

**NEWFOUNDLAND AND LABRADOR**  
**OFFICE OF THE INFORMATION AND PRIVACY**  
**COMMISSIONER**  
**REPORT 2006-002**

**Department of Health and Community Services**

**Summary:**

The Applicant applied under the *Access to Information and Protection of Privacy Act* (“ATIPPA”) for access to the MCP billing information of individual physicians. The Department of Health and Community Services decided to release this information, but before doing so provided third party notification in accordance with section 28 of the ATIPPA. This request for information is the same request that was investigated and reported in my Report 2006-001. However, in this case a second Third Party objected to the release of the information, in accordance with section 27(1), and filed a separate Request for Review with the Office of the Information and Privacy Commissioner. The Commissioner determined that there was no evidence to suggest that this Request for Review should be treated any differently and, consequently, has decided that the arguments and discussion specified in Report 2006-001 are directly relevant to this case. The Commissioner concluded that the exception claimed by the Third Party did not apply and upheld the decision of the Department of Health and Community Services to release the information as per the Applicant’s request. This Report is written in conjunction with the companion Report 2006-001.

**Statutes Cited:**

*Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(o) and (t), 3(1)(a) and (c), 6, 7(1), 8(1), 27(1), 28, 30(1), 30(2)(f) and (g), 43(2), 47, 49(2), 50(1), 60, 64(2); *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5, as am, ss. 20(4)(f), 21; *Medical Care Insurance Act, 1999*, S.N.L. 1999, c. M-5.1, as am, ss. 27, 3(1); *Public Sector Compensation Disclosure Act*, C.C.S.M. 1996, c. P265; *Financial Information Act*, R.S.B.C. 1996, c. 140; *Financial Information Regulation*, B.C. Reg. 371/93; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165, s. 21(1)(b)

**Authorities Cited:** *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, 2005, NSSC 244; *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R. 194; Newfoundland and Labrador OIPC Reports 2005-002 (2005) and 2005-007 (2005); *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.); *Chesal v. Attorney General of Nova Scotia*, 2003 N.S.S.C. 10; British Columbia OIPC Orders 01-39 (2001) and 01-20 (2001); *Canadian Pacific Railway v. British Columbia*, 2002 BCSC 603, 2002 CarswellBC 1022; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 2 F.C. 47 (C.A); *Saint John Shipbuilding v. Canada (Minister of Supply and Services)*, [1990] F.C.J.; *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, [1988] F.C.J.; *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 665; *Canada (Information Commissioner) v. Canada (Prime Minister of Canada)*, [1992] 57 F.T.R. 180, [1993] 1 F.C. 427

**Other Resources Cited:**

Memorandum of Agreement between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2003, available at

[http://www.nlma.nl.ca/documents/agreements\\_negotiations/agreement\\_negotiation\\_1.pdf](http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation_1.pdf);

Arbitration Award between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2003, available at

[http://www.nlma.nl.ca/documents/agreements\\_negotiations/agreement\\_negotiation\\_2.pdf](http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation_2.pdf);

News Release, February 15, 2006, available at

<http://www.releases.gov.nl.ca/releases/2006/exec/0215n04.htm>

## I BACKGROUND

- [1] It is important to note from the outset that this Report must be read in conjunction with my Report 2006-001. Both Report 2006-001 and the current Report have resulted from a single access to information request to the Department of Health and Community Services (the “Department”). This request was dated 18 July 2005, wherein the Applicant requested the following:

*I would like all physicians’ [Medical Care Plan] billings from 2000 to present, listed by physicians’ names.*

- [2] After receiving the request on 26 July 2005, the Department notified the Applicant that the records may contain third party information, as per section 27 of the *Access to Information and Protection of Privacy Act* (“ATIPPA”). In accordance with section 28 of the *ATIPPA*, the Department notified each third party in correspondence dated 29 September 2005. Subsequent to this initial notification, on 4 November 2005 the Department notified each third party that a decision had been made to release the records to the Applicant:

*Notwithstanding the objections put forward by [third parties], the Department of Health and Community Services has decided to disclose the requested information...*

- [3] On 22 November 2005, in accordance with section 43(2) of the *ATIPPA*, a third party filed a Request for Review with this Office, on behalf of the majority of third parties. For ease of reference I will refer to that Request for Review as the “initial Request.” This initial Request resulted in my Report 2006-001. However, another Third Party also filed a Request for Review in accordance with section 43(2), independent of the 22 November 2005 Request. This second Request for Review was received by my Office on 30 November 2005 and is the subject of this current Report. Unless otherwise stated, all references to the Third Party in this Report are to be distinguished from the Third Party in Report 2006-001.

