



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

REVIEW REPORT 17-07

October 10, 2017

Department of Health and Wellness

Summary: Where a third party objects to the disclosure of information on the basis that it believes disclosure would be harmful to its business interests, it is the third party that bears the burden of proving that the applicant has no right of access. If, as in this case, the third party provides no evidence in support of its position, it fails to meet its burden of proof. In the absence of any evidence to support the application of the third party business exemption the Commissioner recommends full disclosure of records relating to the funding of the third party, a licensed home for special care.

Statutes Considered: *Freedom of Information and Protection of Privacy Act*, [SNS 1993, c. 5](#), ss. 21, 45.

Authorities Considered: Nova Scotia: Review Reports 16-07 [2016 NSOIPC 7 \(CanLII\)](#) and 16-09 [2016 NSOIPC 9 \(CanLII\)](#).

Cases Considered: *Atlantic Highways Corp. v. Nova Scotia (1997)* [1997 CanLII 11497 \(NS SC\)](#).

INTRODUCTION:

[1] In 2014 the Department of Health and Wellness (Department) received two access to information requests from an applicant in relation to the funding of licensed homes for special care in Nova Scotia. In the first request the applicant sought access to the amount paid by the Department for operations of each facility for 2012 – 2014 and any record which showed how that amount was determined. In the second request that applicant sought a copy of the summary budget sheet for each licensed home including approved budget, depreciation, capital cost, per diem and mortgage information.

[2] This review was filed by a third party who operates one licensed home for special care in Nova Scotia.

ISSUE:

[3] Is the Department required to refuse access to information under s. 21 of the *Freedom of Information and Protection of Privacy Act (FOIPOP)* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[4] As noted above, this is a third party review that relates to two access to information requests in relation to the funding of licensed homes for special care in Nova Scotia. The background to this review is the same as set out in Review Report 17-08. After collecting fees and confirming the scope of each request, the Department sent out third party consultation letters to all of the operators of licensed homes for special care in Nova Scotia. In response, operators of 38 homes consented to the disclosure of the requested records. In January 2015, the Department informed the remaining third parties who had not consented to the disclosure and the applicant that it would release the requested information in full. In response, eight third parties (operating 22 homes) filed requests for review with this office.

[5] After the expiry of the appeal time limit for all third parties, the Department proceeded to disclose the requested information in relation to 72 homes where no objection to disclosure was received. With respect to the eight third parties who did file a request for review, following informal mediation, only two parties (operating 16 homes) continued to object to the disclosure of the requested information. In total then, the Department disclosed the requested information in relation to 116 homes.

[6] In this case, the third party operates just one licensed home for special care. When this third party filed its request for review, the only information it provided was that it wanted to see the requested records. The Department provided the third party with copies of the records at issue.

Burden of Proof

[7] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, in accordance with s. 45(3)(b) of *FOIPOP*, where the review is of a decision to give an applicant access to all or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record under s. 21 of *FOIPOP*.

Is the Department 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?

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

21(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 undue financial loss or gain to any person or organization...

[9] It is well established in Nova Scotia that in order for the third party business information exemption to apply, the three requirements of s. 21 must be read conjunctively and the third party has the burden of proving that s. 21 applies to the withheld information.¹

[10] In this case, the Department's submission is that s. 21 does not apply to the records at issue. The third party never provided any submission, argument or evidence at any point in these proceedings. It did not respond to the Department's initial notice other than by filing a request for review with this office. And, it did not provide any argument or evidence directly to this office in support of its review request.²

[11] Because s. 21 must be read conjunctively, it will not apply if there is no evidence of the types of harm listed in s. 21(1)(c) of *FOIPOP*. In this case, even if the information I have available to me generally about the nature of the records might lead to a reasonable conclusion that s. 21(1)(a) and (b) applied, I have no evidence that any harm would result from the disclosure of the information within the meaning of s. 21(1)(c).

[12] The third party has failed to satisfy the burden of proof as set out in s. 45(3)(b) of *FOIPOP*. I find that s. 21 does not apply to the withheld information in relation to this third party under the Department requests HEA 14-55 and HEA 14-60.

FINDINGS & RECOMMENDATIONS:

[13] I find that s. 21 does not apply to the withheld information in relation to this third party under the Department requests HEA-14-55 and HEA-14-60.

¹ NS Review Report 16-09 at para 16; see also *Atlantic Highways Corp v Nova Scotia*, [1997 CanLII 11497 \(NSSC\)](#).

² This same situation arose in NS Review Report 16-07, with the same result.

[14] I recommend that:

1. The Department disclose in full the responsive records to request HEA-14-55 with respect to this third party.
2. The Department disclose in full the responsive records to request HEA-14-60 with respect to this third party.

October 10, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia