

Office of the Access  
to Information and  
Privacy Commissioner

New Brunswick



Commissariat à l'accès  
à l'information et à la  
protection de la vie privée

Nouveau-Brunswick

## REPORT OF THE COMMISSIONER'S FINDINGS

*Right to Information and Protection of Privacy Act*

Complaint Matter: 2014-2189-AP-1182

Date: May 12, 2015

*“Case about a third party complaint for not agreeing to the intended release of requested information about itself in response to an access request by Atlantic Lotto Corporation”*

## INTRODUCTION

1. The present Report of the Commissioner's Findings has been prepared pursuant to subsection 73(1) of the *Right to Information and Protection of Privacy Act*, S.N.B. c.R-10.6 ("the Act"). This Report stems from a Complaint filed with this Office for the Commissioner to carry out an investigation.
2. In September 2014, the Applicant, a party to this Complaint, made an access to information request to Atlantic Lottery Corporation for information found in Atlantic Lottery Corporation's record about a services contract entered between Atlantic Lottery Corporation and three separate third party companies.
3. Atlantic Lottery Corporation undertook the third party notification process found in section 34(1) of the *Act*, and notified the third parties that a request for information relating to them had been made and asked for their representations on whether they consented to the requested information being disclosed, or if not, reasons why not. The third party companies submitted their respective representations to Atlantic Lottery Corporation, after which Atlantic Lottery Corporation made a decision regarding disclosure. Part of that decision was to release a Master Agreement with attached Schedules with redactions, and the Amending Agreement; these records concerned one of the third parties.
4. Atlantic Lottery Corporation informed that particular third party of the intended release of that information, which led to that third party filing a complaint under the *Act* with our Office, as provided under 67(1)(b), on December 9, 2014. That third party is hereinafter referred to as the "Third Party" for the purpose of this Report.

## COMMISSIONER'S JURISDICTION

5. Atlantic Lottery Corporation is not a designated 'public body' in Schedule A of the *Act*, and therefore not subject to the *Act*. It is, however, a unique organization jointly owned by the four Atlantic Provinces and, as such, wishes to be transparent and to process requests for information in accordance with the each province's respective right to information statutes. This is highlighted in Atlantic Lottery Corporation's Freedom of Information Policy which states, in part, the following:

#### 4.5 Policy Guidelines

AL will respond to information requests in a timely, reasonable and complete manner in accordance with the access to information legislation for AL's shareholder provinces.

**If an information request is for a record(s), or a portion thereof, that relates specifically to a particular province**, that information request will be processed in accordance and in compliance with the access to information legislation of that province.

If an information request is for **a record(s), or a portion thereof, that relates specifically to more than one particular province**, then the information in the record(s) will be segregated according to the province or provinces to which the information relates. Information related to each province will then be processed in accordance and in compliance with the access to information legislation of that particular province.

6. In this case, the Applicant stated that it was making the request for information pursuant to Atlantic Lottery Corporation's Freedom of Information Policy and the four relevant provincial statutes, given that the requested contracts could have been made with Atlantic Lottery Corporation in any of the four Atlantic Provinces.
7. Part of the Applicant's request sought access to a copy of the contact between Atlantic Lottery Corporation and a New Brunswick Third Party. The request was processed pursuant to the New Brunswick's legislation for that reason.
8. In the past, the Commissioner agreed to receive complaints under the *Act* regarding decisions made by Atlantic Lottery Corporation, provided that all parties consented to the jurisdiction of the Commissioner's Office. Consent was obtained from all parties involved to submit to the Commissioner's jurisdiction to investigate the Complaint and issue findings in this case.

## CONTEXT

9. The facts surrounding this Complaint stems from an access to information request made by an Applicant on September 17, 2014 to Atlantic Lottery Corporation to receive a copy of the 7-year Information Technology managed services contract entered into in 2010 between Atlantic Lottery Corporation and the Third Party (the Applicant requested copies of other contracts relating to other third parties, which are not the subject of this Complaint or Report of Findings).

10. Recognizing that the requested contract records could contain sensitive third party business information, and being aware that subsections 22(1) and (2) of the *Act* require the protection of such information, Atlantic Lottery Corporation notified the Third Party of the request and invited its representations as to whether the requested information could be disclosed to the Applicant.
11. The Third Party submitted its representations to Atlantic Lottery Corporation on October 21, 2014 and after considering them, Atlantic Lottery Corporation informed the Third Party by letter dated November 17, 2014 that, based on its commitment to transparency and its obligations under the *Act*, it would provide the Applicant access to the requested records, with some redactions.
12. In other words, Atlantic Lottery Corporation decided to disclose to the Applicant a copy the Master Agreement with attached Schedules, as well as the Amending Agreement, subject to redactions being made to the records pursuant to sections 21(1), 22(1)(b) and (c), 26(1)(c) and (e), and 30(1) of the *Act*. Atlantic Lottery Corporation informed the Third Party of its decision, unless the Third Party filed a Complaint with our Office or referred the matter to a Judge of the Court of Queen's Bench within 21 days (of December 9, 2014).
13. The Third Party filed a Complaint with us on that day. This Complaint resulted in this Office halting the release of the information until the Commissioner rendered a decision.

## THE THIRD PARTY COMPLAINT

14. The Third Party initially objected to the release of any information without more explanations other than to ask that the Commissioner take into consideration sections 21(1), 22(1)(b) and (c), 26(1)(c) and (e), as well as 30(1) of the *Act*. The Third Party later filed additional representations with our Office on March 30, 2015, in which it withdrew its objection to the disclosure of the Master Agreement with Schedules, provided that the records be disclosed with the redactions proposed by Atlantic Lottery Corporation.
15. The Third Party, however, argued that additional information should be redacted from the Master Agreement before its release, as the disclosure of such information could cause harm to its business interests. In particular, the disclosure could harm its competitive position and result in financial loss (relying upon sub-paragraphs 22(1)(c)(i), (ii) and (iii) of the *Act*). As for the intended disclosure of the Amending Agreement, the

Third Party objected to its release in its entirety, arguing that that record had not been specifically requested, and did not form part of the Master Agreement and Schedules.

16. Finally, the Third Party explained that Atlantic Lottery Corporation had launched a request for proposal of services, which included services covered by the Master Agreement and that the Third Party feared that releasing the requested information could harm its competitive position in that regard. We understand that the request for proposal process has already taken place and is no longer a concern in this case.

### THIRD PARTY COMPLAINT PROCESS

17. Where a complaint is made to the Commissioner about a decision to disclose information that may be subject to protection under the law, we will review the decision to ensure that it respects the individual's right to access the information, while remaining vigilant that some information that the *Act* deems sensitive should remain protected, all while taking into account the relevant factors of the case.
18. This same process is undertaken in the case where a third party files a complaint, with an added element that under section 84(3) of the *Act*, it is the third party that must establish why the applicant has no right of access to the information, not the public body (or in this case, Atlantic Lottery Corporation).
19. In accordance with the *Act*, when we receive a complaint from a third party, we notify all parties affected by the right to information request, in this case the Applicant, Atlantic Lottery Corporation (akin to the public body for the purpose of the *Act*), as well as the Third Party, that the processing of the access request in question is suspended until we can examine the case and render a decision with respect to the disclosure of the information requested. In addition, we inform the parties of their right to send their written submissions for our review; however, in this matter, only the Third Party submitted its representations to our Office.
20. Where the Commissioner finds that the information proposed to be disclosed qualifies as third party business information and that a solid case had been made that releasing the information could harm its business interests, a ruling will issue that the information not be disclosed when responding to the request. Where the Commissioner finds that the information is not third party business information, however, or that the information would not cause harm to business interest if released, based on relevant factors at play, then the ruling will call for the release of the information.

**IN THE PRESENT CASE**

21. We point out again that the Third Party no longer objects to the disclosure of the Master Agreement with Schedules, with redactions as proposed by Atlantic Lottery Corporation, provided that additional information also be redacted as indicated by the Third Party in its submissions.
22. Notwithstanding, the Commissioner has a duty to look at all of the information proposed to be released, to ensure that none that would cause harm to the Third Party be disclosed as part of the response.

**TEST OF DISCLOSURE HARMFUL  
TO THIRD PARTY FINANCIAL OR BUSINESS INTERESTS**

23. When organizations or companies do business with the government or crown corporations, such as the Atlantic Lottery Corporation, the information generated from these commercial interactions will rest in their records and will become subject to possible disclosure under the *Act*.
24. The general right of access to this kind of information encourages accountability of government when conducting business dealings with the private sector and likewise, private sector entities should expect that some information about their dealings with the Province will be made available to the public.
25. The *Act* protects certain information that emanates from doing business with third parties and the test in one such case is whether the disclosure of the information could harm the third party's financial or commercial interests. To successfully argue that information should be protected under paragraph 22(1)(c), the private sector entity must demonstrate that *reasonable harm could result* to its business interests if disclosed.
26. "Business information" is not defined in the *Act*, but under the exception to disclosure relating to business information, the *Act* refers to commercial, financial, or similar types of information relating to private sector business or corporate entities. Examples include a private entity's activities, trade secrets, confidential contracts, proposals, sources of revenues, and other information about its operations.

27. Subsection 22(1) identifies these private interests to guide public bodies when responding to access requests:

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

- (a) a trade secret of a third party,
- (b) commercial, financial, labour relations, scientific or technical information supplied to the public body by a third party, explicitly or implicitly, on a confidential basis and treated consistently as confidential information by the third party, or
- (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.

28. As we observe from the above exception, subsection 22(1) provides seven categories of information belonging to a third party that may be detrimental to its business if released:

- 1) release of trade secrets;
- 2) release of confidential business information;
- 3) release of business information which may affect:
  - a) competition,
  - b) negotiations,
  - c) losses or gains,
  - d) alter the supply of required business information, or
  - e) labour disputes.

29. One must then look to examine the question of harm. Of the seven categories stipulated in subsection 22(1), harm is presumed to exist for information that falls under the first two categories: trade secrets and the confidential business information.

30. Harm from disclosure however, is not presumed in the remaining five categories, which require the third party to bring the necessary evidence to establish that harm can be reasonably expected to occur to a third party if the information was to be released.
31. For instance, to refuse access to information belonging to a third party regarding:
- a trade secret: the third party must prove that the information sought to be withheld constitutes a third party trade secret. In the affirmative, harm is presumed on that fact;
  - confidential business information: the third party must prove that the information was in fact supplied confidentially, and that it was intended to remain confidential. If proven, harm is presumed;
  - release of business information which may affect competition: harm is not presumed, therefore the third party will have to prove that releasing the information can reasonably be expected to cause harm to the third party's ability to compete.
32. When harm is not presumed, and as in the other "harm" test found in the *Act*, the third party will have to show that there is a direct causal link, based in evidence rather than argument, between the disclosure of the information requested and the harm claimed in order to meet its burden regarding refused access to the information. This burden is stipulated at subsection 84(3) of the *Act*:
- 84(3) Despite subsection (1), if the proceeding under this Act concerns a decision to disclose or to refuse to disclose, in whole or in part, a record containing information that is not personal information about a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.
33. Whenever alleging that third party information should be withheld from disclosure under subsection 22(1), the third party must identify which one of the seven categories applies to the information and it must be prepared to substantiate why it is relying on that category as proof that the information should not be released to an applicant. Proof under a single category will suffice for us to find that information should be withheld under this exception to disclosure.



**MEANING OF PARAGRAPH 22(1)(C)'S FINANCIAL AND/OR COMMERCIAL INFORMATION**

34. The terms “commercial” and “financial” are not defined in the *Act*; however, this Office has adopted the definition of these terms used by the Ontario Access and Privacy Commissioner in its various Orders, such as in Order PO-2965 (2011 CanLII 24269):

*Commercial information* is information that relates solely to the buying, selling or exchange of merchandise or services. This term can apply to both profit-making enterprises and non-profit organizations, and has equal application to both large and small enterprises [Order PO-2010]. The fact that a record might have monetary value or potential monetary value does not necessarily mean that the record itself contains commercial information [P-1621].

*Financial information* refers to information relating to money and its use or distribution and must contain or refer to specific data. Examples of this type of information include cost accounting methods, pricing practices, profit and loss data, overhead and operating costs.

**APPLICATION TO PRESENT CASE**

35. Having established how the test in subsection 22(1) is applied, and definitions of financial and commercial information, we will now consider whether the Third Party's proposed redacted information should be withheld from the Applicant in the present case.
36. The Third Party in this case relied on sub-paragraphs 22(1)(c)(i), (ii) and (iii) to argue that the Master Agreement and Schedules should only be disclosed to the Applicant with the additional redactions, indicating that to release this information would:
- (i) harm its competitive position;
  - (ii) interfere with its contractual or other negotiations with Atlantic Lottery Corporation; and/or
  - (iii) result in significant financial loss.
37. We therefore examined the Third Party's proposed redacted information to determine whether it qualified as commercial or financial information. In the affirmative, our analysis would have to determine whether its disclosure could reasonably be expected to harm the Third Party's competitive position, interfere with the Third Party's

- contractual or other negotiations with Atlantic Lottery Corporation, and/or result in significant financial loss to the Third Party or gain to other third parties.
38. Of the records described below, Atlantic Lottery Corporation redacted some information before disclosure to the Applicant on the basis of possible harm to its own competitiveness, or that the information constituted advice; these questions that are not before us in this case. Atlantic Lottery Corporation also redacted information that it believed was sensitive business information about the Third Party under section 22. Those redactions became the focus of our review.
39. The information at issue in the present case consists of a copy of the 7-year contract between the Third Party and Atlantic Lottery Corporation for Information Technology-Managed Services entered into in 2010. It has three components: the Master Service Agreement, Schedules, and the Amending Agreement. The Master Service Agreement is broken down into 20 different sections, referred to as Articles, which are: Interpretation, Services, Transition, Human Resources, Assets Transfer, Facilities, Third party Contracts, Other Obligations, Service Levels, Fees and Invoicing, Relationship Management, Escalation Procedure and Dispute Resolution, Intellectual Property, Audit, Insurance, Confidentiality, Access and Security, Term and Termination, Representations, Warranties and Covenants, Indemnities, Limitation of Liability, and General.
40. Also forming part of the Master Service Agreement are 23 Schedules, which are Transition Plan, Statement of Work, Governance, Change Control Procedures, Service Levels, Atlantic Lottery Corporation Policies and Guidelines, Disaster Recovery Plan, Services Fees, Intentionally Deleted, Termination Assistance Services, Transferred Employee Terms, Transferred Assets, Termination Fees, Project Scorecard, Reports, In-Scope Application Software Portfolio, In-Scope Projects, In-Scope Hardware, In-Scope System Software, Service Locations, Third Party Contracts List, Atlantic Lottery Corporation Partners and Affiliates, and Atlantic Lottery Corporation Enterprise Architecture Charter and Blueprint.
41. Finally, for the Amending Agreement, Atlantic Lottery Corporation proposed to redact information concerning, *inter alia*, length of term of the contract and renewability, specific details about pricing and fees, limitation of liability clauses, indemnity clauses, insurance, service levels, intellectual property, and personnel.
42. The Third Party proposed that additional information found in the Master Agreement be redacted, mostly consisting of definitions of terms and any reference to the said

definitions of terms mentioned in the remaining Master Agreement. Other information the Third Party wished to be redacted included information found in the following Articles: Background and Scope of Agreement, Financial Responsibility, Scope of Services, Disputed and Unpaid Amounts, Compelled Disclosure, and General Information relating to Indemnities. Finally, the Third Party proposed redactions of its contact information.

43. The Third Party relied on the definition of commercial information in support of its argument that the proposed redactions relate to the buying, selling, or exchange of services, and financial information when it relates to money by referring to specific data. In its view, these definitions supported its argument to redact more information from the records prior to their disclosure.
44. After having examined all of these records, we agree that the proposed information to be removed consisted of financial and commercial information relating to the Third Party, and as such, this information falls squarely within the ambit of subsection 22(1). More specifically, under paragraph 22(1)(c).
45. Having qualified the information as either financial or commercial, however, does not automatically warrant its protection from disclosure pursuant to this paragraph. The test must be met by the Third Party in showing that the disclosure of the information *would reasonably result in harm to its business interest*.

## **MEETING THE TEST IN PARAGRAPH 22(1)(c) REASONABLE EXPECTATION OF HARM**

### **Additional Redactions Proposed by the Third Party**

46. The statute places a heavy burden upon the party attempting to prevent disclosure. To rely on subsection 22(1)(c) of the *Act* as grounds to refuse to disclose information to the Applicant, the Third Party must provide detailed and convincing evidence to show that it is reasonable that harm could be expected to occur.
47. The standard of proof required under sub-paragraphs 22(1)(c)(i), 22(1)(c)(ii) and 22(1)(c)(iii) are on the balance of probabilities; the only party that can provide such detailed and convincing evidence is the third party itself. Atlantic Lottery Corporation alone cannot determine whether disclosure of the Third Party business's information

can cause harm to its interests without having received the benefit of the Third Party's representations on the issue.

48. In this case, the Third Party relied on a Supreme Court of Canada decision<sup>1</sup>, in which the Court interpreted a similar exception to disclosure and found that the test to establish is one of “reasonable expectation of probable harm”:

...the word “probable” in this formulation must be understood in the context of the rest of the phrase: there need be only a “reasonable expectation” of probably harm. The “reasonable expectation of probable harm” formulation simply “captures the need to demonstrate that disclosure will result in a risk of harm that is well beyond the merely possible or speculative, but also that it need not be proved on the balance of probabilities that disclosure will in fact result in such harm. ...

This Court ... adopted the “reasonable expectation of probable harm” formulation and it should be used wherever the “could reasonably be expected to” language is used in access to information statutes...the statutes tries to mark out a middle ground between that which is probable and that which is merely possible. An institution must provide evidence “well beyond” or “considerably above” a mere possibility of harm in order to reach that middle ground.

49. In its submissions, the Third Party identified various sections of the Master Agreement it stated would harm its competitive position if released, but did not provide detailed explanations or evidence to show how this would be the case.
50. The Third Party submits that the information in question relates specifically to its commercial and financial information, and that the release of such information would significantly harm its competitiveness vis-à-vis its competitors, and would result in significant financial loss to the Third Party. Further, many of the proposed redactions, especially the redactions in the Schedules of the Master Agreement and the Amending Agreement, contain commercial and financial information, as they relate solely to Atlantic Lottery Corporation buying services from the Third Party, and contain specific monetary figures and algorithms.
51. We have had the opportunity to examine the application of section 22. In assessing harm under section 22(1), each case must be considered independently with a view to the quality of evidence presented and the impact of other factors, such as the positions taken by the third party, the nature of the records at issue, and all of the information at

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<sup>1</sup> *Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, 2014 SCC 31,

issue in them, as well as the passage of time that can affect the sensitivity of the information.

52. As well, the strength of the third party's evidence in support of non-disclosure must be weighed against the key purposes of access-to-information legislation, namely the need for transparency and government accountability. This importance was highlighted by the Ontario Assistant Commissioner in Order PO-2435:

Lack of particularity in describing how harms identified in the subsections of section 17(1) could reasonably be expected to result from disclosure is not unusual in representations this agency receives regarding this exemption. Given that institutions and affected parties bear the burden of providing that disclosure could reasonably be expected to produce harms of this nature, and to provide "detailed and convincing" evidence to support this reasonable expectation, the point cannot be made too frequently that parties should not assume that such harms are self-evident or can be substantiated by self-serving submissions that essentially repeat the words of the *Act*.

In this regard, it is important to bear in mind that transparency and government accountability are key purposes of access-to-information legislation (see *Dagg v. Canada (Minister of Finance)* (1997), 148 D.L.R. (4<sup>th</sup>) 385). Section 1 of the *Act* identifies a "right of access to information under the control of institutions" and states that "necessary exemptions" from this right should be "limited and specific"...

The role of access to information legislation in promoting government accountability and transparency is even more compelling when, as in this case, the information sought relates directly to government expenditures of taxpayer money. ...

53. As we observe, it was established that mere speculation that disclosure would cause harm, without actual proof of a reasonable expectation of harm to actual contractual negotiations, to the competitive position or to financial loss, other than the daily business operations being disrupted or obstructed by the disclosure of the information did not suffice. Evidence of the possible effect of disclosure on other contracts generally and hypothetical problems were held to be insufficient to qualify under the exemption.
54. Upon review of the information proposed by the Third Party to be redacted and the Third Party's submissions, we fail to see which information contains specific monetary figures and algorithms, as that same information is subsumed in the redactions already proposed by Atlantic Lottery Corporation.

55. The Third Party also argued that there are several examples of commercial and financial information found in the Master Agreement, such as information relating to service levels, insurance coverage, intellectual property, limitation of liability and indemnities, process for requesting additional projects and new services, maintenance of third party contracts, relationship management, dispute resolution, audits, termination of agreement, etc.
56. The Third Party submits that the disclosure of this information would result in significant harm to its competitive position by giving its competitors an unfair advantage in knowing the manner in which the Third Party provides these services to Atlantic Lottery Corporation, and that could result in a financial loss. This unfair advantage, according to the Third Party, would not only be present during other requests for proposals for similar services but also for the foreseeable future as the pricing and servicing information of the Agreement will be current and up-to-date until July 2, 2017.
57. Again, we find that information relating to pricing has already been redacted by Atlantic Lottery Corporation in its proposed disclosure, and not in the Third Party's proposed redactions. We therefore fail to see how disclosing the Third Party's proposed redactions would cause harm to its business interests based on that argument.
58. As stated above, in order to rely on subsection 22(1)(c) of the *Act* as grounds to refuse to disclose information, the Third Party must provide detailed and convincing evidence to show that reasonable harm could occur.
59. This was reiterated in a recent decision of the Saskatchewan Information and Privacy Commissioner in Review Report 047-2015. After having received an access request, a government ministry provided notice to a third party that had an interest in the requested record. The third party objected to the release of the record but the ministry then considered its release. The third party filed a complaint and asked the Commissioner to determine whether the third party's information should be disclosed. The Saskatchewan Commissioner requested submissions from all three parties involved but the third party did not provide submissions as to why it believed the disclosure of the requested record would harm its business interests. In the Review Report, the Commissioner stated that the exception raised by the third party is a harm-based exception and as such, it required the decision-maker to analyze whether the release of information could be prejudicial to the interests and that harm was likely to occur. Given that the third party had not provided submissions, the Saskatchewan Commissioner could not determine from a review of the record what harm was

contemplated by the third party, nor the likelihood that harm would occur. As a result, the Saskatchewan Commissioner could not find that the exception to disclosure provision relied upon by the third party applied to the record and recommended that the ministry release the record to the Applicant.

60. In this matter, while the Third Party has provided submissions, it has not provided detailed and convincing evidence to show that if released the intended information would cause harm to its business interests. We do not dispute that the Master Agreement and its Schedules contain proprietary and sensitive business information pertaining to both Atlantic Lottery Corporation and the Third Party; however, we are not convinced that the Third Party's proposed redacted information contains proprietary or sensitive business information as it appears to us, upon review, to be information that consists mostly of generic contract language.
61. For most of the proposed redactions by the Third Party, we find that its arguments in support are too broad and appear to be based on the redactions advanced by Atlantic Lottery Corporation rather than the redactions proposed by the Third Party. For example, the Third Party proposes to have all of the Articles relating to Indemnities redacted from the Master Agreement – as this would harm its competitive position, result in financial loss and/or affect its ability to negotiate with Atlantic Lottery Corporation. Atlantic Lottery Corporation already proposed to have most of the information in the Article about Indemnities redacted, leaving only a few paragraphs that, upon reading, appear to be generic contract language.
62. Without the benefit of explanations from the Third Party as to why the remaining Indemnities paragraphs could cause harm to its business interests, we cannot find that it would in fact cause harm to its business interest.
63. As a result, absent any detailed and convincing evidence from the Third Party that its own proposed additional redactions would cause harm to its competitive position, result in financial loss and/or affect its ability to negotiate with Atlantic Lottery Corporation, we cannot find that paragraph 22(1)(c) applies to the Third Party's proposed redactions.
64. Having said this, however, upon review of the information in question and the Third Party's comments, we find that it did make a valid case for the redaction of some financial information found in Article 1, Financial Responsibility, and we will direct that Atlantic Lottery Corporation redact that information before disclosure to the Applicant.

## AMENDING AGREEMENT

65. As stated above in this Report, the Third Party objects to the release, in full, of the Amending Agreement struck between it and Atlantic Lottery Corporation for the reason that it is a separate agreement that does not form part of the Master Agreement and that the Applicant's Request was solely for the Master Agreement. Additionally, the Third Party states that section 20.12 of the Master Agreement confirms that the Master Agreement and Schedules constitute the entire agreement between the parties. Alternatively, should we recommend that the Amending Agreement be disclosed, the Third Party submits that we ought to recommend the redactions as proposed by Atlantic Lottery Corporation on the grounds identified by the latter.
66. We have reviewed both section 20.12 of the Master Agreement and the Amending Agreement and we find that the Amending Agreement does indeed form part of the Master Agreement, and by extension, is relevant to the Applicant's Request.
67. Section 20.12 of the Master Agreement stipulates as follows:

### **20.12 Entire Agreement**

This Agreement and the Schedules, together with any instruments as contemplated hereby, constitute the entire agreement between the Parties with respect to the subject matter hereof and supersede all prior negotiations and representations, whether written or oral, relating to its subject matter. No amendment, modification, waiver or discharge of this Agreement shall be binding unless previously executed in writing by an authorized signatory of the Party to be bound thereby.

[Our emphasis]

68. Additionally, the Amending Agreement does stipulate that it forms part of the Master Agreement:
1. [the Parties} entered into a Master Services Agreement between Atlantic Lottery Corporation Inc. and [the Third Party] with the Effective Date of July 2, 2010 (as amended to the date hereof, including by this Amendment, the "MSA"); and
  2. [the Parties} wish to enter into this Amendment in order to clarify and/or amend the MSA as set forth herein.



69. Given the above, we find that the Amending Agreement forms part of the Master Agreement and is relevant to the Applicant's Request. As such, Atlantic Lottery Corporation was obligated to consider that record as part of its response to the Applicant.
70. Having reviewed the Amending Agreement, and the proposed redactions by Atlantic Lottery Corporation, we find that the remainder of the information consists mostly of generic contract language and, absent any detailed and specific evidence brought forth by the Third Party that the information should be withheld from disclosure, we do not find that its disclosure could reasonably result in harm to its business interests. We reiterate that the Third Party, in the alternative, agreed with those redactions.
71. In the final analysis, the Third Party did not meet its burden under section 84(3) of the *Act*, except for a minor additional redaction of some financial information.

## SUMMARY AND CONCLUSION

72. In this Complaint matter, we had to determine whether Atlantic Lottery Corporation could proceed with its decision to disclose the Master Agreement, with Schedules, and the Amending Agreement, with redactions, entered into between Atlantic Lottery Corporation and the Third Party based on the application of section 22's protection of third party business information. Furthermore, the Third Party asked that additional redactions be made to the relevant records before disclosure. Our Office was required to determine whether those additional redactions would cause harm to the Third Party's business interests, if disclosed to the Applicant.
73. We found that the records at issue did contain the Third Party's financial and commercial information; however, the Third Party had to present detailed and convincing evidence to show how the disclosure of the proposed information would reasonably be expected to cause harm to its competitive position, to its financial position, or to its ability to negotiate with Atlantic Lottery Corporation. We found that the Third Party argued too broadly on the redactions, except for some information found in the Financial Responsibility clause that we agree can be redacted.
74. Therefore, absent any detailed and convincing evidence from the Third Party that the disclosure of the additional information it seeks to have redacted would cause harm to its business interests, the Master Agreement, with its Schedules, as well as the

Amending Agreement should be released to the Applicant with the redactions Atlantic Lottery Corporation has decided to make to these records.

75. Based on all of the foregoing, and pursuant to paragraph 73(1)(b) of the *Act*, the Commissioner recommends that:

Atlantic Lottery Corporation disclose the requested records to the Applicant, as per its decision communicated to the Third Party in a letter dated November 17, 2014, with only one additional redaction for the second sentence found in Article 1.11-*Financial Responsibility* of the Master Agreement.

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Anne E. Bertrand, Q.C.  
Commissioner