



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-027

October 8, 2019

Town of Stephenville

Summary:

The Town of Stephenville (the Town) received two requests from two different Applicants for all correspondence between the Town and a Third Party: 1) regarding [Numbered Legal Action] and its outcome; and 2) for the period between January 2017 and present. In accordance with section 19 of the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* the Town notified the Third Party of its decision to release the records to the Applicants. The Third Party objected to the disclosure of records and filed two complaints with this Office. The Third Party argued that certain portions of the records met the three-part test under section 39 of *ATIPPA, 2015* (Disclosure harmful to business interests of a third party) and therefore the records should not be disclosed by the Town. The Commissioner found that the Third Party did not meet the burden of proof and therefore the records may not be withheld under section 39, with the exception of bank account information on the cheque reproductions, which may be withheld.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 19 and 39.

Authorities Relied On:

NL OIPC Reports [A-2016-001](#), [A-2016-007](#), [A-2016-011](#), [A-2017-007](#), [A-2017-014](#), [A-2019-026](#); [OIPC Guidance Business Interests of a Third Party \(Section 39\)](#); [Access to Information: Policy and Procedures Manual](#); [Ontario IPC Order PO-3774](#).

I BACKGROUND

- [1] The Town of Stephenville (the Town) received two access requests pursuant to the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)*. The first request sought copies of any and all correspondence in all formats (e-mails, texts, notes, etc.) between the Town (Mayor, Council, staff, finance committee and legal counsel) and Third Party, regarding a legal matter and its outcome. The second request was made shortly after the first and sought copies of, “all correspondence and reports, including electronic and text, for the period January 1, 2017 to date,” involving the Town and the Third Party.
- [2] Following receipt of the requests, in accordance with section 19 of *ATIPPA, 2015*, the Town determined it was necessary to notify the Third Party of its decision to release the requested records. The Third Party filed two complaints with this Office opposing the Town’s decision.
- [3] As informal resolution was unsuccessful, the complaints proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*. As they involve the same Third Party and similar responsive records and issues, this Office determined to investigate them together and produce one Report for both.

II PUBLIC BODY’S POSITION

- [4] The Town’s position is that the requested information does not meet the three-part test outlined in section 39 of *ATIPPA, 2015*. The Town concluded that the information does not include sensitive information, nor does it contain information that was supplied in confidence. It also noted that the settlement agreement is a public document, and the legal action central to the request for information has been discontinued.
- [5] The Town confirmed it had considered all issues, including safety and security, as well as having obtained legal advice that included a review of each document by legal counsel, before determining that section 39 does not apply to the records in question, and it is therefore obligated under *ATIPPA, 2015* to disclose this information.

III COMPLAINANT'S POSITION

- [6] During our informal resolution efforts, the Third Party agreed to release portions of the records in question, all of which were material that is already publicly available (minutes of Town meetings and a NL Power guide for commercial/industrial users).
- [7] The Third Party opposed the release of any further records, arguing that disclosure would put “sensitive and confidential information ... in the public domain.” The Third Party believes release of this information would “jeopardize on-going business discussions ... the details of permitting and negotiations, which would occur if our private information was placed in the public domain.”
- [8] The Third Party noted that the basis for its objection to disclosure of the records is its belief that the Town did not adequately take into account issues of privacy, security, corporate impact, future business, customers and clients. Of the records, it “deem[s] these to be in whole, or in part confidential and sensitive, including letters and documents, some of which were sent to the Town by [the Third Party] under the understanding that these letters and documents were to be held in confidence.” The Third Party also noted that the records include “letters and documents related to the resolution of disputes, tax information, business intentions, current and future operations, inspections,” and that it may “be directly or indirectly private, especially given the fact that the [Third Party] is privy to private and sensitive information and is responsible for the control of that information on behalf of clients and users.”
- [9] The Third Party noted that among the records in question are records, “clearly marked as privileged, without prejudice, confidential or the like, which either are, or refer to, documents, conversations or correspondence between lawyers, which carry a degree of attorney-client confidentiality.” Additionally, it argued that “reference to security upgrades, camera/security apparatus, repairs, deficiencies, leasing arrangements, all can be exploited by a potential terrorist/potential security threat,” and therefore should not be disclosed. It also stated that “discussions over the repair or placement of physical assets, the names of suppliers, all can be potentially exploited.”

[10] Finally, the Third Party expressed concern about the motives and identities of the Applicants requesting the information in question. It cited a conversation with the Town Manager, in which details about one of the Applicants were discussed. The Town Manager withheld the Applicant's identity, but provided that the person was not a citizen or taxpayer of the Town, had previously made additional *ATIPPA, 2015* access requests, and, "after receiving this information immediately released the information acquired," to social media platforms causing individuals and companies harm and financial loss.

IV ISSUES

[11] The issues to be determined include:

1. Application of Section 39
2. Notification Under Section 19
3. Handling of Records

V DECISION

1. Application of Section 39

[12] Section 39(1) of *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.*

[13] Section 39 is a mandatory exception to the right of access under *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied and third party complainants 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.

[14] The records predominantly involve communications regarding a legal dispute between the Town and the Third Party involving a property dispute and building maintenance issues and their fallout and aftermath. With respect to section 39(1)(a), the responsive records do not contain trade secrets, or information that constitutes labour relations, scientific or technical information of the Third Party. This Office is satisfied that only a small selection of the information at issue contains information that could reveal financial information of the Third Party, and an even smaller selection contains information that is commercial information of the Third Party. We therefore conclude that this part of the test has only been established for these select portions of the information at issue, with the remainder of the records failing on this first, most basic, step of the section 39 test.

[15] Given most of the material at issue does not meet section 39(1)(a), this Office confined its review under part two of the test, section 39(1)(b), to only those records that could reveal financial or commercial information of the Third Party.

[16] In reviewing those records containing financial or commercial information, this Office sought evidence of whether the contents were supplied implicitly or explicitly in confidence to determine if the test in section 39(1)(b) was met.

[17] While we have found that a small portion of the records could potentially have been supplied in confidence, as they were created during the negotiations to resolve the legal matter, these same records were not addressed in a specific way by the Third Party in its arguments regarding the harms test in section 39(1)(c). Claims under section 39(1)(c) require

detailed and convincing evidence that the likelihood of harm is more than speculative. Such claims should establish a reasonable expectation of probable harm.

[18] The evidence of the Third Party does not establish a reasonable expectation of probable harm. The only type of harm argued by the Third Party that is relevant to the section 39 investigation, is that of section 39(1)(c)(i), which encompasses significant harm to a third party's competitive position or significant interference with its negotiating position. The Third Party argued that, should the information in question be disclosed, its competitive position would be harmed. This Office has discussed competitive advantage in previous reports and concluded that heightened competition should not be interpreted as significant harm. Absent a reasonable likelihood of significant harm to a third party's competitive position or an undue financial gain or loss to any person, competition is not unfair and ensures that public bodies are making the best possible use of public resources. The Third Party has not met the onus in part three of the test.

[19] The only information within the responsive records that on its face met all three elements of the section 39 test were bank account numbers in the cheque reproductions. The full account number of the business should have been redacted under section 39. This concept has been discussed in Ontario IPC Order PO-3774:

[77] I am satisfied that disclosure of the banking information could reasonably be expected to result in undue loss to the appellant, and relying on previous orders of this office, I find that the information on its face provides clear and convincing evidence of a reasonable expectation that the disclosure of it may lead to the kind of harm that is contemplated in section 17(1)(c) of the Act.

[20] The Third Party argued that it had safety and security concerns about disclosure of the responsive records. These are not considerations under the section 39(1) analysis, and our review is limited to the applicability of section 39 as this Report is the result of a Third Party complaint.

[21] As the issue of the Applicants' identities was raised by the Third Party as part of its section 39 arguments, it must be noted that the specific identity of an Applicant in a Third Party complaint is not part of the assessment as to whether section 39(1) applies to the records in

question. In reviewing responsive records with regard to the application of redactions, including section 39, a public body must assume that disclosure to any one applicant is disclosure to the public at large, with all the potential ramifications that brings. Furthermore, the identity of an applicant seeking information pursuant to *ATIPPA, 2015* is meant to be kept anonymous.

[22] Section 12(1) of *ATIPPA, 2015*, states:

12. (1) The head of a public body shall ensure that the name and type of the applicant is disclosed only to the individual who receives the request on behalf of the public body, the coordinator, the coordinator's assistant and, where necessary, the commissioner.

[23] The Town therefore was obligated to not only keep the identity of the Applicants in these complaints anonymous, but also the type of Applicants as well. Discussing information such as whether these Applicants had made previous requests, whether they are taxpaying residents, and what they have done with records in the past, is all information that should have been kept private from the Third Party and anyone other than those set out in section 12(1) of *ATIPPA, 2015*.

[24] As the Third Party has failed to meet all three parts of the three-part test under section 39 of *ATIPPA, 2015*, section 39 does not apply to the records at issue and they must be disclosed to the Applicants, with the exception of the account numbers in the cheque reproductions.

2. Notification Under Section 19

[25] Section 19(5) of *ATIPPA, 2015* is as follows:

19 (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.

[26] This Office discussed the notification procedure under section 19 in depth in Report A-2016-011 and in subsequent reports, such as Reports A-2017-007 and A-2017-014, and highlighted this again most recently in Report A-2019-026. Report A-2017-007 stated as follows:

*[22] A 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 notices to and responses of the third parties are dealt with.

[27] Report A-2017-014 stated:

[24] Memorial, by its own account, reviewed the responsive records and determined that the information in question "...does not meet the three-part harms test in section 39 of the ATIPPA, 2015 because the records in question are contracts that are considered to have been negotiated, not supplied." At that point, the records ought to have been disclosed immediately to the Applicant. Instead Memorial chose to notify the third parties.

[25] As a result of third party notifications and the complaints to this Office that followed, two periods of unnecessary delay were injected into the process. Consequently, the Applicant's right of timely access to information has been obstructed. Instead of obtaining the records within four weeks or less, the Applicant has already had to wait fourteen weeks.

[28] The Town's notification to the Third Party stated:

...

In our view, this information does not meet the three-part test outlined in section 39...

...

There is no sensitive information included, information was not supplied in confidence. The settlement is a public document.

[29] Based on the Town's conclusion that the three-part test was not met, notification was unnecessary and sending the notification was a misapplication of section 19 of *ATIPPA, 2015*.

[30] Notice to third parties must comply with *ATIPPA, 2015*. If, and only if, a public body is genuinely uncertain whether the section 39 test applies, then notice should be given. If the public body has determined that section 39 clearly does not apply then notice should not be provided, as third party complaints arising from these situations delay the applicant's right to timely access to information.

[31] As section 39 clearly did apply to the bank account information on the cheque reproductions, the Town should have redacted this information itself, without needing to notify the Third Party.

3. Handling of Records

[32] Finally, the Town's handling of the responsive records in question, in both its notification to the Third Party and in providing them to this Office for review, require some general best practice commentary.

[33] The ATIPP Manual states at page 44:

Each page of the records should be numbered consecutively and a list of all records prepared.

[34] Records provided for review should be numbered, organized by subject and/or headings (where appropriate), and reviewed to eliminate duplicates for clarity and ease of review. Any publicly available information that forms part of the responsive records should not normally be provided as part of third party notification as they would typically not be able to meet the third party test. These records should have been released to the Applicant immediately as access delayed is access denied. Additionally, any other applicable redactions should be identified.

VI CONCLUSIONS

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

[36] As section 39 has been found to apply to the banking information on the cheque reproductions, this information should be redacted before release.

[37] Public bodies must only notify third parties in accordance with *ATIPPA, 2015*, and only when there is genuine uncertainty whether section 39 applies to the information.

[38] Public bodies bear a responsibility to keep both the identity and type of applicant anonymous, and to follow general best practice guidelines when presenting responsive records for section 39 review to this Office and any third parties.

[39] As this Report is the result of a complaint from a Third Party, this Office was limited in the scope of its review to the application of section 39 only. We did not analyze the records in the context of other sections of *ATIPPA, 2015* as that is the role of the Town's ATIPP Coordinator.

Whether the Town applies any further exceptions and whether the Applicants dispute those exceptions is a matter for another day.

VII RECOMMENDATIONS

[40] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Town redact bank account numbers from the cheque reproductions and release the remaining responsive records to the Applicants, subject to any relevant redactions which the Town determines must be applied.

[41] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Town 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.

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

[43] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of October 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador