



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-020

September 26, 2016

Department of Finance

Summary:

An applicant requested records from the Department of Finance relating to casino gambling. The Department was prepared to disclose part of the requested records, but a Third Party objected and complained to this Office, arguing that more of the information ought to be withheld on the basis of section 35 of the *ATIPPA, 2015* (disclosure harmful to the financial or economic interests of a public body) and section 39 (disclosure harmful to the business interests of a third party). The Commissioner concluded that the Third Party was not entitled to rely on section 35, and that it had not met the requirements of section 39. The Commissioner recommended that the Department disclose the information that it had proposed to disclose.

Statutes Cited:

Access to Information and Privacy Act, 2015, SNL 2015, c. A-1.2, ss.19, 35, 39.

Authorities Relied On:

Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52; *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University*, Gary Kachanoski, 2014 NLTD(G)107; Ontario OIPC Order PO-3617; British Columbia OIPC Order F15-53; Saskatchewan IPC Review Reports 195-2015 & 196-2015; Nova Scotia OIPC Review Reports FI-13-28 and 16-01; Newfoundland and Labrador OIPC Reports A-2016-008, A-2016-007, A-2016-002, A-2016-001, A-2015-006, A-2015-005, A-2015-001, A-2014-013, A-2014-008, A-2013-009, A-2013-008, A-2011-007..

I BACKGROUND

- [1] An applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* (“the *ATIPPA, 2015*” or “the *Act*”) to the Department of Finance (“the Department”) for the following information:

“Correspondence with companies, people or agencies external to the department about casino gambling in Newfoundland and Labrador, both traditional (land-based) and virtual (web-based). Request includes records in any and all formats, including paper and electronic. Date range of request is Nov. 1, 2015 to the present.”

- [2] The Department intended to disclose some of the responsive records, with some information severed on the basis of section 29 (policy advice or recommendations) and section 39 (business interests of a third party). The Department was concerned, however, that disclosure of some of the information it intended to disclose might also be harmful to the business interests of a Third Party under section 39 of the *ATIPPA, 2015*. The Department notified the Third Party under section 19 of the *Act*, about the information it proposed to disclose. The Third Party filed a complaint with this Office, stating that while it agreed with the severing already proposed by the Department, it did not go far enough, and the Third Party proposed further severing.
- [3] The Complaint could not be resolved informally, and was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Written submissions in support of their positions were received from both the Department and the Third Party.

II THE DEPARTMENT’S POSITION

- [4] The Department took the position that its proposed severing was justified, some under section 29 and some under section 39. It did not agree with the additional severing proposed by the Third Party, arguing that the Third Party had not provided sufficient evidence to meet the test in section 39.

III THE THIRD PARTY'S POSITION

[5] The Third Party took the position that further information ought to be withheld on the basis of section 35 (disclosure harmful to the financial or economic interests of a public body), and also on the basis of section 39 (disclosure harmful to the business interests of a third party). The Third Party also asserted that some information in certain documents was not responsive to the Applicant's request, and ought to be withheld on that basis.

IV DECISION

[6] Previous Reports of this Office have concluded that, under the *ATIPPA, 2015* a third party has a right to file a complaint with this Office only with respect to disclosures which might be harmful under section 39 (in the case of business information) or section 40 (in the case of personal information) and of which they have been notified under section 19 of the Act. In the present case, it is for the Department to decide whether any information in the responsive records ought to be withheld on the basis of section 29 or on the basis of section 35. In its initial severing of the records it proposes to send to the Applicant, the Department has withheld some information relying on section 29. It has not relied on section 35.

[7] This Office has issued a guidance document on the severing of information deemed to be "non-responsive". Decisions about whether a record or information is responsive to the request are the responsibility of the public body, not of third parties. I see no reason to question the Department's decision in this case, as the Third Party has no standing to raise the issue.

[8] The present complaint, therefore, is concerned only with section 39, and only with the additional information that the Third Party claims should be withheld on that basis. If the Department ultimately provides records to the Applicant which have been severed on the basis of any exception, including section 39, then the Applicant will have the right to file a complaint with this Office about that.

[9] Section 39 of the *ATIPPA, 2015* reads, in part, as follows:

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.

[10] The test contained in section 39 consists of three separate parts, in subsections (a), (b) and (c). All three parts of the test must be met to allow a public body to refuse to disclose the requested information. If any one part of the test is not met, the public body must disclose the information. The burden of proof that information must be withheld under section 39 lies with the Third Party.

[11] In the present case, the information in dispute is clearly commercial or financial information of the Third Party. It therefore meets the first part of the test.

[12] The second part of the test requires that the information has been supplied in confidence by the Third Party. A large part of the responsive record was provided to the Department in the form of a memorandum or information note, which distinguishes this

case from other recent Reports from this Office in which the record was a negotiated contract. I conclude that in this case, the information was “supplied” within the meaning of paragraph 39(1)(b).

[13] It is also clear from the context that some of the information was intended to be, and was, supplied “in confidence.” However, some other information, which the Department proposes to disclose, is identical or very similar to information that is publicly available, some of it on the Third Party’s own website. Information that is already publicly available cannot be said to be supplied “in confidence.” That information does not meet the second part of the test, and consequently must be disclosed.

[14] Even for the remaining information that has met the first two parts of the test, part three requires that the third party must provide “detailed and convincing evidence” of a “reasonable expectation of harm” if the information were to be disclosed. In the present case, the Third Party makes a number of arguments that harm is likely to result from disclosure. I have concluded that none of them reaches the threshold of detailed and convincing evidence.

[15] For example, the Third Party argues that “it is reasonable to assume” that harm would result if certain information was made available to its competitors. However, no evidence was provided about those competitors, who they might be, or anything else about them, and there was no evidence linking the disclosure of particular information to specific kinds of harm. The test in section 39 requires evidence. Assumptions, whether reasonable or otherwise, are not enough.

[16] I have concluded that the Third Party has failed to meet the section 39 test for the additional information that it argues should be withheld. Therefore it must be disclosed.

[17] I must emphasize that my conclusions are intended to apply only to the information that the Third Party proposed for additional severing. The way that the *ATIPPA, 2015* is structured, any additional severing that is contemplated by the public body, whether on the basis of section 39 or any other exception, is not at issue in a third party complaint. Any

review of those severing decisions would have to await a complaint from the Applicant, should he or she disagree, after the Third Party complaint has been dealt with and any records have been provided.

V RECOMMENDATIONS

[18] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department of Finance disclose to the Applicant the information it had proposed to disclose, despite the objections made in this complaint by the Third Party,

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

[20] Please note that within 10 business days of receiving the decision of the Department of Finance under section 49, the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of the *ATIPPA, 2015*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of September, 2016.

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