OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

Report A-2013-014

October 2, 2013

Department of Environment and Conservation

Summary: The Applicant requested from the Department of Environment and Conservation (the "Department") a list of pesticides that each operator in the province was permitted to use under the terms of its Pesticide Operator Licence. The Third Party that filed this Request for Review is a company which holds a Pesticide Operator Licence. The Department, in accordance with section 28 of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), advised the Third Party that the Department had received a request for records which, if disclosed, might affect the Third Party's business interests as described in section 27 of the *ATIPPA*. In response to the notice, the Third Party wrote the Department indicating that it did not consent to the release of the records and setting out its reasons for objecting to the release. The Department subsequently advised the Third Party that the records would be released unless the Third Party filed a Request for Review. The Third Party then filed a Request for Review with this Office. The Commissioner determined that the Third Party had not discharged the burden imposed on it by section 64(2) to prove that the Applicant had no right of access to the requested information. Therefore, the Commissioner recommended release of the information requested by the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A–1.1, as amended, section 27 and section 64(2); *Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. F.31, section 17(1).

Authorities Cited: Newfoundland and Labrador OIPC Report 2005-003 and Report A-2011-007; Ontario OIPC Order PO-1998 and Order PO-2987; *Air Atonabee Ltd. v. Canada (Minister of Transport)*, (1989) 37 Admin L.R. 245 (F.C.T.D.).

Other Sources: *Bill 29: An Act to Amend the Access to Information and Protection of Privacy Act (2012)*. First Session, 47th General Assembly. Royal Assent June 27, 2012, section 34. Available on Newfoundland and Labrador House of Assembly website: http://www.assembly.nl.ca/business/bills/bill1229.htm.

I BACKGROUND

[1] Pursuant to the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request to the Department of Environment and Conservation ("the Department") on May 30, 2012, as follows:

> *The Pesticide Operator License – Terms and Conditions, Appendix A – Pesticide List contains the listing of pesticides that each company will be using. I would like to have copies of all valid pesticide Lists.*

[2] The Department treated the request as including the Pesticide Operator Licence for all operators in the Province, with each licence containing a list of the pesticides the operator was authorized to use. The Third Party that filed this Request for Review is a company which holds a Pesticide Operator Licence.

[3] On June 18, 2012, the Department notified the Third Party, in accordance with section 28 of the *ATIPPA*, that it had received an access request for records which may contain information that, if disclosed, may affect the Third Party's business interests as described in section 27(1) of the *ATIPPA*. The Department advised that the Third Party could consent to the release of the requested information or it could provide written representations as to why the information should not be released.

[4] In response to the notification, the Third Party on July 3, 2012 indicated to the Department that it did not consent to the release of the requested information and stated: "I feel the information should not be disclosed as it could reasonably be expected to harm significantly the competitive position of our company."

[5] Following receipt of the Third Party's correspondence, the Department again wrote to the Third Party on July 23, 2012 indicating, in accordance with section 29, that it had made its final decision and would be granting the Applicant access to the records unless the Third Party filed a Request for Review with this Office under section 43 of the *ATIPPA*.

[6] The Third Party filed a Request for Review with this Office on July 30, 2012, in which it stated that the "Dept. of Environment plans to release private information about our business that could potentially assist our competition." The Third Party further stated: "I do not want the information released. I also want to know who is attempting to access my business information."

[7] Attempts at informal resolution of the Request for Review were not successful and by letters dated December 11, 2012, the Applicant, the Department and the Third Party were advised that the Request for Review had been referred for formal investigation pursuant to subsection 46(2) of the *ATIPPA*. As part of the formal investigation process, all three parties were given the opportunity to provide written submissions to this Office in accordance with section 47.

[8] The Department was the only one of the three parties to file a written submission with this Office.

II PUBLIC BODY'S SUBMISSION

[9] The Department's submission is set out in correspondence dated December 20, 2012 and received in this Office on December 24, 2012.

[10] The Department began its submission by providing background information on the access request and on the procedure it followed:

> *As you know, the initial ATIPP request received on May 30, 2012 concerned obtaining all Appendix A – Pesticide Lists for each valid Pesticide Operator Licence in the province. These documents identified individual businesses and the pesticides they are licensed to use under government legislation. As such, notification was sent to the third parties as per Section 28 of the ATIPPA on June 18, 2012, including [the Third Party]. The Department received representations from [the Third Party] in addition to other representations from other affected third parties. The Department also received permission to release from several parties. The representation from [the Third Party] argued that by releasing the records, the Department would harm significantly the competitive position of the company. Indeed, if released, the record would have revealed to the ATIPP applicant the specific pesticides used by [the Third Party]. While the Department was cognizant that a document listing the pesticides for which a business is licenced represents sensitive information to the third party, the task that fell to the Department was determining if the requested records met all three parts of the harms test sent out in Section 27 of the ATIPPA.*

[11] The Department continued its submission with a discussion of the pesticide regulation regime in Canada:

> *All pesticides in Canada are scientifically evaluated and registered by Health Canada's Pest Management Regulatory Agency, under the Pest Control Products Act (PCP Act), before becoming available on the market. Health Canada also maintains an online searchable database of registered pesticide products. The provinces and territories are then responsible for the licencing and enforcement. In Newfoundland and Labrador, pesticides are regulated under the Environmental Protection Act and the Pesticides Control Regulations, 2012. Under section 4 of the Pesticides Control Regulations, 2012, no one can undertake an operation designed to use a pesticide to control a pest without a valid operator's licence. Applicants for a Pesticide Operator's licence must provide the name of the pesticide and the PCP Act Registration number. This information would then be included in 'Appendix A of the Terms and Conditions of the Licence'. That this information is required in the application and included on the granted licence is not a secret.*
>
> *. . . Furthermore, companies who have been or continue to be licenced operators are listed on the Department's website. All such businesses are required to supply this information in order to obtain an Operator Licence.*

[12] The Department then set out its position in relation to the three-part harms test:

> *While all evidence was considered in the ensuing analysis, the Department determined that the information was not supplied in confidence but in accordance with legislation in application for the granting of a government benefit. We concluded that all conditions of the three part harms test in Section 27 were not met in this case and decided to release the records.*

III APPLICANT'S SUBMISSION

[13] The Applicant did not provide a written submission to this Office.

IV THIRD PARTY'S SUBMISSION

[14] The Third Party did not provide a written submission to this Office.

V DISCUSSION

[15] The only issued to be discussed is whether the Department is required to deny access to the requested information on the basis of section 27(1).

[16] Most access to information legislation in Canada contains a provision comparable to section 27(1) of the *ATIPPA*. The rationale for such provisions was discussed by the Ontario Information and Privacy Commissioner in Order PO-2987, where it was stated in relation to section 17(1) of Ontario's *Freedom of Information and Protection of Privacy Act* at pages 8-9:

> *Section 17(1) is designed to protect the confidential "informational assets" of businesses or other organizations that provide information to government institutions. Although one of the central purposes of the Act is to shed light on the operations of government, section 17(1) serves to limit disclosure of confidential information of third parties that could be exploited by a competitor in the marketplace.*

[17] Section 27(1) of the *ATIPPA* provides as follows:

> *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.*

[18] I will note here that the version of section 27(1) of *ATIPPA* that is applicable in this Request for Review is the provision as it existed before the *ATIPPA* was amended by *Bill 29*, which amendments came in force on June 27, 2012. This is in accordance with the transitional provision in *Bill 29* which provided as follows:

> *34. (1) Where, on the coming into force of this Act, a public body, the commissioner or a judge has begun to consider, review or decide on a matter but has not completed the consideration or review or made a decision on it, the Access to Information and Protection of Privacy Act as it existed before the coming into force of this Act shall apply to that consideration, review or decision.*
>
> *(2) Where, before the coming into force of this Act, an application had been made to a head of a public body, the commissioner or a judge but the head of the public body, the commissioner or judge had not yet begun to consider, review or decide upon the matter, the application shall be considered, reviewed or decided upon in accordance with the Access to Information and Protection of Privacy Act as amended by this Act.*

[19] As indicated, the access request that forms the basis of this Request for Review was received by the Department on May 30, 2012. On June 18, 2012, the Department notified the Third Party, in accordance with section 28 of the *ATIPPA*, that it had received an access request for records which may contain information that, if disclosed, could affect its business interests as described in section 27(1) of the *ATIPPA*. In my view, at this point the Department had, in the words of section 34(1) of *Bill 29*, "begun to consider, review or decide on a matter" with respect to the access request.

[20] The amendment to section 27(1) as set out in *Bill 29* came into force on June 27, 2012. At this point in time, the Department had not, in the words of section 34(1) of *Bill 29,* "completed the consideration or review or made a decision" with respect to the access request; the Department was awaiting a response from the Third Party in relation to its June 18, 2012 letter.

[21] In other words, on the coming into force of the amendments in *Bill 29* on June 27, 2012, the Department had already begun to make its decision on whether or not to release the information requested by the Applicant on May 30, 2012, as demonstrated by its letter to the Third Party on June 18, 2012. However, the Department had not completed its decision when the amendments came into force on June 27, 2012, as demonstrated by the fact that it was waiting for a response from the Third Party to its letter of June 18, 2012. Therefore, the *ATIPPA*, in particular section 27(1), as it existed before the coming into force of the amendments on June 27, 2012 is applicable to the

decision of the Department to grant access to the requested information, even though that decision was not made until after the June 27, 2012 amendment.

[22] In Report 2005-003 at paragraph 38, my predecessor discussed the three-part harms test that must be met in order for the exception set out in section 27 to be applicable. The three parts of the test may be stated as follows:

> (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) the information was supplied to the public body in confidence, either implicitly or explicitly; <u>and</u>
>
> (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in 27(1)(c).

[23] All three parts of the test must be met in order for a public body to deny access to information in reliance on section 27(1). If a record fails to meet even one of the three parts, the public body is not entitled to rely on section 27(1) to refuse access to information in the responsive record.

[24] It is important to note that section 64(2) of the *ATIPPA* dealing with the burden of proof is applicable in this matter:

> *(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.*

[25] I discussed the relationship between the three-part harms test and the burden of proof in section 64 in Report A-2011-007 at paragraphs 30 and 31:

> *A claim of section 27 . . . requires this Office to consider the technical aspects of the industry in question, including market conditions in that industry. Section 64 of the ATIPPA clearly puts the burden of proof on the party asserting an exception. Without evidence to back up an argument, the burden of proof cannot be met, and in order to discharge its burden, the public body or third party must provide convincing and detailed evidence as to the harm that would occur should the information at issue be disclosed. The assertion of harm must be more than speculative, and it should establish a reasonable expectation of probable harm.*

> *Any decision of this Office must be based on the information that is put before it. There is often much research done during the investigation of a Request for Review, however, independent research cannot always uncover information about the inner workings of a particular industry. This Office cannot reasonably be expected to become expert in, or to do significant independent research into, a particular industry every time section 27 is claimed. Public bodies and third parties ultimately bear the burden of proving their right to rely on section 27, which includes not only argument on the specific issue at hand, but where necessary, the relevant context and particulars of a given industry or business so that we can make informed decisions based on solid evidence.*

[26] The Department in its submission indicated that in its view the information requested was not supplied in confidence but provided in an application for a Pesticide Operator Licence in accordance with the governing legislation. The Department pointed out that applicants for a Pesticide Operator Licence must provide the Department with the name of the pesticide it intends to use. This information would then be included in Appendix A of the Terms and Conditions of the licence.

[27] In *Air Atonabee Ltd. v. Canada (Minister of Transport)*, Justice MacKay stated at paragraph 42 with respect to confidentiality of information:

> *… whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,*
>
> *b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
>
> *c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential communication.*

[28] Given that the Third Party was required by law to provide the names of the pesticides it intended to use as a condition for obtaining a licence to use those pesticides, such information cannot be said to have been, in the words of Justice MacKay in *Air Atonabee Ltd.*, "communicated in a reasonable expectation of confidence that it will not be disclosed."

[29] In these circumstances, I have no alternative but to find that the information was not supplied in confidence to the Department. Therefore, the Third Party has failed to meet this part of the three-part test and section 27(1) is not available to deny access to the requested information.

[30] Although I have found that one part of the three-part test has not been met, I will comment briefly on the other two parts of the test.

[31] The first part of the three-part test, as set out in section 27(1)(a), requires that disclosure of the information will reveal either trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party. The information in question in this Request for Review is the type of pesticide used by the Third Party. There has been no evidence or submission by either the Department or the Third Party as to which category of section 27(1)(a) the information in question might fit. It is my view that the only possible category which might be applicable is scientific or technical information. While there may be scientific or technical aspects involved in the production of pesticides, the only involvement of the Third Party with the pesticides is in using them. Any scientific or technical information involved in the production of pesticides is not "scientific or technical information of a third party", as required in order for section 27(1)(a) to apply.

[32] In other words, the type of pesticide used by the Third Party is not one of the "informational assets" of the Third Party. As was noted by the Department in its submission, only pesticides of a type approved by Health Canada can be used by the Third Party and Health Canada maintains an online searchable database of registered pesticide products. I cannot accept that data that is publicly available could be an informational asset of the Third Party. Therefore, I find that the part of the three-part test as set out in section 27(1)(a) also has not been met.

[33] This brings me to the third part of the test as set out in section 27(1)(c). This part of the three-part test is often referred to as the "harm" component of the test.

[34] The Third Party stated its position in correspondence to the Department by stating: "I feel the information should not be disclosed as it could reasonably be expected to harm significantly the competitive position of our company." The Third Party reiterated this in its Request for Review by indicating that the "Dept. of Environment plans to release private information about our business that could potentially assist our competition."

[35] These statements by the Third Party indicate that it is relying on section 27(1)(c)(i) which provides that a public body is obligated to refuse access to information the disclosure of which could reasonably be expected to "harm significantly the competitive position or interfere significantly with the negotiating position of the third party."

[36] However, beyond these two statements in its correspondence with the Department and in its Request for Review form, the Third Party has provided no evidence or argument that supports its position that disclosure of the information requested would harm its competitive position. The Third Party did not provide a written submission. Therefore, I have no evidence as to such things as the technical aspects of the industry in which the Third Party is involved or as to the market conditions of that industry, both of which would be helpful in determining if disclosure of the requested information could harm the Third Party's competitive position. Without such evidence or argument to support its position, the Third Party has failed to demonstrate how disclosure of the requested information could harm its competitive position.

[37] In summary, the Third Party has not met any of the parts of the three-part test and, consequently, section 27(1) cannot be relied upon to deny access to the requested information. As such, the Third Party has not met the burden imposed upon it by section 64(2) to prove that the Applicant has no right of access to the requested information.

[38] Although I have found that the version of section 27(1) that is applicable in this matter is the provision as it existed prior to the *Bill 29* amendment, I am of the view that under the new provision in section 27(1) there could not be a refusal of access to the information requested in this matter. The new section 27 provides as follows:

> *27. (1) The head of a public body shall refuse to disclose to an applicant information that would reveal*
>
> *(a) trade secrets of a third party;*
>
> *(b) commercial, financial, labour relations, scientific or technical information of a third party, that is supplied, implicitly or explicitly, in confidence and is treated consistently as confidential information by the third party;* <u>*or*</u>
>
> *(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 or interfere 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 significant 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.*

[39] The *Bill 29* amendment has in essence changed section 27(1) such that there is no longer a three-part test, but now a requirement only that the information can be categorized under either of paragraphs (a), (b) or (c) of section 27(1). I have already made a finding that the information at issue was not supplied to the Department in confidence. Therefore, access to the requested information cannot be denied on the basis of section 27(1)(b). In relation to section 27(1)(c), the only subparagraph that would be applicable is section 27(1)(c)(i) which would require that the disclosure of the requested information "harm the competitive position of a third party." I have already found that there has been no evidence or argument provided by the Third Party to prove that the release of the information in issue would harm its competitive position. Finally, the requested information is not a trade secret of the Third Party within the meaning of section 27(1)(a).

[40] Consequently, it is in my opinion that access to the requested information could not be denied on the basis of the new section 27(1).

[41] There is one other matter that requires comment. The Third Party stated in its Request for Review: "I also want to know who is attempting to access my business information". This indicates the Third Party's wish to obtain the name of the Applicant.

[42] It is a well-established principle of the access to information process that the name of an individual who makes a request for information is made available to only those persons who need to know the name in order to process the access to information request. As was stated in Ontario OIPC Order PO-1998 at page 7:

> *. . . Access to information laws presuppose that the identity of requesters, other than individuals seeking access to their own personal information, is not relevant to a decision concerning access to responsive records. As has been stated in a number of previous orders, access to general records under the Act is tantamount to access to the public generally, irrespective of the identity of a requester or the use to which the records may be put. . . . Ministry employees responsible for receiving access requests*

under the Act must ensure that the identity of a requester is disclosed to others only on a "need to know" basis during the processing of the request. Except in unusual circumstances, there is no need for requesters to be identified because their identity is irrelevant.

[43] Therefore, in keeping with the recognized principles of access to information practice, the Third Party would have no right to obtain the name of the Applicant in this matter.

VI CONCLUSION

[44] The Third Party has not met the three-part test applicable in order to rely on section 27(1) to deny access to the information requested by the Applicant.

[45] Therefore, the Third Party has not met the burden imposed on it under section 64(2) to prove that the Applicant has no right of access to the information requested from the Department.

[46] The Third Party is not entitled to know the name of the Applicant who requested the information from the Department.

VII RECOMMENDATIONS

[47] Under the authority of section 49(1) of the *ATIPPA*, I recommend that the Department of Environment and Conservation release to the Applicant the requested information.

[48] Under the authority of section 50 of the *ATIPPA*, I direct the head of the Department of Environment and Conservation to write to this Office, to the Applicant and to the Third Party within 15 days after receiving this Report to indicate the final decision of the Department with respect to this Report.

[49] Please note that within 30 days of receiving the decision of the Department under section 50, the Applicant or the Third Party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*. **No records should be disclosed to the Applicant until the expiration of the prescribed time for an appeal to the Trial Division as set out in the *ATIPPA*.**

[50] Dated at St. John's, in the Province of Newfoundland and Labrador, this 2nd day of October 2013.

E. P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador