March 6, 2006 **2006-001**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2006-001

Department of Health and Community Services

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* ("*ATIPPA"*) for access to the MCP billing information of individual physicians. The Department of Health and Community Services decided to release this information, but before doing so provided third party notification in accordance with section 28 of the *ATIPPA.* A Third Party, acting on behalf of the majority of third parties, objected to the release of this information and filed a Request for Review with the Office of the Information and Privacy Commissioner. The Third Party claimed that the responsive records should be withheld in accordance with section 30(1) (personal information) and section 27 (business interests of a third party). The Commissioner agreed that the records were personal information but concluded that their disclosure would reveal financial details of a contract to supply services to a public body and, therefore, are exempt from section 30(1). With respect to section 27, the Commissioner found that the release of the records would not meet all three parts of the harms test set out in this exception. The Commissioner concluded that neither of the exceptions claimed by the Third Party applied and upheld the decision of the Department of Health and Community Services to release the information as per the Applicant's request. This Report is written in conjunction with the companion Report 2006-002.

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

Information and Protection of Privacy Act, R.S.B.C. 1996, c. 165, s. 21(1)(b)

Authorities Cited: *Doctors Nova Scotia v. Nova Scotia (Department of Health)*, 2005, NSSC 244; *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R 194; Newfoundland and Labrador OIPC Reports 2005-002 (2005) and 2005-007 (2005); *Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5*, [1997] N.S.J. No. 238 (N.S.S.C.); *Chesal v. Attorney General of Nova Scotia*, 2003 N.S.S.C. 10; British Columbia OIPC Orders 01-39 (2001) and 01-20 (2001); *Canadian Pacific Railway v. British Columbia*, 2002 BCSC 603, 2002 CarswellBC 1022; *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 2 F.C. 47 (C.A); *Saint John Shipbuilding v. Canada (Minister of Supply and Services)*, [1990] F.C.J.; *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, [1988] F.C.J.; *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 665; *Canada (Information Commissioner) v. Canada (Prime Minister of Canada)*, [1992] 57 F.T.R. 180, [1993] 1 F.C. 427

Other Resources Cited:

Memorandum of Agreement between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2003, available at http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation_1.pdf;
Arbitration Award between Newfoundland and Labrador Medical Association and Government of Newfoundland and Labrador, 2003, available at http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation_2.pdf;
News Release, February 15, 2006, available at http://www.releases.gov.nl.ca/releases/2006/exec/0215n04.htm

I BACKGROUND

[1] The Applicant submitted an access to information request to the Department of Health and Community Services (the "Department"), dated 18 July 2005, wherein he requested the following:

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

[2] The Department indicated that they had received the request on 26 July 2005. In subsequent correspondence, dated 22 August 2005, the Department notified the Applicant that the records may contain third party information, as per section 27 of the *Access to Information and Protection of Privacy Act* ("*ATIPPA*"). The Department also indicated that a representative of these third parties had been notified in accordance with section 28 of the *ATIPPA*. In correspondence dated 29 September 2005, the Department advised the Applicant that the third party representative had declined to speak on behalf of the third parties and, as a result, each individual third party would now have to be notified in accordance with section 28. This notification was forwarded to each third party on 29 September 2005.

[3] Subsequent to the initial notification, on 4 November 2005 the Department notified each individual third party that a decision had been made to release the records to the Applicant:

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

[4] On 22 November 2005 a representative of the third parties filed a Request for Review with this Office, in accordance with section 43(2) of the *ATIPPA*. The representative notified this Office that their Request was being filed on behalf of all third parties. For ease of reference, this representative will hereinafter be referred to as the "Third Party." I note that one individual third party filed a Request for Review separate from the Request at hand. This Request is dealt with in a companion Report 2006-002. All other third parties are collectively dealt with in this Report.

[5] The Third Party asked that this Office "…find that the Department erred in its decision [to release the records]." The Department was notified of this Request for Review in correspondence dated 22 November 2005, and was asked to provide the appropriate documentation and a complete copy of the responsive records for our review. An unsevered copy of the records was received at this Office on 29 November 2005.

[6] Attempts to resolve this Request for Review by informal means were unsuccessful. On 22 December 2005 the Third Party, the Department and the Applicant were notified that the file had been referred to the formal investigation process and they were each given the opportunity to provide written representations to this Office under authority of section 47 of the *ATIPPA*. In response, the Third Party and the Department provided written submissions in support of their respective positions. The Applicant did not provide a submission.

II PUBLIC BODY SUBMISSION

[7] In its submission, the Department provides a brief description of the Newfoundland Medical Care Plan ("MCP"):

> *The Newfoundland Medical Care Plan (MCP) was introduced in 1969 and is designed to provide comprehensive medical care insurance to residents of the province. Physicians providing services to eligible residents (beneficiaries) claim the cost of such services directly to the Department of Health and Community Services. The structure and process of claims adjudication, audit, etcetera is supported in legislation through the Medical Care Insurance Act, 1999. Compensation and related issues are negotiated between Government and the* [*Newfoundland and Labrador Medical Association*]*…*

[8] The Department begins its submission with an analysis of section 3 of the *Medical Care Insurance Act, 1999*, and in particular how it balances with sections 6, 7 and 8 of the *ATIPPA*. I believe this analysis to be useful and have reproduced it in its entirety:

Section 3, paragraph (d) of the Medical Care Insurance Act, 1999 states:

> *3. (1) A person employed in the administration of this Act shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of that person's employment and shall not communicate the matters to another person, including a person employed by the government, except*
>
> *(d) to a person who is empowered by a statute which requires disclosure of information;*

The Access to Information and Protection of Privacy Act (ATIPPA) is paramount over all other provincial statutes. Subsection 6(1) of ATIPPA states:

> *6. (1) Where there is a conflict between this Act or a regulation made under this Act and another Act or regulation enacted before or after the coming into force of this Act, this Act or the regulation made under it shall prevail.*

However there are two exceptions to the paramountcy provisions of ATIPPA. The first is reflected in subsection 6(2), which states:

> *(2) Notwithstanding subsection (1), where access to a record is prohibited or restricted by, or the right to access a record is provided in a provision designated in the regulations made under section 73, that provision shall prevail over this Act or a regulation made under it.*

No regulations have yet been published pursuant to section 73 of ATIPPA and there are no plans by the Department of Health and Community Services to request that such records be excluded from the provisions of ATIPPA.

The second exception exists only for a two year window following proclamation of ATIPPA. If there is a conflict between ATIPPA and another statute within that two year window, the other statute will prevail over provisions of ATIPPA. This is reflected in subsections 6(3) and 6(4) of ATIPPA which state:

> *(3) Subsections (1) and (2) shall come into force and subsection (4) shall be repealed 2 years after this Act comes into force.*
>
> *(4) The head of a public body shall*
>
> *(a) refuse to give access to or disclose information under this Act if the disclosure is prohibited or restricted by another Act or regulation; and*
>
> *(b) give access and disclose information to a person, notwithstanding a provision of this Act, where another Act or regulation provides that person with a right to access or disclosure of the information.*

> *The Access to Information and Protection of Privacy Act (ATIPPA) empowers an applicant to access records held in the control or custody of a public body.*
>
> *Subsection 7(1) of the ATIPPA states:*
>
> > *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *Subsection 8(1) of the ATIPPA states:*
>
> > *8. (1) A person may access a record by making a request to the public body that the person believes has custody or control of the record.*
>
> *The Medical Care Insurance Act, 1999 allows for the disclosure of information to a person empowered by ATIPPA. As well, since there is no apparent conflict between the Medical Care Insurance Act, 1999 and the Access to Information and Protection of Privacy Act, an assessment of exemptions to disclosure was performed in the context of ATIPPA.*

[9] The Department then goes on to address two possible exceptions: personal information and harm to the business interests of a third party. With respect to personal information, the Department agrees that the responsive records meet the definition of "personal information" in the *ATIPPA*, but maintains that the information should be released in accordance with section 30(2)(g). In support of this position, the Department references the Memorandum of Agreement ("MOA") between the Newfoundland and Labrador Medical Association ("NLMA"), on behalf of physicians in this Province, and the Government of Newfoundland and Labrador. They argue that this agreement is a financial contract to provide medical services, as anticipated by section 30(2)(g):

> *The Department of Health and Community Services contends that the MCP billing data can be classified as financial and that the MOA identifies a contractual relationship for the billing of services by physicians to the Department and the subsequent reimbursement. As such, we believe that the MOA is a contract for services and that the billing data subject to this request are financial details of that contract. Therefore in the context of paragraph 30(2)(g) of ATIPPA, the billing data cannot be classified as personal information that is required to be exempted from disclosure.*

[10] In further support of its decision to release the information, the Department relies on a recent case from the Supreme Court of Nova Scotia. In *Doctors Nova Scotia v. Nova Scotia (Department of Health),* 2005 NSSC 244, the Court held that the doctors in Nova Scotia have a financial contract with the Province for the supply of services, in accordance with section 20(4)(f) of Nova Scotia's *Freedom of Information and Protection of Privacy Act*. Section 20(4)(f) of Nova Scotia's legislation mirrors section 30(2)(g) of the *ATIPPA.*

[11] With respect to the exception of harm to the business interests of a third party, the Department outlined the steps it took to notify all affected third parties, in accordance with section 28. They then went on to reference the three-part test set out in section 27 and to address each part of this test individually.

[12] The Department agrees that the responsive records are the financial information of a third party and, as such, acknowledges that part one of the test has been satisfied. However, they argue that the records do not meet the other criteria of the harms test.

[13] Part two of the harms test deals with confidentiality. In analyzing this issue the Department uses the confidentiality test set out in *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R 194 to support its position that the information was not supplied in confidence. In so doing, the Department specifically refers to the MOA and the Arbitration Award and the fact that they are publicly available on the NLMA web site. The Department argues that this information could be combined with other publicly available information such as budget reports to extrapolate an approximation or average of individual physician billings.

[14] The Department also references specific language in the *Medical Care Insurance Act, 1999* and in the MOA. They argue that section 3(1) of the *Medical Care Insurance Act, 1999* and Articles 7.01 and 8.01 of the MOA, when taken in the context of the *ATIPPA*, support a commitment to openness, transparency and accountability. The Department believes that Government has acknowledged the public's right to have access to this type of information.

[15] In further support of its position on confidentiality, the Department references section 5 of Manitoba's *Public Sector Compensation Disclosure Act* and British Columbia's *Financial Information Act* and *Regulations*. Under these statues, individual physician billing information is routinely released on an annual basis in these two Provinces. In addition, in *Doctors Nova Scotia v. Nova Scotia (Department of Health)* the Court ruled that this type of information should be made public.

[16] The third and final part of the harms test sets out four specific harms and requires at least one of them to be met in order to engage this part of the test. The Department references a number of Court cases that define harm in an access to information context. These cases support a finding of *probable* harm when applying an exception under access to information legislation. The mere *possibility* of harm is not sufficient to invoke an exception. Based on this jurisprudence, the Department believes there is no evidence to support that the release of this information would likely lead to any of the harms set out in section 27(1)(c). By way of an example, the Department indicates that a search of publicly available news articles and government and physician related web sites in Manitoba and British Columbia, where physician billing information is published annually, revealed no reports of financial harm or injury to physicians.

[17] The Department also spoke to the possibility of a "…negative back lash from the public in that MCP billings do not represent [physician's] individual salary nor reflect their expenditures." The Department argues that the public is capable of understanding that MCP billings do not represent physician's net income. They go on to argue that any potential misunderstanding on the part of the public does not justify the withholding of the responsive records under section 27. In support of these arguments they again refer to *Doctors Nova Scotia v. Nova Scotia (Department of Health).*

III THIRD PARTY SUBMISSION

[18] The Third Party begins its submission by referencing the definition of "public body." They believe "…that the head of the public body has not properly determined if the Medical Care

Commission should be included in this definition and if the confidential billing records between the physicians and patients fall within the definitions of the [*ATIPPA*]."

[19] They also believe "…that the head of the public body failed when it equated the billing history of a physician with a physician's remuneration or with a contract to supply goods or services."

[20] The Third Party states that there was a significant effort to resolve this review through informal means, including an offer to release a variety of information to the Applicant. In addition, it was suggested that the Applicant access previous Annual Reports of the Medical Care Commission as an alternative source of information. The Third Party believes that these alternatives were reasonable and should have been acceptable to the Applicant. In support of this opinion, the Third Party referred to this Commissioner's Report 2005-007. In this Report, I concluded that the responsive records contained a significant amount of personal information and were withheld appropriately in accordance with section 30 of the *ATIPPA*. I also concluded that the public body "…provided reasonable alternatives to the Applicant and that these alternatives are in accordance with the [*ATIPPA*].

[21] The Third Party acknowledges that in general the public has a right of access to records in the custody or under the control of a public body. In this case, however, they argue that the responsive records should be withheld as information that would harm the business interests of a third party (section 27) and as personal information (section 30(1)).

[22] With respect to section 27, the Third Party states that "[t]he disclosure of individualized MCP billing history's [*sic*] would reveal financial and/or labour relations information that is supplied in confidence." They continue on by stating that the release of this information would cause significant harm to the physicians' competitive position or their ability to negotiate. In support of this claim, the Third Party points out that physicians sometimes receive employment offers from other provinces and countries and the release of this information would significantly interfere with the ability of these physicians to negotiate contracts with these potential employers.

[23] The Third Party also claims that disclosing this information could lead to undue financial loss on the part of physicians and would adversely affect the level of cooperation and trust between physicians and MCP. They argue that "[t]he carte blanche release of this information is not in the public interest as the willingness of physicians to continue to participate with government and provided [sic] health information may be compromised."

[24] In further support of their claim of harm, the Third Party believes that if released, the information would be "misconstrued by the public," and therefore would impair the ability of physicians to negotiate with Government and to recruit and maintain new physicians.

[25] With respect to section 30, the Third Party argues that the responsive records constitute personal information as defined by section 2(o)(vii) of the *ATIPPA*. They acknowledge the exemptions set out in sections 30(2)(f) and (g), but argue that neither applies in this situation:

> *We are also of the opinion that the application of section 30(1) in respect of fee-for-service physicians is not affected by section 30(2)(f) or (g) of the Act as the MCP payments of a fee-for-service physicians* [sic] *is not received by him or her as an employee or member of a public body, nor is it remuneration received in relation to a contract to supply services to a public body. In our opinion, the payments for a fee for service physician is* [sic] *received pursuant to an arrangement which the individual physician has with his or her patient to provide medically necessary services.*
>
> *In the case of salaried physicians, the MCP payments can not be considered as part of the physicians 'remuneration' from his or her employer. The level and amount that the physician received from MCP is set by the* [sic] *as a result of an arrangement between the physician and the patient, exclusive of the employer. The* [*Third Party*] *notes that the Applicant did not request the salaries or remuneration of physicians. It is the opinion of the* [*Third Party*] *that MCP billing history should not be equated to the conventional remuneration of a government employee. Furthermore, the MCP payment represent* [sic] *the details of an arrangement to supply medically necessary services to a patient not to a public body.*

[26] In asking this Office to apply section 30(1) to the responsive records, the Third Party again referred to my Report 2005-007. At paragraph 31 of that Report, I spoke to the mandatory nature

of this section and the absence of a harms test. If information is deemed to be personal information in accordance with section 2(o) of the *ATIPPA*, it must not be released.

IV DISCUSSION

[27] I would first like to address the Third Party's claim that the Newfoundland Medical Care Commission may not be a public body, as defined by the *ATIPPA,* and the responsive records may not fall within the definitions of the *ATIPPA.* The Newfoundland Medical Care Commission was continued as a corporation under authority of the *Medical Care Insurance Act*. This Act was repealed and replaced by the *Medical Care Insurance Act, 1999.* This new Act was proclaimed into force in April of 2000 and, consequently, the Newfoundland Medical Care Commission has been disbanded since that time. All assets and liabilities of this Commission were absorbed by the Government. I refer to section 27 of the *Medical Care Insurance Act, 1999*:

> 27. *(1) The Crown is the successor in law to the Newfoundland Medical Care Commission established under the Medical Care Insurance Act.*
>
> *(2) The assets and liabilities of the commission are the assets and liabilities of the Crown.*

[28] In the absence of a Medical Care Commission, on 1 April 2000 MCP was merged with the Department of Health and Community Services, which is clearly a "public body" under the *ATIPPA.* The responsive records, therefore, clearly fall within the scope of the *ATIPPA.* Any suggestion that the Medical Care Commission may not be a public body is irrelevant. I should also note that the Applicant submitted his request to the Department. As indicated in section 7 of the *ATTIPA,* as long as the public body has custody or control of the records, those records are subject to the *Act*:

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

[29] I would also like to comment on the Department's analysis of section 3 of the *Medical Care Insurance Act, 1999*, as reproduced in paragraph 8 of this Report. I believe the Department has appropriately and accurately balanced this confidentiality provision against sections 6, 7 and 8 of the *ATIPPA*. I agree with the Department that there is no apparent conflict between these two statutes and that the Department's decision to release this information was appropriately based on the *ATIPPA*.

[30] Having clearly determined that the responsive records are subject to the *ATIPPA*, I must now look to the possibility that the information is protected by an exception as set out in Part III of the *Act*. The two exceptions that are relevant to the case at hand are personal information (section 30) and third party business information (section 27). I will deal with each of these separately.

[31] I would also note at this point that in accordance with section 64(2) the burden of proof rests with the Third Party:

> *64. (2) On a review of or appeal from a decision to give an applicant access to a record or part of a record containing information that relates to a third party, the burden is on the third party to prove that the applicant has no right of access to the record or part of the record.*

Personal Information (Section 30)

[32] The Third Party claims that the responsive records are personal information and should be withheld under the mandatory section 30(1):

> *30. (1) The head of a public body shall refuse to disclose personal information to an applicant.*

[33] Personal information is defined in section 2(o):

> *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;*

[34] I do not dispute, nor does the Department, that the requested information is personal information as defined by section 2(o). The records are clearly financial information associated with identifiable individuals. I also do not dispute the mandatory nature of section 30(1). Having decided that the information is personal in nature, I must now look to section 30(2) which establishes a number of specific exemptions to the protection provided by section 30(1). Both the Department and the Third Party referenced section 30(2) in their respective submissions.

[35] Specifically, the Department referred to section 30(2)(g):

> *30. (2) Subsection (1) does not apply where*
>
> *(g) the disclosure reveals financial and other details of a contract to supply goods or services to a public body;…*

The Department argues that the MOA signed between the NLMA, on behalf of physicians, and the Provincial Government is a contract between physicians and government, as contemplated by section 30(2)(g). This MOA, available through the NLMA website at http://www.nlma.nl.ca/

documents/agreements_negotiations/agreement_negotiation_1.pdf, sets out agreed upon levels of compensation, working conditions, employment benefits and service coverage.

[36] With respect to the supply of goods or services, the Department referenced Article 10.01 of the MOA:

> *Physicians commit to provide, in accordance with the negotiated payment schedule/salary rate, the insured services which have been traditionally funded through MCP and which the public might reasonably expect to be available, subject to resources and skill limitations.*

[37] With respect to the use of the word "financial" in section 30(2)(g), the Department contends that the billing data being requested reflects the contractual relationship between the physicians who bill for services and the Department who pays for those services. As such, the Department believes that the MOA is a contract and the billing data is considered the financial details of that contract.

[38] Based on the existence of the MOA and the language contained therein, the Department believes that the responsive records would clearly reveal financial and other details of a contract to supply services and, consequently, cannot be protected by section 30(1).

[39] The Third Party, on the other hand, disagrees with the Department's position. While they acknowledge section 30(2), they do not believe that the responsive records are captured by this provision. The Third Party argues that the billing history of a physician should not be equated with remuneration or with a contract to supply goods or services. Instead, the Third Party argues that the physicians are paid "…pursuant to an arrangement which the individual physician has with his or her patient to provide medically necessary services." They also argue that these services are provided to the patient and not to a public body.

[40] I should note at this point that the Third Party has distinguished between salaried physicians and fee-for-service physicians and in so doing has referenced, in addition to section 30(2)(g), section 30(2)(f):

> *30. (2) Subsection (1) does not apply where*
>
> > *(f) the information is about a third party's position, functions or remuneration as an officer, employee or member of a public body or as a member of a minister's staff;…*

For the purpose of this review, however, I do not believe it is necessary to make such a distinction. As the Third Party correctly pointed out, the Applicant did not request salaries or remuneration. The Applicant is seeking the MCP billing details of individual physicians and, according to the Department, physicians who submit MCP bills to the Department of Health and Community Services are reimbursed for those bills on a consistent basis, regardless of their status.

[41] In considering the application of section 30(1) I have relied in part on the decision of the Nova Scotia Supreme Court in *Doctors Nova Scotia v. Nova Scotia (Department of Health),* 2005 NSSC 244. The Department referenced this case in their submission and I believe it to be relevant and important to the case at hand. This case involves a freedom of information request to the Nova Scotia Department of Health for a list of all doctors in Nova Scotia together with their individual Medical Services Insurance billings. The Supreme Court upheld the decision of the Department of Health to release this information.

[42] In reaching his decision in *Doctors Nova Scotia v. Nova Scotia (Department of Health),* MacLellan, J., at paragraphs 29 and 30, said:

> *29 Clearly, the contract here between Doctors Nova Scotia and the Department of Health is a financial contract. It provides for the fees payable for a certain procedure carried out by doctors. The service provided by the doctors are not for the Department of Health but for residents of the Province. As Doctors Nova Scotia speaks for the doctors so does the Department of Health speak for the residents of Nova Scotia.*
>
> *30 I conclude that the contract between Doctors Nova Scotia and the Department of Health is a contract for the supply of services and that the fees paid under the contract are financial details of the contract and therefore come within Section 20(4)(f) of the* ***Act****.*

Section 20(4)(f) of the Nova Scotia *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 30(2)(g) of the *ATIPPA*.

[43] As indicated earlier, the Third Party argues that the billing history is associated with a relationship between the physician and the patient and, as such, should not be considered a contract to supply goods or services to a public body. This argument was also put forward in *Doctors Nova Scotia v. Nova Scotia (Department of Health)* and was dealt with by MacLellan, J., at paragraph 27:

> *27 I reject the suggestion that the contract here is between the doctor and the patient who receives the service. I interpret the contract involved here to clearly set out the rights of doctors to bill the Province provided they provide the service to a resident of Nova Scotia who through their taxes provide the funds to pay the doctors.*

[44] I believe it is also important to note that a recent agreement between government and physicians was facilitated by an arbitration process. Specifically, an Arbitration Award was signed on 15 April 2003 dealing with compensation and working conditions. The parties to this process were the NLMA and the Provincial Government, not the patient. This lends further support to Justice MacLellan's assertion that these types of contracts exist between physicians and governments, not physicians and patients. The Arbitration Award is publicly available through the NLMA website at http://www.nlma.nl.ca/documents/agreements_negotiations/agreement_negotiation _2.pdf.

[45] Having reviewed this relevant case, the MOA between the Newfoundland and Labrador Medical Association and the Government of Newfoundland and Labrador and the Arbitration Award, I accept the argument of the Department. While I agree that the responsive records meet the definition of "personal information," I accept that the agreement between physicians and government is a contract as contemplated by section 30(2)(g). It is true that the physician is administering medical services to the patient, but the reimbursement for those services comes directly from government in accordance with a detailed agreement, to which both parties are

signatories. The patient is not involved in the reimbursement process and, for the most part, is never aware of the amount of the reimbursement or the conditions under which it is paid. I would also note that the information being requested would not identify any individual patient. In my opinion, MCP billings reflect a contractual service provided to the Department of Health and Community Services. Clearly, the agreement to pay physicians under the MCP program facilitates the provision of medical services to the citizens of this Province through the use of public funds.

[46] Having accepted the position of the Department on the application of section 30, I have decided that the release of the responsive records would reveal the details of a contract to supply services to a public body. As such, the Third Party cannot rely on section 30(1) to prevent the release of this information. In this respect, the Department's decision to release the information is an appropriate and correct one.

[47] With respect to the Third Party's reference to my Report 2005-007 and my comments on the applicability of section 30(1) to the records associated with that review, I would note that in that case I determined that section 30(2) did not apply to the situation as it then was. As such, there was no discretion on the part of the public body and they were obligated to withhold the information. If I had concluded that section 30(2) did not apply to the case at hand, my conclusions would have been similar to those reached in my Report 2005-007 and the comparison would have been appropriate. However, the applicability of section 30(2)(g) to this review sets this case apart from Report 2005-007 and renders any comparison irrelevant.

Third Party Business Interests (Section 27)

[48] In addition to section 30(1), the Third Party claims that the responsive records should be withheld under authority of section 27(1) of the *ATIPPA*. Section 27(1) is a mandatory exception which establishes a reasonable expectation of harm 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.*

[49] "Third Party" is defined in section 2(t) to mean "…a person, group of persons or organization other than (i) the person who made the request, or (ii) a public body." This definition is clear and I agree that the individuals affected by this request are third parties as defined by the *ATIPPA*.

[50] As I have emphasized in other Reports, it is important to note the use of the word "and" at the end of section 27(1)(b). This explicitly indicates that at least one of the conditions in each of 27(1)(a), (b) *and* (c) must be met, thereby establishing a three-part test. I spoke directly on this point in my Report 2005-003, 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…*

[51] With respect to the first part of this three-part harms test, both the Department and the Third Party agree that the disclosure of the responsive records would reveal the financial information of a third party, as contemplated by section 27(1)(a)(ii). I see no reason to dispute this decision and agree that the first part of the test has been met.

[52] The second part of the harms test deals specifically with confidentiality (27(1)(b)). In this case the Department and the Third Party have submitted contrary arguments. The Department feels that the exchange of information between physicians and the MCP program is done so in the absence of any implicit or explicit confidentiality. The Third Party, on the other hand, maintains that the information was indeed provided in confidence.

[53] In support of its position, the Department has referenced the decision of the Federal Court of Canada in *Air Atonabee Limited v. Canada (Minister of Transport)* (1989), 27 F.T.R 194. In determining whether or not information is confidential, MacKay, J. at paragraphs 42 to 45 sets out a standard test of confidentiality:

> *42 My review of the authorities, facilitated in part by submissions of counsel, is undertaken in order to construe the term 'confidential information' as used in subs. 20(1)(b) in a manner consistent with the purposes of the Act in a case where the records in question, under control of a government department, consist of documents originating in the department and outside the department. This review*

> *leads me to consider the following as an elaboration of the formulation by Jerome A.C.J. in Montana, supra, that whether information is confidential will depend upon its content, its purposes and the circumstances in which it is compiled and communicated, namely:*
>
> *43 (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,*
>
> *44 (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and*
>
> *45 (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.*

[54] With respect to the first part of this test, the Department acknowledges that the information contained within the MCP database, the source of the responsive records, is not publicly available. They point out, however, that the MOA and the Arbitration Award are publicly available. The Department also states that by analyzing these documents in conjunction with other publicly available documents, such as the annual budgetary reports of the Department, a member of the public could extrapolate individual physician billings.

[55] In analyzing the second part of the test set out in *Air Atonabee Ltd.,* the Department references section 3(1)(d) of the *Medical Care Insurance Act, 1999*:

> *3. (1) A person employed in the administration of this Act shall preserve secrecy with respect to all matters that come to his or her knowledge in the course of that person's employment and shall not communicate the matters to another person, including a person employed by the government, except*
>
> *(d) to a person who is empowered by a statute which requires disclosure of information;…*

While section 3(1) of this *Act* explicitly establishes confidentiality, sections 3(1)(a) to (f) provide a number of exceptions, including any statutory authority to disclose information. It seems

reasonable that this language captures the release of information in accordance with the *ATIPPA*. The *ATIPPA* empowers individuals within this Province to have access to information held by public bodies, subject to specific and limited exceptions:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;…*
>
> *(c) specifying limited exceptions to the right of access;…*

[56] In further support of this point, the Department points out that the MOA does not contain language dealing specifically with the confidentiality of information, but does recognize the rights of government and the priority of legislation. Specifically, the Department references Articles 7 and 8 of the MOA:

> *7.01 All functions, rights, powers, and authority which are not specifically abridged, delegated or modified by this Agreement are recognized by the Newfoundland and Labrador Medical Association as being retained by Government or its delegated Authorities.*
>
> *8.01 The Parties agree that legislation takes precedence over any provision of this Agreement. It is also agreed that should any future legislation render null and void any provision of the Agreement, the remaining provisions shall remain in effect during the term of the Agreement.*

[57] It is important to note at this point that section 27(1)(b) of the *ATIPPA* allows for the implicit or explicit expectation of confidentiality. I have seen no evidence that the responsive records have been supplied to the Department explicitly in confidence. The alternative, therefore, is to determine whether or not the records were supplied implicitly in confidence. In this regard, I find the evidence of the Department convincing. I accept that both the *Medical Care Insurance Act, 1999* and the MOA between Government and the NLMA does not anticipate a veil of secrecy in the processing and payment of MCP billings to physicians. In referencing section 20(4)(f) of Nova Scotia's *Freedom of Information and Protection of Privacy Act,* MacLellan, J. in *Doctors Nova Scotia v. Nova Scotia (Department of Health)* spoke succinctly on this point:

> *34 I interpret this section to be very broad in scope and basically indicating that if a person has a financial contract with a government body to provide goods or services you should expect that it is going to become public knowledge through Freedom of Information. Doctors Nova Scotia are taken to know the law and therefore are taken to be aware when they bill the Department of Health for services provided to patients, that the financial terms of the billing will become public knowledge.*

[58] I have earlier determined that physicians who receive payments through the MCP program do so in accordance with a contract to supply services to the Department of Health and Community Services. It stands to reason therefore, that the financial terms associated with such a contract are subject to an appropriate level of transparency and accountability. The MCP program is publicly funded through the taxpayers of this Province and, as such, should be available to those taxpayers. The remuneration of public employees is available to the public as are the amounts paid to contractors. I do not believe it would be fair or appropriate to treat physicians any differently. In my opinion, it is reasonable to assume that there is no implicit expectation of confidentiality on the part of physicians when providing this information to the Department. As such, I agree with the Department that the second part of the harms test, as set out in section 27(1)(b) of the *ATIPPA*, has not been met.

[59] The public nature of this type of information is supported by its routine public release in other Provinces. The Department made specific reference to section 5 of the *Public Sector Compensation Disclosure Act* of Manitoba and the *Financial Information Act* and *Regulations* of British Columbia. In accordance with these statutes the Provinces of Manitoba and British Columbia publish the billing information of individual physicians annually. While this did not form an integral part of my analysis, it does lend support to my assertion that MCP billing information is not confidential.

[60] I would also point out that the Third Party failed to provide clear evidence that the information in question had been provided to the Department in confidence. They merely provided a statement to that effect. I do not accept that a mere statement should establish implicit confidentiality. The Supreme Court of Nova Scotia spoke to this issue in *Chesal v. Attorney*

General of Nova Scotia, 2003 N.S.S.C. 10. Although this case dealt with a different exception to access, the comments of Coughlan, J. at paragraph 43 are relevant:

> *43 In determining whether particular information is received in confidence, the Court must consider the circumstances as a whole including the content of the information, its purposes and the purposes and conditions under which it was prepared and communicated. It is not enough that the supplier of the information states, without further evidence, that it is confidential; otherwise, a party supplying the information could ensure the information was not released…*

[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 …Having determined that the disputed records satisfy the "in confidence" requirement in s. 21(1)(b), I turn to the question of supply. 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).*

In Order 01-20, the British Columbia Information and Privacy Commissioner said that "[t]he fact that a third party provides information which is negotiated with the public body and incorporated, changed or unchanged, into a resulting contract will not mean that information has

been "supplied" by the third party under s. 21(1)(b)….” Section 21(1)(b) of the British Columbia *Freedom of Information and Protection of Privacy Act* is, in all material respects, equivalent to section 27(1)(b) of the *ATIPPA*.

[62] I earlier concluded that the MOA between the NLMA and the Province is a contract. As such, I believe the information at issue is information that is exchanged in accordance with a negotiated contract and has not been “supplied” as contemplated by section 27(1)(b) of the *ATIPPA*. The MOA is explicitly an agreement between two parties and is signed by both of those parties, indicating a negotiation process. In fact, Government has recently reached a new MOA with the NLMA and in announcing this new agreement confirmed that the terms were negotiated. In a news release dated 15 February 2006, Executive Council and the Department of Health and Community Services said that “Minister [Finance and President of Treasury Board] said negotiations with the NLMA have been ongoing since September of this year and is pleased those talks have resulted in a satisfactory settlement for both parties…” The news release goes on to quote the Minister of Health and Community Services as saying “…[c]learly, both the government and the NLMA share the same goals for our provincial health care system and these successful negotiations have cemented the cooperative partnership that exists between the parties” (this news release is available at http://www.releases.gov.nl.ca/releases/2006/exec/0215n04.htm).

[63] Having determined that the second part of the test has not been met, it is not necessary to speak extensively on the third and final part of the test. However, I believe it may be useful to provide some brief comments on the harm anticipated by section 27(1)(c).

[64] The Department has referenced several cases that have dealt with the expectation of harm under access to information legislation (*Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 2 F.C. 47 (C.A); *Saint John Shipbuilding v. Canada (Minister of Supply and Services)*, [1990] F.C.J.; *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, [1988] F.C.J.; *Canada (Information Commissioner) v. Canada (Minister of External Affairs)*, [1990] 3 F.C. 665; *Canada (Information Commissioner) v. Canada (Prime Minister of Canada)*, [1992] 57 F.T.R. 180, [1993] 1 F.C. 427). The case law strongly supports an expectation of

probable harm, and not merely the *possibility* of harm. I spoke on this point in my Report 2005-002:

> 25 *The language in the ATIPPA, like other access and privacy statutes in Canada, creates a bias in favour of disclosure. By providing a specific right of access and by making that right subject only to limited and specific exceptions, the legislature has imposed a positive obligation on public bodies to release information, unless they are able to demonstrate a clear and legitimate reason for withholding it…The jurisprudence cited above clearly supports this concept. In dealing specifically with the issue of harm, Courts have set the bar higher than a mere possibility of harm.*

[65] In this context, I have not seen any evidence that the probability of harm exists. General statements of harm do not satisfy the burden of proof mandated by section 64 of the *ATIPPA*. For example, I fail to see how the disclosure of this information would *significantly* interfere with the negotiating position of a physician. If I were to accept such an argument, then by association I would have to accept that all individuals who are paid from the public purse, including civil servants, teachers and individual contractors, are automatically at a disadvantage when applying for other positions simply because the amount they are paid is publicly known. I do not accept that this is the case. In the absence of any clear evidence to the contrary, I do not believe it is reasonable to expect that the release of the requested information in the case at hand would lead to probable harm, particularly the "significant harm" anticipated by section 27(1)(c)(i).

[66] Similarly, I have seen no evidence, other than statements by the Third Party, that the disclosure of the requested information would result in similar information no longer being supplied to the Department (27(1)(c)(ii)), result in undue financial loss or gain to any person or organization (27(1)(c)(iii)), or reveal information identified by section 27(1)(c)(iv) that is not already in the public domain. As indicated in the previous paragraph, statements that such harm would result, without clear and concise evidence, does not satisfy the burden of proof mandated by section 64.

[67] Before concluding, I would like to comment on one final point relevant to this review. The Third Party has submitted that if released this information would be "misconstrued by the public," thereby adversely affecting physicians ability to negotiate and recruit new physicians. In

their submission, the Department points out that this issue was also dealt with in *Doctors Nova Scotia v. Nova Scotia (Department of Health)*. At paragraphs 37 and 38 MacLellan, J. said:

> *37 Doctors Nova Scotia are concerned about the possible misinterpretation of this information by members of the public. It is suggested that the public would not understand that doctors have costs associated with their billings and that the monies received are gross figures not net of expenses.*
>
> *38 I do not interpret Section 20(4)(f) as dealing with that issue, however,* ***I also do not believe that any confusion arising from the total billing figure would justify in any way the withholding of information if it was permitted under the Act.***

(Emphasis Added)

I fully agree with Justice MacLellan and with the Department on this point. A potential for misinterpretation must not be substituted for an exception to access. To do so would be contrary to the legislation and contrary to the spirit of openness and transparency.

V CONCLUSION

[68] Having reviewed the responsive records and carefully considered the submissions of the Department and the Third Party, I have concluded that it is appropriate to release the total MCP billings of individual physicians, as per the Applicant's request. While I agree that this information is personal in nature, I have concluded that it meets the criteria of a contract to supply services to a public body and, as such, is subject to disclosure. My conclusions in this respect are based in large part on the fact that these amounts are paid directly to physicians by government, in accordance with a formal agreement. While physicians are providing the medical service to individual patients, the payment for those services comes directly from the public treasury. In the absence of any statutory requirement to the contrary, I believe that the people of this Province have a right to such information, a right that is supported by the *ATIPPA*.

[69] With respect to the Third Party's claim of harm under section 27(1), I have applied the three-part harms test. I have emphasized the need to show that all three parts of this test have been met in order to engage the protection of section 27(1). In the case at hand I have agreed that part one of the test has been satisfied, but have decided that part two does not apply to the information being requested by the Applicant. Having reached this conclusion it was not necessary to determine whether or not part three has been met, as all three parts of the test are required. In the interest of completeness, however, I did analyze this part of the test and have concluded that even if part two had been met I would not have accepted the arguments put forward by the Third Party with respect to part three. I did not find the evidence convincing or sufficient to justify the withholding of this information.

[70] After applying the test in section 27(1) and reviewing this matter from a holistic perspective, I do not believe that the disclosure of the responsive records would lead to the harm envisioned by the *ATIPPA*. While I acknowledge and support the importance of protecting both personal information and information that would harm the business interests of third parties, as evidenced by the mandatory nature of these provisions, I have carefully considered all aspects of this review and have concluded that the Department has appropriately decided to release this information. The Department's arguments were convincing, sound and in accordance with the legislation.

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

[72] Under authority of section 50(1) I direct the head of the Department of Health and Community Services to write to this office and to the Third Party within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report. Section 49(2) provides that the Third Party has a right to appeal the decision of the Department to the Trial Division under section 60 within 30 days of receiving said correspondence from the Department.

No records are to be released by the Department until the expiry of this time limit. If the Third Party fails to file an appeal within 30 days of receiving the decision of the Department, the Department may then release all of the records requested by the Applicant.

[73] Dated at St. John's, in the Province of Newfoundland and Labrador, this 6th day of March 2006.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador