NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-005

Department of Health & Community Services

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 Health and Community Services (the "Department"). The Department determined that releasing the requested information had the potential to affect the business interests of four Third Parties as contemplated by section 27 of the *ATIPPA.* Two of the four Third Parties consented to the release, but the other two filed objections to the release of portions of the information. The Department released to the Applicant only that information to which the Third Parties did not object. The Applicant then filed a Request for Review with the Office of the Information and Privacy Commissioner with the intention of gaining access to the withheld information. During informal resolution efforts, one of the two remaining Third Parties was able to settle with the Applicant. The remaining Third Party forwarded a formal submission to the Commissioner's Office in which it modified its original position in favour of releasing additional information, but the Third Party also continued to maintain that certain information should be withheld based on section 27. The Third Party also identified some additional information in the record which it felt was non-responsive to the request. The Commissioner found that neither the remaining Third Party nor the Department had provided a sufficient basis to allow the Commissioner to recommend that information be severed on the basis of section 27. The Commissioner recommended that all of the information that the Third Party wished to be withheld under section 27 should be released to the Applicant. The Commissioner agreed with the Third Party, however, that the vast majority of the information which it felt was non-responsive to the Applicant's request was indeed non-responsive. The Commissioner therefore recommended that most of this information be severed from any material to be disclosed to the Applicant.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2, 27, 30, 45(1)(a) and (c), 64(1).

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) and 2006-001 (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 13 June 2005 the Applicant filed a request under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") with the Department of Health and Community Services (the "Department") for access to the following records/information:

> *1. All notes, minutes, letters as between pharmaceutical manufacturers and government relative to the operation of the Interchangeable Formulary;*
> *2. All agreements, assurances, or other documentation relative to exemptions granted by government for pharmaceutical manufacturers from the standard fifteen percent up-charge allowable through the Interchangeable Formulary;*
> *3. All intergovernmental memorandums, memorandums to the Minister or other analysis provided to government relative to the inclusion of products within the Interchangeable Formulary and recommendations in relation to same;*
> *4. All notes, documentation, and materials relative to any economic analysis performed for government in relation to the inclusion of exempted products on the Interchangeable Formulary.*

[2] On 24 June 2005 the Applicant forwarded a letter to the Department advising that further to communications between the Applicant and the Department, the Applicant had decided to modify its request by reducing it in scope. The Applicant indicated that the request would now be limited to three specific pharmaceutical products, which I will refer to in this Report as products A, B, and C. The Applicant further stated that the word "interchangeable" should be deleted from the information request.

[3] On 19 July 2005 the Department sent out several letters in relation to this access to information request. One letter was sent to the Applicant, advising that disclosure of the requested records might affect the business interests of a number of Third Parties, as per section 27 of the *ATIPPA*. The Applicant was advised that as per section 28 of the *ATIPPA*, these Third Parties would be advised of the request for information and would be given an opportunity to either consent to the disclosure or make representation to the Department as to why the information should not be disclosed.

[4] Other letters were sent on the same date to the four separate Third Parties identified by the Department. I will refer to these four Third Parties as 1, 2, 3 and 4. Each of the four was advised

that a request for access to information had been made and each was given an opportunity to respond, as outlined in the previous paragraph. The Third Parties were also supplied with a copy of the records pertaining to each of them which the Department was considering for disclosure to the Applicant.

[5] Third Party 1 responded to the Department on 22 July 2005 indicating that it did not object to the disclosure of the record which pertained to it. The record in question was a single piece of correspondence regarding the distribution of product C. On 16 September 2005 the Department wrote to Third Party 1 to advise that based on representations received from Third Party 1 and others, the Department had decided to release a severed copy of the record in question, with personal information being removed as per the mandatory provisions of section 30 of the *ATIPPA*. Neither the Applicant nor Third Party 1 filed any further objections to this disclosure with the Department. This effectively concluded the issue in terms of any further involvement of Third Party 1 in this matter.

[6] Third Party 2 responded to the Department in a letter dated 5 August 2005 indicating that it did not object to the disclosure of the record which pertained to it. As with Third Party 1, the record in question was a (different) single piece of correspondence regarding the distribution of product C. On 16 September 2005 the Department wrote to Third Party 2 to advise that based on representations received from Third Party 2 and others, the Department had decided to release a severed copy of the record in question, with personal information being removed as per the mandatory provisions of section 30 of the *ATIPPA*. Neither the Applicant nor Third Party 2 filed any further objections to this disclosure with the Department. This effectively concluded any further involvement of Third Party 2 in this matter.

