



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-016

June 30, 2017

The Rooms Corporation

Summary:

The Applicant made a request to the Rooms Corporation for submissions made by the Third Party business to a Royal Commission. The Rooms decided to grant access to the records, but also decided to notify the Third Party under section 19. The Third Party filed a complaint objecting to the disclosure of some of the information under section 39 (harm to the business interests of a third party). The Commissioner determined that the Third Party had not met the test for section 39 and recommended that the Rooms Corporation disclose the information to the Applicant.

Statutes Cited:

[Access to Information and Protection of Privacy Act, 2015, SNL 2015, c. A-1.2](#), s. 39.

I BACKGROUND

- [1] The Applicant made a request to The Rooms Corporation (“The Rooms”) under the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*” or “the Act”) for Submissions and a Memorandum presented by a named third party business to the Newfoundland Royal Commission on Mineral Revenue (“the Royal Commission”) in 1974.
- [2] The Rooms located and reviewed responsive records, and determined that there appeared to be no reason to withhold the records under any of the exceptions in the *ATIPPA, 2015*, with the possible exception of two pages of the Memorandum that had been marked “restricted.” Those pages set out the net profit and return on shareholder equity of the Third Party over a period of 18 years, from 1955 to 1973. The Rooms concluded that it was difficult to determine whether disclosure of those two pages could result in harm to the Third Party as contemplated by section 39 of the *ATIPPA, 2015*. It therefore decided to notify the Third Party under subsection 19(5) of the Act that it intended to disclose the information. The Third Party filed a complaint with this Office objecting to the disclosure.
- [3] As the Third Party’s complaint could not be resolved informally it was referred to formal investigation under subsection 44(4) of the *ATIPPA, 2015*. Submissions were received from The Rooms and the Third Party Complainant.

II PUBLIC BODY’S POSITION

- [4] The Rooms concluded that the test in section 39 could not be met. The records at issue were the financial information of the Third Party, and had been supplied by the Third Party to the Royal Commission. However, it was difficult to conclude that they had been supplied in confidence, given that the Royal Commission was a public hearing and that the decision to mark the two pages “restricted” was apparently only made some time after the records had been supplied. The Rooms also argued that it was difficult to determine that disclosure of the information could result in harm, given that the records were over 40 years old.

III THIRD PARTY'S POSITION

- [5] The Third Party consented to disclosure of the majority of the records contained in its 1974 submissions, except for the two pages identified above. It argued that although it did not have evidence that the submission to the Royal Commission was made in confidence, its financial information had always been confidential, and it was the expectation of its shareholders that it remain confidential.
- [6] The Third Party also explained that it is currently involved in litigation, and that the damages claimed by the other party are based on the Third Party's profits from its operations going back as far as 1954. Therefore, although the information in the two pages in dispute is old, it could be used against the Third Party as part of the ongoing legal proceedings.

IV DECISION

- [7] The sole issue in this matter is whether or not the information in the disputed records must be withheld under the provisions of section 39 of the *ATIPPA, 2015*, which 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.

[8] This provision contains a three-part test requiring that all three parts of the test must be met in order to withhold the information. If any one of the parts of the test is not met, the information must be disclosed. In addition, subsection 43(3) of the *ATIPPA, 2015* provides that where a third party wishes to object to the disclosure of information relating to its business interests, the burden is on the third party to prove that the applicant has no right of access to the information.

[9] The two disputed pages consist of tables setting out the Third Party's annual net profit and return on shareholder equity from 1955 to 1973, in both dollar figures and percentages. That is clearly the Third Party's financial information, so the first part of the test has been met.

[10] The second part of the test requires that the information be "supplied in confidence." Since the information was provided by the Third Party as a voluntary submission to the Royal Commission, I conclude that it was "supplied" within the meaning of that term in the *ATIPPA, 2015*.

[11] Whether it was supplied "in confidence" is another matter. Royal Commission reports are public documents, and the main submissions made to the Royal Commission on Mineral Revenue were presented in public hearings. The 1974 Submission and Memorandum were provided in support of the Third Party's public position that profits in the mining industry at that time were unsatisfactorily low, and with regard to proposed changes to mining taxes and royalties.

[12] It is clear that the Submission was presented in public hearings in August 1974. The Memorandum was provided later, in September 1974, as a supporting document. There was a request by the Third Party in October 1974, a month after the Memorandum was

provided to the Royal Commission, asking that the Memorandum be held in confidence, which would explain why the pages in question came to be marked “restricted” in the archives. However, there is no evidence as to whether those documents had been made publicly available during the intervening month.

[13] The Third Party stated that it does not have evidence whether its submissions were made to the Royal Commission in confidence. The burden of proof rests with the Third Party, and in the absence of any convincing evidence to the contrary I conclude that it was not supplied in confidence. While unnecessary to resolve this matter, I will also address the third part of the test.

[14] The third part of the test requires proof of harm. The Third Party’s submission accepts that the disclosure of net profit and return on investment figures which are from 44 to 62 years old would not, in 2017, appear to represent any likelihood of harm. Their submission points only to the possible use of the information in the Third Party’s ongoing legal proceedings as evidence that harm could result from the disclosure. Speculative assertions that harm could occur do not meet the burden of establishing a reasonable likelihood that the disclosure of these records could result in undue financial loss to the Third party or gain to any person.

[15] As the Third Party has not discharged its burden of satisfying all three parts of the section 39 test, the information supplied to the Royal Commission by the Third Party must be disclosed to the Applicant.

V RECOMMENDATIONS

[16] Under the authority of section 47 of the *ATIPPA, 2015* I recommend that The Rooms Corporation disclose the requested information to the Applicant.

[17] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of The Rooms Corporation 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 (in this case the Third Party Complainant) within 10 business days of receiving this Report.

[18] Please note that within 10 business days of receiving the decision of The Rooms Corporation 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 Rooms Corporation with a copy of a notice of appeal prior to that time.**

[19] Dated at St. John's, in the Province of Newfoundland and Labrador, this 30th day of June, 2017.



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