OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2020-009

July 22, 2020

Department of Finance

Summary: The Applicant requested from the Department of Finance correspondence between the Department and a Third Party, Atlantic Lottery Corporation (ALC) relating to video lottery terminals. The Department gave notice to ALC that it intended to disclose some of the information. ALC 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 in Report A-2017-004 found that ALC 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. The Department accepted the recommendation.

ALC appealed the Department's decision to the Supreme Court, which upheld the decision and dismissed the appeal.

Another Third Party, the Beverage Industry Association of Newfoundland and Labrador (BIA) appealed to the Supreme Court, arguing that it had not been given notice of the original decision by the Department and had therefore had no opportunity to make submissions. The Court set aside the Department's decision and remitted the matter to the Commissioner for reconsideration after receiving submissions from BIA.

On reconsideration the Commissioner found that ALC was not entitled to rely on sections 29 or 34, and that neither ALC nor BIA had met the tests for sections 39 or 40. The Commissioner therefore recommended that the information be disclosed.

File # 0005-066-20-031

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, sections 19, 29, 34, 39 and 40.

Authorities Relied On: NL OIPC Reports *A-2013-008*, *A-2013-009*, *A-2016-020*, *A-2017-004*;
OIPC Guidance: Business Interests of a Third Party (Section 39);

Atlantic Lottery Corporation Inc. v. Newfoundland and Labrador (Finance), 2018 NLSC 133;
Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance), 2019 NLSC 222;
Merck Frosst Canada Ltd. v. Canada (Health), 2012 SCC 3;
Corporate Express Canada Inc. v. Memorial University of Newfoundland, 2015 NLCA 52

I BACKGROUND

[1] In October 2016 an applicant made a request under the *Access to Information and Protection of Privacy Act, 2015* ("*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 Atlantic Lottery Corporation 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 *ATIPPA, 2015* (business interests of a third party). The Department, however, was concerned that disclosure of some of the remaining information might be harmful, under section 39, to the business interests of the third party, Atlantic Lottery Corporation (the "ALC") which is the sole owner and operator of all of the VLTs in the province.

[3] The Department determined it was necessary to notify the ALC in accordance with section 19 of *ATIPPA, 2015* of its intention to release the requested records. The ALC filed a complaint with this Office opposing the Department's decision and proposing further severing.

[4] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

[5] That investigation culminated in our Report A-2017-004, issued February 8, 2017. The Report recommended disclosure of the remaining information, and the Department on February 22, 2017 issued its decision to accept the recommendation.

[6] The ALC objected to that decision, and pursuant to section 53 of *ATIPPA, 2015* commenced an appeal of the decision in the Supreme Court. After a hearing the Supreme Court, on June 19, 2018, upheld the Department's decision to disclose the records (see the decision of Orsborn, J. in *Atlantic Lottery Corporation v. Newfoundland and Labrador (Finance)* 2018 NLSC 133).

[7] However, on October 15, 2018, another third party, the Beverage Industry Association of Newfoundland and Labrador (the "BIA") filed an application in the Supreme Court appealing the Department's February 22, 2017 decision. The BIA is an organization representing licensed retailers of alcoholic beverages in the province, in whose establishments the VLTs are located (the "Retailers"). In its application the BIA argued that its members were potentially affected by the Department's decision to disclose the records, but that, unlike the ALC, it had not been given any notification of the Department's intentions under section 19 of *ATIPPA, 2015*, and therefore had no opportunity to make submissions about it. The BIA had therefore not been involved in the previous proceedings.

[8] The Supreme Court heard the BIA's application on October 10, 2019, and on December 11, 2019 issued a judgment ordering that the Commissioner's decision to recommend disclosure be set aside, that the Department's resulting decision to disclose the records was of no effect, and that the matter be remitted to the Commissioner for reconsideration after inviting the BIA to make representations (see the decision of Marshall, J. in *Beverage Industry Association of Newfoundland and Labrador v. Newfoundland and Labrador (Minister of Finance)*, 2019 NLSC 222).

[9] That decision is currently under appeal to the Court of Appeal. Nevertheless, in conformity with the Order of Marshall J. our Office opened a new investigation file and has carried out a complete reconsideration of this matter, treating it as if it were a new third-party complaint received from the BIA on January 7, 2020 (the date of the filed Order) and taking into consideration representations received from the BIA and the other parties. The present Report is the outcome of that investigation.

[10] Our Office sent formal notification of the reconsideration investigation to the Department and to both Third Parties, summarizing the issues to be dealt with, explaining the procedure, and requesting submissions. The Department responded that it would rely on the submissions it had originally made in this matter in 2016. Both the ALC and BIA provided submissions.

[11] It should be noted here that in most of the published reports issued by this Office under *ATIPPA, 2015* or its predecessor legislation, public bodies are identified, but complainants are

not, in order to preserve as far as possible the confidentiality and privacy of complainants, whether they be applicants or third parties, individuals, organizations or corporations. However, in the present case the third party complainants have been publicly identified through successive hearings in the Supreme Court, in the published court judgments, and in the media. Since anonymity can no longer be preserved, we will use their names throughout this Report, rather than potentially confusing "Third Party" designations.

II THE DEPARTMENT'S POSITION

[12] In its original response to the ALC's complaint in 2016, the Department responded to the section 39 issue by stating that it had notified the third party, ALC, under section 19 of its intention to disclose the records, and engaged with the ALC in order to clarify whether the section 39 test could be met so as to withhold the information. Following that consultation the Department concluded as follows:

> *Section 39 of the ATIPPA outlines the three conditions which must be satisfied to sever information from a record. In preparing its response, the Department completed a line-by-line review of the requested report to determine if disclosure of any of its information had the potential to harm the business interests of the third party. Sufficient information was not available to satisfy all three conditions and therefore nothing has been severed under section 39 of the ATIPP Act.*

[13] The Department relies on those original submissions in the present reconsideration.

III ALC'S POSITION

[14] The ALC states that it relies on its 2016 submissions, in which it 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 ALC and provided to the Department, as contemplated by section 29 of the *ATIPPA, 2015*.

[15] The ALC 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*.

[16] The ALC also 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.

[17] The ALC also argued that some information ought to be withheld because it constituted the personal information of some third parties and its disclosure would be harmful to their personal privacy under section 40 of the *Act.*

[18] In addition to the above arguments, the ALC in its 2020 submissions suggests that the standard of proof invoked by the OIPC in its *Guidance: Business Interests of a Third Party (Section 39)* in which this Office states that the third party under section 39 must "make the case", is higher than the "risk of harm" test established by the Supreme Court of Canada in the *Merck-Frosst Canada Ltd. v. Canada (Health)* decision.

[19] The ALC further submits that it provided the information to the Department in confidence.

[20] The ALC further submits that although it has a statutory monopoly over VLTs, it fears competition if the information were disclosed.

[21] The ALC further submits, citing Justice Marshall's decision, that the Retailers retain rights in the information at issue protected by s.39 of the *Act*.

[22] The ALC further submits that the OIPC should accept Justice Marshall's observations that the Retailers have "significant and serious concerns" that are "compelling and persuasive".

IV BIA'S POSITION

[23] The submissions of the BIA address the confidentiality issue (part 2 of the three-part test in section 39) and the harm issue (part 3 of the three-part test).

[24] The BIA states that the agreement between a Retailer and the ALC makes no provision for disclosure. It argues that therefore the information should be kept confidential and not subject to disclosure, particularly in the absence of advance notice and consultation.

[25] The BIA argues that if the information is disclosed, it will provide an opportunity for competitors to gain advantage, undercutting existing Retailers, providing a competitive advantage to parties interested in pursuing similar business opportunities.

[26] The BIA argues that its members, especially those in rural areas, fear that the release of this information will enable people to infer commissions and know which establishments are more successful. This will expose them to public backlash, harming profits.

