



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-004

October 19, 2015

Department of Finance

Summary:

The Applicant requested from the Department of Finance a copy of an Information Note about a proposal for a casino in the province. The Department, and later also a third party, claimed that much of the information must be withheld under section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof had not been met and recommended that the information be disclosed.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A- 1.2, s.39.

Authorities Relied On:

Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, 2014 NLTD(G)107. Newfoundland and Labrador OIPC Reports A-2015-002, A-2015-001, A-2014- 013, A-2014-008, A-2013-009, A-2013-008, A-2011-007, 2008-002 and 2007-003.

I BACKGROUND

- [1] Under the provisions of the *Access to Information and Protection of Privacy Act, 2015* (“*ATIPPA, 2015*” or “the *Act*”) the Applicant submitted a request to the Department of Finance (“the Department”) for a copy of an “Information Note” titled “Casinos in Newfoundland and Labrador” dated April 2, 2012. This record had previously been released in part to the Applicant in response to an earlier access to information request, with extensive severing based on the provisions of the previous *Act*. The Department maintained most of that severing in its response to the Applicant under the provisions of the *ATIPPA, 2015*.
- [2] The Applicant was not satisfied with the Department’s response, and filed a complaint with this Office. During the informal resolution process it was necessary for the Department and for this Office to seek representations from a Third Party, since much of the severing involved the withholding of information relating to third party business interests under the provisions of section 39 of the *ATIPPA, 2015*. The Department had not initially notified the Third Party of the issue, pursuant to section 19 of the *ATIPPA, 2015*, because the Department had not initially intended to disclose any of the severed information. In discussions with this Office, however, the Department was persuaded that some of the information might properly be disclosed. The Department therefore consulted with the Third Party during the informal resolution process.
- [3] The Third Party objected to the disclosure of any of the information in question, and attempts to resolve this complaint informally were not successful. The complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*. At that time our Office provided formal notification to the Third Party, in order to give the Third Party an opportunity to make written representations in support of its position, and to ensure that it would have the right to receive a copy of this Report, to receive notice under section 49 of the *Act*, of the Department’s decision in response to this Report, and to appeal that decision under section 54 of the *Act* if it chose to do so.
- [4] Additional written representations were received from the Department and from the Applicant. No representations were received from the Third Party.

II PUBLIC BODY'S POSITION

[5] In order to set out the Department's position it is necessary to briefly describe the responsive record. It consists of a two-page "Information Note" on the subject of casinos in the province. Information notes are written to provide a brief summary of the history of, or policy on, a particular matter to a Minister. This particular 2012 document explains that there had been a proposal (by a named third party) to develop a casino in the province. It summarized some of the salient facts and financial implications of the proposal, and summarized provincial gaming policy, confirming that it was government's present policy not to entertain requests for the establishment of a casino.

[6] The initial response by the Department to the Applicant severed almost all of the factual details, including the name of the proponent, and all of the figures relating to the estimated cost of the casino, revenue projections, and the proposed sharing of both cost and revenue. The severing was based on section 39 of the *Act*. In addition, some information was severed on the ground that it constituted policy advice and recommendations under section 29 of the *Act*. However, in discussions with this Office, the Department modified its position. It dropped its reliance on section 29, and in its final submission the Department proposed to disclose most of the factual portions of the information note, but to continue to withhold the cost and revenue figures, on the ground that the financial information is unique to the proponent and "...would likely impact their competitive position...."

III APPLICANT'S POSITION

[7] The Applicant had previously made a useful submission on the application of the public interest override to the section 29 exception. However, section 29 is no longer an issue. The Applicant made no submission on the section 39 issue of third party business interests.

IV DECISION

[8] Section 39 of the *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.

[9] Section 39 is a mandatory exception to disclosure. However, it consists of a three-part test, and all three parts have to be met. Failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information.

[10] In the present case, as the complaint was filed by the Applicant following the Department's refusal to disclose the complete record, section 43 of the *Act* provides that the burden is on the public body (the Department) to prove that the exception applies. However, this Office also asked for and received the letter written by the Third Party to the Department setting out its objections to disclosure of any of the information about itself or its proposal. I have carefully considered the Third Party's objections in that letter, particularly since the Third Party declined to provide any further written representations in response to our request.

- [11] Applying the test in section 39, I am satisfied that much of the severed information in the record is the commercial or financial information of the Third Party, and therefore the first part of the test is satisfied.
- [12] I am also satisfied that the Third Party supplied its proposal to the Department in confidence. Therefore the second part of the test is satisfied.
- [13] I am not, however, satisfied that either the Department or the Third Party has met the requirements of the third part of the test. Paragraph 39(1)(c) requires that the disclosure could reasonably be expected to cause some form of harm. It has been consistently held, under this and other similar legislation, that this requires detailed and convincing evidence. As I stated in Report A-2011-007, “[t]he assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.”
- [14] Both the Third Party and the Department have relied principally on the assertion that disclosure of the severed information would harm the competitive position of the Third Party within the meaning of clause 39(1)(c)(i) of the *ATIPPA, 2015*. However, little or no evidence was presented to support that assertion – certainly not the “detailed and convincing evidence” that is required to meet the test. While I cannot describe the responsive record in greater detail than I have done above, a few further comments are in order.
- [15] First, to harm a party’s competitive position, there must be competitors. There is no evidence before me that such competitors exist.
- [16] Second, it must be emphasized that the responsive record is not the Third Party’s actual proposal to government, but a very brief summary of that proposal contained in the Information Note. It might be that there is information in the proposal itself that, if disclosed, could cause harm to the competitive position or the financial interests of the proponent. However, the proposal is not part of the responsive record, and I am not persuaded that the disclosure of either the identity of the proponent, or the very limited information about the proposal contained in the Information Note, could be expected to result in harm to the Third Party’s business interests.

[17] The Department has proposed to disclose some of the severed information, but to continue to withhold the figures, such as the estimated cost of the proposal, the estimated annual revenue, and the percentage of the revenue that would be divided between the proponent and the government. I do not agree. It is true that this information was provided by the Third Party. However, the figures contained in the Information Note tell us nothing at all about the Third Party itself, about its assets, liabilities, current revenue, business model, history or prospects. Nor do the figures contained in the Information Note convey any details about how the proposed business would actually operate. It is therefore my conclusion that any harm to be expected from the disclosure of any of the information is speculative at best.

[18] One minor point remains. The Department has severed one word from one sentence, claiming it falls under the “cabinet confidences” exception in section 27 of the *Act*. It consists of an identification number for a “minute of cabinet”. I do not necessarily agree with the Department’s application of section 27 to that item. However, in the present case it is unimportant, and so I will await a more appropriate occasion to discuss and make a recommendation on that issue.

VI RECOMMENDATIONS

[19] Pursuant to section 47 of the *ATIPPA, 2015* I therefore recommend that the Department of Finance grant the Applicant access to the entire responsive record, excepting only the single word withheld from page 2 on the basis of section 27 (cabinet confidences).

[20] 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 to any person who was sent a copy of this Report, within 10 business days of receiving this Report.

[21] Please note that within 10 days after 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*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal.**

[22] Dated at St. John's, in the Province of Newfoundland and Labrador, this 19th day of October, 2015.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador

