OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2017-018

July 24, 2017

Department of Finance

Summary: The Applicant made a request to the Department of Finance for briefing materials relating to a specific borrowing program. The Department severed a large amount of information pursuant to section 29 (policy advice and recommendations) and section 35 (disclosure harmful to the financial or economic interests of a public body) of the *ATIPPA, 2015*. The Department gave notice to the Third Party in relation to the remainder of the information. Following receipt of the Third Party's response, the Department determined that the remainder of the information should be released. The Third Party complained to this Office, arguing that the information should be withheld in its entirety pursuant to sections 35 and 39 (business interests of a third party). The Third Party abandoned reliance on section 35 and the Commissioner found that the Third Party had not met the test in section 39. The Commissioner recommended that the requested information be disclosed.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, SNL 2015, c. A 1.2, s. 39.

Authorities Relied on: *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.)

Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski, 2014 NLTD(G) 107

Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52

File# 0005-066-17-020

I BACKGROUND

[1] The Applicant made a request to the Department of Finance ("the Department") under the *Access to Information and Protection of Privacy Act, 2015* (the "*ATIPPA, 2015*" or "the *Act*") for briefing materials relating to the *"Borrowing Program – Guaranteed Income Supplement Renewal – Retroactive Payments."*

[2] The Department determined that records received from the Third Party were responsive to the Applicant's request. The Department severed a large amount of information in the records pursuant to sections 29 and 35 of the *ATIPPA, 2015*. In relation to the remainder of the information, the Department notified the Third Party under subsection 19(1) of the *Act* to ask whether it would consent to the disclosure. Following a response from the Third Party, the Department concluded that they were prepared to release the information and, therefore, notified the Third Party under section 19(5). The Third Party then 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*.

II THE DEPARTMENT'S POSITION

[4] After receiving a response from the Third Party following their notification in accordance with section 19(1), the Department completed a line-by-line review of the records to determine if the disclosure of the remaining information would harm the business interests of the Third Party. The Department determined that the information did not satisfy all three elements of section 39. In particular, the Department noted that information in the records (not otherwise redacted) is either publicly available or is factual. Therefore the Department maintained that the information should be disclosed.

III COMPLAINANT'S POSITION

[5] The Third Party provided two lengthy and detailed submissions arguing that the record in question constitutes its proprietary commercial, financial, labour relations and technical information or is a trade secret of the Third Party. It further argued that the record was explicitly supplied in confidence and that the information was "objectively confidential." The Third Party also argued that disclosure of the information could reasonably be expected to harm its competitive position, result in similar proprietary compilations no longer being supplied to the Department, result in undue gain to other parties or result in undue loss to the Third Party. A large portion of the Third Party's final response to this Office focused on the Third Party's assertions of confidentiality and the undue loss which the Third Party would suffer if the information is disclosed. The Third Party also abandoned its reliance on section 35 (a section that only public bodies can invoke).

IV DECISION

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

> *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.*

[7] This is a mandatory exemption containing a three-part test. All three parts must be met in order to require a public body to refuse to disclose the requested information. Section 43(3) of the *Act* places the burden of proof on the third parties to prove that applicants have no right of access to the information.

[8] The portions of the record in dispute are sections of a specialized borrowing presentation used for business development and educational purposes, presented and distributed by the Third Party to Departmental representatives. This presentation was distributed globally by the Third Party to approximately 800 other governments and institutions.

Reveal Commercial or Financial Information of a Third Party

[9] As the record does contain commercial or financial information of the Third Party it meets the first part of the test.

Supplied in Confidence

[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 presentation to the Department, 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. The test for assessing confidentiality is an objective one, as outlined 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*.

[12] The Third Party argued that while certain information in the presentation is publicly available, it has compiled, analyzed and presented that information in a specialized manner utilizing its expertise, skill and judgment. Assuming this to be true, that does not negate the fact that the presentation was widely circulated around the world via ordinary mail.

[13] The presentation was given to Departmental representatives and hard copies were distributed. The Third Party asserts that a measure of its efforts to maintain confidentiality is that it spends a great deal of money to ensure that hard copies, as opposed to electronic copies, are provided to its clients. However, it also distributes copies to 800 governmental and professional institutions worldwide.

[14] The Third Party has argued that it is necessary to provide copies of the presentation to ensure that clients fully understand the information provided, to reinforce the concepts discussed, and to give the clients a "takeaway" to allow them to remember the presentation in meaningful detail. Furthermore, the Third Party has argued that it made the choice to provide hard copies as opposed to electronic copies so as to make distribution more difficult. I do not accept this argument. In today's technological environment with rapid scanners that take seconds to convert documents to e-mail attachments, this is not a compelling argument in regards to the Third Party's demonstration of its efforts to maintain confidentiality of the presentation. Not sharing any copies of the presentation or sharing only a precis of its key points would have enhanced its ability to prove that it intended the records to be in confidence.

[15] Also, there is a statement on the presentation which indicates that the presentation is confidential and there is a disclaimer at the end of the presentation which indicates that it is not to be redistributed. However, the prohibition is contained within a general legal notice, with no specific attention drawn to it. In *Corporate Express Canada, Inc. v. The President and Vice-Chancellor of Memorial University of Newfoundland, Gary Kachanoski*, 2014 NLTD(G) 107 it was held that:

> *[34] If one were to accept the argument that information is confidential merely because when it was supplied to the public body it was endorsed as such, then all third parties dealing with a public body could routinely frustrate the intent of the Act by adding such an endorsement to the information supplied. This point was recognized by Strayer J.) in the case of Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sport), [1989] F.C.J. No. 7, where he stated at page 4:*
>
> > *I am satisfied that when individuals, associations, or corporations approach the government for special action in their favour, it is not enough to state that their submission is confidential in order to make it so in an objective sense. Such a principle would surely undermine much of the purpose of this Act which in part is to make available to the public the information upon which government action is taken or refused. Nor would it be consistent with that purpose if a Minister or his officials were able to exempt information from disclosure simply by agreeing when it is submitted that it would be treated as confidential.*

[16] The Third party has not discharged its burden to establish that the presentation was supplied in confidence. While unnecessary to resolve this matter, I will also address the third part of the test

[17] The third part of the test requires proof of harm. As noted in Reports A-2017-006 and A-2011-007 detailed evidence establishing a reasonable expectation of *significant* harm must be provided. Speculative assertions that harm could occur are insufficient.

<u>Significantly Harm the Competitive Position of the Third Party.</u>

[18] The Third Party's position is that access to the presentation would result in undue gains to its competitors. This argument focuses on the possibility of a competitor reverse-

engineering the presentation and obtaining the technology behind the compilation of the presentation – the Third Party's databases in which it compiles the information and the technological mechanisms by which it analyses the information. I fail to see how any of these technological elements could be accessible through the disclosure of an already significantly redacted copy of the presentation. The Third Party's submissions do not demonstrate a clear and direct connection between disclosing the disputed information and these alleged harms.

[19] The Court of Appeal in *Corporate Express Canada Inc. v. Memorial University of Newfoundland,* 2015 NLCA 52 found that there must be "*a clear cause and effect relationship between the disclosure and the alleged harm."*

[20] The Third Party has on its website a number of presentations containing detailed financial information, analysis and observation, some of which is contained in the presentation. If disclosure of the presentation in issue will result in significant harm, undue gain to a competitor or undue harm to the Third Party, one might reasonably expect additional measures other than the precaution of distributing it globally via ordinary mail as opposed to electronic distribution. Electronic distribution avoids all the potential unintended disclosures associated with ordinary mail, provides for measures such as managed file transfers, encryption and password protection.

Information Will no Longer be Supplied

[21] In relation to the Third Party's position that similar information will no longer be supplied, the Third Party submitted that it would simply discuss the possibility of no longer providing the information. Going forward, the Third Party acknowledged it could consider simply not providing hard copies of its presentation and continue to provide advice and information to the Department just not in paper form. The Third Party has argued, however, that this would not be ideal and would not communicate the same information and encourage the same level of discussion. This is not sufficient to meet the threshold of "no longer being supplied." Additionally, the Public Body, in deciding to release the records, did not view this concern as sufficient to invoke the exception.

[22] The Third party has failed to satisfy its burden of proof with respect to the third element of the test.

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

V RECOMMENDATIONS

[24] 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.

[25] As set out in subsection 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 (in this case, the Third Party) within 10 business days of receiving this Report.

[26] 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 of Finance with a copy of its notice of appeal prior to that time.**

[27] Dated at St. John's, in the Province of Newfoundland and Labrador, this 24th day of July, 2017.

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