

NEWFOUNDLAND AND LABRADOR
OFFICE OF THE INFORMATION AND PRIVACY
COMMISSIONER

REPORT 2007-002

Department of Innovation, Trade and Rural Development

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”) for access to records in the custody of the Department of Innovation, Trade and Rural Development (the “Department”). The Department determined that releasing the requested information had the potential to affect the business interests of the Third Party as contemplated by section 27 of the ATIPPA. The Third Party filed with the Department an objection to the release of portions of the information. The Department considered the Third Party’s objections, and decided to sever some additional information based on the Third Party’s position, but the Department advised the Third Party that it intended to release the remainder of the information as it had originally intended. The Third Party then filed a Request for Review with the Office of the Information and Privacy Commissioner with the intention of preventing the majority of the information from being released to the Applicant. The Commissioner found that the Third Party had not provided a sufficient basis to allow the Commissioner to recommend that additional information be severed on the basis of section 27 above and beyond that which the Department had decided to release.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 7, 27, 30, 47, 64(2).

Authorities Cited: *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194; *Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, (1997) N.S.J. No. 238 (N.S.S.C.); Newfoundland and Labrador OIPC Reports 2005-003 (2005), 2006-001 (2006) and 2006-005 (2006); British Columbia OIPC Order 01-39 (2001); *Canadian Pacific Railway v. British Columbia*, 2002 BCSC

603, 2002 CarswellBC 1022; *Ontario (Worker's Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner)* 1998 CarswellOnt 3445.

Other Sources Cited:

Access to Information and Protection of Privacy Act Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, updated September 2004, available at <http://www.justice.gov.nl.ca/just/civil/atipp/Policy%20Manual.pdf>

I BACKGROUND

- [1] On 26 May 2006 the Department of Innovation, Trade and Rural Development (the “Department”) received a request from the Applicant for the following information under the *Access to Information and Protection of Privacy Act* (the “ATIPPA”):

I request information on all contracts signed between your department and the company known as [Third Party], also trading as [Third Party] located in [location], formerly located in [location]. The company’s president is [name]. The period to be covered would be from 1987 to date.

I request what the contract covered, date and amount.

- [2] The Department sent a letter to the Applicant on the same date the request was received, acknowledging receipt of the request. This was followed up after a period of weeks by the following e-mail to the Applicant from the Department’s Access & Privacy Coordinator (the “Coordinator”):

Because of the age of the files concerned with your request for information concerning [Third Party], it has taken us several weeks to locate these files. What we have found in our files is the documentation concerning several requests and approvals by the company for financial assistance under the Offshore Industry Subsidiary Agreement and the Offshore Development Fund. Is this the kind of information that you are looking for? We have no record of any contracts between our department and this company to perform work.

- [3] On 20 June 2006 the Applicant responded by e-mail, indicating “yes, it would be the requests and the amount of financial assistance provided and approximate dates.” On 23 June 2006 the Department sent a letter to the Applicant advising him of a fee estimate, and also that “much of the information” contained in the records cannot be released pursuant to section 27 of the *ATIPPA*. In its response, the Department also attached a record comprised of two brief paragraphs which it had created, containing “all funding approvals by this department for which we were able to find records during the period 1987 to date.”

[4] The Applicant agreed to pay the fee estimate, and on 7 July 2006 the Department issued a letter to the Applicant advising him that the records had been reviewed, and they had determined that “these records may contain information, which, if disclosed would affect the business interests of a third party as described in section 27 of the Act.” The Department further explained to the Applicant that it would have to notify the Third Party as per section 28 of the *ATIPPA* and give the Third Party an opportunity to either consent to the disclosure or to make its case as to why the information should not be disclosed. The Department sent its letter of notice to the Third Party on 7 July 2006.

[5] A series of correspondence was then exchanged in July 2006 between the Third Party and the Department during which the Third Party requested an extension of the time period to review the material and make any objections known to the Department. The Department responded by explaining that the deadlines were set by the *ATIPPA*, and could not be extended. The Third Party then forwarded a letter dated 2 August 2006 in which it outlined its objections to the release of a list of documents, above and beyond those which the Department had already determined must be withheld from the Applicant under section 27.

[6] In a letter dated 8 August 2006, the Third Party was advised by the Department that the Department had received the correspondence dated 2 August 2006 outlining the Third Party’s objections, but after considering the objections, the Department advised that it still intended to provide access to a portion of the records. The Department maintained its decision to release most of the records which were the subject of the Third Party’s objections, although some additional material was withheld based on the objections of the Third Party. The Third Party was then advised of its right to appeal to this Office.

[7] On 29 August 2006, this Office received a copy of a Request for Review from the Third Party. The Third Party indicated that it objected to the release of certain information responsive to the Applicant’s request.

[8] Staff at this Office pursued some preliminary discussions with the Third Party, the Applicant, and the Department with the goal of settling this matter, but these efforts were not successful in

establishing a basis for informal resolution. These discussions did result, however, in the Department issuing to the Applicant another list, similar to the one referenced above which the Department forwarded to the Applicant on 23 June 2006. This list contained additional funding approvals which the Department had not previously identified due to the fact that the division which was involved when the approvals were granted is no longer a part of the Department, having been transferred to another department.

- [9] On 18 October 2006, the Applicant, the Third Party, and the Department were advised that no informal resolution had been attained, and as a result this matter was being referred to the formal investigation process in accordance with section 43 of the *ATIPPA*. The parties were advised that, under authority of section 47 of the *ATIPPA*, they should provide their written representations to this Office no later than 1 November 2006. The parties were also advised that “if we do not receive a response by 1 November 2006 we will proceed with our investigation based on the information currently on file.”

II PUBLIC BODY’S SUBMISSION

- [10] On 18 October 2006 the Department forwarded an e-mail to this Office advising the following:

We will not be submitting any further representations in support of our position with respect to this appeal of our decisions regarding this ATIPP request.

III APPLICANT’S SUBMISSION

- [11] On 30 October 2006 this Office received a brief letter from the Applicant containing his comments on this matter. The Applicant summarized the basis of his request, as well as the list of funding approvals forwarded to him by the Department. He questioned why the Third Party wishes to withhold the information, and added the following comments:

I requested information where tax dollars were spent assisting a private company. The third party has objected. It is important for me to see the details of the above contracts to ascertain if there is relevant information to a legal matter involving myself and [the Third Party].

Since the time that these contracts have been let are considerable [sic] and I am no longer involved in the [...] industry, I cannot use the information in a competitive manner against his company. I request that the information be released to me.

IV THIRD PARTY SUBMISSION

- [12] In its Request for Review to this Office, the Third Party briefly summarized the basis for its objection to the disclosure of the requested information. The Third Party also expressed a willingness to participate in any informal resolution efforts, and it also indicated that if no such informal resolution is attained, it “looks forward for the opportunity to make representations at the review hearing.”
- [13] On each occasion during which counsel for the Third Party was in contact with this Office, he made reference to a desire to make such representations at a review hearing. Each time he indicated this wish, he was advised by my staff that it is not the usual practice of this Office to hold hearings, but rather to give parties an opportunity to make written submissions, which are then reviewed by this Office in concert with the responsive records, the *ATIPPA*, case law, and any other factors determined to be relevant through the course of our investigation. Counsel for the Third Party was specifically advised that if he wished to proceed to make that request, he must do so in writing.
- [14] No written request for a formal hearing was received from the Third Party, neither before nor after the issuance of the letter from this Office on 18 October 2006 inviting written submissions from the parties to be received by this Office no later than 1 November 2006, after which time this Office would proceed on the basis of information already on file. Furthermore, no written submission of any kind was provided by the Third Party.

[15] The Third Party did, however, provide a brief submission to the Department dated 2 August 2006, a copy of which was provided to this Office by the Department. In that submission, the Third Party indicated the portions of the responsive record which it believed should be withheld, in addition to those portions of the record which the Department had already designated for severance under section 27 of the *ATIPPA*.

[16] In its submission to the Department, the Third Party gave a brief description of the following pages and indicated its wish that these pages be withheld in their entirety because they contain “commercial and financial information”: pages 3 through 11 inclusive; pages 13 through 20 inclusive; pages 30 through 60 inclusive; and pages 76 through 95 inclusive. The Third Party indicated that it was relying on section 27(1)(a)(i)(ii), (b), and (c)(i),(ii),(iii) of the *ATIPPA*.

V DISCUSSION

[17] Subsection 64(2) of the *ATIPPA* states that the burden of proof lies with the Third Party to prove that that the Applicant should not have access to the records at issue:

64. (2) On a review of or appeal from a decision to refuse access to a record 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 or part of the record.

[18] No submission was received by the Third Party in relation to this review, leaving me to consider the Third Party’s 2 August 2006 letter to the Department objecting to disclosure as my primary source for the Third Party’s position. I retain the right under section 47(3) of the *ATIPPA* to determine the format of representations during a Review:

47. (3) The commissioner may decide whether representations are to be made orally or in writing.

As noted above, the Third Party was advised in writing by my Office of the deadline for receipt of a written submission on this matter, and that if no written submission was received that this Office would proceed based on the information on file.

[19] In making any case opposing disclosure of records based on section 27 of the *ATIPPA*, one of the most important factors is that evidence supporting reliance on section 27 must be both detailed and convincing. As I have outlined in my Report 2006-005:

41 The necessity for “detailed and convincing” evidence is well established in the case law. The decision of the Ontario Court of Appeal in Ontario (Worker’s Compensation Board) v. Ontario (Assistant Information & Privacy Commissioner) 1998 CarswellOnt 3445 simply states, “if the evidence lacks detail and is unconvincing, it fails to satisfy the onus and the information would have to be disclosed.” The same three-part test was being applied in that case as in the present matter.

[20] Despite this, the Third Party has requested that I undertake this Review, and I must do so with the information which has been provided to me. I will begin by briefly reviewing the function and application of section 27 of the *ATIPPA*.

[21] Section 27 has been explored in some detail in my previous Reports, including 2005-003, 2006-001 and 2006-005. As I have outlined in those Reports, section 27 is a mandatory exception to access which instructs public bodies to withhold information in a record which, if disclosed, would be harmful to the business interests of a third party:

27. (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 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.*

(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.

(3) Subsections (1) and (2) do not apply where

(a) the third party consents to the disclosure; or

(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.

[22] The application of section 27 involves a three-part test. This provision of the *ATIPPA* cannot be relied upon unless at least one of the conditions in each of 27(1)(a), (b) and (c) has been met. My Report 2005-003 addresses this at paragraphs 38 and 39:

38 Section 27(1) and similar sections in other access legislation is considered to be a three-part “harms test,” as established in Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5, [1997] N.S.J. No. 238 (N.S.S.C.). In that decision, Kelly, J at paragraph 29 set out this three-part test with regard to Section 21 in Nova Scotia’s legislation:

(a) that disclosure of the information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;

(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and

(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).

39 *Note that all three parts of the test must be met in order to sever a record. It should also be noted that Nova Scotia's 21(1)(c) is identical to Newfoundland and Labrador's 27(1)(c) except the ATIPPA adds a fourth injury in relation to the release of information in a report which has been completed by a person or body appointed to resolve a labour relations dispute...*

[23] In my Report 2006-005 I referred to *Air Atonabee v. Canada (Minister of Transport)* (1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180. In that case, MacKay J. states that in understanding the use and application of the terms “financial, commercial, scientific or technical information,” regarding third party business interests, it is sufficient “that the information relate or pertain to matters of finance, commerce, science or technical matters as those terms are commonly understood.” To the extent that the information at issue includes commercial and technical information about the business operations of the Third Party, I accept that this information is commercial in nature, thus satisfying part one of the three-part test. There is, however, a significant amount of information of a more general nature among the records which the Third Party wishes to protect under section 27. This more general information can best be characterized as general information about the particular industry, as well as application forms, etc.

[24] Part two of the three-part test, as set out in section 27(1)(b), requires that the information had to have been “supplied, implicitly or explicitly, in confidence.” The two factors to be considered here are the word “supplied” and the term “in confidence.” I explored this issue in my Report 2006-005.

[25] It is noted in British Columbia Order 01-39 that information can be said to have been supplied implicitly or explicitly in confidence “if, in all of the circumstances, it can be objectively regarded as having been provided in confidence with the intention that it be kept confidential.” Neither the Department nor the Third Party has presented any evidence of an explicit agreement to keep the information at issue confidential. It should be noted that although explicit confidentiality agreements may be helpful under these circumstances, they are not sufficient in and of themselves to make the case. Lacking any convincing evidence from either the Department or the Third Party, I am also unable to conclude that any of the information was supplied with an implicit expectation of confidentiality.

[26] To meet the second component of part two of the test, a particular record or piece of information must be deemed to have been “supplied.” This means that it must have come from and been developed entirely by a third party, rather than negotiated with a public body. I dealt with this in my Report 2006-001 at paragraph 61:

61 Although not raised by either of the parties to this Review, I believe it is important to also discuss the use of the term “supplied” in section 27(1)(b). Jurisprudence in this area has supported a distinction between information that is “supplied” and information that is “negotiated.” In its Order 01-39 (upheld on judicial review, in Canadian Pacific Railway v. British Columbia, 2002 BCSC 603, 2002 CarswellBC 1022) the Office of the Information and Privacy Commissioner for British Columbia concluded that contractual information, despite a reasonable expectation of confidentiality, was not supplied in confidence:

43 ...By their nature, contracts are negotiated between the contracting parties. The fact that the requested records are contracts therefore suggests that the information in them was negotiated rather than supplied. It is up to CPR, as the party resisting disclosure, to establish with evidence that all or part of the information contained in the contracts including their schedules was not negotiated, as would normally be the case, but was “supplied” within the meaning of s. 21(1)(b).

44 A number of cases have addressed the difference between negotiated and supplied information (see Orders 00-09, 00-22, 00-24, 00-39, 01-20). The thrust of the reasoning in all of these decisions is that the information contained in contractual terms is generally negotiated. Information may be delivered by a single party or the contractual terms may be initially drafted by only one party, but that information or those terms are not “supplied” if the other party must agree to the information or terms in order for the agreement to proceed (see Order 01-20, paras. 81-89).

[27] Much of the material responsive to this request is comprised of agreements between the Department and the Third Party. Such information cannot be said to be “supplied” for the purpose of section 27 of the ATIPPA, because it is part of an agreement between the two parties. As noted above in the British Columbia Commissioner’s Order 01-39, even if the terms are drafted and delivered by one party to another, the other party must agree to those terms in order for any transaction to proceed. Both the Department and the Third Party had the option not to go

along with the terms of the agreement, and to refuse to sign it. By proceeding with the agreement, both parties are in fact agreeing to the terms, regardless of how much actual negotiation may or may not have been required for this to occur. Once again, I do not agree that most of the information which the Department intends to release can be said to have been “supplied” by the Third Party, and it would therefore fail to meet part two of the three part test.

[28] Despite this, the Department has not taken the position that the entire record must be released. On many pages, the Department has determined that some specific information must be severed as per section 27, representing fixed costs of the Third Party and other information specific to the operations of the Third Party which it accepts as having been supplied by the Third Party as background information for its applications to the Department. The Third Party has not questioned the Department’s position on this, but in cases where a word, a figure, or a paragraph has been highlighted by the Department to indicate the Department’s intention to withhold that portion, the Third Party appears to have adopted the position that the entire page upon which that information is found must be withheld.

[29] This brings into play an important provision in the *ATIPPA*. Section 7 sets out not only a right of access, but also specifies the limits of such access by creating a duty on the part of public bodies to sever any information from a record which is to be withheld based on one of the exceptions to access outlined in the *ATIPPA*, and in so doing it requires public bodies to provide access to the remainder of the record from which such information has been severed:

7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.

(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.

(3) The right of access to a record is subject to the payment of a fee required under section 68.

[30] For illustration purposes, I have chosen one page to comment on in detail. Page 8 of the record appears to be part of a standard form in use by the Department. On this particular page, the Department has severed the specific items which it believes should be withheld under section 27, and has designated the remainder of the page for release. The remainder of the page includes some start and completion dates for the activities to which the Third Party's application relates, as well as a figure for the estimated contribution of the Department towards the project. The time frame indicated by the dates is over 12 years ago, and the amount contributed by the Department is certainly not something which can be said to have been "supplied" by the Applicant. The Third Party therefore has no basis for its claim to withhold the entire page, and the Department has been correct in applying section 7 of the *ATIPPA* by severing any information which it believes to be exempt from disclosure under section 27, while releasing the remainder of that page of the record.

[31] Among the information designated for release by the Department, there is some material which has been directly supplied by the Third Party, although, as noted above, I find no basis to accept that it was supplied in confidence. It is primarily background information about the services offered by the Third Party, as well as some history in relation to its operations, and some comments of a general nature about its role in the future of its particular industry. A subset of that material could be interpreted as being commercial in nature. Even though I do not believe that this information satisfied both parts one and two of the harms test as required to meet the threshold to claim section 27, I believe there is some value at this point in exploring the application of part 3 of the harms test to these records. I must reiterate that all three parts of the harms test must be met in order for me to accept the Third Party's position that information should be withheld above and beyond that which the Department has severed.

[32] The third part of the test requires that a case be made for a reasonable expectation of probable harm should the information be disclosed. The *Policy and Procedures Manual* of this province's Department of Justice *ATIPP* Coordinating Office provides a concise summary of what is required when a public body wishes to withhold information based on section 27. Due to the fact that the burden of proof rests with third parties in this type of situation, the same

standard must be met by a third party who has objected to a decision made by a public body to disclose information:

A public body [or third party] must be able to present detailed and convincing evidence of the facts that led to the expectation that harm would occur if the information were disclosed. There must be a link between the disclosure of specific information and the harm which is expected from release.

- [33] Lacking a submission from the Third Party, it is difficult for me to accept that there is a reasonable expectation of probable harm. The only thing I can refer to is the statement of the Third Party in its letter to the Department of 2 August 2007 which states:

The release of the noted information would be harmful to our business interest and compromise our position in the market through the release of financial, marketing, and strategic information and would also release information confidential in the form of salaries, details on personnel, financial information on financing and profitability.

- [34] Given the fact that much of the information is twelve to fourteen years old, with the most recent information being seven years old, I find it difficult to accept that its release would result in a reasonable expectation of probable harm to the Third Party's competitive position in 2007. Furthermore, I question the characterization of the records themselves. The information which was provided by the Third Party in support of its applications to the Department for funding is information which in some cases is available on the web site of the Third Party, would be easily obtainable by customers or potential customers of the Third Party, and is likely common knowledge or assumed throughout the industry in which the Third Party is involved. Also, I feel that the Department has already severed any information which could possibly meet the threshold of the three part harms test as required under section 27.

- [35] Additionally, in the brief notation accompanying its table summarizing the pages of the record of which it objects to disclosure, the Third Party repeatedly lists as the reason under its category entitled "objection," that such information "contains commercial and financial information." As noted above, even if the third party could prove that all of the objectionable information contained commercial and financial information, this does not come close to meeting the three part test. The information available to me in relation to the Third Party's

objection is neither detailed nor convincing regarding the nature or severity of the harm which it anticipates from the release of this information. Consequently, part three of the three-part test has not been met, and the information should be released.

[36] The Department has also severed some information based on section 30, which primarily involves names and other personal information of individuals who are employed by the Third Party. Section 30 is a mandatory provision of the *ATIPPA*, which requires a public body must withhold personal information. It is not specifically at issue in this Review, however, because the basis for third party notification, and consequently this Review, only allows a Third Party to request a review based on section 27 of the *ATIPPA*.

VI CONCLUSION

[37] It is unfortunate that the Third Party chose not to provide a submission in relation to this Review. On the other hand, having reviewed the records, I feel it is highly unlikely that a submission from the Third Party would have altered my position. I do not believe the Department risks acting in a manner contrary to section 27 in disclosing to the Applicant the portion of the records which it has designated for release.

VII RECOMMENDATIONS

[38] Under authority of section 49(1) of the *ATIPPA*, I find that the threshold of proof required in order to recommend that the Department withhold additional information from the records on the basis of section 27 has not been attained, contrary to the position held by the Third Party. I hereby recommend that the Department of Innovation, Trade and Rural Development release to the Applicant all information in the records which were subject to this Review which it had previously decided to release as of its letter to the Third Party on 8 August 2006.

[39] Under authority of section 50(1) I direct the head of the Department of Innovation, Trade and Rural Development to write to this Office and to the Third Party and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[40] The Third Party may appeal the decision of the Department with respect to these recommendations to the Supreme Court Trial Division. This appeal must be filed within 30 days of receiving the decision of the Department, as per section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time period for an appeal to the Trial Division as set out in the *ATIPPA*.**

[41] Dated at St. John's, in the Province of Newfoundland and Labrador, this 5th day of February, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador