OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2020-004

February 3, 2020

Department of Health and Community Services

Summary: The Department of Health and Community Services (HCS) received a request for information about rebates provided to the Province by a number of drug manufacturers between 2014 and 2019. HCS notified the third parties of its intention to release the responsive records to the Applicant. Eight of the third parties objected to the disclosure of records and filed complaints with this Office. The third parties argued that the information proposed for release meets the three-part test under section 39 of *ATIPPA, 2015* (disclosure harmful to business interests of a third party), and therefore, should not be disclosed. The Commissioner determined that the third parties did not meet the burden of proof and recommended release of the records.

Statutes Cited: *Access to Information and Protection of Privacy Act, 2015*, S.N.L. 2015, c. A-1.2, section 39.

Authorities Relied On: NL OIPC Report A-2019-029, Report 2017-022 and Report 2016-007

0005-074-19-045; 0005-074-19-046; 0005-074-19-047; 0005-074-19-048; 0005-074-19-049

I BACKGROUND

[1] On September 6, 2019, the Department of Health and Community Services ("HCS" or "the Department") received the following access to information request:

> *I am seeking information regarding rebates provided to the Province from Pharmaceutical manufacturers including specific amounts for specific products including volumes of product for which the rebate would have been provided together with any contracts entered into between manufacturers and the Province for the supply of pharmaceutical products and rebates associated with such contracts.*

[2] The Department worked with the Applicant to narrow this request, and on September 9, 2019, the request was refined to cover a six-year period between 2014 and 2019. On September 20, 2019, the request was further narrowed to 26 drugs, manufactured by ten pharmaceutical companies.

[3] The records responsive to this request are product invoices sent by HCS to the ten companies. These invoices include, among other information, the name of the company, the name of the drug being invoiced for, the total quantity of drugs eligible for rebate, the total rebate amounts claimed, and the total aggregate amount for each invoice.

[4] In consultation with the Pharmaceutical Services Division of Health and Community Services, the Department determined it would grant partial access to the records. HCS decided that some information would be withheld under sections 34(1)(a)(i) and 40(1) of the *Access to Information and Protection or Privacy Act (ATIPPA, 2015)*. It also withheld additional information under section 39. HCS determined it would disclose the Total Rebate Claimed, while redacting the Total Quantity Eligible for Rebate.

[5] The Department elected to inform the third-party pharmaceutical companies of the pending release of information. On September 30, 2019, the Department sent notifications to each of the pharmaceutical companies advising them that a request for access to information had been made. The Department included records pertaining to each company and included copies of the records with the proposed redactions highlighted. The Department wrote in its notification letter that it "has elected to provide these records as a courtesy and

not a formal consultation." It also included that the third parties could make a complaint to this Office, and provided the OIPC contact information.

[6] The Department then consulted with the third party companies on the proposed disclosure. HCS was unable to achieve a consistent response from all ten companies. After these consultations, representatives of some of the third parties agreed with partial disclosure. However, they asked that the Department redact the Total Rebate Claimed, as well as aggregate totals, and instead to the release the Total Quantity Eligible for Rebate. The Department agreed to the change in information to be disclosed.

[7] The Department then notified four of the ten companies to advise them of the change in position, but failed to notify the other six, who by that time had already filed a complaint with this Office. In total, eight of the ten companies filed third party complaints with the Office.

[8] Some third parties took issue with how the Department had changed its position; others took the position that the proposed redactions are not sufficient and that the Total Rebate Claimed, the Total Quantity of Eligible Rebates, and the aggregate totals should all be redacted. Many of the third parties also argued that section 35 of *ATIPPA, 2015* must be considered, although the Department did not apply that exception to the records.

[9] During the informal resolution efforts, three of the third party complainants informally resolved their complaints with the Department. However, five of the Complainants were not satisfied to informally resolve the matter.

[10] As informal resolution was unsuccessful, the complaint proceeded to formal investigation in accordance with section 44(4) of *ATIPPA, 2015*.

II PUBLIC BODY'S POSITION

[11] On October 24, 2019, the Department provided submissions to this Office outlining its reasoning for providing notification to third parties. The Department submits that it was unclear whether the information in the responsive records would clearly meet the three-part harm test as set out in section 39 of *ATIPPA, 2015.* The Department states that the reason it

proposed partial disclosure was because it was of the view that withholding the Total Quantity Eligible for Rebate "would prevent the calculation of unit prices, the disclosure of which may jeopardize the competitive position of each company."

[12] The Department notes that its aim was to balance transparency with accountability pursuant to the aims of *ATIPPA, 2015:*

> *Based on third party consultations, the Department maintains its decision for partial disclosure rather than an access refusal as argued by a few of the third parties. This decision is made with the support of a number of third parties and their preference for a partial disclosure of total quantity amounts.*

III THIRD PARTIES' POSITIONS

[13] For the purpose of clarity, third parties will be referred to in chronological numerical order, based on the date of their complaint. As noted above, third parties 1, 2, and 8 were satisfied to informally resolve their complaints.

[14] The remaining third parties took similar positions on the release of the information. All five parties submit that all information contained within the records, including the Total Quantity Eligible for Rebate, is exempt from disclosure pursuant to *ATIPPA, 2015.* The third parties addressed the three-part test laid out in section 39. They also raised section 35 in their submissions, as well as the Department's failure to accept submissions from third parties, and that other jurisdictions have recommended against disclosure of similar information.

Section 39(1)

(i) Information Would Reveal Commercial and/or Financial Information

[15] Third party 3 submits that information proposed for release by the Department is commercial and financial information, as it contains "information pertaining to agreements for merchandise and services and monetary amounts of rebates." It noted that at paragraph 121 of the Ontario Order PO-3176 the Information and Privacy Commissioner found that "volume discount formulas and other discount information are very sensitive commercial information" and was therefore exempt for disclosure.

[16] It also notes that "the [Product Listing Agreements (PLAs)] also contain an acknowledgment by HCS that pricing and financial information, including value and records of payment made under the PLAs, is confidential information."

(ii) Information was "Supplied in Confidence"

"Supplied"

[17] Third parties 5 and 6 state that the "supplied" requirement of the test is met as "Information in a negotiated agreement will be considered 'supplied' by the third party where the "immutability" or "inferred" exceptions apply."

[18] The inferred exception, the parties argue, applies where disclosure of the information would permit an Applicant to make an "accurate inference" of third party information that would not be disclosed under *ATIPPA, 2015*. These third parties state that any information which reveals terms of the PLA meets the "inferred" exception, because disclosure of said information would allow an Applicant to infer confidential information. Third party 3 believes that this information, along with publicly available information accessible through other access requests would allow a person to "simply do the math to quantify the discounts" and therefore, draw conclusions about confidential information.

[19] Third party 3 also cited *Corporate Express Canada Inc. v. The President and Vice Chancellor of Memorial University, Gary Kachanoski, (2014, NLTD)* at para. 107, arguing that while information resulting from contractual negotiations cannot be said to have been supplied, this information that in its view is "a layer down from the negotiated agreements themselves…cannot be characterized as forming part of the negotiated information."

"In Confidence"

[20] It is the position of third party 3 that the PLAs explicitly state that the Department is required to keep confidential and not disclose any information pertaining to the PLAs, including the terms of the PLAs.

[21] Third party 4 states that information in the invoices would reveal net pricing of certain drugs, which is not public information and is confidential.

Disclosure of Information Could Reasonably Be Expected to

(i) Harm Significantly the Competitive Position or Interfere Significantly with the Negotiating Position of the Third Party

[22] Third party 3 submits that disclosure of the Total Quantity Eligible for Rebate would reveal its commercial business strategy, as it would interfere with negotiations with other provinces and third party payers. Other parties could deduce the discounts and demand similar discounts. Third party 3 also states that it would be put at a competitive disadvantage, especially concerning other manufacturers with similar products, if this information was released.

[23] Third party 7 writes that disclosure of PLA information will significantly disadvantage its company. It notes that release of the Total Quantity Eligible for Rebate would "allow the requester to determine the size of the public market for [named drug] in Newfoundland." Third party 7 states that an assiduous inquirer might estimate the rebate amounts by combining it with other information, namely the recommendations from the Canadian Agency for Drugs and Technologies in Health.

[24] Third parties 5 and 6 cite Ontario Order PO-3032, which states that

> *{...} compliance with [previous order] Order PO-2685 has in fact resulted in manufacturers becoming more reluctant to enter into pricing negotiations to achieve the kind of savings described above. [...] The disclosure has prejudiced the Ministry's ability to secure savings and ensure price stability through the negotiated agreements described above.*

(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.

[25] Third party 3 asserts that disclosure of the information at issue could reasonably discourage drug manufacturers from negotiating large volume discounts, as the disclosure could result in other public and private customers seeking similar terms.

(iii) Result in Undue Financial Loss or Gain to Any Person

[26] Third party 3 argues that consequences of the competitive damage would result in undue loss of profits for the manufacturers, "while public, private and other purchasers, as well as competitors would enjoy undue gain."

Section 35

[27] Third parties 3, 5, 6 and 7 made submissions regarding section 35, stating that the disclosure of the Total Quantity Eligible for Rebate, as well as the other information contained within the records will cause harm to HCS because it would prevent the Department from obtaining favourable agreements in future.

Information at Issue Not Responsive to Request

[28] Third party 4 took the position that "the request was for disclosure of rebates. Redacting rebates, which is confidential information, leaves the remaining disclosure non-responsive to the request." It also submitted that invoices and cover letters are records of payments, which are recognized as confidential information in the PLAs.

Failure of the Public Body to Allow Third Party Submissions

[29] Third parties 5 and 6 take the position that the Department provided a "courtesy notice" without consulting the third parties before making a final decision. Third parties 5 and 6 state that "the Public Body suggested that it would receive and consider submissions prior to the release of a final decision on or before October 22, 2019." However, the Public Body then notified the third parties of its revised final decision on October 17, 2019. Third parties 5 and 6 both state that their submissions were not considered prior to the Department making its final decision and ask the OIPC to confirm that "the Public Body must give third parties notice and an opportunity to make submissions to the Public Body prior to the issuance of a final decision."

IV SCOPE OF THIS REPORT

[30] This Report is limited to the information which the Department of Health and Community Services has decided to release, specifically items listed under the column Total Quantity Eligible for Rebate. This Report will not address the information which the Department has determined to withhold, specifically the items listed under the column Total Rebate Claimed, the aggregate totals for the invoices, and the redactions under sections 34 and 40 of *ATIPPA, 2015.* These issues are not before the Commissioner in this complaint.

[31] Three other issues that are not within the scope of this report but which merit comment are the application of section 35, "information at issue not responsive to the request", and the public body's handling of the third party submissions.

[32] The third parties urged this Office to consider the application of section 35 of *ATIPPA, 2015* to the records. Third parties are not entitled to make submissions on section 35. Section 19(1) provides for notification to third parties by public bodies only where sections 39 or 40 might apply. Section 42(3) limits third party complaints to the subject matter of the notification received under section 19(1).

[33] This Office does not find any merit to the claim that the records are not responsive to the Applicant's request. The Applicant's request asks for information about rebates provided, including "specific amounts for specific volumes of product for which the rebate would have been provided". In the view of this Office, the information contained in the records is clearly responsive to the wording of the request.

[34] While public bodies may allow third parties to make submissions or engage in consultations prior to making a final decision, there is nothing in *ATIPPA, 2015* which requires public bodies to do so. Section 19 sets out the obligations of public bodies and it states that:

> *19. (1) Where the head of a public body intends to grant access to a record or part of a record that the head has reason to believe contains information that might be excepted from disclosure under section 39 or 40 , the head shall make every reasonable effort to notify the third party.*
>
> *(2) The time to notify a third party does not suspend the period of time referred to in subsection 16 (1).*
>
> *(3) The head of the public body may provide or describe to the third party the content of the record or part of the record for which access is requested.*
>
> *(4) The third party may consent to the disclosure of the record or part of the record.*
>
> *(5) Where the head of a public body decides to grant access to a record or part of a record and the third party does not consent to the disclosure, the head shall inform the third party in writing*

> *(a) of the reasons for the decision and the provision of this Act on which the decision is based;*
> *(b) of the content of the record or part of the record for which access is to be given;*
> *(c) that the applicant will be given access to the record or part of the record unless the third party, not later than 15 business days after the head of the public body informs the third party of this decision, files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53 ; and*
> *(d) how to file a complaint or pursue an appeal.*

(6) Where the head of a public body decides to grant access and the third party does not consent to the disclosure, the head shall, in a final response to an applicant, state that the applicant will be given access to the record or part of the record on the completion of the period of 15 business days referred to in subsection (5), unless a third party files a complaint with the commissioner under section 42 or appeals directly to the Trial Division under section 53.

(7) The head of the public body shall not give access to the record or part of the record until

> *(a) he or she receives confirmation from the third party or the commissioner that the third party has exhausted any recourse under this Act or has decided not to file a complaint or commence an appeal; or*
> *(b) a court order has been issued confirming the decision of the public body.*

(8) The head of the public body shall advise the applicant as to the status of a complaint filed or an appeal commenced by the third party.

(9) The third party and the head of the public body shall communicate with one another under this Part through the coordinator.

[35] Therefore, the only issue to be addressed in this Report is whether the third party complainants have discharged their burden of proof in establishing that section 39 applies to the information the Department intends to release, specifically the items listed under the column Total Quantity Eligible for Rebate.

V DECISION

[36] As has been discussed many times in Reports from this Office, section 39 is a mandatory exception to disclosure under *ATIPPA, 2015.* As set out in Report 2017-022,

> *[5] Third parties should understand, and it is the responsibility of public bodies to explain to them, that it is now generally settled law that a contract for the purchase of goods or services by a public body is considered to be negotiated, not supplied, and therefore the test in section 39(1)(b) cannot be met. The ATIPPA, 2015 presumes the right of access to information, subject only to its specific exceptions.*
>
> *[6] Clear and convincing evidence of particular circumstances may, on occasion, result in a conclusion that the disclosure of some information contained in a contract document would meet the section 39 test, therefore justifying its redaction.*

[37] As all three parts of the test must be met, failure to meet any part of the test means the exception is not met and the requested records must be released. Third parties who file complaints with this Office bear the burden of proof of establishing that the Applicant has no right of access to the records, per section 43(3).

[38] Section 39 states:

> *39. (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*
> *(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] This Office is satisfied that the information in the records would reveal commercial or financial information of the third parties, and therefore meets the criteria of section 39(1)(a).

[40] The second part of the three-part test states that the information must have been "supplied, implicitly or explicitly, in confidence." The third parties submit it is stated clearly in the PLAs that the information is to be kept confidential. The PLAs also have "confidential" marked on each page.

[41] However the PLAs outline the terms of agreement and include provisions about the expectations of confidentiality. One such provision acknowledges that information may be subject to access to information requests:

> *7.3 The Parties acknowledge that the Minister is subject to the provisions of the Newfoundland and Labrador Access to Information and Protection of Privacy Act (ATIPPA) and the Management of Information Act. Where Supplier Confidential Information is requested under the ATIPPA and the Management of Information Act or required to be released under an order, the Supplier will be notified in writing at least fifteen (15) business days in advance of the disclosure deadline, and if not practically possible to do so, the Supplier will be notified as soon as practically possible.*

[42] Therefore, this Office is satisfied that the information in the records is not supplied in confidence by the third parties.

[43] Regarding "supplied", previous reports from this Office (A-2019-029, 2016-007), have found that contracts or agreements between third parties and public bodies are generally considered to be negotiated, not supplied.

[44] Further, the information in this case has clearly been negotiated and cannot be said to be supplied, as provision 13.9 of the PLAs state:

> *13.9 The Parties acknowledge and agree that:*
>
> *(a) each Party and its representatives has reviewed and negotiated the terms and provisions of this Agreement and has contributed to its revision;*

[45] The language of the PLAs explicitly express in each case that the terms of the agreements, including any pricing information or product information, were negotiated by the parties, which indicates that the information was not supplied by any third party to the Department. The Total Quantity Eligible for Rebate in the invoices, which are subject to the PLAs, is therefore not supplied by any third party.

[46] The third parties submit, despite the agreements being negotiated, that the release of the information would allow for an accurate inference of third party business information and should, therefore, be withheld. They also note that information is a "layer down" from the negotiations and does not make up the negotiated agreements themselves.

[47] The third parties which argued that the information meets the "inferred" exception made their arguments in relation to "disclosure of the quarterly total rebate payments per drug", stating the Applicant would be able to "determine the rebate amounts per unit, i.e. the unit pricing." The information at issue is not, in fact, the Total Rebate Payments, but rather the Total Quantity Eligible for Rebate. These third parties were made aware that the Department had changed its position on October 17, 2019 and were provided a copy of the records with the new proposed redactions on October 18, 2019.

[48] We do not accept that the Applicant could derive the rebate amount per unit from the disclosure of the Total Quantity Eligible. The mere assertion of this risk of inference does not meet the threshold of clear and convincing evidence required to establish this exception and therefore the information in question does not meet the criteria of section 39(1)(b). Furthermore, even if the disclosure of such information could be inferred, the burden of proof would remain with the third parties to establish that all three parts of the three-part test are met, including "supplied in confidence", in order for the information to be withheld.

[49] As the third parties have not satisfied the second part of the three-part test under section 39 of *ATIPPA, 2015,* this Office finds that section 39 does not apply to the information at issue and the information should not be withheld.

VI RECOMMENDATIONS

[50] Under the authority of section 47 of *ATIPPA, 2015* I recommend that the Department of Health and Community Services release the items listed under the column Total Quantity Eligible for Rebate to the Applicant.

[51] As set out in section 49(1)(b) of *ATIPPA, 2015*, the head of the Department of Health and Community Services must give written notice of his or her decision with respect to these recommendations to the Commissioner and any person who was sent a copy of this Report within 10 business days of receiving this Report.

[52] Please note that within 10 business days of receiving the decision of the Department of Health and Community Services under section 49, the third parties may appeal that decision to the Supreme Court of Newfoundland and Labrador Trial Division in accordance with section 54 of *ATIPPA, 2015*. Records should be disclosed to the Applicant on the expiration of the prescribed time for filing an appeal except for the records of third parties that have provided the Department with a copy of a notice of appeal prior to that time.

[53] Dated at St. John's, in the Province of Newfoundland and Labrador, this 3rd day of February 2020.

Michael Harvey
Information and Privacy Commissioner
Newfoundland and Labrador