on the content, purpose and circumstances under which the information is communicated. The records in question were submitted by the Third Party at the request of the Department and I therefore find, as in Reports A-2016-006 and A-2013-014, that such information cannot be said to have been communicated with a reasonable expectation of confidence that it will not be disclosed. Further, while not determinative of confidentiality (see for example Report A-2016-030 at paragraphs 18 to 21), there is no indication in the text of the Department’s memorandum or the Third Party’s Cover Letter that responses were intended to be treated as confidential. Therefore, I find that the second part of the test has not been met because the information in the Cover Letter was not supplied “in confidence”.

[17] Given my finding with regard to the second part of the test, it is not necessary to address the third part of the test. However, I have considered subsection 39(1)(c) and have concluded that the third part of the test would also not be satisfied. Subsection 39(1)(c) requires that there be clear and convincing evidence that disclosure of information could reasonably be expected to result in one of several types of harm. The Third Party has cited subsections 39(1)(c)(i), (ii), (iii) and (iv), alleging that disclosure would harm its competitive position, result in similar information not being provided in the future, cause undue financial loss or gain and interfere with the resolution of a labour relations dispute.

[18] The Third Party’s concerns under subsections 39(1)(c)(i) and 39(1)(c)(iii) deal with the fact that there is another ambulance operator in their area and the Third Party fears that this competitor could use the information contained in the records to identify the wages paid to the Third Party’s employees and under-bid the Third Party on future contracts. While all three records do contain financial or commercial information of the Third Party, I disagree that the disclosure of the information can reasonably be expected to result in harm to the Third Party. The wage increase funding provided by the Department is in the form of a one dollar

per hour (in 2014 to 2015) and two dollar per hour (in 2015 to 2016) top-up to wages paid to ambulance staff. The information contained in the Cover Letter and the Block Funding Tables merely discloses the amount of funding provided and could not be used to calculate total employee wages. The Payment Schedule, meanwhile, details WorkplaceNL assessments which are a levy charged to businesses based on their overall payroll by applying industry-specific rates. For 2017, the rate for ambulance services is \$2.95 for every \$100 of payroll. This information could potentially be used to determine the Third Party's total payroll costs. However, doing so would require certain assumptions such as the number of employees included in the assessment; that the Third Party does not employ other staff under other industry classifications; and that the assessments charged by WorkplaceNL and enumerated in the Payment Schedule do not include penalties, interest or assessments in arrears. Overall, the Third Party's salaries are only one component of its operating expenses and far more information would be required to determine how the Third Party might bid on a future contract.

[19] The Third Party also alleges that as this matter deals with employee salaries, the records ought to fall under subsection 39(1)(c)(iv) which requires a public body to refuse to disclose records that would reveal information provided to a person or body appointed to resolve a labour relations dispute. The text of the subsection clearly contemplates protecting the confidentiality of information exchanged in the resolution of a labour dispute and is not applicable to the present matter.

[20] Finally, the Third Party raises subsection 39(1)(c)(ii) which requires a public body to refuse to disclose information where the release of such third party information would result in such information no longer being supplied to the public body in the future. The Third Party contends that if its information is released, then it and other ambulance operators will be dissuaded from cooperating with future requests for information, resulting in additional costs and inefficiency in the Department's efforts to obtain this information. The Department has not raised this as a concern. In addition, as this information was requested by the Department to confirm that ambulance operators had in fact spent the wage subsidy funds as intended, the Department could compel cooperation with such audits by withholding

future funding until ambulance operators were in compliance. Therefore, the notion that the Department will be unable to obtain this information in the future is not compelling.

[21] As this Office has stated in previous Reports (see for example Report A-2016-016 at paragraphs 21 to 23), simple assertions of harm do not establish a reasonable expectation of probable harm. I find that the Third Party has not provided detailed and convincing evidence of a reasonable expectation of probable harm and as a result, the Third Party has also failed to meet the third part of the test established by section 39.

[22] With regard to section 40, the Third Party contends that as the corporation is named after a natural person (now deceased), the release of information related to the business would constitute an unreasonable invasion of the privacy of the family members of that individual. I disagree that the release of the corporate name would be an invasion of the privacy of any individual. “Personal information” as defined at subsection 2(u)(i), refers only to information about an identifiable individual and it cannot apply to a business which happens to be named after a deceased individual. The name in this case is “about” the business, not the namesake. Finally, the names of the Third Party’s directors are already publicly available through the Registry of Companies maintained by ServiceNL as required by the *Corporations Act*. The connection between the corporation and the family members who own and operate the business is therefore already public information, and this would be the case even if the Third Party went by a generic name such as “XYZ Ambulance Inc.” rather than the name of a deceased family member.

[23] Beyond sections 39 and 40, the Third Party has raised other objections to the release of the records. However, as confirmed in previous Reports issued by this Office (most recently in Report A-2017-004), a third party may only make a complaint opposing the disclosure of its information pursuant to sections 39 or 40 if it has received notice from a public body with respect to one or the other exception. It is for the public body to decide whether any information in the responsive records ought to be withheld on the basis of any other exceptions provided by the *ATIPPA, 2015*.

[24] The Third Party has requested that this Office consider the initial request to be frivolous, vexatious and made in bad faith under subsection 21(1)(a). Case law and Reports from this

Office and other jurisdictions have established the meaning of the terms “frivolous and vexatious” and “bad faith” in the access to information and protection of privacy context and there is no basis to assert such a claim in this case. Furthermore, section 21 only allows a public body in receipt of a request to apply to this Office to disregard the request. In the present matter, the Department has not chosen to make such an application.

[25] The Third Party has also taken the position that this Office should disregard the Applicant’s request for information as being outside of the spirit and purpose of the *ATIPPA, 2015* as stated in section 3. While section 3 is a statement of principles to inform the application of the *ATIPPA, 2015* it cannot be used as an exception to the right of access.

[26] Having found that all three documents have failed the second and third parts of the test established by section 39 of the *ATIPPA, 2015*; having found that section 40 does not apply; and having also found that there are no further grounds on which to deny the release of the records, I conclude that the Department must release the six pages of records proposed for release, being the Cover Letter, Block Funding Tables and Payment Schedule.

V RECOMMENDATIONS

[27] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Health and Community Services disclose to the Applicant the information it had proposed to disclose, despite the objections made in this complaint by the Third Party.

[28] As set out in subsection 49(1)(b) of the *ATIPPA, 2015* the head of the Department of Health and Community Services must give written notice of his or her decision with respect to these recommendations 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.

[29] Please note that within 10 business days of receiving the decision of the Department of Health and Community Services 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 the Department with a copy of its notice of appeal prior to that time.

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

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

