



REFUSAL TO CONDUCT AN INQUIRY

under section 64.1 of the *Freedom of Information and Protection of Privacy Act*

Re: Department of Innovation and Advanced Learning

March 17, 2015

- [1] The Department of Innovation and Advanced Learning (the “Public Body”) received a request to access information about loans and grants approved or forwarded to an organization (the “Third Party”) between January 2010 and December 2013, including terms, amounts, interest rate and current status. There are two responsive records: a nine-page letter with the re line “Offer to Finance”; and a one-page document entitled “Loan Details”.
- [2] Before deciding whether to give the Applicant access to the responsive records, the Public Body notified the Third Party that it was considering disclosing the records¹. The Public Body gave the Third Party an opportunity to consent to disclosure or to make representations to the Public Body explaining why the information should not be disclosed. The Third Party’s solicitor objected to disclosure on two grounds: solicitor-client privilege; and subsection 14(1) of the *Freedom of Information and*

1

Notification pursuant to s. 28 of the *Freedom of Information and Protection of Privacy Act*, R.S.P.E.I. 1988, c. F-15.01

Protection of Privacy Act (the “*FOIPP Act*”) [disclosure harmful to a third party’s business interests].

- [3] The Public Body considered the Third Party’s representations and decided that the records were not subject to solicitor-client privilege and the conditions of subsection 14(1) of the *FOIPP Act* did not apply to all of the information in the records at issue. The Public Body decided that it would withhold a one-page attachment to the Offer to Finance entitled “Proposed Budget”, which includes proposed deliverables, time line dates and amounts. The Third Party requested the Information and Privacy Commissioner review the Public Body’s decision.² As the Public Body decided not to disclose the one-page attachment, it is not part of this review.

Clause 25(1)(a), Solicitor-client privilege

- [4] The Third Party claims the records are the subject of solicitor-client privilege, which is a discretionary exception to disclosure at clause 25(1)(a) of the *FOIPP Act*. It says,

25. (1) The head of a public body may refuse to disclose to an applicant
(a) information that is subject to any type of legal privilege,
including solicitor-client privilege or parliamentary privilege;

- [5] The Supreme Court of Canada in *Canada v. Solosky*, [1980] 1 S.C.R. 821 lays out three criteria for solicitor-client privilege:

- (i) there is a communication between a lawyer and the lawyer's client; and
- (ii) the communication entails the giving or seeking of legal advice; and
- (iii) the communication was intended to be confidential.

- [6] The Offer to Finance is a letter from an employee of the Public Body to the Third Party’s Executive Director (at that time), neither of whom are lawyers. The Offer to Finance is

2

Request pursuant to s. 60(2) of the *FOIPP Act*, *supra*

signed by representatives of the Third Party and is the agreement setting out the terms and conditions of the financing. It is not a communication between a lawyer and the lawyer's client. The content of the record does not refer to legal advice, and it is not possible to tell if any terms arose from legal advice.

[7] The one-page document entitled "Loan Details" is not a communication between a lawyer and the lawyer's client. It is created by Finance PEI, and it does not entail giving or seeking legal advice.

[8] I invited the Third Party to highlight information that it objected to disclosing. It did not respond and has not identified the information it claims is subject to solicitor-client privilege.

[9] I cannot identify any information in the records that is subject to solicitor-client privilege. The records at issue do not meet the requirements of the discretionary exception under clause 25(1)(a) of the *FOIPP Act*.

Subsection 14(1), Disclosure harmful to business interests of a third party

[10] Subsection 14(1) of the *FOIPP Act* has three conditions that must be met to require a public body to withhold records or information from an applicant:

14. (1) Subject to subsection (2), 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, explicitly or implicitly, 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 a 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, 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.

[11] I invited the Third Party to highlight the information it objected to disclosing. The Third Party did not respond. It was not willing or able to identify the commercial or financial information in the records that would be revealed by disclosure. As the Third Party does not substantiate the elements of clause 14(1)(a), it is not necessary for me to consider clauses 14(1)(b) or 14(1)(c).

Section 64.1, Refusal to Conduct an Inquiry

[12] Section 64.1 of the *FOIPP Act* gives the Commissioner the discretion to refuse to conduct an inquiry if the subject matter has been dealt with in an order of the Commissioner, or if the circumstances warrant:

- 64.1 The Commissioner may refuse to conduct an inquiry pursuant to section 64 if, in the opinion of the Commissioner,
 - (a) the subject matter of a request for a review under section 60 has been dealt with in an order or investigation report of the Commissioner; or
 - (b) the circumstances warrant refusing to conduct an inquiry.

[13] In these circumstances, the Third Party bears the burden of proof under section 65 of the *FOIPP Act*. I reviewed a copy of the records at issue and the submissions the Third Party provided to the Public Body.

[14] The records are not subject to solicitor-client privilege as found at clause 25(1)(a) of the *FOIPP Act*, and clause 14(1)(a) is not substantiated by the Third Party. I see no new issue to be addressed. The circumstances warrant refusing to conduct an inquiry.

[15] Pursuant to section 64.1 of the *FOIPP Act*, I refuse to conduct an inquiry.

Maria C. MacDonald
Information and Privacy Commissioner

Postscript re Judicial Review: Under section 62 of the FOIPP Act, upon receiving a request for review I am to advise all parties of the review procedures. When I perform adjudicative functions, my decisions may be reviewed by the Court on judicial review.