



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2019-030

November 26, 2019

Eastern Health

Summary:

Eastern Health received a request for access to a copy of a contract awarded to a Supplier through a Group Purchasing Organization (GPO), a complete list of contract items with pricing, and correspondence and meeting notes between six individuals regarding the awarding of the contract, as well as the pricing analysis. Eastern Health granted access to the information, but failed to provide all the records responsive to the request. The Complainant went back to Eastern Health to inquire about the responsive records that were not disclosed. Eastern Health found the responsive records, but determined that the *Access to Information and Protection of Privacy Act, 2015 (ATIPPA, 2015)* section 39 (disclosure harmful to third party business interests) may be applicable to the records. Eastern Health also questioned whether it had custody or control of the records at the time of the request. Eastern Health provided third party notification under section 19 to the GPO. Eastern Health advised the Complainant it would disclose the records if the GPO did not object. The GPO did not file a complaint with the OIPC; however, Eastern Health continued to engage the GPO in discussions about the application of section 39. Three months after the “final” response to the Complainant, Eastern Health informed him that it had determined that the records would not be disclosed. The Complainant filed a complaint with this Office. The Commissioner determined that the records were in the custody or control of Eastern Health when the Complainant requested the information and that Eastern Health inappropriately applied the section 39 test to the responsive records. The Commissioner also determined that Eastern Health inappropriately provided the GPO with third party notification, that it failed in its duty to assist the Complainant, and that it failed to protect the anonymity of the Complainant. The Commissioner recommended the release of the records at issue after the appropriate appeal period. The Commissioner also recommended Eastern Health review guidance on sections 19 and 39, that it improve its searches for responsive records, ensure the protection of applicants, and adhere to legislated timelines.

Statutes Cited: [Access to Information and Protection of Privacy Act, 2015](#), S.N.L. 2015, c. A-1.2, sections 12, 13, 19, 39; [Regional Health Authorities Act](#), S.N.L. 2006, c R-7.1, section 17

Authorities Relied On: NL OIPC Reports [A-2017-021](#), [A-2019-029](#); Ontario IPC Report [MO-2750](#); [Canada \(Information Commissioner\) v. Canada \(Minister of National Defence\)](#) [2011] 2 S.C.R. 306.

I BACKGROUND

- [1] The Complainant submitted an access to information request seeking the following:
- I request a copy of the contract with [the Group Purchasing Organization (GPO) that was awarded to [the Supplier] to be effective May 1, 2019. I'm requesting the complete list of contract items with pricing and details of any rebates offered I also request any meeting notes and correspondence between [six named individuals] regarding the decision to award the contract to [the GPO] and analysis of savings.*
- [2] The Third Party in this matter is a group purchasing organization (GPO), through which Eastern Health arranged a contract with the Supplier for products. A group purchasing organization is an entity or organization that leverages buying power to negotiate advantageous contracts with suppliers for its members. It was later explained to the Complainant by Eastern Health that in fact its contract is with the Supplier, but that the GPO is a third party in this matter. This Report addresses the issues based on that understanding.
- [3] On May 24, 2019, Eastern Health responded to the access request advising that “access to this information is granted and the applicable information is enclosed.” This enclosed information consisted of a copy of the Supplier Contract Information Sheet and correspondence between the six named individuals. The Supplier Contract Information Sheet is a four page document that includes a summary of the contract terms and agreement negotiated by the GPO on behalf of its members.
- [4] On May 31, 2019, the Complainant contacted Eastern Health to notify it that he believed there was information missing from the final release package. The Complainant advised Eastern Health that he did not receive all the requested information: specifically, he noted, Eastern Health did not include the complete list of items with pricing, information related to rebates offered, nor did Eastern Health provide a copy of the pricing analysis.
- [5] Eastern Health informed the Complainant that it would go back to its staff to request the specific documents outlined in the email. At this time, Eastern Health began discussions with the GPO regarding release of the requested information. On May 31, 2019 the GPO

questioned whether any of the requested documents had been released, as it had not received third party notification. The GPO noted that it presumed “any contemplated disclosure will be subject to a notice to us and the opportunity to formally object”.

[6] Eastern Health conducted a further search during which additional records were found. Eastern Health provided the Complainant with a copy of the pricing analysis, as well as an explanation regarding the lack of records related to the topic of rebates. Eastern Health also confirmed that a list of items existed but that “[t]he information would need to be disclosed by [the GPO] and as we are not permitted to provide to third parties.”

[7] The Complainant responded to Eastern Health, stating it was his position that unless there was an applicable exception to disclosure under *ATIPPA, 2015*, the records should be released.

[8] On June 21, 2019, Eastern Health advised the Complainant through email that it would notify the GPO of the request per section 19 of *ATIPPA, 2015*. On June 28, 2019, a letter of notice was provided to the Complainant noting it would release the records to the Complainant if the GPO did not object by filing a complaint to the Office of the Information and Privacy Commissioner (OIPC) within 15 business days. Barring a complaint to the OIPC, the records were to be released to the Complainant on July 22, 2019.

[9] Eastern Health also provided the GPO with third party notification on June 28, 2019. In this notification letter, Eastern Health characterized the request for the list of contract items with pricing as a further request by the Complainant. Eastern Health wrote the following:

As per section 19(5) of the Act, we are required to provide you with written notice of our decision. Eastern Health has deemed the list of contract items with pricing document to be excluded from Section 39, as this information was used for the awarding of a contract with a public body and has decided to disclose this part of the contract to the applicant.

Additionally, after careful consideration, Eastern Health has decided that the that the information [GPO's] complete list of contract items with pricing (the “Remaining Records”) – do not meet the three-part test outlined in Section 39 and has decided to grant access to the information as attached...

- [10] On July 8, 2019, legal counsel for the GPO sent a letter to Eastern Health objecting to the release of the information. On July 15, 2019, Eastern Health advised the GPO that its legal counsel wished to extend the deadline to respond to the letter. The GPO then requested it be given an additional 10 business days to consider Eastern Health's forthcoming correspondence "to allow time to prepare and file a complaint with the Privacy Commissioner should this be necessary." Eastern Health agreed. Eastern Health also informed the Complainant that it would be delaying the release of the responsive records until August 2, 2019 to permit Eastern Health legal counsel to correspond with the GPO.
- [11] On August 2, 2019, Eastern Health notified the Complainant it would again delay the disclosure of the records to provide the GPO with sufficient time to file a complaint with the OIPC. On August 14, 2019, Eastern Health contacted the GPO to advise that the next day was the deadline to submit a complaint to the OIPC. No complaint was received at the OIPC from the GPO.
- [12] Eastern Health did not disclose the records to the Complainant. On August 20, 2019, Eastern Health informed the Complainant that access had been granted to the responsive records on May 24, 2019, and that the request for a copy of the products and pricing was a subsequent request for additional records. Eastern Health further advised the Complainant that it would not be releasing the list of items with pricing, but did not cite any exception under *ATIPPA, 2015*.
- [13] The Complainant subsequently made a complaint to the OIPC. Upon learning the details noted above, as further explained throughout this Report, there were significant concerns on the part of the OIPC regarding the handling of this matter. As a result, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

Completeness of Response

[14] It is Eastern Health's position that the response provided to the Complainant on May 24, 2019 was a final response to the Complainant's access request. Eastern Health states that the Complainant's correspondence disputing the completeness of the response amounted to the Complainant seeking additional records: "After having received the disclosure of the records, the Complainant came back to Eastern Health seeking more records."

[15] Eastern Health submits that after the Complainant's request for additional records, it had two options: to direct the Complainant to the OIPC, or to fulfill its duty to the Complainant by trying to assist him in his search for records. Eastern Health chose to assist the Complainant. Eastern Health advises that it perhaps ought to have been stricter in its adherence to procedures set out in *ATIPPA, 2015* by advising the Complainant of his right to file a complaint with the OIPC and not attempting to assist.

Custody or Control of Records

[16] Eastern Health asserts that the records subsequently sought by the Complainant were not in Eastern Health's possession at the time of the request nor were they in Eastern Health's custody when the request was made. Eastern Health advised the Complainant of this position in correspondence dated June 18, 2019, in which it stated, "the document you requested is not in the custody of Eastern Health". Eastern Health submits that because the records are only accessible via the GPO's website, which requires a password to access, that the records are in the custody of the GPO and not Eastern Health.

Third Party Notification

[17] Eastern Health advises that it inappropriately provided section 19 notice to the GPO relating to the "additional records" on June 28, 2019. Eastern Health states this was not proper procedure, as "[a]sking the GPO to file a complaint on a closed matter was not appropriate."

[18] Eastern Health’s legal team and the GPO engaged in discussions about the third party Notification and about the terms of their contract. During these discussions they sought extra time to respond to each other’s letters that were sent and to the points being made. On August 2, 2019 Eastern Health’s legal counsel sent out to the GPO its explanation of how *ATIPPA, 2015* required the disclosure of the supplier contract sheet and the pricing analysis they had already released, and how section 39 did not apply to the complete list of products and pricing. Eastern Health’s legal counsel stated the following:

Eastern Health requests that [GPO] consider if the requested information can be disclosed to the applicant. If [GPO] determines that section 39(c) ought to apply that [GPO] should decide whether to file a complaint with the OIPC under s. 42 within 15 days. If a complaint is filed, the onus rests with [GPO] to establish that section 39 applies.

[19] Eastern Health states that this advisement by legal counsel was also an error because “there was no outstanding access request to complain about disclosure/ non-disclosure.”

Extensions and Delays

[20] Eastern Health submits that the delay in response to the Complainant was caused when Eastern Health and GPO legal counsel became involved in the matter. Although third party notification had been issued, legal counsel for Eastern Health was out of the office until the end of July. Eastern Health states that the use of the term “extension” in its communication to the GPO, which has a specific meaning under the *ATIPPA, 2015*, had nothing to do with the Act. This was to inform the GPO that there would be no reply from Eastern Health until August. Eastern Health stated in its formal submissions

Legal services at no time requested an extension, rather it was a function of simply not having a lawyer in the office to review the file or respond to [the GPO]. There was no decision made at that time by Eastern Health regarding disclosure because no person had reviewed it by 15 July 2019. Legal services provided no correspondence or advise [sic] on this matter until after 23 July 2019.

[21] Again, in its submissions to the OIPC, Eastern Health maintains that during the period of June 28, 2019 to August 20, 2019:

Eastern Health was still having discussions with [the GPO] about what the document was, whether Eastern Health would be breaching [the GPO] supplier's privacy by disclosing, and whether there was potential that s.39 could apply in this case. While discussions were ongoing it was agreed to not release the record until it could be figured out what was going on. Unfortunately, prior to this and while Eastern Health was still gathering information and seeking legal advice, the Complainant was informed that the records would be released. Eastern Health acknowledges this error.

Interests Harmful to the Third Party.

[22] Eastern Health submits that the refusal to disclose the information to the Complainant came after Eastern Health's legal counsel determined that there was an argument that the responsive records may be required to be withheld under the three-part test in section 39 – specifically, that the records contained pricing information of the Supplier supplied to the GPO in confidence. There was also concern because Eastern Health was required to confirm that the information in the document was considered confidential. Because of these considerations, Eastern Health made the decision not to release the information “without giving [the GPO] the ability to defend their position.”

[23] Despite the complexity of the situation, Eastern Health submits that its efforts to assist the Complainant were its primary concern and that “every effort was made to make the best decisions at the time they were made.” Eastern Health acknowledges it could have communicated with the Complainant better but it wanted to ensure that it would not be breaching any confidentiality obligations to the GPO.

III THIRD PARTY'S POSITION

[24] This Office exercised its discretion in accordance with section 96(1) to invite the GPO to make a submission during the formal investigation. The GPO responded, outlining its position.

[25] Eastern Health is a member of this GPO, which entitles Eastern Health to “participate in supply contracts negotiated by [the GPO].” The GPO submits that Eastern Health opted to become an indirect purchaser in the contract between the GPO and the Supplier.

[26] The GPO advises that the pricing information is the property of the GPO and that information was supplied to Eastern Health through a permitted download from the GPO's website. The GPO argues:

Eastern Health did not participate in the creation of the subject contract, nor was it involved in the negotiated prices. All negotiations with the supplier were conducted by [the GPO]. Furthermore, the information (including prices) contained in the contract download are immutable. Eastern Health had no ability to negotiate or amend these terms.

[27] The GPO submits that Eastern Health was permitted access subject to its membership, which included the condition that all information remain confidential. The GPO advises that before the information was supplied, "Eastern Health was required to confirm that the pricing information was confidential and would not be disclosed outside Eastern Health." It is the GPO's position that without this covenant of confidentiality, the information, including pricing, would not have been supplied.

[28] In its submissions, the GPO states that there is risk of significant harm to not only the GPO, but also its members, if pricing information were to be available to its competitors. The GPO's fundamental reason for existence is to negotiate the best prices for members through advantageous contract pricing. If the information were to fall into the hands of competitors, it would interfere with the GPO's ability in achieve the best pricing.

[29] The GPO also cites *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52, stating,

The Court of Appeal in your Province held that the tender information (as opposed to the University's usage report) might be considered confidential. In the present case, the subject documents are (the GPO)'s original confidential information and not something derived therefrom or an analysis of its utilization. Also, in contrast to the finding in paragraph [39] of that decision, it is not arguable that the document and its content was supplied otherwise than in confidence.

[30] The GPO also distinguishes this situation from those in NL OIPC Reports A-2014-008 and A-2013-009 in which the Commissioner had recommended disclosure of records which had been asserted to be protected against disclosure by the mandatory third party exception.

IV COMPLAINANT'S POSITION

[31] The Complainant submits that section 39 under *ATIPPA, 2015* and section 27 under the previous *ATIPPA*, have been dealt with many times by this Office, as well as the Supreme Court Trial Division and Court of Appeal. The Complainant believes that, as in these previous cases, the section 39 test does not succeed.

[32] The Complainant takes issue with the characterization of his request by Eastern Health. The Complainant states that Eastern Health's final response did not address most of the items in his request. He states in his submissions that he never received the information he was told he would be given access to, specifically two of the primary documents he requested; therefore, he submits that the response should not have been closed or considered complete.

[33] The Complainant submits that the Public Body should have decided to release the information, placing the onus on the third party to request a review by the OIPC. The Complainant cites paragraph 28 of Report A-2013-009:

If Memorial was not prepared to make the argument that section 27(1)(c) was applicable or did not have the necessary evidence to make the argument, its decision should have been to release the information and notify the Third Party of this decision. Then, if the Third Party objected to disclosure, it could have submitted a request for review to this Office and the burden of proving the exception applies would have shifted to the Third Party under section 64(2).

[34] The Complainant also maintains that Eastern Health violated *ATIPPA, 2015* by constantly delaying the release of records to him, before informing him that the records would not be disclosed without citing any exception under *ATIPPA, 2015*.

V ISSUES

[35] There are a number of substantive and procedural matters that will be addressed in this report:

1. Did Eastern Health conduct a reasonable search for records and provide a complete response to the Complainant in accordance with sections 13 and 17?
2. Did Eastern Health have custody or control of the records at the time of the request?

3. Did Eastern Health appropriately apply section 39?
4. Did Eastern Health properly apply section 19 (notification to the third party)?
5. Did Eastern Health violate section 12 by providing the Complainant's identity to the third party?
6. Did Eastern Health fulfill its duty to assist a Complainant under section 13?

VI DECISION

Reasonableness of Search

[36] In considering whether Eastern Health conducted a reasonable search for records, one must first look to the wording of the request. In his request to Eastern Health, the Complainant writes:

I request a copy of the contract with Health Pro that was awarded to [Supplier] to be effective May 1, 2019. I'm requesting the complete list of contract items with pricing and details of any rebates offered. I also request any meeting notes and correspondence between [six named individuals] regarding the decision to award the contract to [GPO] and analysis of savings.

[37] Although Eastern Health provided the Complainant with a final response on May 24, 2019 advising access to the information was granted, the only documents provided with the final response was the Supplier Contract Information Sheet and correspondence between the six individuals.

[38] Eastern Health did not locate the complete list of contract items with pricing or provide information about rebates, nor did it locate the analysis of savings requested by the Complainant. Additionally, Eastern Health did not inform the Complainant that there were no records responsive to these parts of his request. It was only when the Complainant followed up with Eastern Health after receiving the final response did Eastern Health conduct a second search for those three specific items. At this point, Eastern Health provided the analysis of savings and an explanation about the GPO dividends, on June 7, 2019.

[39] Eastern Health has taken the view that the May 24, 2019 final response completed the request. However, this position does not stand up to scrutiny. The final response advised that

full access had been granted, but it did not include sufficient information to address three of the items requested, nor were all the records included in the package.

[40] Eastern Health's position that the Complainant's follow up queries amounted to a new request is untenable. The wording of the Complainant's follow up correspondence used the exact wording as the original request and specified that Eastern Health failed to include that information in the final response or provide any information about whether it had been unable to find the records, or whether the remaining records were being withheld under an exception to access in *ATIPPA, 2015*.

[41] Furthermore, even if Eastern Health was sincerely of the view that the follow-up email consisted of a new request for more records, Eastern Health failed to take appropriate steps to respond to the new request. Notably, it failed to cite an exception to disclosure when it refused disclosure of the list of items with pricing in its August 20th correspondence to the Complainant about the outstanding aspects of his request. Failure to cite an exception means that Eastern Health's response cannot be considered "complete" in accordance with section 13, nor does it comply with section 17(1)(c) which requires public bodies to cite a provision in *ATIPPA, 2015* when there is a refusal of access.

[42] This Office finds that the follow up email to Eastern Health did not amount to a new request for "more records", but was an attempt by the Complainant to understand the deficient response from the Public Body. It appears that Eastern Health has reframed the issue to avoid addressing its failure to issue a complete response within the legislative timelines set out in *ATIPPA, 2015*.

Custody or Control

[43] In the period during which Eastern Health was considering whether to release the records to the Complainant, it assessed the issue of whether the records were in its custody or control. In its formal submissions to this Office, Eastern Health takes the position that the complete list of items with pricing "was not in Eastern Health's possession at the time the request was processed."

[44] Custody or control of records is a necessary aspect to consider in determining whether information may be disclosed to an applicant. In Order MO-2750, the Ontario Information and Privacy Commissioner outlines criteria developed by its Office to determine whether a public body has custody or control of a record. These criteria include:

1. Was the record created by an officer or employee of the institution?
2. What use did the creator intend to make of the record?
3. Does the institution have a statutory power or duty to carry out the activity that resulted in the creation of the record?
4. Is the activity in question a “core”, “central” or “basic” function of the institution?
5. Does the content of the record relate to the institution’s mandate and functions?
6. Does the institution have physical possession of the record, either because it has been voluntarily provided by the creator or pursuant to a mandatory statutory or employment requirement?
7. If the institution does have possession of the record, is it more than “bare possession”?
8. If the institution does not have possession of the record, is it being held by an officer or employee of the institution for the purposes of his or her duties as an officer or employee?
9. Does the institution have a right to possession of the record?
10. Does the institution have the authority to regulate the record’s content, use and disposal?
11. Are there any limits on the use to which the institution may put the record, what are those limits, and why do they apply to the record?
12. To what extent has the institution relied upon the record?
13. How closely is the record integrated with other records held by the institution?
14. What is the customary practice of the institution and institutions similar to the institution in relation to possession or control of records of this nature, in similar circumstances?

[45] Further, the Supreme Court of Canada in *Canada (Information Commissioner) v. Canada (Minister of National Defence)* adopted the two-part test of whether an institution has control of records that are not in its *physical* possession:

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?

[46] Report A-2017-021 from this Office also lays out considerations in deciding custody or control:

[11] Section 5(1) sets out an important threshold question. In order for the ATIPPA, 2015 to apply to records, the records must either be in the custody of OR under the control of a public body, it need not be both.

[12] The terms “custody” and “control” are not defined in the ATIPPA, 2015, however, these terms have been given a broad and liberal interpretation in keeping with the purposes of access to information legislation. One of the purposes of the ATIPPA, 2015 is to facilitate democracy through ensuring that citizens have the information required to participate meaningfully in the democratic process, increased transparency in government and public bodies and protecting the privacy of individuals.

[13] It has generally been established that while physical possession of a record is the best evidence of custody, simple possession is not determinative.

[47] The record in question in this case is located on the GPO’s website, to which Eastern Health was given access after signing a contract to become a member, enabling it to use the information. The record was created by the GPO acting for the benefit of Eastern Health and other members to get the best value on products. The record was negotiated by the GPO to set prices for its members. The record is intended for use by Eastern Health and other health authorities.

[48] Eastern Health, per section 17(1)(a) of the *Regional Health Authorities Act*, has the statutory power to make purchases of personal property. The purchasing of items is a basic function of Eastern Health. The record is relied upon by Eastern Health to make purchases.

[49] Eastern Health stated in its submissions that it did not have physical possession of the records at the time the request was made. It did later obtain the records. Further, in the responsive records provided to this Office, there is an indication Eastern Health was entitled to a copy of the records pursuant to the contractual requirements with the GPO. This possession amounted to more than “bare possession” as these records relate to procurement by Eastern Health of goods and services to enable it to carry out its mandate.

[50] Eastern Health has the right to access and possess the record as laid out in the contract with the GPO. The GPO’s Participation Agreement gives Eastern Health the ability to deal directly with the Supplier and act in place of the GPO when purchasing and reselling products. The contract does include a confidentiality clause which may limit the use of the record that requires members not to disclose any information “unless required by law”. In this case, the applicable law would be *ATIPPA, 2015*.

[51] Having reviewed the criteria developed by the Ontario IPC and taken the facts of this situation into consideration, this Office finds that the records were in the custody or control of Eastern Health at the time the request was made.

Disclosure Harmful to Business Interests of a Third Party

[52] The next issue is whether Eastern Health appropriately applied the section 39 test to the record. This matter was discussed at length in Report A-2019-029, which also involved a GPO. The circumstances in that report are analogous to this situation and shall be referenced for brevity.

[53] The GPO states in its submissions that “[t]he information being requested is the GPO’s pricing information. It is not something derived therefrom.” However, as outlined in Report A-2019-029, while it is clear that the records consist of commercial information, “it has not been established that this commercial and financial information is “of” the third party.” In its submissions, Eastern Health also confirms that the information is not that of the GPO, but rather “the record was pricing information of [the Supplier] supplied to [the GPO] in

confidence”. Section 39 does not apply to information of one third party supplied to another in confidence.

[54] Report A-2019-029 continues at paragraph 20:

In the current matter, Western Health has entered into a contract through its participation in the GPO. Both the terms of its contract with the Supplier and of its arrangement with the Third Party were initially information “of” those parties, but following the analysis in Corporate Express, once Western Health entered into contracts with those parties the information was no longer exclusive to the Third Party or the Supplier but became Western Health’s. On that basis, the Third Party has not demonstrated that it meets the first part of the three-part test.

[55] Of the second element of the test, Report A-2019-029 at paragraph 22 speaks to the issue of whether the information was “supplied in confidence”, beginning with a quotation from British Columbia OIPC Order F17-14:

[18] I acknowledge that the PHSA is a member of HealthPRO and that it benefits from the contract pricing. HealthPRO’s evidence was that it does not ask its members for changes to its supplier contracts and does not permit its members to make changes to those contracts. However, the PHSA could have conducted the contract negotiations with Stericycle, either on its own or in concert with its fellow healthcare organizations. The fact that it chose to assign this task to HealthPRO does not mean the information sheet contains “supplied” information. Moreover, HealthPRO admitted that it conducted the negotiations with Stericycle. In negotiating the contract, HealthPRO was clearly acting for, or in place of, its members. Thus, while HealthPRO provided the information sheet to the PHSA, in my view, the information sheet contains a summary of a contract negotiated on the PHSA’s behalf. I therefore reject 9 R Report A-2019-029 HealthPRO’s argument that the information in the information sheet was not “susceptible to change” by the PHSA and was not negotiated. I also note that the PHSA did not support HealthPRO’s position on the “supply” issue. I find that the information in the information sheet was not “supplied” to the PHSA for the purposes of s. 21(1)(b).

[23] As with the above matter, Western Health could have conducted the contract negotiations with the Supplier, either on its own or in concert with its fellow healthcare organizations. Its membership in the Third Party’s group purchasing agreement is solely to engage the Third Party to negotiate on its behalf and, the fact it chose to assign this task to the Third Party does not mean the information sheet contains “supplied” information. Additionally, as with the BC matter, the Third Party admitted that it conducted the negotiations with Supplier, and in doing so was clearly acting for, or in place of, its members.

Given this, the CIS and pricing sheet constitute merely a summary of a contract negotiated on Western Health's behalf, and this Office rejects the argument that the information contained therein is not susceptible to change by Western Health and was not negotiated. It is also worth noting that similar to the BC matter, Western Health does not support the Third Party's position on the "supplied" issue and instead has argued the records in question involve a negotiated contract.

[24] If a public body can essentially outsource its procurement to another entity and thereby escape accountability and transparency, the result would subvert the spirit and intent of ATIPPA, 2015 and would create an untenable and unreasonable outcome. The legislative aims of transparency and accountability of public bodies cannot be thwarted merely by engaging a third party organization to contract on one's behalf.

[56] The GPO argues the release of its pricing information would cause significant harm to the GPO and its members. The GPO also argued that suppliers would be less likely to engage in supplier contracts, which would also bring harm to other members.

[57] As for the third part of the test, Report A-2019-029 sets out this Office's position on "significant harm":

[29] This Office finds similarly, that the arguments and evidence provided by the Third Party are not sufficient to demonstrate a significant harm to its competitive or negotiating position will occur were the CIS and pricing sheet to be disclosed. The analysis set out by the above BC Order is persuasive that it is more likely disclosure would lead to lower prices from competitors and encourage suppliers to offer lower prices or better terms as well in order to compete. 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.

[58] We do not find the GPO's argument persuasive that disclosure of the records will cause significant harm. As noted in many other Reports issued by this Office, competition is not sufficient to meet the harms test. As a GPO, the GPO is in a unique position to negotiate on behalf of its many members. Its competitive advantage comes from negotiating agreements with members to purchase from suppliers, attracting lower purchase prices for members while

promising high volume sales to suppliers. This places the GPO in an advantageous negotiating and competitive position regardless of whether or not pricing details are disclosed.

[59] As Eastern Health and the GPO have failed to meet the three part test set out in section 39 of *ATIPPA, 2015*, this Office finds that section 39 does not apply to the record and it must be disclosed to the Complainant.

Third Party Notification

[60] Eastern Health provided third party notification to the GPO on two occasions – the first time, formally, in a section 19 notification letter on June 28, 2019 and the second time in a letter dated August 2, 2019 outlining why Eastern Health did not believe that the record would meet the section 39 test and directing the GPO to file a complaint with the OIPC.

[61] In its formal submissions, Eastern Health states that it was an error to have provided third party notice under section 19 because a final response had been provided in May and therefore the access request was complete. As noted earlier, we have found that Eastern Health was in error in its assessment that the access request was complete at that point. This Office also disagrees with Eastern Health’s reasoning about why third party notice was not necessary.

[62] This Office’s position on the application of third party notification under section 19 is clear and outlined succinctly in Report A-2019-029:

[36] This Office discussed the notification procedure under section 19 in depth in Report A-2016-007 and in subsequent reports, such as A-2017-014, and highlighted this again more recently in Reports A-2019-026 and A-2019-027. 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.

[37] 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.

[63] In this case, Eastern Health did not believe that section 39 applied to the records, but they were uncertain as to whether the records were within its custody or control. Eastern Health erred in sending the third party notice because it determined that section 39 did not apply, not because there was no open request

[64] Furthermore, Eastern Health erred when it failed to disclose the record to the Complainant, despite the OIPC receiving no complaints or objections from the GPO. Eastern Health did not abide by the 15 day timeline as set out in section 19(5)(c) and prolonged the timeline to continue conversations with the GPO. Eastern Health was aware that it would not meet the 15 day timeline set out in *ATIPPA, 2015*, yet it did not seek an extension from this Office. If Eastern Health was of the view that there was a valid reason to allow for additional time, it ought to have requested an extension from the OIPC. However, it must be noted that the non-availability of Eastern Health's legal counsel to respond to the GPO does not justify Eastern Health's delay of its response without approval of this Office.

Anonymity of the Applicant

[65] Eastern Health admits that on August 26, 2019, it advised the GPO that it would not disclose the information to the Complainant. At this time, Eastern Health provided the complaint, as well as the Complainant's personal information, to the GPO.

[66] Section 12 of *ATIPPA, 2015* sets out the requirements concerning the anonymity of an applicant:

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.

(2) Subsection (1) does not apply to a request

(a) respecting personal information about the applicant; or

(b) where the name of the applicant is necessary to respond to the request and the applicant has consented to its disclosure.

(3) The disclosure of an applicant's name in a request referred to in subsection (2) shall be limited to the extent necessary to respond to the request.

(4) The limitation on disclosure under subsection (1) applies until the final response to the request is sent to the applicant.

[67] Eastern Health provided a letter to the Complainant on May 24, 2019 advising it was the final response, but, as already noted in this Report, that response was deficient. Therefore, the access complaint was not complete at this point. Eastern Health was aware the matter was still ongoing and yet provided the third party with the name and status of the Complainant.

[68] Therefore, this Office finds that Eastern Health contravened section 12 of *ATIPPA, 2015*.

Duty to Assist

[69] A public body's duty to assist an applicant is set out in section 13 of *ATIPPA, 2015* as follows:

13. (1) *The head of a public body shall make every reasonable effort to assist an applicant in making a request and to respond without delay to an applicant in an open, accurate and complete manner.*

(2) *The applicant and the head of the public body shall communicate with one another under this Part through the coordinator.*

[70] Eastern Health's submissions state that it set out to fulfill its duty to assist the Complainant by choosing to conduct a second search for information when the Complainant questioned the completeness of the final response. Eastern Health states, "After the completion of the ATIPP request in May, Eastern Health was contorting itself in its efforts to assist the Complainant. This was a new and complex situation for Eastern Health to navigate, and every effort was made to make the best decisions at the time they were made."

[71] Although Eastern Health maintains that best efforts were made to assist the Complainant, Eastern Health failed in this duty.

[72] While Eastern Health did conduct a second search after the Complainant expressed dissatisfaction, this second search was necessary because the first search was deficient. Eastern Health did provide explanations *after* the second search was complete, but this ought to have been included in the final response first issued in May.

[73] Additionally, Eastern Health advised the Complainant for three months that it would be releasing the record to him, updating him on a weekly basis that the record would soon be disclosed. However, Eastern Health ultimately determined not to release the record to the Complainant and provided no explanation as to why the decision had been changed.

[74] Eastern Health was neither open, accurate, nor complete in its communications, and prolonged the process unnecessarily by not following the process set out in *ATIPPA, 2015*. As a result, Eastern Health failed in its duty to assist the Complainant.

VII RECOMMENDATIONS

[75] The handling of this file caused serious concerns for the OIPC. We therefore make the following recommendations:

1. Eastern Health should release the record in question to the Complainant once the appropriate appeal period has lapsed.
2. Eastern Health should improve searches for responsive records by giving consideration to the specific wording of requests, not restricting search parameters, and analyzing whether records are responsive and in the custody or control of the Public Body.
3. Eastern Health should review OIPC guidance related to sections 19 and 39. If a public body determines that a record does not meet all three parts of section 39, the Public Body must disclose the requested information and should not provide third party notification. Notification to third parties should only occur where there is genuine uncertainty as to whether or not section 39 applies to the records.
4. Eastern Health must ensure the identity of applicants is protected in accordance with *ATIPPA, 2015*.
5. Eastern Health must adhere to legislated timelines set out in *ATIPPA, 2015*.

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

[77] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of November 2019.



Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador