Speaking Notes for Access to Information and Protection of Privacy Act (the "Act") Statutory Review 2020

1. General Overview of Heavy Civil Association of Newfoundland and Labrador's (the "**Association**") concerns and how they relate to the Committee Terms of Reference:

    - The Association's submissions relate primarily to what it feels is a current lack of protection for sensitive commercial information contained in bids, quotes and proposals to public bodies.
    - Specifically, the Association feels the current protections afforded by the third party notification threshold at s.19 of the Act and the exception at s.39 are not proportional to the potential harm caused by disclosure of the information to the public (and thereby other industry members), and is not in accordance with the spirit and intent of the legislation. Further, the current complaint process for third parties is burdensome and unpractical.
    - Currently, the position of the Office of the Information and Privacy Commissioner ("**OIPC**") in relation to bid information is:

        - *Prices contained in bids, proposals and contracts are not exempt from disclosure pursuant to section 39. This includes the aggregate contract price as well as unit prices and copies of full bids (see Report A-2013-008 and Report A-2013-009).*

      Although the Association agrees aggregate contract prices should be disclosed, it believes unit prices, bid breakdowns and subcontractor invoicing should be protected by the Act.
    - Our submissions therefore relate to the following terms of reference of this Committee:

        - An examination of exceptions to access as set out in Part II, Division 2 of the Act.

- Whether there are any categories or types of information (personal information or otherwise) that require greater protection than the ATIPPA, 2015 currently provides.
- An examination of the complaints process to the Office of the Information and Privacy Commissioner.

2. S.39 – Exception for Third Party Information

- The test, as it is currently stated in s.39 and interpreted by the OIPC, creates a burden that is nearly impossible for our industry members to meet. Several parts of the s.39 test are unreasonable.
- *Supplied in Confidence*. The OPIC takes the position that, due to s.8(2) of the *Public Procurement Regulations*, third parties are required to specifically identify the contents of their bid that are exempt from disclosure under s.39.
    - This creates a huge practical issue for our industry. If a bidder alters their bid in any way, including by (a) making a note on the unit price form that each unit price is subject to s.39 of the Act or (b) adding an additional piece of paper outlining such exemptions, the bidder faces the risk of the public body deeming that its bid contains a qualification and is therefore non-compliant and disqualified.

  However, the OPIC has stated that this part of the test fails without the specific exemptions listed on the bid.
- *Harm - Harm to Competitive Position/Interreference with Contractual Negotiations/Undue Financial Loss*. The OPIC has stated that it is not enough to show that a competitor may take the pricing information it learns from disclosure and apply it to the next bid to gain an advantage. That in itself just "levels the playing field", and does not show "detailed and convincing evidence" of the harm.

  If that argument does not succeed, it is practically near impossible for a third party to prove disclosure of unit prices causes it harm – even though in fact our members are confident it does. Although a third party

can attest to the value that the information provides to itself and therefore a competitor, a third party can't provide any real time evidence regarding losses it expects to incur in the future – which it won't actually incur until a similar project is bid.

Further, without knowing the identity of the requestor, a third party is denied the opportunity to put forth an argument showing that the requestor later won a bid at the expense of the party who's information was disclosed. Without knowing the company obtaining the information, a third party can't begin to try and put together a pattern showing loss of future bids to that company.

The OIPC's rationale on this point is often that "heightened competition ensures that public bodies are making the best possible use of public resources" – i.e. if bid information is disclosed, it may ultimately lead to lower bids and savings for public bodies. That in itself acknowledges the loss incurred by the bidder who's information caused lower bids in the future. It also isn't necessarily true that the lowest bid is providing the best value to the Province.

- *Association' s Position on Harm.* It is the opinion of the industry that publicizing individual item unit prices and sub-contractor invoicing would reveal proprietary trade secrets that have taken years of experience, education and software knowledge to obtain. Unit pricing in this industry is not the same as a pen or sheet of paper. Contractors make large financial investments in software, specific equipment, experienced personnel and accounting advice in the development of proprietary unit pricing. This significant investment leads to the establishment of business models which are effective and efficient, which in turn results in lower prices for contractor clients including government and hence taxpayers. Our members pricing formulas, their expected costs and anticipated profits to complete a project, and the methods for compiling same, are essential to the function of their business and are not something they would ever willingly share with a competitor.

- *Other Jurisdictions.* We are aware of several other jurisdictions that accept the very argument that the Association is seeking to make in respect of the harm caused by disclosure of unit prices.

  ORDER PO-3764 (Appeal PA16-136) (2017) (Ontario)

  [48] On my review of the evidence and representations before me, I conclude that the withheld information meets the "harms" part of the test for exemption under section 17(1). ***A number of decisions have considered the application of section 17(1) to unit pricing information, and have concluded that disclosure of such information could reasonably be expected to prejudice the competitive position of an affected party. A reasonable expectation of prejudice to a competitive position has been found in cases where information relating to pricing, material variations and bid breakdowns was contained in the proposal.[18] I accept the appellant's submission that disclosure of the withheld information at issue could reasonably be expected to prejudice the appellant's competitive position or cause undue loss to the appellant because its competitors can use the withheld information to underbid the appellant in future RFP and/or RFQ processes.*** *I find that the withheld information at issue in the appellant's proposal and the appellant's representations establish the harms in section 17(1)(a) and (c) to this information. Accordingly, as I have found that all three parts of the test have been met for this information, this information is exempt under section 17(1) of the Act.*

  Carmont et al v. PNB et al, 2018 CarswellNB 120 (New Brunswick).

  In this instance, the Court accepted that the information descrbied in the below evidence was exempt from disclosure as confidential information that posed a competitive disadvantage to the third party:

  11. A competitor having access to Shannex's per diem rate and its components (operating expenses such as salaries and benefits, food, supplies and operation costs) and, using other public data, such as the Department of Social Development's required care ratios, could reverse

engineer Shannex's components to determine Shannex's pricing formula. For example, with the disclosure of the salaries and benefits component and FTEs, a competitor could determine our management and staffing structure within the Protected Envelop, identify efficiencies and adjust their bid component accordingly to match or best our number. The components together comprise the entire operation of the nursing home. Each component can be similarly deconstructed to identify savings and then reconstituted into a competitive bid. In this respect, the components are inextricably connected with the per diem rate. When combined they form the building blocks of the financial summary that becomes the per diem rate.

12. Having access to the successful per diem amount in previous RFPs or service agreements would provide a competitive advantage, reveal trade secrets as competitors could ascertain Shannex's pricing formula and harm Shannex's ability to successfully be awarded future nursing home bids. Having knowledge of Shannex's per diem rate and the components of the per diem in and of themselves provides a competitor with the precise manner on how Shannex won previous bids. This allows the competitor to structure their future bids favourably relative to Shannex's bid to ensure they have the lowest price, resulting in Shannex not being awarded the contracts.

Medavie v. PNB (Department of Health), 2018 NBQB 121 (New Brunswick)

In this instance, the Court accepted that the information descrbied in the below evidence was exempt from disclosure as confidential information that posed a competitive disadvantage to the third party:

8. The Key Financial Information is critical to allow MHS/MHSNB to negotiate the essential terms of the Agreement and any other agreements for MHS operations across Canada and elsewhere. If the Key Financial Information is disclosed, this would provide other parties, including competitors of MHS, with an unfair advantage as they could

easily calculate MHS's anticipated costs and expected profits to operate an ambulance service from the proprietary information of MHS during negotiations of agreements or bidding processes for ambulance services agreements across Canada.

9. A competitor, having access to MHS' Key Financial Information could reverse engineer MHS' components to determine its pricing formula. For example, a competitor could determine MHS' management and staffing structures, identify efficiencies and adjust competing bid components to match or improve on MHS' numbers. Each component for which privilege is claimed can be deconstructed to identify savings and then reconstituted into a competitive bid. As a result, these components are inextricably connected with the Key Financial Information and together form the building blocks of the financial matrix which then becomes the Baseline Budget. MHS does not have access to the comparable information from its competitors.

3. Section 19 – Notification Threshold.

- Currently, public bodies fail to provide notice to industry members when their bid information is subject to an access to information request.
- The OIPC's interpretation of ATIPPA creates a high threshold for notification:
    - *Section 19 notification ONLY comes into play when there is an intention to release and the Public Body is uncertain regarding the application of section 39 (those records in the "grey area").*
- If the bid fails to mark specific information with a s.39 expectation, the notification doesn't come into play. Again, the Association submits there is a practical issue with notes on bids.
- The Association also has doubts of whether the ATIPPA Coordinators at the relevant public bodies have the required industry experience to understand what constitutes a "trade secret" or "confidential commercial information" of our members – yet these are the individuals who determine whether we are notified of the potential disclosure.

- The OPIC guidelines actually state that some information in bids should be exempt:
    - *Asking a third party to disclose, for example, how much it pays to obtain the goods they sell, how they decide what price(s) to bid or how it produces or manufacture its products would be unfair. These are some types of third party information that I believe section 27 [now section 39] is intended to protect, not the prices paid by a public body to procure goods and services.* (Report A-2013-009,).

  However, our members consistently are not receiving notice when such information is subject to an access to information request.

- The burden of proof when a third party contests the disclosure of information on a complaint ultimately rests with the third party (s.43 of the Act). If it is up to the third party to meet the test, they should at least be given the opportunity to do so.

4. Public Interest and Purpose of the Act

    - The Association understands the necessity for transparency and openness in how government funds are spent and government resources procured.
    - However, in accordance with section 3 of the Act that purpose should be balanced with the exceptions to the right of access, including protecting "from harm the confidential proprietary and other rights of third parties".
    - The current use of the Act is not properly balancing these rights. Practically, the vast majority of request for bid information are coming from industry members who are seeking an advantage against their competitors. These requestors are not motivated by the proper purposes of the Act and granting them access to the information is doing nothing to further those purposes. Providing

access of pricing information to these requestors is not achieving balance of the Act's purposes, but rather failing to protect third party proprietary information for no reason supported by the Act.

- The average citizen, or even the media, have no reason to be interested in unit prices and bid breakdowns. Industry members are the only people motivated to gain access to this information.
- We would argue the current interpretation of the Act in the long run will inhibit the continuous improvement of the industry. Industry members have less motivation to improve and make efficient their processes and resources when they can simply look at what their lowest competitor is doing and be assured a reasonable chance of success.

5. Timeline for Complaints

- In the event a third party is provided notice of a potential disclosure, the Act provides them 15 days to file a complaint with the OIPC or an appeal with the Trial Division (s.42 and 53 respectively). We submit this is not enough time given the requirements of the complaint.
- The complaint contains the written submissions of the third party and must make specific reference to which parts of the records it is objecting to. This usually involves a review of significant pages of records and often requires accompanying proposed redactions. A third party will not be successful under s.39 if it simply requests a "blanket denial" of an entire page. This process is timely and third parties should be provided more than 15 days' notice.

Business Interests of a Third Party (Section 39)

Overview

Section 39 of the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*") is a mandatory exception, meaning that information that falls into this exception must be withheld from an access to information Applicant. The Commissioner has interpreted this section many times and the purpose of this document is to:

- assist Public Bodies with determining if information is exempted from disclosure in accordance with section 39;
- assist Public Bodies and Third Parties in understanding the effect of sections 8(1)(g) and 8(2) of the Public Procurement Regulations (the "*Regulations*");
- assist Public Bodies in determining when notice to Third Parties is required pursuant to section 19 of the *ATIPPA, 2015*;
- assist Public Bodies in preparing notices to Third Parties when required pursuant to section 19 of the *ATIPPA, 2015*;
- inform Third Parties about the interpretation of section 39 and 19; and
- educate the public and others who may request Third Party business information from Public Bodies.

Sections 8(1)(g) and 8(2) of the *Regulations* state:

> *8. (1) An open call for bids shall contain the following:*
> ...
> *(g) a statement that the procurement process is subject to the Access to Information and Protection of Privacy Act, 2015;*
>
> *(2) A bid received in response to an open call for bids shall identify any information in the bid that may qualify for an exemption from disclosure under subsection 39(1) of the Access to Information and Protection of Privacy Act, 2015.*

Section 39 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;*

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(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,

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return, gathered for the purpose of determining tax liability or collecting a tax, or royalty information submitted on royalty returns, except where that information is non-identifying aggregate royalty information.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or
(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

Effect of the *Public Procurement Regulations* on Section 39 of the *ATIPPA, 2015*

Section 8(2) of the *Regulations* imposes a mandatory requirement on Third Parties to identify the contents, if any, of a bid that may be exempt from disclosure under section 39. Designating content as potentially subject to section 39 enables Third Parties to highlight for Public Bodies the information that they believe should be withheld in the event of an access to information request.

Reading the *Regulations* and the *ATIPPA, 2015* together, sections 8(1)(g) and 8(2) of the *Regulations* impact the ability of a Third Party to claim, under section 39(1)(b) of the *Act*, that information was supplied to the Public Body *implicitly* in confidence. The *Regulations* require expectations of confidence to be stated explicitly and specifically.

The ability to claim that information was provided *explicitly* in confidence is also impacted if the Third Party has failed to identify specific information in its bid that may qualify for an exemption. Section 8(2) says that this must be stated explicitly in the bid submission.

Failure by a Third Party to indicate a claim of section 39 in the bid submission makes it unlikely that a Third Party could later meet the second part of the test in section 39, that it supplied information in confidence.

Section 39 of the *ATIPPA, 2015*

In order for section 39(1) to apply, all three parts of the "test" must be met, meaning that the information must:

a) be of a type set out in section 39(1)(a);
b) have been **supplied implicitly or explicitly in confidence; and,**
c) there must be a **reasonable expectation** that one of the outcomes identified in section 39(1)(c) will probably occur if the information is disclosed.

While the first part of the test is often easy to apply, parts (b) and (c) can be more difficult. The burden of proving that the exception applies rests with the party relying upon the exception. A Public Body relying on section 39 to withhold information or a Third Party objecting to a Public Body's decision to disclose must be able to "make the case". This requires (as discussed more fully below) presenting detailed and convincing evidence that the exception applies.

The first step requires the Public Body to assess the requested records to determine whether, in its opinion, section 39 (or any other exception) applies. In the procurement context, a Public Body is only required to assess the application of section 39 if the Third Party has, in accordance with section 8(2) of the *Regulations*, identified information that may be subject to section 39. If a Third Party does not identify any information in its bid that may be subject to section 39, the Public Body should proceed to release the information without notice to the Third Party (assuming that no other exceptions apply). Public Bodies can assume that Third Parties considered their mandatory legal obligations in accordance with section 8(2) of the *Regulations*. If a Third Party identifies information that may be subject to section 39, Public Bodies are still required to assess the information and decide if, in the Public Body's opinion, the information meets all three elements of the test in section 39.

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.

Supplied Implicitly or Explicitly in Confidence

As already noted, section 8(2) of the *Regulations* now requires that Third Parties explicitly assert any expectations of confidence in a bid submission to an open call for bids. There may also be situations and records requiring consideration under section 39 which fall outside those contemplated by the *Regulations* (i.e., records which are not bids received from Third Parties in an open call for bids) to which section 39(1)(b) may apply. In those instances, the Public Body should of course proceed with its section 39 analysis.

British Columbia Order 03-02 extensively addressed the interpretation of whether information is "supplied". The interpretation in that report is applied uniformly across

Canada. Our Office adopted this interpretation (see Report A-2014-008) and will generally only consider information to be supplied where the information is immutable and not subject to change. Examples of this might include research and development information, fixed costs incurred by the Third Party or where disclosure of information in the contract will permit an Applicant to make an "accurate inference" of sensitive third-party business information that would not in itself be disclosed under the *Act*.

This means that generally speaking, the contents of a contract between a Public Body and a Third Party will not qualify as having been "supplied". Contracts generally result from negotiations. Even a contract preceded by very little or no negotiation (i.e. a proposal that has been incorporated into a contract without change) will still usually be seen as "negotiated" as the other party agreed to it.

Information of a proprietary nature that is not subject to negotiation between a Third Party and a Public Body is generally considered to be supplied (see *Canadian Pacific Railway v. British Columbia (Information and Privacy Commissioner)*, 2002 BCSC 603 starting at paragraph 69).

Assessment of confidentiality is addressed in *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.), at paragraph 42:

> *[...] whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
>
> *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
>
> *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.*

In order for section 39(1)(b) to apply, the information must not only have been "supplied" by the Third Party as described above, but also supplied in confidence.

Reasonable Expectation

Section 39(1)(c) uses the phrase "could reasonably be expected to." This refers to the standard of proof that must be met in order to rely on the exception. Report A-2013-008 canvasses the interpretation of this phrase by the Supreme Court of Canada and by other Canadian authorities. The consensus is that there must be detailed and convincing evidence

that logically explains why and how the disclosure could lead to a particular identifiable outcome or harm. The potential occurrence of an alleged outcome must be established as being considerably more than merely possible or speculative. It need not, however, be proven on a balance of probabilities. The likelihood of the occurrence of the outcome alleged must be considerably higher than a mere possibility, but somewhat lower than more likely than not. In *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 S.C.R. 23, the Court stated "A third party... must show that the risk of harm is considerably above a mere possibility, although not having to establish on the balance of probabilities that the harm will in fact occur."

Harm

This Office adopted the test used in Saskatchewan as set out in Report 2005-003 to provide clarity to the concept of harm:

1) *there must be a clear cause and effect relationship between the disclosure and the alleged harm,*
2) *the harm must be more than trivial or inconsequential (in fact, the ATIPPA, 2015 uses the term "significant harm"), and*
3) *the likelihood of harm must be genuine and conceivable.*

Report A-2013-008 stated that given the importance of the principle of accountability, heightened competition should not be interpreted as harm. Heightened competition ensures that Public Bodies are making the best possible use of public resources; this is not possible if bid details are protected from disclosure in the absence of detailed and convincing evidence requiring such details to be withheld.

Knowing the bid details of the successful bid may give an Applicant some insight with respect to competitive pricing, but it does not automatically ensure that a competitor will be successful the next time there is an open call for bids. Pricing is influenced by several factors, which may vary from company to company and these factors are not static and can change from year to year.

As a result, on numerous occasions, this Office has found that prices contained in bids, proposals and contracts are not exempt from disclosure pursuant to section 39. This includes the aggregate contract price as well as unit prices and copies of full bids (see Report A-2013-008 and Report A-2013-009).

That being said, it is important to remember that certain kinds of information are protected by section 39. In Report A-2013-009, the Commissioner stated:

> *Asking a third party to disclose, for example, how much it pays to obtain the goods they sell, how they decide what price(s) to bid or how it produces or manufacture its products would be unfair. These are some types of third party information that I believe section 27* [now section 39] *is intended to protect, not the prices paid by a public body to procure goods and services.*

Interference with Contractual or Other Negotiations

The Federal Court interpreted this provision in *Societe Gamma Inc. v. Canada (Department of the Secretary of State)*, (April 27, 1994), T-1587-93, T-1588-93 (F.CT.D.) as requiring that "it must refer to an obstruction to those negotiations and not merely the heightening of competition for the Third Party which might flow from disclosure".

Harm to Competitive Position

In Report A-2013-009, this phrase was interpreted to mean:

> *...actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process which is transparent to the public and supports the accountability function that underlies the purpose of the ATIPPA. Contracts with public bodies require greater transparency than those with private sector entities, this is simply a "cost of doing business" with public sector entities.*

The Newfoundland and Labrador Court of Appeal also commented on this issue in Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52. In that case, the request was for information about the cost of office supplies Memorial purchased from Staples under the tender contract and also supplies purchased outside the contract. The court stated:

> *[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples' competitive position or result in significant financial loss to it. **While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples' competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder's loss of exclusive knowledge of MUN's contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a risk of harm considerably above a mere possibility, or a real risk of financial loss. More specifically, disclosure of MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples' bidding strategy, without more, is not evidence from which harm to Staples' competitive position and significant financial loss to it can be reasonably inferred.***

> *[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples' competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.* [emphasis added]

Report A-2011-007 addressed circumstances in which harm was assessed as being more than speculative where information with respect to video lottery machines was requested. Specifically, the request was for PAR sheets, which are design documents created by slot machine manufacturers to illustrate the math, probabilities and computer algorithms used in each of their slot machine games. The Third Party was able to show that development of these games involved considerable investment of both time and monetary resources and disclosure of the requested information would enable competitors to create and manufacture market-proven successful games on an on-going basis without incurring the same research or development costs, which can be significant. Thus, a competitor, armed with this information, could offer these games to market for substantially less cost than the original creator, so much so that the original creator would no longer be competitive at all. The Commissioner accepted that this type of harm was one of the harms that the exception for Third Party business interest was designed to protect against.

Undue Financial Loss or Gain

Report A-2008-013 considered the notion of "undue financial loss" and quoted at length from British Columbia Order 00-10, pages 16-18. In that case, an Applicant brewery sought records containing sales data for two competing breweries who both opposed the release of the data:

> *Molson argued that disclosure of this information could, within the meaning of s. 21(1)(c)(iii), reasonably be expected to "result in undue financial loss or gain to any person or organization". Labatt agreed with this. Molson submitted that disclosure of the information would cause loss to it because the information would hurt its competitive position, thus causing a loss of revenue. Molson also said it would allow Pacific Western or another competitor to make profits without having invested any capital to do that...*
>
> *When is a financial gain or loss "undue"? As is the case with the significant harm test under s.21(1)(c)(i), this test obviously requires one to consider what loss or gain might be 'due' in trying to define what is 'undue'. The ordinary meanings of the word "undue" include something that is unwarranted, inappropriate or improper. They can also include something that is excessive or disproportionate, or something that exceeds propriety or fitness. Such meanings have been approved regarding the similar provision in Alberta's freedom of information legislation. See Order 99-018. The courts have also given 'undue' such meanings, albeit in relation to other kinds of legislation.*

> *See, for example, the judgement of Cartwright J. (as he then was) in Howard Smith Paper Mills Ltd. v. The Queen (1957), 29 C.P.R. 6 (S.C.C.), at p. 29.*
>
> *In my view, this financial gain to Pacific Western, and others, would be undue. It would not be undue because the gain would be large. The evidence does not permit me to make any finding on the costs saved by Pacific Western if it were to obtain information that it would otherwise have to pay for. Nor does it allow me to decide what price Pacific Western would pay to buy such information if it were available. But the information doubtless has value to Pacific Western and to others. The gain to Pacific Western from having that information would be undue because it would be unfair, and inappropriate, for Pacific Western to obtain otherwise confidential commercial information about two of its competitors and thereby reap a competitive windfall. . . .* [emphasis in original]

A financial loss or gain is not "undue" merely because it is large. In Report A-2008-013 and Report A-2009-006, the loss and/or gain was undue because disclosure of the requested information, developed by a Third Party at considerable cost, would enable a competitor to produce a competing product that could be put on the market for a significantly lower cost (as the competitor would not have to incur the development costs). Additionally, it was unlikely that the Third Party would be able to offer similar developed processes or products to current or prospective clients (due to the competitor's significantly lower prices). As a result, the Third Party would then have to incur considerable costs (that it would not have had to incur otherwise) to develop other products and processes to offer to clients.

Notification under Section 19

Notification of a Third Party is only required where a Public Body believes that all three elements of section 39 might apply to information but is uncertain about that conclusion. Identification by the bidder, pursuant to section 8(2) of the *Regulations*, of information that might qualify for exemption pursuant to section 39, does not automatically require notification of a Third Party pursuant to section 19. 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, and in fact inappropriately frustrates timely access to information.

Section 8(2) must not be interpreted by Public Bodies as an amendment to section 19, requiring notification every time a Third Party identifies information in a bid which it believes may qualify for an exemption under section 39. Section 19 continues to require an assessment of the records by the Public Body to determine whether section 39 actually applies and then it must process the records in accordance with that assessment.

i) If section 39 clearly applies and the information is being withheld, no notification is required.
ii) If section 39, in the opinion of the Public Body, *might* apply, notice should be sent to the Third Party.

iii) If section 39 clearly does not apply and information is being released, no notification should be provided.

While unnecessary and not recommended by the Office of the Information and Privacy Commissioner (OIPC), there is nothing in *ATIPPA, 2015* prohibiting Public Bodies from informally notifying Third Parties (outside of section 19) of the release of records concurrently with release to the Applicant. If given, any such informal notice must not imply or state that the Third Party has a right pursuant to *ATIPPA, 2015* to file a complaint with the Commissioner or an Appeal with the Trial Division.

Likewise, if a Public Body is satisfied that section 39 **is** applicable, that information can be withheld without notification to the Third Party.

However, Public Bodies may need assistance and input from the affected Third Party in order to effectively determine whether the requirements of section 39(1)(c) can be met. If required, this consultation should be done informally, without any section 19 notification. **A Section 19 notification ONLY comes into play when there is an intention to release and the Public Body is uncertain regarding the application of section 39 (those records in the "grey area").** These are records for which the Public Body does not believe it can discharge the burden of proof to withhold under section 39 but which hold enough of the characteristics of **all** three parts of the test that they "might" be excepted from disclosure.

Public Bodies act contrary to *ATIPPA, 2015* when they frustrate an Applicant's right to timely access by providing unnecessary notifications to Third Parties. Public Bodies sometimes notify Third Parties despite determining that the records in question clearly fall outside of section 39. The most commonly cited reasons for these gratuitous notices is the desire to preserve long standing business relationships or perceived ethical issues associated with 'blind siding' business partners. While business relationships may be important, these reasons are clearly irrelevant in the *ATIPPA, 2015* context, and such notices unacceptably deny timely access to information.

If, after reviewing all the records a Public Body is **unable** to decide if the records (or a portion of them) are within section 39, the Public Body should notify the Third Party of its intention to release these grey area records as set out in section 19(1). To ensure meaningful notice, it should be accompanied by the grey area records only (those the Public Body is unsure about). There is no need to send the entire package of records to the Third Party if section 39 is assessed as potentially applying to only a portion of the records. The notice should seek the Third Party's consent to release the grey area information and should also include a deadline by which the Third Party should respond, as the Public Body's 20 business day timeline for responding to the Applicant is not suspended during the section 19(1) notification process. If the Third Party does not consent and/or does not offer any additional evidence with respect to the applicability of section 39, the Public Body must decide to release the information, thus triggering the section 19(5) notification to the Third Party.

Section 19(5) lists the mandatory contents of this notice, including the reasons for the decision and the provision of the *Act* upon which the decision was based. Simply stating that it was determined that section 39 did not apply is inadequate. Sufficient detail **must** be provided to allow the Third Party to understand the reasoning behind that determination. **At**

a minimum, the reasons should summarize what the Public Body's submissions to the OIPC will be if a complaint is made by the Third Party.

Upon receipt of notification, the Third Party must decide whether to file a complaint, and if it does, it bears the onus of establishing the applicability of section 39. Third Parties are generally in a better position to present the evidence required to meet the burden of proof, as they know their business best.

We note above that the Public Body must review all of the records prior to sending them to the Third Party (in order to determine which records may be subject to section 39 and which are clearly not). The entire set of records should not be sent to the Third Party, unless, after reviewing them, it has been determined that the entire set of records may be subject to section 39. This is the ideal scenario, but we recognize that in all cases this may not possible. In some situations, the volume of records and the tight timelines for response will preclude a thorough review of the records by the Public Body prior to sending them to the Third Party. Other times, the involvement of a Third Party will not become apparent until late in the game. These situations may require modifications to the process such as sending the entire package of records to the Third Party or having a very informal section 19(1) notification that may not include records at all or simply a detailed description of the records at issue. However, it is important that Public Bodies make every effort to review the entire set of records first and only send the Third Party the grey area information. This will allow the Third Party to do a more focused and efficient review of the information, thus enabling them to respond to the Public Body or prepare a Complaint to the OIPC in a complete and timely manner.

Further, it is the expectation of the OIPC that all records not impacted by the potential application of section 39 will be sent to the Applicant within the original response timeline, subject of course to any other exceptions that may apply.

Releasing Records

Once the Public Body has made a decision regarding the release of records, it must notify the Third Party, who then has a specific deadline in which to file a complaint with the Commissioner or go to court. Public Bodies should be sending these notices by express or registered mail so that they can track the delivery of the notice and ensure they are aware of when the notice was received by the Third Party. This will ensure accuracy of timelines and eliminate any uncertainty regarding the date upon which it is appropriate to release records.