OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-004

February 8, 2017

Department of Finance

Summary: The Applicant requested from the Department of Finance correspondence between the Department and a Third Party relating to video lottery terminals. The Department gave notice to the Third Party that it intended to disclose some of the information. The Third Party complained to this Office, arguing that some of the information should be withheld based on sections 29 (policy advice or recommendations), 34 (disclosure harmful to intergovernmental relations or negotiations), 39 (disclosure harmful to business interests of a third party) and 40 (disclosure harmful to personal privacy) of the *ATIPPA, 2015*. The Commissioner found that the Third Party was not entitled to rely on sections 29 or 34, and had not met the test for sections 39 or 40, and recommended that the information be disclosed.

Statutes Cited: *Access to Information and Privacy Act, 2015*, SNL 2015, c.A-1.2, ss.2, 19, 29, 34, 39, 40;

Freedom of Information and Protection of Privacy Act, SNS 1993, c.5, s.21;

Freedom of Information and Protection of Privacy Act, RSA 2000, c.F-25, s.16.

Authorities Relied On: Authorities Relied On: Newfoundland and Labrador OIPC Reports A-2016-019, A-2016-020;

Nova Scotia OIPC Review Report 16-10;

Alberta OIPC Order F2015-22.

I BACKGROUND

[1] The 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") as follows:

> *"Correspondence, in any and all formats, including paper and electronic, from the last two years between the Department of Finance and* [a named Third Party] *relating to the operation of and revenue from video lottery terminals (VLTs) in Newfoundland and Labrador."*

[2] The Department intended to disclose some of the responsive records, with some information severed on the basis of a number of exceptions to disclosure that are not relevant here, and some further information severed on the basis of section 39 of the *ATIPPA, 2015* (business interests of a third party). The Department, however, was concerned that disclosure of some of the remaining information might be harmful to the business interests of the Third Party under section 39 and notified them accordingly under section 19 of the *Act*. The Third Party filed a complaint with our Office, objecting to the disclosures proposed by the Department, and proposing further severing.

[3] As the complaint could not be resolved informally it was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Written submissions were received from the Department and the Third Party.

II PUBLIC BODY'S POSITION

[4] The Department advised that it had discussed with the Third Party the information it proposed to disclose. The Department stated that after consideration of the Third Party's views on the application of section 39, it had concluded that sufficient evidence was not provided to prove potential harm should the information be disclosed.

III THIRD PARTY'S POSITION

[5] The Third Party argued that some of the information ought to be withheld on the basis that it constituted policy advice or recommendations to the public body, prepared by the Third Party and provided to the Department, as contemplated by section 29 of the *ATIPPA, 2015*. The Third Party also claimed that the disclosure of certain information would be harmful to intergovernmental relations and therefore should be withheld under section 34 of the *ATIPPA, 2015*.

[6] The Third Party relied on section 39 of the *Act*, arguing that some of the information ought to be withheld because its disclosure would be harmful to its own business interests or to the business interests of other third parties with which it has business relationships. The Third Party also argued that some information ought to be withheld because it constituted the personal information of third parties and its disclosure would be harmful to their personal privacy under section 40.

IV DECISION

[7] In previous Reports our Office has concluded that, under the *ATIPPA, 2015* a third party has a right to file a complaint with our 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 about which they have been notified under section 19 of the *Act*. It is for the public body to decide whether any information in the responsive records ought to be withheld on the basis of any other exceptions.

[8] This is not to say that a third party cannot raise the possible application of other exceptions with the public body in the course of a consultation process following a section 19 notification. However, the ultimate decision on claiming such exceptions always rests with the public body.

[9] As such, this Report only addresses sections 39 and 40, and only the additional information that the Third Party claims should be withheld on that basis. If the Department ultimately provides records to the Applicant from which the Department has severed information for any reason, the Applicant is entitled to file a complaint with our Office, and such severing can be reviewed at that time.

[10] 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*
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> *(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*
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> *(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.*

The test in section 39 consists of three separate parts that must all 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 rests with the third party.

[11] The record contains several different types of information which the Third Party claims must be withheld on the basis of section 39. One document consists of a "Communications Plan" sent by the Third Party to the Department. First, I find that while some of the information in it might be commercial or financial information, the Plan as a whole is not.

Second, while the Plan was created by the Third Party and was "supplied" to the Department, it cannot be said to be "supplied in confidence" when the information in it was clearly designed to be publicly disclosed in response to media or other inquiries.

[12] Finally, there must be clear and convincing evidence that one of the types of harm referred to in paragraph 39(1)(c) is likely to occur. The harm specifically cited by the Third Party is that "the disclosure could result in similar information no longer being supplied." While this could happen, the provision in paragraph 39(1)(c) continues: "…when it is in the public interest that similar information continue to be supplied." There is no evidence that this is so. The document was not solicited by the Department, and the Department advises that it would cause no harm if such information was not provided in future. As all three parts of the section 39 test have not been met, this record must be disclosed.

[13] The Third Party also claims that section 39 applies to a document consisting of a 10-page table listing all of the business establishments in Newfoundland and Labrador in which there are video lottery terminals ("VLT's") along with the name of the community and the region in which they are located, and a column titled "Net Revenue" for each establishment. The Third Party argues that disclosure of this information would be harmful to its own business interests and to the business interests of the individual establishments.

[14] A little background is necessary. VLT's are installed in licensed establishments, or "retailers" in the province under contracts with the Third Party that owns, installs and operates them. "Net Revenue" means "cash in minus cash out" – that is, the figure obtained by taking all of the money put into the VLT's in the establishment by players during a particular period, and subtracting all of the money paid out in winnings by the same VLT's during the same period. Commissions to the retailer, expenses and profits of the Third Party, and payments to the province, all come out of net revenue.

[15] The "Net Revenue" information is not created or provided by the establishment in which the VLT's are located. It is created electronically by the operations of each individual VLT, and transmitted directly and securely by high-speed internet connection to the Third Party. It

cannot be altered in any way by the retailer. This data is assembled and processed by the financial software of the Third Party to produce records such as the "Net Revenue" table. Although each VLT can produce a "cash in and cash out" printout that is available to the retailer under the terms of the contract, the information does not belong to the retailer. The evidence provided to our Office is conclusive that the information belongs to the Third Party.

[16] The first part of section 39 provides that to meet the test, the information in question must be "…commercial, financial, labour relations, scientific or technical information of a third party." I conclude that "of" means belonging to a third party – it refers to a proprietary interest of some kind in the information. Section 40, by contrast, is concerned with personal information, which is defined by section 2 as "information about an identifiable individual." The term "about" means that the information is descriptive of the individual in some way and does not necessarily belong to the individual.

[17] Access to information legislation in other Canadian jurisdictions uses similar language to that in the *ATIPPA, 2015*. Nova Scotia's *Freedom of Information and Protection of Privacy Act*, at section 21, contains the identically worded provision "…commercial, financial, labour relations, scientific or technical information of a third party." In a recent decision, *Review Report 16-10*, the Nova Scotia Information and Privacy Commissioner decided that the word "of" means "having a claim to a proprietary interest in the information."

[18] Section 16 of Alberta's *Freedom of Information and Protection of Privacy Act* also contains an identical provision, and in that jurisdiction the expression "of the third party" is also taken to refer to "…proprietary information, in the sense that it could be said to *belong* to a third party." (See Alberta *Order F2015-22*).

[19] On the evidence, the retailers whose establishments are referred to in the "Net Revenue" table do not have a proprietary interest in the information. Therefore section 39 cannot be applied so as to claim that the disclosure of that information could be harmful to the business interests of the retailers. This exception is only relevant in considering whether there is any requirement to protect information belonging to the Third Party.

[20] I have concluded that the "net revenue" information is information "of the Third Party" and it is clearly financial or commercial information, so the first part of the test has been met.

[21] It also appears to have been "supplied" by the Third Party to the Department, within the meaning of the second part of the section 39 test. However, the Third Party did not provide any evidence of the circumstances under which the information was supplied, to establish whether it was supplied in confidence. Therefore, as there is no other evidence that might support that finding, I conclude that the second part of the test has not been met.

[22] Finally, there is no evidence that there is any likelihood of harm to the Third Party if the information were to be disclosed. The Third Party argues that the information is a highly valuable corporate asset, and disclosure of the information would provide a "competitive advantage to other interested parties pursuing similar business opportunities…." While the information is clearly a corporate asset, in the sense that it is one of the Third Party's core sources of revenue information, in circumstances where the Third Party has a statutory monopoly on the business of placing and operating VLT's in the province and in the absence of evidence of likely harm, the assertion of harm is simply speculative.

[23] As all three parts of the section 39 test have not been met, the record must be disclosed.

[24] The Third Party has also claimed section 40 (disclosure harmful to personal privacy) as a basis for withholding the information in the "Net Revenue" table that consists of the name of the establishment and the community in which it is located. It is my view that this is information about business, not personal information. It is true that many of the establishments have names that appear to relate to persons, including many whom are fictional, historical and other such characters. To the extent that the information in the table can be related to real individuals, this is not a basis to withhold information about individuals acting in their business capacity, and not their personal capacity, so section 40 does not apply.

[25] In summary, I have concluded that none of the exceptions claimed by the Third Party apply to any of the information at issue, and so the information should be disclosed.

V RECOMMENDATIONS

[26] 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,

[27] 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.

[28] 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.* **Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless the Third Party has provided the Department with a copy of its notice of appeal prior to that time.**

[29] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of February 2017.

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