[7] Third Party 3 responded in a letter dated 5 August 2005 in which it objected to the disclosure of the vast majority of the information which the Department had identified as possibly affecting its interests as outlined in section 27. This information was contained on 36 pages which had been forwarded by the Department to Third Party 3 for review and comment. The Department had already severed any material from the records which in its opinion did not relate to Third Party 3 or was not responsive to the Applicant's request. Third Party 3 provided a very brief

submission specifying the material within the 36 pages which it would be willing to disclose, as well as the material which it did not wish to be disclosed to the Applicant, along with a brief outline of its reasons for opposing the disclosure of that information.

[8] Third Party 4 filed its response on 9 August 2005. Third Party 4 noted in its response that there were 14 pages of documents containing information related to it which the Department had forwarded for its review. As with Third Party 3, the Department had already severed any material from the 14 pages which in its opinion did not relate to Third Party 4 or was not responsive to the Applicant's request. Third Party 4 provided a detailed submission specifying the material within the 14 pages which it would be willing to disclose as well as the material which it did not wish to be disclosed to the Applicant, along with its reasons for opposing the disclosure of that information.

[9] On 16 September 2005, the Department wrote separate letters to Third Parties 3 and 4 to advise them that after considering their representations, the Department had decided to give the Applicant partial access to the records. Importantly for Third Parties 3 and 4, however, the Department indicated that "we will not be releasing any information that you specifically requested be exempt from disclosure." Both Third Parties were also advised that in addition to parts of the record which were being withheld under section 27 of the *ATIPPA*, personal information would also be severed under the mandatory exception outlined in section 30 of the *ATIPPA*. Third Party 4 forwarded further correspondence to the Department on 26 September 2005 in which it pointed out the presence of one piece of personal information which had not previously been severed by the Department, namely the address of an employee of Third Party 4. This information was removed from the material released by the Department to the Applicant.

[10] In a letter dated 11 October 2005 the Department advised the Applicant that representations had been received from the affected Third Parties, and that the Department had decided to give partial access to the records requested. The Department further advised the Applicant that information which was not responsive to the request had been severed, and that access to other parts of the record had been denied on the basis of section 27 of the *ATIPPA*. The Department

also informed the Applicant that other information had been severed as per section 30 of the *ATIPPA* whereby personal information cannot be disclosed.

[11] On 21 November 2005 this Office received a Request for Review from the Applicant in relation to the Department's decision regarding the records which were withheld. Following receipt of the responsive records by this Office from the Department, Third Parties 3 and 4 were advised by this Office in a letter dated 9 December 2005 that the Review was being undertaken, and my officials undertook attempts to settle the matter informally. As a result of informal settlement discussions, the Applicant agreed following the release of an additional small portion of information from Third Party 4 that it would no longer pursue access to information which Third Party 4 wished the Department to maintain in confidence. Product C is associated with Third Party 4. This effectively concluded any further involvement by Third Party 4 (and by extension, Product C) in this Review, leaving Third Party 3 as the only remaining Third Party, and Products A and B as the two products of interest to the Applicant. No settlement was achieved with regard to the records affecting Third Party 3, and as a result, the Department, the Applicant and Third Party 3 were each notified that the file had been referred to the formal investigation process and they were each given an opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. All three parties provided submissions.

II PUBLIC BODY'S SUBMISSION

[12] The Department forwarded its written submission to this Office in a letter dated 2 February 2006. In it, the Department first notes that it has released some of the requested information to the Applicant. The Department recounted the process through which it went in identifying that some of the material requested by the Applicant warranted Third Party notification under section 28 of the *ATIPPA*, and the process of providing that notification. It noted that two of the four Third Parties consented to the release of records pertaining to them, while the other two raised objections with the disclosure of certain portions of the records. Following this, the Department's severance of records was guided by representations received from the Third Parties. Information

in the records which the Department felt was not responsive was also severed, and the remaining records were provided to the Applicant.

[13] The Department indicated that it has "no capacity to dispute the claims by [Third Parties] on the potential for harm should the documents in question be fully disclosed." The Department also advised that it is of the understanding that only records relating to Third Party 3 remain at issue in this Review, with the Applicant being satisfied with the level of disclosure involving Third Party 4. The Department concluded its submission by advising that "pending the consent of [Third Party 3], the Department of Health and Community Services has no objections to full disclosure of the documents related to that manufacturer, except those passages or clauses that are non-responsive to the request."

III APPLICANT'S SUBMISSION

[14] The Applicant provided a submission dated 13 January 2006 in support of its efforts to gain access to the records at issue. The Applicant begins by noting that sections 27 and 30 of the *ATIPPA* were relied upon by the Department in its decision to withhold the records which are subject to this Review. The Applicant then indicates that any information withheld under section 30 presumably "relates to the names and locations of individuals" employed by the Third Party. The Applicant notes that while this information is not without value, "it is not specifically necessary and our client is satisfied not to pursue the release of names of individuals at this time."

[15] The Applicant, in addressing the material which was withheld on the basis of section 27, advises that it can see no basis for the argument that the release of this information would impact on the competitive position of any third party, because "the products involved are branded patented pharmaceuticals for which the manufacturer holds a monopoly under statute by virtue of its patent." The Applicant takes the position that the "upcharge" (a term used to describe the mark-up in price applied to pharmaceutical products) on products A and B had been set at a certain level in order to get the products listed as approved drugs on the provincial formulary as

part of the Newfoundland and Labrador Prescription Drug Program (the "P.D.P."). The Applicant further states that

> *the only competitive issue would be communication with Government through the Prescription Drug Program (PDP) regarding the listing of product on the formulary. Currently, the manufacturer's upcharge has been set and the product has been listed. There is no longer a competitive issue in this regard as the purpose for the restricted upcharge was to achieve listing which has been accomplished.*

[16] The Applicant also puts forward the position that the information requested "relates only to the process used to achieve the listing and how the amount of the upcharge was determined." The Applicant says that they expect that the process involved in having the product listed would be the same one used by any other manufacturer, and therefore the release of this information would not impact on the competitive position of any third party.

[17] The Applicant concludes its submission by proposing that the release of this information "would be in the public interest by allowing a degree of transparency to the process of the operation of the P.D.P." The Applicant suggests that if the information is withheld, "the public may lose confidence in the administration of the program and expenditure of public funds under the P.D.P. as details of the operation of the program would not be readily available."

IV THIRD PARTY'S SUBMISSION

[18] On 6 February 2006, this Office received the submission of Third Party 3 outlining its position on the requested records. Third Party 3 notes in its submission that in responding to this matter, it is relying on correspondence it received from this Office dated 9 December 2005 which describes the records at issue in this Review as being in relation to the decision of the Department not to disclose "… a number of documents relating to pricing for [products A and B] in the context of the Newfoundland and Labrador Prescription Drug Program." Third Party 3 also notes that it was not provided with a copy of the Request for Review form submitted by the Applicant. Regardless, Third Party 3 points out that this Report must be confined to dealing with the specific information sought by the Applicant in its Application for Access.

[19] Third Party 3 notes in its submission that it was advised in correspondence from this Office that the date of the Request for Review was 21 November 2005. Third Party 3, in its submission, presumes that the Applicant was advised of its right to file a Request for Review at the same time Third Party 3 received notice of the Department's decision to disclose a portion of the requested records, which was in a letter dated 16 September 2005. Third Party 3 then refers to paragraph 45(1)(a) of the *ATIPPA* which states that a Request for Review shall be made by an Applicant within 60 days of notification of a decision. Third Party 3 therefore proposes that the Request for Review be dismissed on the basis that the Applicant did not file a Request for Review within 60 days. Third Party 3 acknowledges paragraph 45(1)(c) which allows the Commissioner to extend the time period within which a Request for Review may be made, but proposes that this discretion may only be exercised in advance of the 60 day time limit on the basis of an explicit request for an extension of time from the Applicant.

[20] Third Party 3 also indicates that, without detracting from or withdrawing its argument in relation to the time limit for filing a Request for Review, it has conducted, as part of its submission to the Commissioner, a new review of the records which were withheld from the Applicant. This process has resulted in a modified position, which proposes the release of additional material within the records at issue. A new copy of these records has been provided to this Office by Third Party 3. In this new copy, Third Party 3 points out some material which it believes to be unresponsive to the Applicant's request. Third Party 3 states that any such unresponsive material should be withheld from the Applicant.

[21] Third Party 3 also points out in its new copy of the records the information which it believes should not be disclosed to the Applicant on the basis that the disclosure of such information "is harmful to its business interests pursuant to Section 27(1) of the Act." Third Party 3 specifically references section 27(1)(c)(i) and/or (iii) in its notations on its copy of the record.

[22] The submission of Third Party 3 indicates that Third Party 3 is aware of the three-part test that must be satisfied to establish the use of section 27 as an exception to disclosure of information under the *ATIPPA*. Third Party 3 outlines its representation of the three-part test as follows:

> *(a) the information would reveal, inter alia, trade secrets or commercial or financial information of* [*Third Party 3*] *(Section 27(1)(a));*
>
> *(b) the information must have, implicitly or explicitly, been supplied in confidence by* [*Third Party 3*] *(Section 27(1)(b));*
>
> *(c) disclosure of the information "could reasonably be expected" to result have* [*sic*] *one or more specified harms (Section 27(1)(c)).*

[23] Third Party 3 further states that section 27(1)(c) clearly stipulates that information should not be disclosed which "could reasonably be expected" to:

> *(a) harm significantly the competitive position of* [*Third Party 3*] *(Section 27(1)(c)(i));*
>
> *(b) result in undue financial loss to* [*Third Party 3*] *or gain to the Applicant or to any other person (Section 27(1)(c)(iii)).*

Third Party 3 states in its submission that disclosure of the information which it wishes to see severed from the record "could reasonably be expected to harm its business interest," and that this assertion is primarily based on section 27(1)(c)(i) and (iii).

[24] Third Party 3 explains in its submission that it partners with a number of companies in the pharmaceutical industry to market, distribute and sell pharmaceutical products within this province and elsewhere in Canada. It further states that in order for a pharmaceutical product to be charged to the P.D.P., it must be listed on the Formulary established for the P.D.P. Third Party 3 says that the compensation received by it for co-marketing products A and B is related to the amount of products A and B distributed each year. Third Party 3 states that other pharmaceutical companies make competitive products to products A and B which are listed on the Formulary and dispensed in the Province. Third Party 3 says that "the price of the competitive products is a determinant whether they, or [products A and B] as the case may be, will be dispensed when the cost is to be charged to the [P.D.P.]."

V DISCUSSION

[25] I will first deal with the matter raised in the submission of Third Party 3 in which it expresses concern that the Request for Review may have been accepted from the Applicant by this Office beyond the time frames outlined in the *ATIPPA*. Third Party 3 notes that the Applicant filed its Request for Review on 21 November 2005. Third Party 3 also presumes that the Applicant was advised of its right to file a Request for Review at the same time Third Party 3 received notice of the Department's decision to disclose a portion of the requested records, which was in a letter dated 16 September 2005. I do not accept that there is any sort of issue here, the simplest reason being that the letter of 16 September 2005 referenced by Third Party 3 advises that the Department agrees with the position of Third Party 3 and only intends to release to the Applicant the information within the record which Third Party 3 has consented to release. The Department then wrote to the Applicant in a letter dated 11 October 2005, providing partial access to the records as noted, and advising the Applicant that it may appeal to this Office within 60 days. The Applicant clearly filed the Request for Review within 60 days of that notice as prescribed in section 45(1)(a), notwithstanding my discretion to accept a Request for Review within a longer time period as per section 45(1)(c).

[26] The Applicant, as noted above, has further clarified in its submission which information it is interested in obtaining, and has specifically advised that it is no longer concerned with acquiring any personal information which may be found in the record. Personal information is defined in the *ATIPPA* as:

> *2. In this Act*
>
> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> *(i) the individual's name, address or telephone number,*
>
> *(ii) the individual's race, national or ethnic origin, colour, or religious or political beliefs or associations,*
>
> *(iii) the individual's age, sex, sexual orientation, marital status or family status,*

> *(iv) an identifying number, symbol or other particular assigned to the individual,*
>
> *(v) the individual's fingerprints, blood type or inheritable characteristics,*
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> *(vii) information about the individual's educational, financial, criminal or employment status or history,*
>
> *(viii) the opinions of a person about the individual, and*
>
> *(ix) the individual's personal views or opinions;*

[27] I will therefore not recommend the release of any personal information found in the records, reflecting the statements in the Applicant's formal submission. As a result, my discussion will focus primarily on section 27 and how it applies to the records at issue. Section 27 of the *ATIPPA* 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.*

[28] The application of section 27 involves a three-part test, as I have noted in previous reports. Owing to the use of the word "and" at the end of section 27(1)(b), 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…*

[29] It should first be noted that the information which Third Party 3 wishes to have severed from any disclosure to the Applicant involves numeric figures, the majority of which are simply the specific percentage mark-up or "upcharge," as it is commonly known in the industry, in relation to products A and B. The remainder of the material which Third Party 3 wishes to sever is comprised of wholesale prices and prices per daily recommended dose of those products.

[30] Products A and B are patented medicines, meaning that while there may be other products which may be used for the same or similar medical purposes, there is no identical competitor drug. Products A and B are also available only through "Special Authorization" under the province's "P.D.P.". This means that coverage by the Program for these drugs can only be approved following a request from a patient's health care provider under certain clinical criteria as described on the Department of Health and Community Services web site (http://www.health.gov.nl.ca/health/nlpdp/CRITERIA.PDF).

[31] With respect to the first two parts of this three-part harms test, neither the Department nor the Applicant make any specific arguments nor present any relevant evidence in their respective submissions. Third Party 3 notes that it is "aware" of the three-part test as noted in its submission, and states regarding the first part of the test that the information it wishes the Department to withhold is "commercial or financial information" of Third Party 3, "or in the alternative in the nature of a trade secret." In *Air Atonabee v. Canada (Minister of Transport)* (1989) 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d) 180, 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." Given that the information at issue relates to the pricing of a product which Third Party 3 sells, I accept that this information is commercial in nature, thus satisfying part one of the three-part test.

[32] Part two of the three-part test, as per section 27(1)(b), requires that the information at issue had to have been "supplied, implicitly or explicitly, in confidence." The two factors at play here are the word "supplied" and the term "in confidence."

[33] As noted in British Columbia Order 01-39, 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 Third Party 3 have presented any evidence of an explicit agreement to keep the information at issue confidential. Despite this, I should note that although explicit confidentiality agreements may be helpful under these circumstances, they are not sufficient in and of themselves in making the case.

[34] Even though no explicit confidentiality agreement has been presented as evidence, it is clear to me that there is an implicit understanding between the Department and the Third Party that the information was intended to remain confidential. This is because the Department maintains the information on a secure web site to which only pharmacists have access, as opposed to the general public, or industry competitors. Clearly, pharmacists need to have access to the pricing information of the products which they sell, and providing the information to them in this way demonstrates the intention on the part of the Department to limit disclosure to individuals within this defined group. I believe it was the intention of both parties that this information remain confidential among themselves and other specific parties with a bona fide need to know.

[35] Confidentiality, however, is only one component of part two of the test. In order for a particular record or piece of information to be deemed to have been "supplied," 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).*

[36] It is not a straightforward matter in this case as to whether or not any sort of negotiations or contract exists between Third Party 3 and the Department. It is clear from some of the material subject to this Review that there is communication between the Department and Third Party 3 regarding the figures which are at issue, namely the percentage upcharge and product prices. Many of the records, however, show Third Party 3 advising the Department that an agreement has been negotiated with other third parties (namely wholesalers) as to the percentage upcharge to be applied to products A and B. I also recognize that the Department has not participated in that particular negotiation, and it would therefore appear to be the case upon casual observation that the information is simply being supplied by Third Party 3 to the Department. On the other hand, the Department is ultimately responsible for paying this upcharge on behalf of citizens who receive drugs under the P.D.P., and there is an argument to be made that the breakdown of the prices paid should be publicly available. Even though the percentage of upcharge being applied by wholesalers is not the only component, or perhaps not even the primary component, of the decision to approve a request for Special Authorization coverage for products A and B, the

Department has the ability to use that information as a factor in determining whether to pay for products A and B. As noted above in the B.C. 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. In theory, the option always remains with the Department not to pay for the purchase of products A and B through the P.D.P. By proceeding with the purchase of products A and B through the P.D.P., the Department is in fact agreeing to the terms of the sale, including the upcharge. For this reason, I do not agree that the figures at issue were "supplied" by Third Party 3, in the meaning of the word as derived from the above reference and other similar cases and Commissioner's Reports.

[37] Clearly, then, I do not agree that the second part of the three-part harms test has been met, namely, that the information was supplied by Third Party 3 to the Department implicitly or explicitly in confidence, on the basis that the information does not meet the threshold required in order to be deemed to have been "supplied." As a result, the three-part test has not been met, and the information must be released.

[38] Despite this, I believe that some discussion of the third part of the test is warranted. 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:

> *A public body 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.*

[39] The manual also states that it is not necessary to demonstrate that actual harm will or has resulted from similar past disclosure, but past experience would be noteworthy. As noted above, the Department stated in its submission that it has "no capacity to dispute the claims by [Third Parties] on the potential for harm should the documents in question be fully disclosed." Other than this statement, no evidence of any kind, let alone "detailed and convincing" has been presented by the Department.

[40] Subsection 64(1) of the *ATIPPA* states that the burden of proof lies with the Department to prove that that the Applicant should not have access to the records at issue:

> *64. (1) On a review of or appeal from a decision to refuse access to a record or part of a record, the burden is on the head of a public body to prove that the applicant has no right of access to the record or part of the record.*

The Department has taken the position that proof of harm in this case is outside of its expertise, and appears content to allow Third Party 3 to attempt to present any evidence to support its position that section 27 applies to certain portions of the record at issue.

[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.

[42] Third Party 3 addresses the issue of harm briefly in its submission, stating that the Department is not authorized to disclose the information at issue because "this information, in the hands of a competitor, could be used to set wholesale prices for compatible pharmaceutical products which could reasonably be expected to undercut [Third Party 3's] prices and displace the Products on the Formulary." Additionally, in the brief notation accompanying each appendix of the record of which it objects to disclosure, Third Party 3 says that such disclosure "could reasonably be expected to be harmful to its business interests, specifically the competitive pricing of the Products relative to its competitors." As noted above, the Department presented no evidence in relation to harm, and the case put forward by Third Party 3 is neither detailed nor convincing regarding the nature or severity of the harm which it anticipates from the release of this information. As such part three of the three-part test has not been met.

VI CONCLUSION

[43] After reviewing the responsive records and carefully considering the submissions of the Applicant, the Department and Third Party 3, I have concluded that it is appropriate to release the material within the records which the Third Party had sought to protect under section 27. I have also determined that the majority of the information which Third Party 3 had sought to withhold on the basis that it was not responsive to the Applicant's request should be withheld by the Department on that basis. I have further determined that several pieces of information which Third Party 3 had sought to withhold on the basis of non-responsiveness are in fact responsive to the request and should be released to the Applicant.

[44] I have applied the three-part harms test with respect to the Third Party's claim of harm under section 27. In the case at hand I have agreed that part one of the test has been satisfied, but I have decided that neither part two nor part three have been met with respect to the information being requested by the Applicant. Given the fact that all three parts of this test have to be met in order to engage the protection of section 27, it was not necessary, after determining that part two had not been met, to determine whether part three had been met. I did review this part of the test, however, and I have concluded that even if part two had been met I would not have accepted the arguments with respect to part three, as I found the evidence presented by the Department and Third Party 3 neither sufficiently detailed nor convincing in order to justify a recommendation that the Department withhold this information.

[45] In conjunction with this Report, I will issue to the Department a copy of the records, which will form part of my recommendations. This copy of the records will specify which portions of the record Third Party 3 had sought, in its submission to this Office, to be withheld from the Applicant based on non-responsiveness and on section 27. It will also specify from among the portions so designated by Third Party 3 those parts which I am recommending for release, as well as the parts which I recommend should be severed.

VII RECOMMENDATIONS

[46] 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 information in the records on the basis of section 27 as presented by Third Party 3 has not been attained by the Department nor Third Party 3. I hereby recommend that the Department of Health and Community Services release to the Applicant all information in the records which were subject to this Review as per the attached copy issued by this Office, except those portions of the record which I have deemed to be non-responsive to the request of the Applicant.

[47] Either Third Party 3 or the Applicant 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 until the expiration of the prescribed time period for an appeal to the Trial Division as set out in the *ATIPPA*.**

[48] 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 Third Party 3 and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[49] Dated at St. John's, in the Province of Newfoundland and Labrador, this 13th day of April, 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador