



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-013

May 8, 2017

Department of Transportation and Works

Summary:

The Department of Transportation and Works (the “Department”) received an access request seeking disclosure of all correspondence between the Provincial Government, two named individuals and the Third Party. The correspondence was identified by the Applicant as “all correspondence and emails exchanged...requesting an increase to the floor space,” at a specific location. The Department was prepared to provide access to the information with only minimal redactions based on section 40 (disclosure harmful to personal privacy), however, the Third Party filed a complaint with this Office objecting to some of the information being released based on section 39 (disclosure harmful to business interests of a third party) and section 31 (disclosure harmful to law enforcement). The Commissioner found that the Third Party was not entitled to rely on section 31 and had not met the test for section 39 and recommended that the information be disclosed.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015,
S.N.L. 2015, c. A-1.2, ss.31 an 39.

Authorities Relied On:

Newfoundland and Labrador OIPC Report [A-2017-004](#)

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Department of Transportation and Works (the “Department”) received an access request seeking disclosure of all correspondence and e-mails exchanged during 2016 between the Provincial Government, two named individuals and the Third Party. The correspondence was identified by the Applicant as “all correspondence and emails exchanged...requesting an increase to the floor space,” at a specific location.
- [2] Following receipt of the access request, the Department informed the Applicant that it intended to provide access to the information, but in accordance with section 19 of the *ATIPPA, 2015*, the Department determined it was necessary to notify the Third Party who then filed a complaint with this Office opposing the release of some of the information.
- [3] As informal resolution could not be achieved the complaint proceeded to formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

- [4] The Department has relied on the position that the requested information did not meet the three-part test outlined in section 39 of the *ATIPPA, 2015*.

III THIRD PARTY'S POSITION

- [5] The Third Party filed a complaint with this Office opposing the release of the information contained on pages 7-14 and 25-28 of the responsive records. Page 28 contains the Third Party's operating expenses in relation to a specific building while the remaining pages contain plans indicating the layout of the building. The Third Party stated that the information contained on page 28 is proprietary commercial information, the disclosure of which may be beneficial to competitors and will harm the Third Party's competitive position.

Regarding the remaining pages, which contain building plans, the Third Party argued that release of this information may compromise security as the plans depict and provide specifications and layouts of certain facilities which are subject to security controls and access restrictions. It is the Third Party's position that both the operating expenses and building plans were provided to the Department with an expectation of confidence and that disclosure of the information would adversely affect the negotiating position of the Third Party with respect to the building's space. The Third Party also claimed that disclosure of the building plans may be contrary to section 31 (disclosure harmful to law enforcement) of the *ATIPPA, 2015*.

IV DECISION

[6] As recently stated in Report A-2017-004, a third party has a right to file a complaint with our Office only with respect to disclosures which might be harmful under section 39 (in the case of business information) or section 40 (in the case of personal information) and about which they have been notified under section 19 of the Act. 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 to disclosure and the ultimate decision on claiming such exceptions always rests with the public body.

[7] Therefore, the Third Party is not entitled to rely on section 31 as an exception to disclosure to withhold the information in question and this Report will only address section 39. It is worth noting that the Third Party had raised section 40 concerns with the Department prior to the Third Party's complaint to this Office and as those concerns were addressed by the Department they did not form part of the Third Party's complaint to this Office.

[8] 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.*

[9] Section 39 is a mandatory exception to disclosure under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be met to allow a public body to refuse to disclose the requested information. If any one part of the test is not met, the public body must disclose the information. Once a complaint is filed with this Office, the burden of proof under section 43(3) rests with the third party to prove that the information must be withheld under section 39.

[10] Page 28 of the records at issue consists of operating expenses while the rest of the records contain building plans. With respect to section 39(1)(a), I am satisfied that the information at issue would reveal commercial, financial or technical information of the Third Party and I therefore conclude that this part of the test has been met.

[11] With respect to section 39(1)(b), the information requested must meet two criteria. The information must be “supplied” and the information must be supplied “implicitly or explicitly in confidence”. I accept that the information was supplied as it was provided by the Third Party to the Department during negotiations with respect to the floor space. It is my understanding that no contract has been signed and the records at issue were provided as supplemental information during the negotiation process.

[12] As for the information having been supplied “in confidence”, I must emphasize that the onus is on the Third Party to prove that. The Third Party simply stated that the information was provided “with the expectation of confidence” but did not provide any evidence of the circumstances under which the information was supplied, to establish that it was supplied in confidence. A simple assertion that the information was provided with an expectation of confidence is not sufficient. Therefore, I conclude that the second part of the test has not been met.

[13] With respect to section 39(1)(c), there must be clear and convincing evidence that one of the types of harm referred to in that section is likely to occur. The Third Party claimed that disclosure of the information would harm its competitive position and adversely affect its negotiating position. Again, the Third Party has provided no evidence to support these statements. Therefore, I conclude that the third part of the test has not been met.

[14] As all three parts of the section 39 test have not been met, these records must be released to the Applicant.

V RECOMMENDATIONS

[15] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department release to the Applicant the records on pages 7-14 and 25-28, which the Third Party objected to being disclosed based on section 39.

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

[17] Please note that within 10 business days of receiving the decision of the Department 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.

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of May, 2017.

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

