

# REPORT OF THE COMMISSIONER'S FINDINGS

Office of the Integrity Commissioner

*Right to Information and Protection of Privacy Act*

Third Party Complaint: 2017-3961-AP-2155

Date: October 6, 2017

## INTRODUCTION

1. On March 20, 2017, the Applicant made an access to information request to the Department of Health (“the Department”) for records related to complaints, concerns, or feedback from any party concerning the Conceptia Clinic in Fredericton or Moncton as well as any inspections conducted at either facility.
2. In processing the request, the Department retrieved the relevant information it held in its records. As some of the information was about and directly related to the Conceptia Clinic and the Department was considering disclosure, the Department identified the Clinic as a third party and undertook the third party notification process under ss. 34 to 36 of the *Right to Information and Protection of Privacy Act*. The Department notified the Clinic (“the Third Party”) of the possible disclosure of the information in question and invited it make representations on whether the information should be disclosed.
3. By letter dated June 16, 2017, the Third Party provided its input to the Department, objecting to the disclosure of all of the information in question on the basis that disclosure could reasonably be expected to harm its business interests, referring to s. 22(1)(c) of the *Act*.
4. After taking the Third Party’s concerns into consideration, the Department issued its formal notice of decision on June 27, 2017, informing the Third Party that it would not grant full disclosure on the basis of ss. 22(1)(c)(i), 22(1)(c)(ii), and 22(1)(c)(iii) to protect the Third Party’s business interests. The Department also indicated that it intended to disclose “highly redacted copies of the records in order to comply with the *Act*,” stating that the redacted records do not contain personal information or comments that may be harmful to the Third Party’s business interests.
5. The Third Party continued to have concerns about the disclosure of the information in question and filed a complaint with our Office on July 14, 2017.
6. At issue is the disclosure of portions of 17 pages of correspondence submitted to the Department by individuals (and in one case, by a physician on behalf of an individual) who had applied for financial assistance under the Province’s Special Assistance Fund for Infertility Treatment. As these individuals had received services from the Third Party, the letters reference the services received and the individuals’ views and opinions about the Third Party. The Department has heavily redacted the letters and intends to release the portions of these correspondences that do not contain protected third party

business or personal information. The Department provided our Office with copies of the relevant records that indicate what specific information it intends to disclose to the Applicant for our review as part of our investigation process.

## BACKGROUND

7. The Department's view is that the information it is prepared to disclose to the Applicant is not protected from disclosure under the *Act* as the redacted records do not contain personal information or comments that could be harmful to the Third Party's business interests. We note that the Department does not intend to release full copies of the records in question and that it applied exceptions to protect some of the information contained therein. As such, our investigation only considers the information that the Department intends to disclose and to which the Third Party objects.
8. The Third Party presented a number of reasons to our Office when making the complaint why it is of the view that the information in question should not be publicly disclosed, including:
  - the Third Party is not a Crown corporation and is not subject to the same evaluation processes as public bodies;
  - the correspondences in question were not shared with the Third Party and were submitted by individuals seeking to obtain financial assistance from the Province, rather than filing complaints about the Third Party; and
  - the Third Party's competitors are not subject to this level of scrutiny as there is no public funding available for their patients.
9. The Third Party also raised concerns about the nature of the information in question and the context in which it was generated, as it consists of correspondences from clients writing to the Department to present their case as to why they should be approved for financial assistance. The Third Party suggests that some may have expressed dissatisfaction with the services they received to bolster their applications. The Third Party argues that the circumstances of each individual case is unique and there are numerous reasons why treatment was not successful or possible, and that without this context, the information in question is incomplete and would give an unfair and negative impression of the Third Party, and for the same reason, the Third Party would be unable to respond to media reports about this information should it be disclosed.

10. For all of these reasons, the Third Party is strongly of the view that the disclosure of this information would damage its reputation and lead to a direct and substantial competitive and financial loss, and that this falls within the scope of the protection offered by the s. 22(1)(c) exception.

## FINDINGS

11. Section 22(1)(c) of the *Act* states:

22(1) The head of a public body shall refuse to disclose to an applicant information that would reveal

(c) commercial, financial, labour relations, scientific or technical information the disclosure of which could reasonably be expected to

(i) harm the competitive position of a third party,

(ii) interfere with contractual or other negotiations of a third party,

(iii) result in significant financial loss or gain to a third party,

(iv) 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, or

(v) 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. The test to determine whether information falls within the scope of this exception involves two steps. If either step is not met, the exception cannot apply.
13. First, the information in question must consist of one of the five specific types of information named in the exception: commercial, financial, labour relations, scientific, or technical information.
14. If so, the second step is to determine whether there is detailed and convincing evidence to support a claim that the disclosure of the information could reasonably be expected to result in at least one of the types of contemplated harm listed in ss. 22(1)(c)(i) to (v).
15. In applying the test in this case, we first note that the information at issue is found in letters from private individuals seeking assistance from the Department in their

personal capacity. While the letters directly refer to the Third Party, they consist entirely of the views and opinions of the individuals about the Third Party. As such, the information in question does not constitute commercial or financial information about the Third Party, does not relate to labour relations matters, nor is it scientific or technical in nature. We find that the first step of the test has not been met. There is no need to consider the second step as s. 22(1)(c) cannot apply.

16. That being said, given the nature of the information in question, we find that it is the personal information of the individuals who wrote the letters, rather than the Third Party's business information. The letters were written to the Minister in relation to these individuals' personal capacity to seek additional consideration for eligibility for financial assistance under the Province's Special Assistance Fund for Infertility Treatment. For this reason, we must also consider whether any of the information in question is protected from disclosure under the s. 21(1) exception (*Unreasonable invasion of third party privacy*) so as to prevent a breach of these individuals' personal information.
17. We find that, in its redacted form, the information that the Department intends to disclose does not contain any details that could lead to the identification of the individuals involved and would not result in an unreasonable invasion of these individuals' privacy.
18. On this point, the true third parties in this case are the individuals who submitted and/or were the subject of these correspondences, and it would have been more appropriate for the Department to notify these individuals and seek their input on the possible disclosure of their comments and feedback, rather than the Third Party as the Department did in this case.

## CONCLUSION - RECOMMENDATION

19. In conclusion, we find that the Third Party's Complaint is without merit as the information that the Department intends to disclose does not consist of protected business information under the s. 22(1)(c) exception.
20. We also find that the information in question consists of the personal information of the individuals mentioned above in paragraphs 6 and 15 and that the disclosure of the redacted versions of these records will not result in an unreasonable invasion of their privacy and thus does not merit protection from disclosure under s. 21(1).

21. Based on all of the foregoing, and pursuant to s. 73(1)(b) of the Act, the Commissioner recommends that the Department of Health release the information in question in keeping with the redacted versions that were presented for our review during our investigation of this Complaint.

Issued at Fredericton, New Brunswick, this 6<sup>th</sup> day of October, 2017.



The Hon. Alexandre Deschênes, Q.C.  
Integrity Commissioner