



OFFICE OF THE INFORMATION
AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2016-006

June 8, 2016

Department of Natural Resources

Summary:

The Applicant requested information about an archaeological / historical research project from the Department of Natural Resources (the “Department”). The Department was prepared to release the information requested, however a Third Party objected and filed a Complaint with this Office. The Third Party claimed that the information must be withheld from the Applicant on the basis of section 39 (disclosure harmful to business interests of a third party). The Commissioner found that the burden of proof under subsection 43(3) had not been met by the Third Party and recommended that the information be released.

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. Memorial University of Newfoundland, 2015 NLCA 52; Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, 2014 NLTD(G)107; Air Atonabee Ltd. v. Canada (Minister of Transport), (1989) 37 Admin L.R. 245 (F.C.T.D.); Newfoundland and Labrador OIPC Reports A-2016-002, A-2015-005, A-2015-002, A-2013-014 and A-2011-007.

I BACKGROUND

- [1] Pursuant to the *Access to Information and Protection of Privacy Act, 2015* (the “*ATIPPA, 2015*”) the Applicant submitted an access to information request to the Department of Natural Resources (the “Department”) seeking disclosure of “Any and all emails, documents, and conversations that pertain to [named research project].” The subject of the request is an archaeological / historical research project.
- [2] The Department informed the Applicant that it had decided to disclose the records, but in accordance with section 19 of the *ATIPPA, 2015* the Department decided to notify the affected Third Party. The Third Party filed a complaint with this Office, opposing the release of portions of the records that include correspondence between the Third Party and the Department.
- [3] Attempts to resolve this Complaint by informal resolution were not successful, and the complaint was referred for formal investigation pursuant to subsection 44(4) of the *ATIPPA, 2015*.

II PUBLIC BODY’S POSITION

- [4] The Department relied on its position that the requested information did not meet the three-part test outlined in section 39, and that it was prepared to release the information to the Applicant.

III THIRD PARTY’S POSITION

- [5] The Third Party provided two separate detailed submissions during the informal resolution process that I will rely upon, as it did not provide any further submission at the formal investigation stage. The Third Party has submitted that the correspondence between it and the Department included in the responsive records would make public “private and

confidential information” and “scientific and technical information and methodologies” used by the Third Party in its business.

- [6] It is the position of the Third Party that the release of this information will result in the loss of its competitive advantage and would be harmful to its business interests. The Third Party also suggests that the information pertains to a “personal project” and release of the information would make public the results of “personally funded” research and work.

IV DECISION

- [7] Section 39(1) 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.*

- [8] This is a three-part test; failure to meet any part of the test will result in the inapplicability of section 39 to the relevant information and the release of same.

- [9] In respect of section 39(1)(a), the information in this matter is not a trade secret; however, the Third Party has submitted that the requested records contain some information that is scientific or technical in nature. I agree that there are brief and

somewhat vague elements of scientific or technological information included in some of the correspondence contained in the requested records, so I will accept that the Third Party just barely meets the description under this section for a portion of the information. It is my opinion that this element of the test has been established.

[10] In respect of section 39(1)(b), the Third Party acknowledges in its submissions that the information in this matter was submitted “in response to requests for status reports from the government of [Newfoundland and Labrador].”

[11] In *Air Atonabee Ltd. v. Canada (Minister of Transport)*, Justice MacKay stated at paragraph 42 with respect to confidentiality of information:

[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] While the Third Party was not required by law to submit the contested information to the Department, the Third Party acknowledges itself that it was submitted by request of the Department. I therefore find similarly to my previous Report A-2013-014 that, “such

information cannot be said to have been, in the words of Justice MacKay in *Air Atonabee Ltd.*, ‘communicated in a reasonable expectation of confidence that it will not be disclosed.’”

[13] In *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, the Court of Appeal noted:

[25] While [the precursor to section 39(1)(b)] of the Act does not require a determination that the information be assessed for its confidentiality in the same manner as section 20(1)(b) of the Federal Act requires, the confidentiality of the requested information must still be determined.”

[14] With respect to confidential information, the Court of Appeal highlighted the following at paragraph 28:

[28] The Judge seemed to accept that the requested information was supplied implicitly or explicitly in confidence and treated consistently as confidential by Staples, but he characterized Staples’ evidence in this regard as self-serving, saying at paragraph 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 ...”

[15] While the Third Party notes in its submission that the contested information was “supplied explicitly in confidence” as it had “requested confidentiality” in three of the twenty-three records of correspondence at issue, this instead illustrates an inconsistent treatment of the information as confidential by the Third Party itself. Moreover, simply including phrases like “please keep this information as confidential as you can,” does not, on its face mean that the Department accepted and was treating the information in strict confidence. I also agree with the Court in *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski* that simply accepting all information provided to a public body as confidential merely because the party providing it has endorsed it as such would lead to a slippery slope towards frustrating the purpose and intent of the Act.

[16] Furthermore, the limited scientific or technical information included in some of the correspondence forming the requested records has not been demonstrated by the Third Party as “unobtainable by observation or independent study by a member of the public acting on his own,” as noted above in paragraph 11. In fact there has been media coverage demonstrating that others have undertaken similar investigations as the Third Party and have made similar findings.

[17] Consequently, the elements of section 39(1)(b) have not been established and section 39 cannot be applied to protect the information from disclosure. Given that I have found that the second element of section 39 has not been established I need not go any further in my analysis, however, I will elaborate on section 39(1)(c) as it is my finding that even if the second element of the test was established, I conclude that the third element would not be satisfied.

[18] A claim under section 39(1)(c) requires detailed and convincing evidence and, as established 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.”

[19] The Third Party focused its arguments on section 39(1)(c)(i), but also appeared to allude to section 39(c)(iii) in its submissions, so I will address this as well. Generally, the Third Party claimed that the release of the information could reasonably be expected to cause harm to its business interests and jeopardize its competitive advantage in its field of work. However, beyond these two statements in its submissions, the Third Party has provided no evidence or argument that supports its position that disclosure of the information requested would harm its competitive position. Therefore, I have no evidence as to such things as the technical aspects of the industry in which the Third Party is involved or as to the market conditions of that industry, both of which would be helpful in determining if disclosure of the requested information could harm the Third Party’s competitive position.

[20] Without such evidence or argument to support its position, the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position under section 39(1)(c)(i). Furthermore, as previously discussed in paragraph 9

above, the contested information in the correspondence that forms part of the records in question is so brief and vague that it is difficult to see how it could reasonably be expected to cause significant harm.

[21] With respect to section 39(1)(c)(iii), the Third Party submits that the information in question is part of a “personally funded project” but has not provided information detailing how release of the contested information could reasonably be expected to result in undue financial loss or gain

[22] As the Third Party has failed to meet parts two and three of the three-part test under section 39 of the *ATIPPA, 2015*, it is my finding that section 39 does not apply to the information at issue and the Third Party cannot rely on section 39 to withhold the information.

V RECOMMENDATIONS

[23] The Third Party has not met the burden of proof with respect to section 39. Therefore, under the authority of section 47 of the *ATIPPA, 2015* I recommend that the Department release the requested information to the Applicant.

[24] As set out in section 49(1)(b) of the *ATIPPA, 2015*, the head of the Department must give written notice of his or her decision with respect to this recommendation to the Commissioner and the Third Party within 10 business days of receiving this Report.

[25] Please note that within 10 business days of receiving the decision of the Department 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.**

[26] Dated at St. John's, in the Province of Newfoundland and Labrador, this 8th day of June 2016.

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