- [4] The Department was notified of this second Request for Review in correspondence dated 7 December 2005. The Department had provided this Office with a complete copy of the

responsive records on 29 November 2005, in accordance with the previous Request as referenced above.

- [5] Attempts to resolve this Request for Review by informal means were unsuccessful. On 22 December 2005 the Third Party, the Department and the Applicant were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. In response, the Department provided an abbreviated submission wherein they referred to their earlier submission provided in response to the initial Request, and previously outlined in Report 2006-001. The Third Party also provided a written submission, but the Applicant did not provide a submission.

## **II PUBLIC BODY SUBMISSION**

- [6] The Department has indicated that they have applied the same assessment criteria and rationale to this Request for Review as they applied to the initial Request. For this reason I would refer the reader to my outline of the Department's submission in my Report 2006-001, specifically paragraphs 7 to 17.

- [7] The Department states that representations they have received from the Third Party seem to indicate that the Third Party is relying on section 27(1) of the *ATIPPA* in requesting that the responsive records not be disclosed. As such, the Department reiterates the three-part harms test set out in section 27(1). They believe that their analysis of this test in response to the initial Request applies to the case at hand. They go on to state that, in their opinion, the Third Party has not provided sound reasoning or evidence to support a reasonable expectation of probable harm as anticipated by section 27. In conclusion, the Department argues that the responsive records "...should be disclosed to the applicant. There is no legal interpretation or precedent, either in *ATIPPA* or through case law examination, that would justify an exemption from disclosure."

### III THIRD PARTY SUBMISSION

[8] The Third Party is asking that the responsive records be withheld in accordance with section 27(1) of the *ATIPPA*. Their submission is based on three distinct arguments. First, the Third Party argues that the release of this information would create a perception that the Third Party's ability to perform their duties and responsibilities would be compromised, thereby adversely affecting their reputation. The Third Party emphasizes that they are in no way compromised, but it is the *perception* of incapacity which causes the concern. Second, the Third Party believes that the "...release of the information could potentially undermine my ability to pursue negotiations with prospective employers, partners, or other authoritative bodies..." With respect to the third and final argument, I have chosen not to identify the specifics here. I believe that to do so may lead to the identity of the Third Party. However, I do acknowledge the argument and will speak to it in the Discussion section below.

### IV DISCUSSION

[9] Based on the similarities with the initial Review, my discussion in Report 2006-001 is directly relevant to this case. I do not believe it is necessary to repeat that discussion here. While I will provide some general comments I would again refer to my previous Report, particularly the Discussion section. I should note that the Third Party in this case did not question the applicability of the *ATIPPA*, nor did they reference the Newfoundland Medical Care Commission. The Third Party's submission concentrated on the specific issues as referenced above.

[10] It is also important to note that the Third Party in this case did not specifically ask that the responsive records be withheld in accordance with section 30(1) of the *ATIPPA*. I believe, however, that my discussion of section 30(1) in Report 2006-001 is useful and provides an appropriate context for my decision in both this case and the initial Review.

[11] The arguments of the Third Party are focused on section 27(1):

*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.*

[12] My decision in this Review is based on an analysis of section 27(1) of the *ATIPPA* and particularly the mandatory three-part harms test. As I have described in Report 2006-001 and in other Reports, all three parts of this test must be met in order to engage the protection of section 27(1). I would also reiterate that the burden of proof in establishing the applicability of an exception to access, and by association the applicability of all three parts of this test, rests with the Third Party, in accordance with section 64(2) of the *ATIPPA*:

*64. (2) On a review of or appeal from a decision to give an applicant 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.*

[13] Having concluded that only part one of this harms test has been met with respect to the initial Review, I must determine whether or not any of the evidence put forward by this second Third Party sets this situation apart from the situation as described by the other Third Party in Report 2006-001. As such, I will speak to each of the arguments made in this Request for Review.

[14] As in the initial Review, the Third Party here has claimed that the release of the responsive records would interfere with his/her ability to negotiate future employment or partnership opportunities. I established in Report 2006-001 that the third party is tasked with the burden of proving the probability of harm. The mere possibility of harm is not sufficient to invite the protection of section 27(1). I have seen no evidence that such probability exists in the case at hand. I refer specifically to paragraphs 64 to 66 of my Report 2006-001.

[15] With respect to the claim that releasing this information may create an adverse *perception* of compromised ability, I also spoke directly on this point in Report 2006-001. In my opinion, any claim of potential misinterpretation of information or inaccurate perception as a result of an access to information request does not justify a refusal to disclose the information. This is supported by the Nova Scotia Supreme Court in *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, 2005 NSSC 244, as quoted at paragraph 67 of Report 2006-001.

[16] As I indicated earlier, releasing details of the Third Party's third and final argument may lead to the identity of the Third Party. In the interest of minimizing this possibility I do not believe it is necessary to specifically discuss these details. I will say, however, that I have seen no convincing evidence that the release of the responsive records would lead to the alleged harm as described by this particular argument. I am not satisfied that the probability of harm exists in this circumstance. At any rate, the Third Party has failed to identify any provision of the *ATIPPA* that would allow the possibility of such an adverse affect to override the purpose of the legislation as specified in section 3(1):

3. (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;*
- (b) *giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
- (c) *specifying limited exceptions to the right of access;*
- (d) *preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
- (e) *providing for an independent review of decisions made by public bodies under this Act.*

[17] With respect to the issue of confidentiality anticipated by section 27(1)(b), the Third Party has not provided any evidence to show that the information was supplied in confidence. I also believe that the information was provided in accordance with a contract between the Newfoundland and Labrador Medical Association and the Government of Newfoundland and Labrador. As such, I do not believe that the information was actually “supplied” as required by section 27(1)(b), but instead has been “negotiated.” This distinction has been supported in a number of Orders issued by the Office of the Information and Privacy Commissioner for British Columbia, at least one of which (Order 01-39) has been upheld on judicial review, in *Canadian Pacific Railway v. British Columbia*, 2002 BCSC 603, 2002 CarswellBC 1022. For a detailed discussion on this issue of confidentiality, please refer to paragraphs 52 to 62 of my Report 2006-001.

## **V CONCLUSION**

[18] My conclusions in this case mirror my conclusions in Report 2006-001. The Third Party has failed to provide sufficient evidence to show that the three-part harms test in section 27(1) of the *ATIPPA* has been met. I agree that the information is financial in nature, thereby satisfying part one of the test, as required by section 27(1)(a), but have concluded that the other requirements of the test have not been met. I did not find the evidence convincing enough to show that the information had been supplied in confidence (section 27(1)(b)), nor was I convinced that

disclosure of the information could reasonably be expected to lead to one of the conditions specified in section 27(1)(c). I have concluded, therefore, that it is appropriate to release the total MCP billings of individual physicians, as per the Applicant's request. As such, I believe that the Department has appropriately decided to release this information.

[19] Accordingly, I find that the case of the Third Party is not well founded with respect to the responsive records described above and I hereby advise that the Department of Health and Community Services may release to the Applicant the records as it had originally planned, **provided that no appeal to the Trial Division is filed within the prescribed time period by the Third Party.**

[20] Under authority of section 50(1) I direct the head of the Department of Health and Community Services to write to this Office and to the Third Party within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report. Section 49(2) provides that the Third Party has a right to appeal the decision of the Department to the Trial Division under section 60 within 30 days of receiving said correspondence from the Department. No records are to be released by the Department until the expiry of this time limit. If the Third Party fails to file an appeal within 30 days of receiving the decision of the Department, the Department may then release all of the records requested by the Applicant.

[21] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6<sup>th</sup> day of March 2006.

Philip Wall  
Information and Privacy Commissioner  
Newfoundland and Labrador