

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Recommendation 12-061
December 18, 2012

Review File: 12-164-5

BACKGROUND

On approximately March 30th, 2012, the Applicant made a Request for Information from the Department of Finance, Taxation Division, seeking:

the amount of payroll tax remitted by each of the following employers for each year starting from 2006 to present

The request then listed eight companies, all in the health care contract sector.

The public body refused to disclose any of the records requested, citing sections 24(1)(c)(ii) and 24(1)(d).

The Applicant requested a review of that decision.

THE RELEVANT SECTIONS OF THE ACT

Section 24 of the *Access to Information and Protection of Privacy Act* addresses the protection of sensitive third party business information. It reads as follows:

- 24.(1) Subject to subsection (2), the head of a public body shall refuse to disclose to an applicant
- (a) information that would reveal trade secrets of a third party;
 - (b) financial, commercial, scientific, technical or labour relations information
 - (i) obtained in confidence, explicitly or implicitly, from a third party, or
 - (ii) that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement;

- (c) information the disclosure of which could reasonably be expected to
 - (i) result in undue financial loss or gain to any person,
 - (ii) prejudice the competitive position of a third party,
 - (iii) interfere with contractual or other negotiations of a third party, or
 - (iv) result in similar information not being supplied to a public body;
 - (d) information about a third party obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax;
 - (e) a statement of a financial account relating to a third party with respect to the provision of routine services by a public body;
 - (f) a statement of financial assistance provided to a third party by a prescribed corporation or board; or
 - (g) information supplied by a third party to support an application for financial assistance mentioned in paragraph (f).
- (2) A head of a public body may disclose information described in subsection (1)
- (a) with the written consent of the third party to whom the information relates; or
 - (b) if an Act or regulation of Nunavut or Canada authorizes or requires the disclosure.

It should be noted that the *Payroll Tax Act* of Nunavut sets up a tax system by which employees working in Nunavut are taxed 2% on the remuneration which they earn working in Nunavut. The Act requires employers to collect and remit the tax to the Department of Finance on behalf of the employee. Under the terms of that Act, companies employing individuals in Nunavut are required to provide the Department with a statement of their payroll each year for the purpose of confirming the amount payable by them each year under the Act.

THE GOVERNMENT'S POSITION

The public body relies primarily on the exemption contained in section 24(1)(c) to support their refusal to disclose the requested information. They say that the information requested, whether it were to be disclosed in the form of the reports provided to the Department by the individual corporations or in the form of a document created by the public body containing only the basic number showing the payroll tax paid each year by each corporation, would amount to the disclosure of third party information which has been gathered by the public body for the purpose of determining tax liability or collecting a tax.

As a secondary argument, the public body relies on section 24(1)(c), on the basis that the disclosure of this information could reasonably be expected to prejudice the competitive position of a third party. To support this position, the public body contacted each of the named third party corporations and advised them that an Applicant was seeking the information in question, and requested their input on whether or not it should be disclosed.

THE THIRD PARTIES

All but one of the third parties responded negatively to the possible disclosure of the information requested. One of the third parties indicated that they had no objection to the disclosure of the information requested insofar as it related to them. The other third parties were not happy with the possibility that this information might be disclosed. In addition to relying on the provisions quoted by the public body, some of the third parties also referred to section 24(1)(b), which prohibits the disclosure of third party information where that information is financial information of a confidential nature which has been supplied by a third party in compliance with a lawful requirement. They point out that the *Payroll Tax Act* which governs the collection of this tax, contains provisions requiring the government to treat the information received through the payroll tax system as confidential. In particular, they point out that section 55 of the *Payroll Tax Act* forbids the government from disclosing information received under that Act except in very narrow circumstances, all of which are clearly outlined in the Act and none of which apply to this situation. All of the objecting third parties point out that the disclosure of this information would be to disclose sensitive business information. As one company put it:

...should the information be released, it would be simple for the requester to derive from the information the size of [the company's] operations in Nunavut. By figuring out the strength of the organization's workforce, the requester could easily use the information to prejudice [the company's] competitive position. In fact, while it is impossible to say for certain, it would seem that this is the ONLY motive behind the request and, as such, the information must not be released.

THE APPLICANT'S POSITION

Firstly, the Applicant points out that one of the Third Parties appears to have consented to the disclosure of the information requested insofar as it relates to them. They say that section 24(2) allows the disclosure of business information of third parties with the consent of the third party.

They also argue that section 24(1)(d) is not applicable as the information sought does not "appear on a tax return". They point out that the information sought does not appear in the employer's tax return as a deduction nor in the employee's tax return as a credit or deduction. If it does not "appear on a tax return" they argue, section 24(1)(d) does not apply.

With respect to the Department's objection to disclosure pursuant to section 24(1)(c)(ii), the Applicant says that in order for this exemption to apply, the party must establish that the information is reasonably expected to bring about the alleged outcome - i.e. to prejudice the competitive position of the third party. There must be a "reasonable expectation" of harm. They refer me to Order F2008 -019 issued by the Alberta Information and Privacy Commissioner which sets out this test, providing me with the following quote:

In Qualicare Health Service Corporation v. Alberta (Office of the Information and Privacy Commissioner), 2006 ABQB 515 the Court agreed with the Commissioner that a party alleging that it will suffer harm if information is disclosed must establish, through evidence, a reasonable expectation of harm:

...The legislation requires that there be a "reasonable expectation of harm." Bare arguments or submissions cannot establish a "reasonable

expectation of harm.” When interpreting similar legislation, courts in Ontario and Nova Scotia have held that there is an evidentiary burden on the party opposing disclosure based on expectation of harm.

In their submission, the Applicant suggests that not one of the letters from the third parties setting out their objections to the disclosure sets out in any detail the basis upon which section 24(1)(c)(ii) is met, nor did any of them argue that there was a reasonable expectation of harm.

The Applicant did not address section 55 of the *Payroll Tax Act* or section 24(1)(b) of the *Access to Information and Protection of Privacy Act*.

DISCUSSION

As always, there is a benefit to reviewing the purposes of the *Access to Information and Protection of Privacy Act* when entering into a review of a decision to refuse disclosure of any record held by the Government of Nunavut.

Section 1 of the Act provides that:

1. The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by
 - (a) giving the public a right of access to records held by public bodies;
 - ...
 - (c) specifying limited exceptions to the rights of access;

The rule under this legislation is that all records are available to the public unless they fall within one of the specified and limited exceptions outlined in the Act. That said, the exemptions are there for a reason and if the information falls under one of those exemptions, particularly a mandatory exemption, it must be applied.

Furthermore, section 33 of the Act provides that the onus of establishing that an exception applies lies squarely on the public body seeking to refuse access:

- 33.(1) On a review of a decision to refuse an applicant access to all or part of a record, the onus is on the head of the public body to establish that the applicant has no right of access to the record or part.

or on a third party seeking to prevent disclosure:

- (3) On a review of a decision to give an applicant access to all or part of a record containing information that relates to a third party,
- (a) in the case of personal information, the onus is on the applicant to establish that disclosure of the information would not be contrary to this Act or the regulations; and
 - (b) in any other case, the onus is on the third party to establish that the applicant has no right of access under this Act to the record or the part of the record.

It is to be noted that the exemptions from disclosure provided for in section 24 of the *Act* are mandatory. As such, if the exemption applies, the public body **MUST** refuse to disclose the records or the information contained in the records.

With this in mind, I will address the arguments made by all of the parties.

Firstly, with respect to the one third party who gave their consent to the disclosure of the information requested, the Applicant is absolutely correct that where there is consent, the third party information can be disclosed pursuant to the *Access to Information and Protection of Privacy Act*. When consulted, one of the third parties clearly indicated that they had no objection to the disclosure of the requested information, implying consent to the disclosure. That would be sufficient to authorize the disclosure if it were not for section 55 of the *Payroll Tax Act*. That section makes it an offence for any person to “communicate or allow to be communicated to any person information obtained under this Act” except in certain listed circumstances. Those circumstances include “with the consent of the person to whom the information or statement relates”. In the circumstances, therefore, the public body should disclose the information requested for the company which consented to the disclosure.

This leaves us with seven other companies which have not consented to the disclosure , some of whom have, in fact, objected to the disclosure of the information requested.

Section 24(1)(d)

This section of the *Access to Information and Protection of Privacy Act* provides that a public body must refuse to disclose information about a third party “obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax”. The Applicant in this case suggests that because the information requested was not obtained on a conventional “tax return”, either personal or corporate, that the section does not apply to prevent the disclosure. This, however, ignores the rest of the provision which prohibits the disclosure of information “gathered for the purpose of determining tax liability or collecting a tax”. The only reason that the public body has the information in question is for the purpose of determining the payroll tax liability of the company/employees and for collecting that tax. In my opinion, section 24(1)(d) applies and the public body is, therefore, prohibited from giving the Applicant the information they have requested.

Section 24(1)(c)(ii)

This section prohibits public bodies from disclosing information about third parties where that disclosure could be reasonably expected to prejudice the competitive position of a third party. While the Applicant suggests that no evidence has been provided that would support this exemption, I am satisfied, based on what I know generally about the competitiveness of the contract health industry in Nunavut and the submissions of the third parties received, that the information being requested is valuable corporate information that could inform competitors and provide valuable ammunition in a bidding war. There is a reasonable expectation that this information could prejudice the competitive position of the third parties involved.

Section 24(1)(b)

While not relied on by the public body as a reason for refusing to disclose the information requested, at least some of the third parties involved have referred me to section 24(1)(b) of the Act as also providing a mandatory exemption from disclosure. This section prohibits the disclosure of third party financial information obtained in confidence, explicitly or implicitly, from a third party, or that is of a confidential nature and was supplied by a third party in compliance with a lawful requirement.

The information requested by the Applicant is clearly financial information about the third parties - it is a request which would reveal with precision the payroll of each of these companies in Nunavut in each of the years for which the information was requested. It is information which the public body has obtained in confidence from the third parties. Section 55 of the *Payroll Tax Act* prohibiting the communication of information gathered under that Act makes it fairly clear that there is a confidentiality implied in the information gathered for the purpose of determining the payroll tax. And it is information of a confidential nature supplied by the third parties in compliance with a lawful requirement because the *Payroll Tax Act* clearly requires the filing of the payroll information with the Department of Finance by all employers who employ individuals in the Territory, with serious penalties for failure to comply with the filing requirements. Therefore, section 24(1)(b) also applies and prohibits the disclosure of the information.

SUMMARY AND RECOMMENDATIONS

In summary, I make the following recommendations:

- a) that the Department provide the requested information to the Applicant for the one company which consented to the disclosure;
- b) that the Department not disclose the requested information about any of the remaining named companies.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner