



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-012

May 17, 2019

Service NL

Summary:

Service NL received a request for amounts paid out by a Third Party (a lottery licence holder) to another organization for a specific time period. This information was included in the financial reports submitted by the Third Party to Service NL. Service NL decided to issue a notification about the request to the Third Party under section 19. Service NL was prepared to release the records but the Third Party objected to the disclosure and filed a complaint with this Office. The Third Party argued that it is a private organization and the *ATIPPA, 2015* does not apply to the private sector; therefore, its records should not be disclosed by Service NL. The Third Party did not provide any arguments relating to section 39 (disclosure harmful to business interests of a third party) to support its position that the records should be withheld. The Commissioner found that the Third Party did not meet the burden of proof and recommended release of the records.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 5 and 39; [Lottery Licensing Regulations](#) sections 20-23 and 38.

Authorities Relied On:

NL OIPC Reports [A-2014-012](#), [A-2018-023](#); OIPC Guidance [Business Interests of a Third Party \(Section 39\)](#).

I BACKGROUND

- [1] Service NL received an access request pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) seeking access to records of all funds paid to a named organization from the Third Party (a lottery licence holder) from September 1, 2016 to February 7, 2019. This information was included in the financial reports submitted by the Third Party to Service NL.
- [2] Service NL determined it was necessary, in accordance with section 19 of the *ATIPPA, 2015*, to notify the Third Party that it intended to release the records. The Third Party was not satisfied with Service NL’s decision and filed a complaint with this Office.
- [3] The records sent to the Third Party as part of this notice included a table prepared by Service NL outlining the cheque number and amounts and the actual cheques issued. During informal resolution, the original Applicant agreed to accept the table alone. The Third Party disputed disclosure of the table.
- [4] As an informal resolution could not be reached, the complaint proceeded to formal investigation in accordance with section 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [5] The Public Body’s position is that the information in the records did not meet the three-part test as outlined in section 39 of the *ATIPPA, 2015* and therefore the records must be disclosed. Service NL stated that the records were not supplied in confidence as the information was required to be provided by the Third Party to Service NL.
- [6] Service NL explained that the Consumer Affairs division and Government Service Centres can issue lottery licences to organizations as allowed by the provincial *Lottery Licensing Regulations* (the “*Regulations*”). Service NL further explained that licensees are expected to

comply with the Lottery Scheme General Rules and with federal, provincial and municipal laws as stated in the Regulations.

[7] Service NL advised that part of a licensee's compliance is to have a trust account and for the licensee to maintain financial records. When required, a licensee must also provide a financial report. Service NL provided this Office with the lottery licence certificates of the Third Party which expressly require that the Third Party submit a financial report to Service NL as a term and condition of the licence.

[8] Service NL stated to this Office that:

A licensee is aware financial reports must be filed with Service NL as per the Lottery Licensing Regulations, Lottery Scheme General Rules and the application process. There should be no expectation that this information is provided in confidence by the licensee as it is a mandatory condition of a lottery licence.

[9] Service NL stated that due to the lottery licensing process, it has custody and control of the records in questions which would make the records subject to the *ATIPPA, 2015* as per section 5(1) of the *Act*.

[10] Service NL further stated that there have been previous similar requests made and that the Third Party is already aware that its financial information (as it is in the custody and control of a public body) was subject to the *ATIPPA, 2015*.

III COMPLAINANT'S POSITION

[11] The Third Party's position is that the *ATIPPA, 2015* does not apply to the private sector and as it is a private organization, its information is not in the custody and control of the Government of Newfoundland and Labrador. The Third Party's position is that its records should not be disclosed.

[12] The Third Party has acknowledged that it has a lottery licence from Service NL and that it "is bound by rules and regulations to provide information to Service NL to get another licence."

[13] The Third Party argues that Service NL has an obligation to review the information provided by the Third Party, and if it is correct, to issue a new licence for another year. It is the Third Party's opinion that this is where Service NL's authority ends and that even though Service NL is a public entity, Service NL does not have the right to release the Third Party's private information which was provided for "their eyes only for the sole purpose of acquiring another licence."

[14] The Third Party states:

We recognize Service NL is a public body. However, the information they have in their possession from [the Third Party] and are willing to distribute is from a private company [the Third Party] was meant for one purpose only and that is to see if we have carried out our mandate properly within acceptable guidelines of our licence. To share that information without our express written consent is illegal in the eyes of the board.

[15] The Third Party also addressed the issue of the three-part test under section 39 of the *ATIPPA, 2015* as follows:

We have not attempted to defend ourselves in the 3 part test because the three part test does not apply to the private sector. The legislation is written that way. It is clear and concise with no room for debate.

[16] The Third Party also raised concerns about not knowing the identity of the access requester. The Third Party is of the view that "an anonymous request brings into questions [sic] the legalities of such a request, the motive of person [sic], people or organization involved in this request."

[17] Third Party also asserts that releasing its private information amounts to a breach of privacy.

IV DECISION

[18] Section 5(1) of the *ATIPPA, 2015* outlines the application of the legislation and states, in part, as follows:

5. (1) This Act applies to all records in the custody of or under the control of a public body...

[19] The issue of custody or control was discussed at length in Report A-2014-012. As stated at paragraph 30 of that Report:

*[30] Section 5(1) sets out an important threshold question. In order for the ATIPPA to apply to records, the records must either be in the custody of or under the control of a public body. A record will only be subject to the ATIPPA if it is in the custody **OR** under the control of a public body; it need not be both.*

[20] Report A-2014-012 went through many of the considerations when determining custody or control. While possession of a record is usually the best evidence of custody, there must be something more than mere possession. Regarding control, paragraph 40 of Report A-2014-012 outlined the test used:

[40] The Court went on at paragraph 50 to support a two-part test for whether a document was under the control of an institution. This test is as follows: ... in the context of these cases where the record requested is not in the physical possession of a government institution, the record will nonetheless be under its control if two questions are answered in the affirmative: (1) Do the contents of the document relate to a departmental matter? (2) Could the government institution reasonably expect to obtain a copy of the document upon request?

[21] Service NL relies on sections 20-23 of the *Regulations* which outline the requirement of a licensee to maintain financial records. Furthermore, section 38(1) of the *Regulations* can require a financial report be submitted. These sections of the *Regulations* are as follows:

20. (1) The licensee shall maintain the divisions financial records that relate to the licensed lottery, or a similar version that is approved by the division.

(2) In addition the licensee shall maintain books and other documents in support of all financial records and reports.

(3) The licensee shall obtain receipts for each expense incurred.

(4) These records shall be kept up to date and be retained for no less than 6 years from the expiry date of the licence.

21. A peace officer as defined by the Criminal Code or an official of the division, shall be given unencumbered access to all areas of a premises on which a lottery scheme is taking place and, the officer or official shall be given unencumbered access at any reasonable time to all records pertaining to a lottery scheme, including the records of any commercial agent, and if considered necessary to remove the records from a premises.

22. (1) *When requested the licensee shall deliver to the division, or permit the removal of, the licensee's books, records and other documents that would be requested.*

(2) *Where the licence refuses access or does not produce as requested, records or documents, the division may suspend or revoke licences.*

23. *The division may require the licensee to provide audited statements in accordance with guidelines established by the division.*

...

38. (1) *When required a financial report shall be submitted to the division within 60 days after the expiry date of the licence or as demanded.*

[22] Service NL provided records showing that the Third Party had a lottery licence and that there were terms and conditions imposed including the requirement for the Third Party to submit a financial report within 60 days after the expiry of its licence. The requested records involve funds paid by the Third Party to another organization and are part of the financial report.

[23] Not only does Service NL have possession of the records, but Service NL also has the right to require that the records be provided. Service NL has both custody and control of the records in question. Based on this assessment, it is clear that the *ATIPPA, 2015* applies to these records.

[24] While the Third Party is correct that the *ATIPPA, 2015* does not apply to private sector organizations, it is incorrect in its position regarding how the Act applies to records. The *ATIPPA, 2015* can apply to private sector records if those records are in the custody of or under the control of a public body.

[25] Since the *ATIPPA, 2015* applies to the records in question, the section 39 exception must be examined. Service NL's position is that section 39 of the *ATIPPA, 2015* cannot be claimed in order to withhold the records as there is no expectation that the records were supplied in confidence. Service NL's position is that, in this case, the provision of the financial report is a requirement of obtaining a lottery licence. The Third Party must provide a financial report within 60 days after the expiry of its lottery licence.

[26] 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.

[27] Section 39 is a mandatory exception to the right of access under the *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third parties bear the burden of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

[28] During the informal resolution process, we provided the Third Party with our guidance documents, *Business Interests of a Third Party (Section 39)* and *Third Party Guidelines for Preparing for an Access Complaint*. We asked the Third Party to provide a submission to explain why they believed the section 39 exception applied to this.

[29] The Third Party provided submissions, but focused on its position that it is not subject to the *ATIPPA, 2015* as a private organization and its private information should not be

disclosed. The Third Party advised that it had not attempted to defend itself under the three-part test as the three-part test does not apply to the private sector.

[30] Similar to Report A-2018-023 where the third party only provided general statements without corroborating arguments or evidence as its submission, the Third Party in this case chose not to provide an argument outlining why they believed the information contained in the records met the three-part under section 39 of the *ATIPPA, 2015*. Under section 43(3) of the *ATIPPA, 2015*, the burden of proof is on the Third Party to prove that an applicant has no right of access to the records. The Third Party declined the opportunity to provide any submission or evidence regarding the applicability of section 39 of the *ATIPPA, 2015* to the records in question. With no evidence to consider, the Third Party has not met the burden of proof.

[31] Given this finding, there is no need to proceed with an analysis of section 39 of the *ATIPPA, 2015*. As section 39 is a mandatory exemption, we reviewed the responsive records. We concur with Service NL's assessment that they are not exempt from disclosure pursuant to section 39.

[32] Given the circumstances of this request and the position put forth by Service NL, I question whether such notice was necessary. Service NL is reminded that Third Party notification should only be commenced when appropriate, as outlined in guidelines issued by this Office:

If a Public Body determines that section 39 does not apply, the Applicant is entitled to disclosure of the records without the delays associated with the notification of a Third Party. Notice is unnecessary when section 39 clearly does not apply.

If, and only if, the Public Body is uncertain as to whether section 39 might apply to the records is the Public Body required by the ATIPPA, 2015 to notify a Third Party in the manner set out in section 19.

V CONCLUSIONS

[33] The requested records are in the custody and control of Service NL and therefore subject to the *ATIPPA, 2015*.

[34] The Third Party failed to discharge its burden of proof in establishing that all three parts of the test under section 39(1) of the *ATIPPA, 2015* apply to the requested information.

VI RECOMMENDATIONS

[35] Under the authority of section 47 of the *ATIPPA, 2015*, I recommend that Service NL release the records (the table prepared by Service NL outlining the cheque number and amounts) to the Applicant.

[36] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of Service NL 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 within 10 business days of receiving this Report.

[37] Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party Complainant provides Service NL with a copy of its notice of appeal prior to that time.

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of May 2019.



Victoria Woodworth-Lynas
Information and Privacy Commissioner (A)
Newfoundland and Labrador