



OFFICE OF THE INFORMATION  
AND PRIVACY COMMISSIONER  
NEWFOUNDLAND AND LABRADOR

## Report A-2016-017

August 25, 2016

### Office of the Premier

#### Summary:

An applicant requested information about casinos from the Office of the Premier. The Office of the Premier was prepared to disclose the information, but decided to notify a Third Party about its decision to release. The Third Party filed a complaint with this Office, arguing that disclosure would violate section 39 of the Act (disclosure harmful to the business interests of a third party.) The Commissioner found that the test in section 39 had not been met, and recommended disclosure of the information.

#### Statutes Cited:

*Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A1.2, s.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; *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.); OIPC Reports A-2016-016, A-2016-008, A-2016-007, A2016-006, A2016-003, A-2016-002, A-2016-001, A-2015-009, A-2015-006, A-2016-004, A-2016-002;

## I BACKGROUND

[1] The Office of the Premier received a request under the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the Act”) for “correspondence to and from the Office of the Premier related to casino gambling in Newfoundland and Labrador.” The Premier’s Office concluded that disclosure of some of the information might affect the business interests of a third party. The Premier’s Office notified the Third Party, which filed a complaint with our Office, arguing that the disclosure of the information would cause harm to its business interests as provided in section 39 of the *ATIPPA, 2015*.

[2] Attempts to resolve this complaint by informal resolution were not successful, and the complaint was referred for formal investigation under subsection 44(4) of the *ATIPPA, 2015*.

## II PUBLIC BODY’S POSITION

[3] The Premier’s Office took the position that while the records contained information of the Third Party, the disclosure of that information could not reasonably be expected to cause harm within the meaning of section 39 of the *ATIPPA, 2015*.

## III THIRD PARTY’S POSITION

[4] The Third Party argued that the information in question is a trade secret or commercial information and is protected from disclosure by copyright law. It also argued, pursuant to section 39 of the *ATIPPA, 2015* that it was supplied to the Premier’s Office in confidence, and that its disclosure would cause harm to ongoing negotiations, as well as harm to its competitive position. It further argued that disclosure could result in similar information no longer being supplied, when it is in the public interest that similar information should continue to be supplied.

#### IV DECISION

[5] Section 39 of the *ATIPPA, 2015* reads 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.*

[6] The test in section 39 is a three-part test, and all three parts have to be met in order for the information to be withheld. The Third Party bears the burden of proof to show that the information should be withheld.

[7] The part of the responsive record in dispute in the present case consists of a 10-page document prepared by the Third Party. One part may be characterized as thoughts on the development and operation of a casino in Newfoundland and Labrador, and the remainder is information about the experience of the Third Party in building and operating casinos in other jurisdictions.

- [8] The Third Party has argued that the document is copyrighted property and that federal copyright law prohibits its disclosure. However, the *Copyright Act, RSC 1985, c. C-42* explicitly provides, in section 32.1, that it is not an infringement of the *Copyright Act* to disclose a record pursuant to federal or provincial access to information legislation.
- [9] With respect to the first part of the test in paragraph 39(1)(a), while the information has been compiled by the Third Party, I do not regard any of it as a trade secret. It may be that some of it could be regarded as commercial information about the Third Party itself, and might meet the first part of the test. The balance of the proposal is information about the operation of casinos in other provinces, and the Third Party's summary assessment of the benefits that might be expected from different management models. Much of this information may be obtained from public sources, which may argue against regarding it as the Third Party's commercial information. However, for the purposes of this Report, I will accept that the first part of the test might be met.
- [10] With respect to paragraph 39(1)(b), I accept that the Third Party may have intended that its proposal be treated confidentially. That in itself is not enough to satisfy the second part of the test. Whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated. In particular, as was determined recently in Report A-2016-006, it must be shown that the content of the record would not be 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." The information about the Third Party here is all obtainable from the Third Party's own website. The information about the operation of casinos in other provinces is publicly available. Therefore I conclude that the information cannot be said to have been supplied "in confidence" and so the second part of the test has not been met.
- [11] Given the conclusion I have reached on confidentiality, it is not necessary to deal with the third part of the test in paragraph 39(1)(c). However, as the present Report is the 13<sup>th</sup> to deal with third party business interests since the coming into force of ATIPPA, 2015, many of which have resulted in court applications by third parties, I will address it.

[12] The third part of the test requires the Third Party to show that there is a reasonable expectation that harm will be a probable result of the disclosure, and this must be demonstrated by clear and convincing evidence. In this case the assertions of harm have not been supported by evidence. For example, the expectation of harm to its competitive position, as argued by the Third Party, would require, at a minimum, some evidence of an existing competitive market, and of existing competitors. I have been provided with no such evidence. Similarly, the Third Party argues that disclosure would cause harm to its negotiating position. That would require that there be negotiations, but the Office of the Premier advises that there are no ongoing negotiations with the Third Party.

[13] Finally the Third Party has provided no evidence to support its argument that it is in the public interest that similar information continues to be supplied to the public body. In fact, it appears that the information about the Third Party, its activities and its employees is no more than what it has made public on its own website. It also appears that the proposal was unsolicited. I have no evidence that the government needs, or wants to be supplied with, the information in this proposal, or that it is in the public interest.

[14] In conclusion, I have found that the three-part test in section 39 has not been met, and that therefore the information ought to be disclosed.

## VI RECOMMENDATIONS

[15] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Office of the Premier disclose the responsive records in dispute in this complaint to the Applicant.

[16] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Office of the Premier must give written notice of his or her decision with respect to these recommendations to the Commissioner and to any person who was sent a copy of this Report, within 10 business days of receiving this Report.

[17] Please note that within 10 business days of receiving the decision of the Office of the Premier 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.**

[18] Dated at St. John's, in the Province of Newfoundland and Labrador, this 25<sup>th</sup> day of August, 2016.

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

