



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2015-006

October 26, 2015

Department of Finance

Summary:

The Applicant requested from the Department of Finance records on the topic of casinos and casino-style gambling. The Department and third parties claimed that much of the information must be withheld under sections 27 (cabinet confidences), 29 (advice and recommendations) or 39 (disclosure harmful to business interest of a third party). The Commissioner found that the burden of proof had been met in some cases, but not in others, and recommended that some of the withheld information be disclosed.

Statutes Cited:

Access to Information and Protection of Privacy Act, 2015, S.N.L. 2015, c. A-1.2, ss. 9, 27, 29, and 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-2015-004, 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:

“Information notes, briefing notes, media response lines, and/or House of Assembly briefing materials, in any and all formats, including paper and electronic, prepared for and/or provided to the minister on the topic of casinos and/or casino-style gambling in Newfoundland and Labrador. Date range of request is April 1, 2014, to the present.”

The Department disclosed the responsive records in part, with extensive severing, claiming exceptions in sections 27 (cabinet confidences), section 29 (policy advice or recommendations) and section 39 (disclosure harmful to the business interests of a third party) 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 the Department sought representations from a number of third parties, 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 parties 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 parties during the informal resolution process.

- [3] The third parties each objected to the disclosure of much of the information in question that related to them, 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 parties, in order to give them an opportunity to make written representations in support of their positions, and to ensure that they 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 they choose to do so.

- [4] Additional written representations were received from the Department, from the Applicant and from one of the third parties.

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 five-page "Information Note" on the subject of casinos in the province, together with four pages of media response lines. The media response lines were released to the Applicant in their entirety, and are not in issue. Information notes are written to provide a brief summary of the history of, or policy on, a particular matter to a Minister. This particular 2015 document explains that there had been proposals (by named third parties) to develop casinos in the province. It summarized some of the salient facts and financial implications of the proposals, and provided some analysis of each. It also 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 many of the factual details, including the names of the proponents, and all of the figures relating to the estimated cost of the casinos, revenue projections, and the proposed sharing of cost and revenue in each proposal. Most of the severing was based on section 39 of the *Act*. In addition, some of the information was severed on the ground that it constituted policy advice and recommendations to government, under section 29 of the *Act*. Thirdly, certain information was severed on the ground that it constituted cabinet confidences under section 27 of the *Act*.
- [7] In discussions with this Office, the Department modified its position, and agreed to disclose many of the factual portions of the information note, but wished to continue to withhold the cost and revenue figures associated with the proposals pursuant to section 39, arguing that the financial information in each case is unique to the proponents and "...would likely impact their competitive position...." Second, the Department agreed to disclose some of the information it had originally withheld as non-responsive to the request.

[8] The Department continued to rely on its position that some information was properly redacted under sections 27 (cabinet confidences) and 29 (advice and recommendations). The Department also provided submissions on whether section 9 of the *Act* (the public interest override) applied to the information severed under section 29.

III APPLICANT'S POSITION

The Applicant provided representations on the subject of the public interest override (section 9 of the *Act*) which I will address in a later section of this Report.

IV THIRD PARTY POSITIONS

[9] One of the third parties had written to the Department during the informal resolution period, outlining its position that none of the information related to it should be disclosed, on the ground that it would harm its financial interests and its competitive position. Our Office received a copy of that representation with consent of the third party. This third party did not provide any additional written representations to this Office.

[10] Another third party did provide our Office with a substantial written representation in support of its position that much of the information that had been severed by the Department from the responsive record should continue to be withheld, on the basis that it could reasonably be expected to result in undue financial loss (to the third party) or gain (to others) if it were disclosed.

V DECISION

[11] 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.*

[12] Section 39 is a mandatory exception to disclosure. 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.

[13] The Information Note is divided into a number of parts, each with a sub-title or heading. These headings have already been disclosed to the Applicant, as follows: Background and Current Status; Analysis of the Proposal; Financial Support; Project Matthew – NL Casino; Current Gaming Policy; and Geo-Sweep. Each part involves the information of one or more different third parties. It is therefore appropriate to assess the application of section 39 to each part separately.

[14] The first part (Background and Current Status) on page 1 of the Information Note contains information about a proposal from a third party for a casino. The third party has objected to the disclosure of any information about itself or its proposal. Applying the test in section 39, I am satisfied that much of the severed information in this part of the record is the commercial or financial information of the third party. I am also satisfied that the third party supplied its proposal to the Department in confidence. Therefore the first and second parts of the test are satisfied.

[15] I am not satisfied that either the Department or the third party has met the requirements of the third part of the test. It has been consistently held, under this and other similar legislation, that

paragraph 39(1)(c) 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.”

[16] 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. However, little or no evidence was presented to support that assertion.

[17] To harm a party’s competitive position, there must be competitors. There is no evidence before me that the third party has such competitors. Second, it must be emphasized that the responsive record is not the actual proposal to government, but a very brief summary of that proposal contained in the Information Note. 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. I have concluded that any harm to be expected from the disclosure of any of the information is speculative at best. Therefore I recommend that this information be disclosed.

[18] The second part of the Information Note (Analysis of the Proposal) is a summary of an analysis of the proposal, done by a different third party. Most of this part has been withheld. As with the information in the first part of the Note, I conclude that the summary of the analysis is the commercial or financial information of the third party, and that it was supplied in confidence to the Department. The first two parts of the test are therefore met.

[19] The third party has also satisfied me that it has met the requirements of the third part of the test. The third party has provided considerable information from areas in which it commercially operates. I am persuaded that disclosing the identity and detailed conclusions contained in the second part of the Information Note would significantly harm the third party’s competitive position, or result in undue loss to it, or gain to competitors, under clauses 39(1)(c)(i) and (iii). I therefore recommend that the Department continue to withhold that information about the third party in this part, including its identity.

[20] The Department has, in addition, argued that most of the information in this second part of the Note should be withheld because it constitutes advice or recommendations from the third party to the Department under section 29 of the *Act*. The relevant portion of section 29 reads:

29. (1) The head of a public body may refuse to disclose to an applicant information that would reveal
(a) advice, proposals, recommendations, analyses or policy options developed by or for a public body or minister;

I agree that much of the information in this second part of the Note falls into this category.

[21] The Department also advised that it has considered section 9 of the *ATIPPA, 2015* (public interest override) in relation to this information. The relevant portion of section 9 states:

9. (1) Where the head of a public body may refuse to disclose information to an applicant under a provision listed in subsection (2), that discretionary exception shall not apply where it is clearly demonstrated that the public interest in disclosure of the information outweighs the reason for the exception.

[22] The Applicant has argued that the public interest in this subject favours disclosure. However, in this instance I agree with the Department that the public interest does not outweigh the reason for the exception.

[23] The third part of the Information Note (Financial Support) was partially severed by the Department under section 39, as it contained information about the proposal of the third party in the first part of the Note, or because it was considered non-responsive to the request. I have recommended that the information about the third party in the first part of the Note be disclosed, and the information in this part should be disclosed as well, as it similarly does not meet the test set out in section 39. In addition, the Department has agreed that there is a close enough connection between the information severed as being non-responsive and the other information about the third party's proposal, to make the severed information responsive, and I recommend that it be disclosed.

[24] The fourth part of the Information Note (Project Matthew – NL Casino) contains a summary of a proposal from a third party to develop a business case for a casino in St. John's. A portion of this part has been disclosed to the Applicant, but the Department has severed several paragraphs, as well

as the identity of the third party, either on the basis of section 39, arguing that disclosure would cause harm to the third party's business interests, or on the basis of section 29, as advice or recommendations to the Department. The third party involved in this section of the Note also provided written representations arguing that section 39 applies to the severed information in this section.

[25] Based on the evidence and argument provided to me I am satisfied that both the Department and the third party are right. I agree that disclosure of the specific details in the severed portions, along with the identity of the third party, is likely to harm the third party's competitive position or to result in undue financial loss to it, or gain to a competitor. I therefore recommend that the Department continue to withhold that information.

[26] The fifth part of the Information Note (Current Gaming Policy) contains assessments of both casinos and casino-style online gaming. Much of this part consists of assessments, mixed fact and opinions, written by Department staff, and much of that has already been disclosed to the Applicant. The Department has severed some paragraphs on the basis that it consists of proposals from a third party.

[27] In this case I am not satisfied that the Department or the third party have met the three-part test in section 39. The information is very general, and does not contain the kind of information that any competitor in the online gaming world could use to any advantage. I therefore recommend that the information be disclosed to the Applicant.

[28] Most of one paragraph, as well as one single word, in this fifth section have been withheld on the ground that it constitutes cabinet confidences under section 27 of the *Act*, the relevant portion of which states:

27. (1) In this section, "cabinet record" means

(a) advice, recommendations or policy considerations submitted or prepared for submission to the Cabinet;

(b) draft legislation or regulations submitted or prepared for submission to the Cabinet;

- (c) *a memorandum, the purpose of which is to present proposals or recommendations to the Cabinet;*
 - (d) *a discussion paper, policy analysis, proposal, advice or briefing material prepared for Cabinet, excluding the sections of these records that are factual or background material;*
 - (e) *an agenda, minute or other record of Cabinet recording deliberations or decisions of the Cabinet;*
 - (f) *a record used for or which reflects communications or discussions among ministers on matters relating to the making of government decisions or the formulation of government policy;*
 - (g) *a record created for or by a minister for the purpose of briefing that minister on a matter for the Cabinet;*
 - (h) *a record created during the process of developing or preparing a submission for the Cabinet; and*
 - (i) *that portion of a record which contains information about the contents of a record within a class of information referred to in paragraphs (a) to (h).*
- (2) *The head of a public body shall refuse to disclose to an applicant*
- (a) *a cabinet record; or*
 - (b) *information in a record other than a cabinet record that would reveal the substance of deliberations of Cabinet.*

[29] I am satisfied that the severed information identifies a cabinet record and contains information about its contents, pursuant to paragraph 27(1)(i). I therefore recommend that the Department continue to withhold that information.

[30] The Department withheld the last paragraph in the fifth section on the basis of section 29, that it constitutes advice or recommendations to the Department, given by Department staff. I am not persuaded that it does – rather, it consists of statements of fact about differing opinions that may exist about internet gaming. It does not materially differ from the preceding paragraphs already disclosed to the Applicant, and I will recommend that the Department disclose it.

[31] The sixth and last part of the Information Note (GeoSweep) consists mainly of information about an online game launched and eventually discontinued by Atlantic Lottery Corporation (“ALC”). The Department severed one paragraph under section 39, on the ground that it could

cause harm to ALC. I have concluded that most of the information about this discontinued project is already public knowledge, and the disclosure of the severed remainder is unlikely to cause harm, loss or gain to anyone. Therefore I will recommend that the Department disclose it.

[32] A part of one sentence in this part of the Note is properly severed as a cabinet confidence under paragraph 27(1)(i) and I will recommend that the Department continue to withhold it.

VI RECOMMENDATIONS

[33] 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:

- (a) the passages withheld from pages 3, 4 and 5 on the basis of section 27 (cabinet confidences);
- (b) the passages withheld from page 2 on the basis of section 29 (advice and recommendations);
- (c) the passages withheld from pages 1, 2 and 3 on the basis of section 39 (disclosures harmful to business interests of a third party);

all of which are more clearly indicated as highlighted passages on a copy of the responsive record provided to the Department accompanying this Report.

[34] 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.

[35] Please note that within 10 days after receiving the decision of the Department of Finance under section 49, the Applicant or a 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.**

[36] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of October 2015.

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