[27] The BIA argues that the net revenue figure, without context, is misleading because it doesn't consider the operating costs of the retailer, including mortgage or rent, electricity, payroll, insurance and so on. This will lead the public and competitors to believe that establishments are generating income that they are not, causing an influx of people into the industry, and undermining the position of existing members.

[28] The BIA argues that if the public discovers which establishments are most successful, attributing an inaccurately high volume of cash to the locations where it may be found, the disclosure will render those establishments a target for crime, putting all BIA members at risk. This concern is amplified in smaller communities because of marginal police presence.

V ISSUES

[29] The notification letter sent out to the parties by our Office set out what we viewed as the essential issues in this reconsideration, as follows:

- *What is the proprietary or other interest of any party to the information in the responsive records within the meaning of the phrase "of a third party" in section 39(1)(a) of ATIPPA, 2015?*

- *What is the proper application of the three-part test in s. 39 to the responsive records?*

[30] The submissions of the responding parties have raised additional specific issues. For the ALC, those issues may be stated as follows:

- *Whether the standard of proof for s.39 invoked by this Office in its guidance materials is higher than that established by the Supreme Court of Canada in Merck-Frosst Canada Ltd. v. Canada (Health);*

- *Whether the retailers retain rights protected by s.39, as stated by Justice Marshall, or whether this Office should reject that finding.*

- *Whether the ALC provided the information in the responsive records to the Department in confidence;*

- *Whether the ALC, although it holds a monopoly on the operation of VLTs in the province, reasonably fears competition;*

- *Whether this Office should accept Justice Marshall's observations that the VLT Retailers have "significant and serious concerns" that are "compelling and persuasive";*

- *The ALC also reiterates arguments about certain other responsive records, dealt with in Report A-2017-004, and also asks why it cannot invoke s.29 (advice and recommendations) section 34 (harm to intergovernmental relations) and section 40 (disclosures harmful to personal privacy).*

[31] The submissions of the BIA may be summarized as follows:

- *Whether the site agreement between the retailers and the ALC makes no provision for disclosure of the information at issue;*

- *Whether competitors will gain advantage from the disclosure of the information, thereby undercutting existing retailers;*

- *Whether retailers will suffer harm from public backlash if the public are able to "infer" the level of commissions;*

- *Whether the net revenue information is misleading because it does not consider the operating costs of the retailer;*

- *Whether there are safety concerns because disclosure of the net revenue increases the risk of retailers becoming targets of crime.*

[32] All of these issues will be examined in the paragraphs below.

VI DECISION

[33] Some further background is necessary for an understanding of these issues. As explained in the Report A-2017-004 from this Office, the record contains several different types of information which ALC claimed must be withheld on the basis of section 39. One document consists of a "Communications Plan" sent by ALC to the Department.

[34] ALC and also BIA claim that section 39 applies to a document which consists of a 10-page table, listing by name all of the business establishments in Newfoundland and Labrador in which there are VLTs, along with the name of the community and the region in which they are located, and a column titled "Net Revenue" for each establishment. It is the disclosure of this record (the "Table") which is the central issue for both ALC and BIA.

[35] As explained in our earlier Report, VLTs are installed only in licensed establishments (establishments in which alcoholic beverages are sold under license from the Newfoundland and Labrador Liquor Commission) and only under contracts with ALC, which owns, installs and operates the terminals, and which has a statutory monopoly on doing so. The expression "Net Revenue" means "cash in minus cash out" – that is, the figure obtained by taking all of the money put into the VLTs in an establishment by players during a particular period, and subtracting all of the money paid out in winnings by the same VLTs during the same period.

[36] It is important to note that the "Net Revenue" figure represents net revenue **to ALC**, not net revenue to the retail establishment. The income of the retailer from VLTs is a commission, calculated as a percentage of Net Revenue as set out in the siteholder agreement between the retailer and ALC. The expenses and profits of ALC, payments to the province, and commission to the retailer all come out of Net Revenue. The expenses and profits of the retailer are defrayed partly from VLT commissions but also, of course, from the other income of the retailer such as food and beverage sales.

[37] The "Net Revenue" information is not created or provided by the establishment in which the VLTs are located. It is created electronically by the operations of each individual VLT, and is automatically transmitted directly and securely by high-speed internet connection to ALC. That data cannot be altered in any way by the retailer. The data is then assembled and processed by

the financial software of ALC 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, that information is not created by, and cannot be altered by, the retailer.

Proprietary Rights of the Retailers

[38] On the basis of the above evidence, our Office concluded in Report A-2017-004 that the information in the Table belongs to ALC, and not to the Retailers. However, as noted above, in the BIA decision Justice Marshall concluded that the Retailers may have retained some form of proprietary interest in the information at issue, which would permit them to argue that they have rights that could be protected by section 39 of the *Act.*

[39] This Office disagrees with that conclusion, and the decision is presently under appeal. Nevertheless, for the purposes of this Report we will defer to the finding of Justice Marshall that the Retailers, and therefore the BIA as representative of Retailers, may have some form of proprietary interest in the information in question, sufficient to ground a claim under section 39. The discussion will therefore proceed on that basis.

Arguments about Harm

[40] ALC submits that our Office should adopt the view of Justice Marshall that BIA has provided "…compelling and persuasive support for the position that the release of the information could indeed harm the business interests of VLT operators, put them at a competitive disadvantage, and open them to possible harm." However, the task before us is to conduct a reconsideration of the issues involved in this matter, after inviting the BIA to make representations. The question of whether disclosure of the information in question is likely to result in harm within the meaning of section 39 is the core issue to be decided in this reconsideration. That must be determined on the basis of the evidence and argument presented in the reconsideration process, not on the basis of evidence that may have been put forward in the Trial Division hearing.

Section 39

[41] Section 39(1) of *ATIPPA, 2015* states:

> *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.*

[42] Section 39 is a mandatory exception to the right of access under *ATIPPA, 2015* and consists of a three-part test. All three parts must be satisfied, and third party complainants bear the burden of proof pursuant to section 43. Failure to meet any part of the test will result in disclosure of the requested records.

Standard of Proof

[43] Before embarking on the application of section 39 we must deal with a preliminary issue raised by ALC: whether the standard of proof for section 39 invoked by this Office in its Guidance document is higher than that established by the Supreme Court of Canada in *Merck-Frosst Canada Ltd. v. Canada (Health).* We do not agree that it is.

[44] First of all, it is settled law that under section 39 of *ATIPPA, 2015* the burden is on the third party to show that a disclosure should not be made. The burden is not on the applicant or the public body to show that the information should be disclosed. When our Guidance refers to the

fact that the third party must "make the case" that information should be withheld, it is simply emphasizing where the burden of proof lies.

[45] It is also now settled law that there is only one civil standard of proof at common law, and that standard is proof on the balance of probabilities (see *Merck-Frosst*, paras. 92-94). That is the standard explicitly referred to in our guidance document. However, as the Court in Merck-Frosst states, the proof of risk of future harm is often not easy, and "…what evidence will be required to reach that standard will be affected by the nature of the proposition the third party seeks to establish and the particular context of the case".

[46] Proof of harm, as required in section 39 of *ATIPPA, 2015* must meet the standard that is affirmed by the Court in *Merck-Frosst* as a "reasonable expectation of probable harm":

> *[196] …I conclude that this long-accepted formulation is intended to capture an important point: while the third party need not show on a balance of probabilities that the harm will in fact come to pass if the records are disclosed, the third party must nonetheless do more than show that such harm is simply possible. Understood in that way, I see no reason to reformulate the way the test has been expressed.*

[47] Proof of harm must be more than merely speculative. As the Court stated:

> *[206] …the accepted formulation of "reasonable expectation of probable harm" captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm.*

[48] In other words, there must be at least some evidence in support of an argument, and that evidence must be rationally connected in some way to the harm that is alleged to result. The likelihood of the occurrence of the outcome that is alleged must be higher than a mere possibility, but somewhat lower than "more likely than not". This issue was thoroughly canvassed in Report A-2013-008 and elaborated upon in subsequent Reports.

[49] We conclude that the standard of proof required by our Office in assessing the application of an exception to access such as section 39 is the same standard that is described by the Supreme Court in *Merck-Frosst.* That is the standard to be applied in this reconsideration.

Part One of the Three-Part Test

[50] Section 39(1)(a) first requires that the information at issue must be information the disclosure of which "would reveal trade secrets of a third party, or commercial, financial, labour relations, scientific or technical information of a third party." The issue here is not whether the information in question, about "Net Revenue", is commercial or financial information - it clearly is. Rather, this issue is whether the information is "of a third party" – whether it **belongs to** the third party. Several paragraphs in our previous Report were devoted to explaining our position on this question. For the purposes of the present Report, however, as explained above, we will proceed on the basis of the proposition that ALC and BIA each have a sufficient proprietary interest in the information to qualify as "of a third party" under section 39. Therefore the first part of the three-part test is deemed to have been met.

Part Two of the Three-Part Test

[51] Section 39(1)(b) requires that the information be supplied, implicitly or explicitly, in confidence, to the public body. There are two aspects to this test.

[52] First, the term "supplied" means that the information was in the possession of the third party and was provided by that third party to the public body. As is shown by the detailed description summarized above, the information in question, generated by the VLTs themselves, was clearly in the possession of ALC, and was provided, in the Table format, by ALC to the Department of Finance. Therefore it was "supplied" by ALC to the Department.

[53] The same cannot be said, however, for the Retailers or their representative BIA. It is clear that the information was not created by the Retailers, nor can it be said that it was "supplied" in any sense by the Retailers, even to ALC. It certainly was not provided by the Retailers to the Department – the Retailers had no part in that transaction. There is no evidence that they were even aware of it. In its submissions BIA has presented no evidence or argument relating to this issue. Therefore BIA has not met this aspect of the second part of the three-part test.

[54] Clearly the information at issue was supplied by ALC to the Department. The second aspect of this part of the test requires that it was supplied "in confidence". Our previous Report concluded that the ALC did not provide any evidence of the circumstances under which the

information was supplied, to establish whether it was supplied in confidence. In its current submissions ALC reiterates its position that the information is regarded as "highly sensitive and confidential." However, ALC has provided no evidence that it was actually treated as such by ALC or the Department at the time it was supplied.

[55] The only evidence put forward by ALC consists of a disclaimer, attached to the bottom of the e-mail to which the information was attached, which stated:

> *This e-mail message, (including attachments, if any) is intended for the use of the individual or entity to which it is addressed and may contain information that is privileged, proprietary, confidential and exempt from disclosure.*

[56] Such a disclaimer, routinely attached to an organization's e-mail messages, falls short of evidence showing that a particular communication was actually treated as confidential at the time it was made. Therefore although ALC supplied the information to the Department, it has not shown that it was supplied in confidence. ALC has failed to meet the second part of the three-part test.

[57] The BIA submission argues that the agreement between a Retailer and the ALC makes no provision for disclosure, and that therefore the information should be kept confidential. However, the fact that an agreement is silent about confidentiality cannot rise to the level of evidence sufficient to establish that confidentiality was in fact contemplated. We therefore conclude that BIA has not shown that the information was supplied in confidence, either by the Retailers or by ALC. The second part of the three-part test has not been met by either of the third parties.

Part Three of the Three-Part Test

[58] In most cases a finding that any one part of the three-part test has not been met is sufficient to dispose of the issue. However, under the circumstances, because the parties have devoted a significant part of their submissions to the risk of harm that could result from disclosure, we have decided to complete the assessment by dealing with those arguments.

[59] Section 39(1)(c) requires that the disclosure must be "reasonably expected to" have one or more specified results. That phrase refers to the standard of proof that must be met by a third

party, as explained earlier in this Report. In order to meet that standard, the third party must support its argument with evidence that is "detailed and convincing" (see Report A-2013-008).

[60] ALC and BIA have argued that two of the kinds of possible harm that are set out in section 39(1)(c) are likely to result from disclosure. One is that it can be reasonably expected to: "*(i) harm significantly the competitive position or interfere significantly with the negotiating position of the third party."* The other is that it can reasonably be expected to: "{*(ii) result in undue financial loss or gain to any person."* We will discuss each of those submissions below.

ALC and BIA – Concerns about Competition

[61] ALC has argued that, while it is true that it holds a statutory monopoly over the operation of "lawful VLTs" in the province, disclosing the Net Revenue information can harm its competitive position. The primary concern is stated to be that other entities may use the information to place unregulated video gaming devices in competition with ALC's VLTs near high performing sites.

[62] The problem is that ALC has provided absolutely no evidence that anyone has ever attempted to set up and operate unregulated VLTs in the province, nor any explanation of how anyone would go about doing so successfully in circumstances where it would be clearly illegal. In the absence of such evidence or explanation, this assertion is purely speculative.

[63] ALC also states that as section 39(1)(c)(ii) refers to "any person", financial losses to BIA and its members need to be considered. ALC further submits that:

> "*It appears clear based on ALC's previous submissions and the BIA submissions to Justice Marshall that the VLT operators will suffer financial loss. Likewise, other persons will experience financial gain."*

In Report A-2017-004, this argument was rejected on the ground that the Retailers do not have a proprietary interest in the information to be disclosed. In the present reconsideration we accept that such a proprietary interest exists for the purpose of the argument. However, the problem is that ALC has provided no evidence, either in its 2016 submissions or in its present submissions, to support the argument that harm, in the form of financial loss to BIA, can be expected to result from the disclosure.

[64] For its part, BIA has submitted that competitors will gain advantage from the disclosure of the information. It argues that if the information is disclosed, it will provide an opportunity for competitors to gain advantage, undercutting existing retailers, providing a competitive advantage to parties interested in pursuing similar business opportunities.

[65] BIA has provided no evidence to support this concern. In order to become a competitor, a new retailer must first open a licensed establishment, meeting all the requirements of the NLC. This would be a significant investment. The new retailer would then have to meet the requirements of ALC as well, before VLTs could be installed in the establishment. BIA has provided no evidence showing how the possession of some additional details about the operations of existing retailers, as a result of disclosure of the Net Revenue information, would assist a potential competitor, still less give such a new retailer a "competitive advantage".

[66] There is an even more important consideration. It is settled law that competition, in and of itself, is not to be equated with harm. This was discussed in Report A-2013-009, as follows:

> *[25] Last, but certainly not least, we cannot lose sight of the purpose of the ATIPPA in general and the purpose of section 27 in particular. The accountability of public bodies is one of the core purposes of the ATIPPA. Section 27, which recognizes the need, in some cases, to protect certain third party information, must balance the notion of accountability with the principle that third parties should not be harmed. Section 27 should not be interpreted in such a way that it acts as a shield against competitive bidding, nor should it be used by a third party to maintain an unfair advantage over other bidders. I interpret "harm to competitive position" to mean actions or harm which would place other bidders at an unfair competitive advantage, not actions that would level the playing field. In my mind, disclosure of the requested information will ensure a more level playing field, thus encouraging a robust competitive process which is transparent to the public and supports the accountability function that underlies the purpose of the ATIPPA. Contracts with public bodies require greater transparency than those with private sector entities, this is simply a "cost of doing business" with public sector entities.*

[67] While those comments were made in the context of the predecessor to *ATIPPA, 2015*, the relevant statutory language is unchanged. Moreover, the issue was canvassed extensively in the 2015 decision of the Court of Appeal in *Corporate Express Canada v. Memorial University*. In that judgment the Court stated:

> *[43] The most that can be said about the impact disclosure of the usage reports would have, is that Dicks may be in an improved position to compete for the next office supplies tender contract that MUN offers, and that this could possibly affect whether Staples would be awarded the next tender contract. I agree with the Judge that this is speculation, and that there was no evidence as to how such a speculative result could reasonably be expected to harm Staples' competitive position or result in significant financial loss to it. While it can be reasonably inferred that disclosure of the requested information could have some effect on the advantageous competitive position that Staples has been enjoying, it does not follow that, in the absence of other evidence, Staples' competitive position would be harmed or that Staples would suffer significant financial loss as a result. One prospective bidder's loss of exclusive knowledge of MUN's contract and non-contract usage of office supplies in a previous time period, without more, does not translate to a risk of harm considerably above a mere possibility, or a real risk of financial loss. More specifically, disclosure of MUN's usage information simply puts prospective bidders on a more equal footing. This is how it should be, for it ultimately makes MUN, as a public institution, more accountable in its expenditure of public monies. Accordingly, to the extent that disclosure of the requested information would expose the bidding strategy of Staples, exposure of Staples' bidding strategy, without more, is not evidence from which harm to Staples' competitive position and significant financial loss to it can be reasonably inferred.*
>
> *[44] Additionally, Staples has not pointed to any evidence that the Judge failed to consider, or indeed any evidence that could be said to show that Staples' competitive position would be harmed or that it would be caused significant financial loss. I agree with the Judge that some empirical, statistical, and or financial evidence would generally be required to substantiate Staples' arguments in these regards and that no such evidence was adduced. Accordingly, the Judge cannot be said to have erred in concluding that Staples did not establish that disclosure of the requested information would cause Staples significant financial loss, or harm its competitive position.*

[68] Applying this reasoning, we find that BIA has provided no evidence that the disclosure of the Net Revenue information would result in greater competition for existing Retailers, much less unfair competition that would constitute "significant" harm within the meaning of section 39(1)(c)(i).

BIA – Public Backlash

[69] BIA has argued that the release of this information will enable people to infer commissions, and know which establishments are more successful. This will expose them to public backlash, harming profits. First, as noted earlier, there is no evidence that knowing a Net Revenue figure will enable the public to infer the amount of commission paid to a retailer, in the absence of

additional information about how the commission is calculated, and there is no evidence that such information is publicly available.

[70] There are many other factors which affect the viability of a business – for example, overhead costs such as rent and insurance, which may not be known publicly. Retailers also may offer other amenities and promotions, such as live music, pool tables, and so on, which may affect the profitability of the enterprise. It is difficult to see how disclosure of the Net Revenue figure, in such a complex environment, would result in public backlash that might harm profits.

[71] Second, people in a community may already have a good idea which licensed establishments are "more successful" simply because the level of public patronage of the VLTs or of the establishment as a whole, is directly observable. There is no evidence that the disclosure of additional information, in the form of the Net Revenue figure, would result in negative consequences.

[72] BIA has additionally argued that the net revenue figure, without context, is misleading because it does not consider the operating costs of the retailer. This will lead the public and competitors to believe that establishments are generating income that they are not, causing an influx of people into the industry, and undermining the position of existing members.

[73] First, this resembles an argument for restraint of competition. As noted above, the courts have stated that a robust competitive process is in the public interest generally, and supports the goal of increased transparency and accountability that is at the heart of access to information legislation like *ATIPPA, 2015*. It should be noted that section 39(1)(c)(ii) uses the expression "**undue** financial loss or gain"*.*

[74] More importantly, the Supreme Court of Canada has ruled, in the *Merck-Frosst* decision already cited above, that accepting such an argument would defeat the purpose of the legislation:

> *The courts have often — and rightly — been sceptical about claims that the public misunderstanding of disclosed information will inflict harm on the third party: [citations omitted] If taken too far, refusing to disclose for fear of public misunderstanding would undermine the fundamental purpose of access to*

> *information legislation. The point is to give the public access to information so that they can evaluate it for themselves, not to protect them from having it. In my view, it would be quite an unusual case in which this sort of claim for exemption could succeed.*

The solution to this problem would be for the concerned party to publicly provide additional information to correct any misunderstanding, rather than to attempt to block disclosures that are otherwise permissible.

BIA – Increased Crime

[75] BIA argues that the disclosure will render those establishments a target for crime, putting all BIA members at risk. This is a serious concern, since it is obviously a different category of risk than increased competition or loss of profit. BIA illustrates its argument with reference to a recent case in which a patron of a BIA establishment was killed during an armed robbery.

[76] The example provided was tragic, and there can be no question that any measure that could be taken to reduce the risk of such occurrences must be seriously considered. The problem is that BIA has, first of all, provided no evidence that licensed premises where VLTs are located are particularly targeted for armed robbery, compared with the incidence of robbery at, for example, all-night service stations or convenience stores. Second, BIA has not provided evidence, or any explanation, how disclosure of the amount of VLT Net Revenue would likely increase the existing risk of robbery. Third, even if such evidence did exist, it would need to be evaluated in the context of prevailing and prospective measures that Retailers ought to take in order to reduce such risks.

[77] If there is a risk, it may simply be due to the fact that VLTs are on the premises and that there may be some cash on hand, which is publicly known. In the example provided by the BIA, it was no doubt publicly known that there were VLTs on the premises, but the robbery occurred even though the Net Revenue information subject to this request was not publicly available.

[78] We have carefully considered this argument, and we must conclude that without evidence to support it, this argument does not meet the test for a reasonable expectation of probable harm resulting from the disclosure.

[79] Having assessed the submissions from both ALC and BIA with regard to the application of section 39 of the *Act,* and having accepted, for the purposes of this review, that the first part of the three-part test is deemed to have been met, I have concluded (a) that the information at issue, specifically the Net Revenue Table, was not supplied in confidence, and (b) that the evidence provided is insufficient to show that its disclosure would reasonably be expected to result in probable harm. Therefore neither ALC nor BIA has established that the information should be withheld on the basis of section 39.

Section 40 – Personal Privacy

[80] ALC also argued in its 2016 submissions that the names of the businesses listed in the Table ought to be redacted on the basis that they constituted an unreasonable invasion of personal privacy under section 40 of the *Act.* Report A-2017-004 concluded that although the names of some establishments appear to relate to persons, including historical or fictional characters, to the extent that those names relate to real individuals, this related to them in their business capacity and was not personal information. Therefore section 40 does not apply. There is nothing in the submissions before us that would persuade us to reach a different conclusion.

Section 29 – Advice and Recommendations
Section 34 – Harm to Intergovernmental Relations

[81] ALC also submitted that a communications plan, developed by ALC and provided to the Department, ought to be withheld on the basis of section 29 of the *Act* (policy advice or recommendations). ALC also argued that the disclosure of certain information would be harmful to intergovernmental relations under section 34 of the *Act.* Those issues were raised in ALC's 2016 submissions and dealt with in Report A-2017-004. Since these are the exact same issues of statutory interpretation, we can do no better than to repeat the explanation and the conclusion arrived at in that Report:

> *[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.*

Since neither section 29 nor section 34 was raised by the Department, either in 2016 or in the present reconsideration, those issues are not before us.

VII CONCLUSIONS

[82] Having reconsidered this matter on the basis of evidence and argument placed before us by the Department of Finance, Atlantic Lottery Corporation and the Beverage Industry Association of Newfoundland and Labrador, we have concluded that neither party has met the burden of proving that the information at issue (the 10 page Net Revenue Table and the Communications Plan) must be withheld on the basis of either sections 29, 34, 39 or 40 of the *ATIPPA, 2015*.

VIII RECOMMENDATIONS

[83] Under the authority of section 47 of *ATIPPA, 2015*, I recommend that the Department of Finance disclose the records at issue to the Applicant.

[84] As set out in section 49(1)(b) of *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 Atlantic Lottery Corporation and the Beverage Industry Association of Newfoundland and Labrador) within 10 business days of receiving this Report.

[85] Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal unless either of the Third Parties provides the Department with a copy of its Notice of Appeal prior to that time.

[86] Dated at St. John's, in the Province of Newfoundland and Labrador, this 22nd day of July, 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador