Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 16-01

January 12, 2016

Nova Scotia Business Inc.

Summary: Businesses that interact with government are generally unfamiliar with the accountability regime set out in the *Freedom of Information and Protection of Privacy Act* ("*FOIPOP*"). In order for a public body such as Nova Scotia Business Inc. ("NSBI") to withhold third party business information, NSBI must satisfy a three part test. Included in that test is a requirement that the disclosure would result in a reasonable expectation of harm to the third party business. When businesses are consulted by public bodies such as NSBI, they often insist that business information should be held confidential without any evidence that harm would occur from the disclosure. It is no doubt a challenge for organizations such as NSBI to educate their business partners to better understand NSBI's very important accountability obligations. In this case, neither NSBI nor any third party provided evidence of harm from the disclosure of the requested information. As a result, the Commissioner recommends full disclosure of information relating to the government's payroll rebate program.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, SNS 1993, c 5, ss. 15, 17, 21, 37, 45; *Nova Scotia Business Incorporated Act* SNS 2000 c. 30, ss. 2(aa), 6(1)(b), 34; *Business Development Incentives Regulations*, NS Reg 321/2015, ss. 2, 10, 12.

Authorities Considered: British Columbia: Order 03-05, 2003 CanLII 49169 (BC IPC); **Nova Scotia:** Review Reports FI-00-90, 2001 CanLII 15370 (NS FOIPOP); FI-00-92, 2001 CanLII 15986 (NS FOIPOP); FI-01-34, 2001 CanLII 7345 (NS FOIPOP); FI-02-31 2002 CanLII 4624 (NS FOIPOP); FI-02-40, 2002 CanLII 19155 (NS FOIPOP); FI-02-41, 2002 CanLII 19128 (NS FOIPOP); FI-02-55, 2002 CanLII 10205 (NS FOIPOP); FI-03-20, 2003 CanLII 36114 (NS FOIPOP); FI-03-37, 2003 CanLII 23843 (NS FOIPOP); FI-09-100, 2015 CanLII 70493 (NS FOIPOP); FI-10-59(M), 2015 CanLII 39148 (NS FOIPOP); FI-13-28.

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport) (1989), 37 Admin. L.R. 245 (FCTD); Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52; *Fuller v. R. et al. v. Sobeys*, 2004 NSSC 86; *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231; *Merck Frosst Canada Ltd. v. Canada (Health)*,[2012] 1 SCR 23, 2012 SCC 3 (CanLII); *Monkman v. Serious Incident Response Team*, 2015 NSSC 325; *O'Connor v. Nova Scotia,* 2001 NSCA 123;

Other sources considered: Crown Corporation Business Plans for the Fiscal Year 2008-2009: Nova Scotia Business Incorporated http://www.novascotiabusiness.com/site-nsbi/media/NovaScotiaBusinessInc/bp-NSBI2008-09.pdf

INTRODUCTION:

[1] The applicant sought information relating to the government's payroll rebate program. In response, Nova Scotia Business Inc. ("NSBI") produced a series of spreadsheets some of which were partially withheld. NSBI claimed that the disclosure would harm third party business interests and had originally claimed that the disclosure would also harm the government's economic interests.

ISSUE:

[2] Is NSBI required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[3] On May 1, 2010 the applicant made an access request to NSBI for a list of all investments, loans or other forms of funding by NSBI made to clients for the first five years of its existence including any expectations for job creation and provisions for repayment of the loans. In addition the applicant sought an update on the clients including jobs created, funds repaid, amounts written off and any assessment by NSBI officials on the status of the public investment.

[4] As a result of a series of conversations, emails and letters that spanned more than one year, the applicant eventually narrowed his request to a report produced from the Corporate Strategist FTE electronic data that shows for each of the 55 payroll rebate authorizations made by NSBI during its first five years (from Nov. 6, 2001 to March 31, 2007):

a. The client's year-by-year minimum/maximum incremental full-time equivalent (FTE) employment benchmarks under its payroll rebate agreement,
b. The client's baseline FTE benchmark under the agreement (if applicable), and
c. The client's incremental FTEs for each year up to and including its most recent report/update.

[5] On September 28, 2011 NSBI advised the applicant that it had identified a 52 page report responsive to his request. NSBI provided the applicant with partial access to the requested information withholding some information under sections 17 and 21 of *FOIPOP*.

[6] The applicant filed a request for review with this office on July 21, 2010. As a result of the informal resolution process with this office the records relating to six third parties (eight pages) remain at issue in this review. Each page is a print out from the Corporate Strategist FTE

electronic data and each contains entries by year for minimum/maximum incremental full-time equivalent employment benchmarks under the payroll agreement and the client's incremental FTE (actual jobs created) for each year at issue.

[7] In its submission made in response to the notice of this formal review, NSBI withdrew its reliance on s. 17 of *FOIPOP*.

[8] Section 21 of *FOIPOP* provides in part:[1]

> 21(1) The head of a public body shall refuse to disclose to an applicant information
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> (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;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
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> (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 organization…

[9] In accordance with the *Nova Scotia Business Incorporated Act* and *Business Development Incentives Regulations*, NSBI is authorized to provide business incentives in the form of payroll rebates using strategic investment funds.[2] NSBI is empowered, subject to certain Ministerial approvals, to determine the amount of and conditions respecting the incentive and the form and content of any documents to be provided by participating businesses. Businesses are required to complete an application for financing and a payroll rebate agreement and to supply NSBI with job creation estimates over the life of the proposed project. NSBI is required to publish its policies and guidelines with respect to the payroll rebate program each year in its business plan. These policies require that businesses produce an audited statement containing the incremental gross wage or payroll bill, the number of incremental employees and hours worked, the gross wage or payroll bill and the total number of employees of the company on each anniversary date.[3] Payment of the payroll rebate is subject to the business providing the required information and audit reports.

Burden of Proof

[10] Where a review is requested by the original access applicant, the public body bears the burden of proving that the applicant has no right to access the withheld information:

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[1] A copy of the *Freedom of Information and Protection of Privacy Act* is available on our website at foipop.ns.ca.

[2] *Nova Scotia Business Incorporated Act* SNS 2000 c. 30, ss. 2(aa), 16(1)(b); *Business Development Incentives Regulations*, NS Reg 321/2015 ss. 2, 10, 12.

[3] NSBI Business Plans are available at: http://www.novascotiabusiness.com/en/home/aboutus/corporatereportsandplans/businessplan.aspx The policies and procedures with respect to the payroll rebate program are generally located in appendices at the end of each report.

> 45(1) At a review or appeal into a decision to refuse an applicant access to all or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part.

[11] In accordance with s. 37(2)(b) of *FOIPOP* the third parties were included as parties to this review. Section 45(3) of *FOIPOP* provides that in the case of third party confidential information as described in s. 21, it is the third party who bears the burden of proof:

> 45(3) At a review or appeal into a decision to give an applicant access to all or part of a record containing information that relates to a third party,
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> (a) in the case of personal information, the burden is on the applicant to prove that disclosure of the information would not be an unreasonable invasion of the third party's personal privacy; and
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> (b) in any other case, the burden is on the third party to prove that the applicant has no right of access to the record or part.

[12] Typically the burden placed on the third party arises when the third party files the request for review. In this case it is my view that because it is the access applicant who has filed the request for review, the burden of proof lies ultimately with the public body.[4]

Is NSBI required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

General approach

[13] Nova Scotia's access legislation is unique in that it declares as one of its purposes a commitment to ensure that public bodies are fully accountable to the public. It is intended to give the public greater access to information than might otherwise be contemplated in the other provinces and territories in Canada.[5] *FOIPOP* strikes a balance between the demands of openness and commercial confidentiality in two ways: it affords substantive protection of information by specifying that certain categories of third party information are exempt from disclosure and it gives procedural protection through the third party notice process.[6]

[14] As I have previously discussed, courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[7]

[15] The issue of the application of s. 21 of *FOIPOP* to records relating to a government sponsored payroll rebate program have been considered on a number of occasions by this office.[8] Review Officer Fardy noted that information about the program was vital if citizens were to

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[4] This is consistent with the approach I took in NS Review Report FI-10-59(M) at para. 8.
[5] *O'Connor v. Nova Scotia*, 2001 NSCA 123 at paras. 54 – 57 [*O'Connor*].
[6] *Merck Frosst Canada Ltd. v. Canada (Health)*, [2012] 1 SCR 23, 2012 SCC 3 (CanLII) at para. 23 [*Merck Frosst*].
[7] NS Review Report FI-10-59(M) paras. 9-15, *Imperial Oil Limited v. Alberta (Information and Privacy Commissioner)*, 2014 ABCA 231 at para. 67.
[8] See for example NS Review Reports FI-00-90, FI-00-92, FI-01-34, FI-02-40 and FI-02-41.

judge whether the government received good value for the subsidy provided to the companies enrolled in the program. If the value of the subsidy substantially exceeded the expected revenues to the province, for example, then citizens may fairly ask whether the deal was a good one. In determining that further information should be disclosed Review Officer Fardy stated, "NSBI must understand that it is obliged to ensure it is disclosing enough information to allow for informed judgement by the public."[9]

Submissions of the third parties

[16] The six third parties affected by this review were provided with notice and an opportunity to provide submissions. No third party provided submissions in response to the notice of formal review. One third party had earlier supplied the investigation in this office with a brief submission opposing the release of the information. That company stated, "the pricing data, descriptions of items and all of the terms and conditions are integral and particular to [the company]". Clearly there is no pricing data, no description of items nor anything that could be characterized as terms and conditions contained in the withheld information. This response came despite the fact that the company was provided with a copy of the record on at least two occasions. No other company provided any submission in support of withholding the records and no evidence was provided.

(a) Reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party

[17] In evaluating this part of the s. 21 test, it is necessary to consider three questions:

1) Does the withheld information constitute trade secrets, commercial, financial, labour relations, scientific or technical information?
2) Is the withheld information, information <u>of</u> the third party?
3) Or does the withheld information <u>reveal</u> commercial, financial etc. information of the third party or allow for accurate inferences about such information?

[18] The information at issue here is forecasted maximum and minimum jobs over a period of time (generally 3 to 5 years) for identified businesses and actual jobs created during the same periods of time for the same businesses.

Is it commercial, financial or labour relations information?

[19] The terms commercial, financial and labour relations are not defined in *FOIPOP*. It has been generally accepted that dictionary meanings provide the best guide and that it is sufficient for the purposes of the exemption that information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.[10]

[9] NS Review Report FI-03-20 at p. 8.
[10] *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD) at p. 268 cited with approval in *Merck Frosst* at para. 139.

[20] Review Officer Fardy had this to say about the meaning of these three terms:[11]

> Definitions for these words can be found in an order of the Ontario Information and Privacy Commissioner (PO-1911), upheld on appeal. In the absence of definitions in this **Act**, I adopt the Ontario Commissioner's.
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> > "Commercial" information is information which relates solely to the buying, selling or exchange of merchandise or services.
> > "Financial" information refers to information relating to money and its use or distribution and must contain or refer to specific data.
> > "Technical" information is information belonging to an organized field of knowledge which would fall under the general categories of applied sciences or mechanical arts. Examples of these fields are architecture, engineering or electronics.
> > "Labour relations" information is information concerning the collective relationship between an employer and its employees.

[21] NSBI argues that the forecasted job numbers, including those for past years, is commercial, financial and labour relations information for three reasons:

- They form the commercial terms of the payroll rebate agreement,
- They reveal a third party's plans for acquisition (buying) of labour services (an operating cost), and
- They reveal a third party's year-by-year planned hiring intentions which is a matter concerning the collective relationship between the company and its employees.

[22] In *Fuller v. R. et al. v. Sobeys*, an applicant sought access to an audit produced as part of a payroll rebate application along with a schedule to the audit that contained the incremental and gross payrolls of the third party. The Nova Scotia Supreme Court determined that the incremental and gross payroll amounts qualified as commercial and financial information.[12]

[23] In this case, the information is both incremental payroll in the form of actual jobs created and forecasted payroll in the form of forecasted maximum and minimum jobs. Consistent with the decision in *Fuller* I find that this information qualifies as commercial and financial information.

Is it information <u>of</u> the third party or does the withheld information reveal information of the third party?

[24] While the information is contained in a report created by NSBI, NSBI states that the numbers were transcribed information received from the third parties and compiled by NSBI. NSBI says the actual jobs created data was supplied by the businesses as part of their rebate claim and consistent with the requirements of the rebate agreement.

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[11] NS Review Report FI-03-37 at p. 7.
[12] *Fuller v. R. et al. v. Sobeys*, 2004 NSSC 86 at para. 51[*Fuller*].

[25] NSBI collects current and projected job information from a client when considering an application for financial assistance. NSBI says the source of the forecasted minimum and maximum FTEs is the application for financing and/or the business plans supplied by the businesses.

[26] I conclude that the withheld information is information of the third party. The payment of the rebate is contingent upon the company satisfying minimum incremental employment requirements as set out in s. 3 of the template payroll rebate agreement. Therefore I am satisfied that the information is commercial and financial information "of a third party". It is therefore unnecessary to examine the last question – does the withheld information reveal information of the third party.

(b) Supplied implicitly or explicitly in confidence

[27] As noted above, NSBI's evidence is that the information in the spreadsheets was supplied by the third parties through applications for financing, business plans and rebate claim documentation. But was the information supplied in confidence?

[28] NSBI states that it treats the information as confidential third party information. The one third party who provided a submission stated only that it submitted its proprietary information on the basis of it being held in the strictest of confidence and, since its submission, it has been treated on a strictly confidential basis in all of its dealings with NSBI. Section 15 of Appendix A to the template payroll agreement provides that the information provided to NSBI pursuant to the agreement will be treated as confidential subject to the provisions of the *Freedom of Information and Protection of Privacy Act.*

[29] Based on the nature of the information, its purpose, and the circumstances in which it was compiled, I accept that the information was supplied in confidence in this case.

(c) Reasonable expectation of harm

[30] The third part of the s. 21 test is that the disclosure could reasonably be expected to result in harms listed in s. 21(1)(c). A "reasonable expectation of harm" requires evidence well beyond a mere possibility of harm but somewhat lower than harm that is more likely than not to occur.

[31] The Nova Scotia Supreme Court recently revisited the "reasonable expectation of harm" test in *FOIPOP*. In *Monkman v. Serious Incident Response Team*[13] the Court examined the leading Nova Scotia case and the leading Supreme Court of Canada case on the meaning of the reasonable expectation of harm test in the context of the application of s. 15 of *FOIPOP* (harm to law enforcement). The Court concluded that:

> [61] Reading the decisions of the Supreme Court of Canada with that of the Nova Scotia Court of Appeal leads to the following conclusion: that the burden falls on the Director

[13] *Monkman v. Serious Incident Response Team*, 2015 NSSC 325 at pp. 22-23 [*Monkman*].

to show that it is more than merely possible, but at a standard less than a balance of probabilities that the disclosure could harm "law enforcement".

[32] As a practical matter, mere assertions of harm will rarely be sufficient. Independent evidence of expectations of harm or at least evidence of harm from the third party and the public body is helpful; evidence of previous harm from similar disclosures is also useful and evidence of a highly competitive market would all assist in determining whether the test has been satisfied. In all cases, it is evidence of a connection between the disclosure of the type of information at issue and the harm that is necessary.[14] Alternatively, some empirical, financial or statistical evidence would generally be required to substantiate the third party arguments.[15]

[33] The burden of proof in this case rests with NSBI. As I have previously stated however, third parties are in the best position to provide evidence of harm to their business resulting from the disclosure.[16] It will be rare when a public body, unaided by independent evidence from a third party, can successfully establish harm under s. 21.

[34] In this case the third parties provided no evidence of harm. The one third party who supplied a brief submission made reference to the disclosure of information not even at issue in this case. One other third party consented to the disclosure and a third said that it had no objections but that it did not wish to make representations. The remaining three third parties provided no submission and no evidence in support of the application of s. 21 to the withheld information.

[35] NSBI submits that the disclosure of the information would reasonably be expected to result in similar information no longer being supplied to NSBI (s. 21(1)(c)(ii)), that the disclosure could reasonably be expected to result in undue financial loss to the third party and undue gain to the third party's competitors (s. 21(1)(c)(iii)), and that disclosure could harm significantly the competitive position of the third parties (s. 21(1)(c)(i)).

21(1)(c)(i) – harm significantly the competitive position of the third party

[36] NSBI argues that the disclosure of the current and future year employment plans would reasonably be expect to harm significantly the competitive position or interfere significantly with the negotiating position of the third party. In its submission, NSBI says the information in the hands of a competitor can be used to significantly harm and interfere with the third party's access to labour and other resources to support the planned growth, drive up the cost of these inputs and significantly harm the client's ability to achieve performance targets under the payroll rebate agreement. No evidence was offered by the third parties or NSBI in support of this assertion. Mere assertions of harm or speculations regarding possible uses of the information are simply not enough to meet the reasonable expectation of harm test. One can always speculate but speculation is not proof beyond a mere possibility that significant harm will occur.

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[14] I have applied this approach in other Review Reports such as NS Review Report FI-10-59(M) at para. 66 and NS Review Report FI-09-100 at para. 45.

[15] *Corporate Express Canada Inc. v. Memorial University of Newfoundland*, 2015 NLCA 52 at para. 44.

[16] See for example NS Review Report FI-13-28 at para. 40.

[37] I find that s. 21(1)(c)(i) does not apply to the withheld information.

21(1)(c)(ii) – result in similar information no longer being supplied

[38] NSBI states simply that the disclosure would reasonably be expected to result in similar information no longer being supplied to NSBI from the third party or from other clients and prospective clients when it is in the public interest that NSBI continue to receive employment plans from the full range of current and prospective clients so it can conduct its investment attraction activities. None of the third parties made this argument and so, of course, provided no evidence in support of this position.

[39] Other jurisdictions across Canada have provisions similar, if not identical to s. 21 of Nova Scotia's *FOIPOP*. Commissioners in a number of jurisdictions have considered what the necessary reasonable expectation is under the equivalent to section 21(1)(c)(ii). Their conclusions are that in general, the necessary reasonable expectation will be found not to exist where a third party supplies information under statutory compulsion (or in circumstances where the prospect of compulsion exists) or where there is a financial incentive for the third party to supply the information.[17]

[40] On at least two previous occasions NSBI has argued that the disclosure of information supplied by recipients of the payroll rebate incentive would refuse to provide the information in future if they knew it would be disclosed in response to an access request under *FOIPOP*. In NS Review Reports FI-02-31 and FI-02-55 Review Officer Fardy specifically addressed this issue. He said in both reports that a third party seeking financial assistance is unlikely to be in a position to refuse to provide the government with the information it requested to help it decide whether to provide assistance.[18]

[41] The provision of the data at issue in these reports is all required under the law, regulations and policies of NSBI.[19] Payment of the rebate is contingent upon receipt of the information. Put another way, businesses can choose not to supply the information, but if they do not supply the information, they will not receive the payroll rebate even if they have satisfied the performance

[17] See for example B.C. OIPC Order 03-05 at para. 15 for a summary of the relevant cases.

[18] NS Review Report FI-02-55 at p. 5, NS Review Report FI-02-31 at p. 7. NS Review Report FI-02-55 was the subject of an appeal to the Nova Scotia Supreme Court in *Fuller*. The Review Officer's decision was upheld in part and was not overturned on the point discussed here.

[19] The template agreement provides that the disbursement of the funds is subject to the terms and conditions of the agreement which are set out in the appendix to the template agreement. The appendix states within 90 days of the expiration of the program year the company shall deliver documentation specified including an audit report on the incremental gross wage or payroll and the number of incremental employees and hours worked (Appendix A, s. B3). The *Nova Scotia Business Incorporated Act* provides that regulations may be made to prescribe the criteria, eligibility, terms and conditions upon which business development incentives, including the payroll rebate incentive, may be provided (s. 34(1)(b)). The Regulations in turn state that NSBI may provide investment funds on any terms and conditions that it consider appropriate including the requirement that documents be provided by the applicant (s. 10(1)(c)). The Regulations also require that NSBI publish the policies and guidelines governing the payroll rebate program in their yearly business plans. The performance conditions set out in the appendices to NSBI's yearly business plans consistently state that performance conditions for receiving a payroll rebate include the requirement that the applicant report incremental and/or retained gross wage or payroll and the gross wage or payroll bill. See for example, Appendix I to Crown Corporation Business Plan for Fiscal Year 2008-2009 – Nova Scotia Business Inc. at p. 91 http://www.novascotiabusiness.com/site-nsbi/media/NovaScotiaBusinessInc/bp-NSBI2008-09.pdf

targets set out in the agreement. According to the summary provided by NSBI to the applicant, by June 9, 2010 the six businesses in this case received a total of $3.7 million dollars in payroll rebates. Presumably that provided some motivation to produce the required reports.

[42] I find that the evidence does not support a finding that the test in s. 21(1)(c)(ii) has been satisfied.

21(1)(c)(iii) – undue loss or gain

[43] NSBI submits that the disclosure would also reasonably be expected to result in undue financial loss to the third party and undue financial gain to the third party's competitors. NSBI submits that a competitor would be able to learn from the employment plans and strategies of the third party. NSBI notes that these plans were developed at the third party's expense using its initiative, competitive insight and market intelligence.

[44] NSBI does not explain how disclosure of actual jobs created for a particular project would lead a competitor to learn of the third party's employment plans. At the time the records were released, 18 of the FTE figures were for the current or future years. They predicted maximum and minimum potential FTE increases as a result of the project. While this might give an indication of a third party's employment plans, it is only the employment plans for one project. Absent other detailed information about the scope of the business I am uncertain what use such information could have to a competitor. Aside from the mere assertion of the harm, no evidence was offered in support of this argument.

[45] In *Fuller* the Nova Scotia Supreme Court considered the application of s. 21(1)(c)(iii) of *FOIPOP* to records supplied by third party businesses to the Nova Scotia Business Development Corporation.[20] The records consisted of an auditor's report and a single page schedule of head office incremental and gross payrolls of the third party. Both documents were submitted to the Nova Scotia Business Development Corporation by the third party in support of a request for a payroll rebate. In determining that s. 21 did not apply to the schedule of incremental and gross payrolls of the third party, the Court determined that the public body had not met its burden of proof with respect to the application of the third part of the s. 21 test:

> [61] The Province and the Third Party asked the court to infer that the release of this information could reasonably be expected to harm the competitive position of the third Party. The Province and the Third Party suggest that the Third Party's competitors possessed of this information would be in a position to determine the average salary of the Third party's employees at its Head Office and that this information could be used to recruit the Third Party's employees. There is no direct evidence before me to support this contention.
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> [62] There is no evidence given by anyone employed by or representing the Third Party. The only evidence before this court is the affidavit and testimony of Marvyn Robar [employee of the Office of Economic Development]. Mr. Robar would not have the

[20] *Fuller* was an appeal of the public body's refusal to accept the recommendations in NS Review Report FI-02-55.

necessary corporate knowledge to bring the Province's and the Third Party's position within s. 21(1)(c).[21]

[46] Likewise in this case, NSBI does not have the necessary corporate knowledge to bring the province's and the third parties' positions within s. 21(1)(c). I find that the evidence does not support a finding that the test in s. 21(1)(c)(iii) has been met.

[47] In conclusion, I find that s. 21 does not apply to the withheld information.

Process notes

[48] This case raises some interesting issues relating to the third party process – both with respect to the effect of third party consent and with respect to what public bodies should be seeking when they provide third party notice.

(a) Third party consent (s. 21(4))

[49] In the course of the informal mediation process that occurred in late 2014 and early 2015 an investigator with this office contacted a number of third parties. He did so because the Commissioner as Review Officer has the authority to determine who can participate in a review pursuant to s. 37(2)(d) of *FOIPOP*. Third parties who had not consented to the disclosure of the information were identified as appropriate parties to participate in the review. The investigator in this office therefore contacted all of the third parties who had either not responded to NSBI's original consultation request in 2011 or had declined to consent to the disclosure of the requested information in 2011.

[50] As a result of those contacts, all but five third parties consented to the disclosure of the information. One of the six third parties in this matter expressly consented to disclosure as follows: "I provide consent for NSBI to release the requested information to the Applicant".

[51] Nonetheless, for the one third party quoted above, NSBI continues to withhold that information under s. 21. However, s. 21(4) is a mandatory provision which states, "Subsection (1) and (2) do not apply if the third party consents to the disclosure." Therefore for this third party I find that s. 21 cannot be applied to the record at issue.

(b) Third party notice (s. 22)

[52] In the course of processing this request, NSBI attempted to contact all third parties whose information was included in the spreadsheets. *FOIPOP* requires public bodies to provide third parties with notice on receiving a request for access to a record "the head of the public body has reason to believe contains information the disclosure of which must be refused pursuant to section 20 or 21". This means that the head must first assess the responsive record to see if it is possible that the three requirements of s. 21 have been met. I previously discussed what standard must be met in order to trigger a notice requirement under s. 22. Public bodies must first evaluate the specific information at issue and determine if the record contains or may contain

[21] *Fuller* at paras. 61 & 62.

information that must be withheld. While this is not a high threshold it is nevertheless a condition precedent to the issuing of a s. 22 notice.[22]

[53] The purpose of the s. 22 notice is twofold. First, the public body may seek the consent of the third party to the disclosure of the information. Secondly, in case the third party does not consent, it is incumbent on the public body to obtain some proof as to how disclosure of the requested information could result in the harms listed in s. 21.

[54] If the third party fails to produce evidence of harm sufficient to satisfy the requirements of s. 21 of *FOIPOP*, the public body is usually not in a position to apply s. 21 to the record. This is because the public body will generally not have the necessary corporate knowledge to bring the province's and the third party's position within s. 21(1)(c)[23]. Without adequate evidence the public body should then provide the third party with notice of its obligation to disclose the record, and then the third party can file a review request if it disagrees. The public body will have met its duty to both the public and the third party. The third party will, on review, have another opportunity to adduce evidence of harm.

[55] Under the *Nova Scotia Business Incorporated Act* NSBI's objects are to promote economic growth, attract investment and connect businesses in the province with export markets. In undertaking these tasks, NSBI has an obligation under *FOIPOP* to be accountable to the public for how it expends public funds. Part of that accountability will inevitably involve disclosing terms and conditions relating to the use of that money. No doubt NSBI, like other public bodies,[24] experiences pressure from business partners to hold as confidential any information related to third party businesses.

[56] But *FOIPOP* sets a higher standard. NSBI can only reach that standard in most cases with evidence supplied by its third party business partners. In undertaking third party notices under s. 22, NSBI should clearly indicate to its business partners that it requires their help in meeting this test, and failing that, NSBI is required to disclose information in order to meet its important public accountability responsibilities.

[57] A lack of third party consent does not mean s. 21 applies. Upon receipt of third party submissions the public body must make a final decision as to whether or not s. 21 applies. The three parts of the s. 21 test must be analysed and applied to the records at issue. Even in the face of active opposition to disclosure by a third party, the three part test must be satisfied. In this case, given the lack of evidence of harm, s. 21 did not apply.

[22] See NS Review Report FI-10-59M at para 72-76 for a discussion of the equivalent to *FOIPOP* s. 22 notice in s. 481 of the *Municipal Government Act.*
[23] As stated by the NSSC in *Fuller* at paras. 61 and 62.
[24] I made similar comments about the Town of Wolfville in Review Report FI-10-59M.

FINDINGS & RECOMMENDATIONS:

[58] I find that:

1. With respect to the third party who provided consent to disclosure, s. 21 cannot apply to that record.
2. The withheld information is commercial or financial information of a third party within the meaning of s. 21(1)(a).
3. The withheld information was supplied in confidence as required under s. 21(1)(b).
4. There is no reasonable expectation of harm from the disclosure of the withheld information as required under s. 21(1)(c).

[59] I recommend the full disclosure of the withheld information.

January 12, 2016

Catherine Tully
Information and Privacy Commissioner for Nova Scotia