NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-005

Department of Health and Community Services

Summary: The Applicant applied to The Department of Health and Community Services (the "Department") under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to information related to the provision of the Selfcare/Telecare service, including the Memorandum of Understanding (the "MOU") between the Province of Newfoundland and Labrador and the Province of New Brunswick with respect to this service. The Department and the Applicant acknowledged the MOU as the only responsive record. The Department denied access to the entire record citing sections 23 (Intergovernmental Relations), 24 (Financial or Economic Interests of a Public Body), and 27 (Business Interests of a Third Party). The Commissioner concluded that a portion of the responsive record, identified as a contract between another Province and a third party, as well as Schedule C to the Agreement between the two Provinces, were appropriately withheld in accordance with sections 23(1)(b)and 23(1)(a) respectively. The remainder of the record was not protected by either of the claimed exceptions. The Commissioner recommended that the MOU be disclosed to the Applicant, with the exception of the above noted contract as appended to the MOU and Schedule C.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A-1.1, as am, ss. 2(t), 3, 23(1), 24(1), 27(1), 28, 49(1), 50, 60, 64(1).

Authorities Cited: Newfoundland and Labrador OIPC Reports 2007-003, 2006-011, 2006-001, and 2006-006.

I BACKGROUND

[1] Under authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"), the Applicant submitted an access to information request to the Department of Health and Community Services (the "Department"), dated 14 September 2006, wherein it requested access to the following:

> 1. *Memorandum of Understanding between Gov of NL and the Gov of NB to provide the Selfcare/Telecare service or any other agreements related to this service.*
> 2. *Any agreements directly with Clinidata for providing the Selfcare/Telecare service.*
> 3. *Information on the Primary Health Care Atlantic partnership that relates to the Selfcare/Telecare services.*

[2] In correspondence dated 27 September 2006 the Department advised the Applicant that the responsive records "…may contain information which, if disclosed, might affect the business interest of a third party as described in section 27…" The Department further advised that each of the third parties had been notified in accordance with section 28. The corporation named in the Applicant's request, Clinidata, and the Province of New Brunswick were identified by the Department as third parties for the purpose of section 27. While I do not normally identify third parties, the Province of Newfoundland and Labrador has publicly identified the Province of New Brunswick as the lead province for Selfcare/Telecare Atlantic and has announced that it has signed an agreement with the Province of New Brunswick to establish a Selfcare/Telecare Nurse Contact Centre in this Province. In addition, this Province has publicly announced that Clinidata Corporation (Clinidata) will operate this contact centre.

[3] In subsequent correspondence dated 6 November 2006 the Department advised the Applicant that information responsive to item 2 of the Applicant's request did not exist and access to all other information requested by the Applicant was being denied in its entirety in accordance with sections 23, 24 and 27 of the *ATIPPA*:

> *…Information that is responsive to the request consists of agreements between the Province of New Brunswick and the Province of Newfoundland and Labrador.*

> *There is no direct contractual agreement between the Province of Newfoundland and Labrador and Clinidata Corporation. There are no specific documents other than the aforementioned records related to the selfcare/telecare arrangements between the Province of New Brunswick and the Province of Newfoundland and Labrador.*
>
> *Access to these documents is being denied in accordance with:*
>
> > *a) section 23 of the Act whereby information was provided in confidence from the Province of New Brunswick and disclosure is anticipated to be injurious to the relations between our two provinces,*
> >
> > *b) section 24 of the Act whereby information disclosed could reasonably cause financial or economic harm to the province, and*
> >
> > *c) section 27 of the Act whereby the information is of a commercial nature, was provided to government in confidence and it can reasonably* [*be*] *asserted that the release of the information would harm the competitive position of the third party.*

[4] The Applicant filed a Request for Review with this Office on 21 November 2006 with respect to items 1 and 3 of his original application for access, as referenced above. Item 2, therefore, is not at issue in this investigation. The Department was notified of this Request for Review in correspondence dated 22 November 2006, and was asked to provide the appropriate documentation and a complete copy of the responsive record for my review. The Department provided a copy of an "Agreement" between the Province of New Brunswick and the Province of Newfoundland and Labrador with respect to the selfcare/telecare initiative. The Department also provided a copy of a second document which it has identified as an amended Agreement between the two Provinces to replace the original Agreement. Collectively, both of these agreements and all supporting Schedules to each agreement are referred to as the Memorandum of Understanding (MOU) as requested in item 1 of the Applicant's request. It is this MOU that I am considering to be the responsive record for the purpose of this review.

[5] Attempts to resolve this Request for Review by informal means were unsuccessful. On 7 February 2007 the Applicant and the Department 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*. Clinidata and the

Province of New Brunswick were also invited to provide written representations to this Office. The Department, the Applicant and Clinidata each filed written submissions in support of their respective positions. The Province of New Brunswick did not file a submission.

II PUBLIC BODY'S SUBMISSION

[6] The Department acknowledged the existence of a Memorandum of Understanding (MOU) as requested in item 1 of the Applicant's request and accepted this MOU as the responsive record. The Department also acknowledged that a copy of an agreement between Clinidata and the Province of New Brunswick was appended to this MOU. As such, the Department considered this agreement to be part of the responsive record. With respect to item 2 of the Applicant's request, the Department submits that "…there is no direct contract between Clinidata and the Province of Newfoundland and Labrador respecting the provision of selfcare/telecare services."

[7] Item 3 of the Applicant's request relates to information about the Primary Health Care Atlantic partnership as it relates to selfcare/telecare services. The Department submits that no documents, other than the MOU that has been identified as the responsive record, could be found that would be considered responsive to item 3.

[8] Having identified the responsive record as the MOU, including the appended agreement, the Department provided arguments in support of each of the exceptions claimed in denying access to the record. The Department first submits that release of the record would reveal information that was provided in confidence by another province and could reasonably be expected to harm relations with that province, as provided for in section 23 of the *ATIPPA*. In further support of this position, the Department points out that this other Province concurred in an e-mail that disclosure of the responsive record would harm inter-provincial relations.

[9] The Department submits that section 23 is a broad injury based exemption "…whereby probable harm may reasonably be expected to occur to relations between jurisdictions." Such harm may arise from the release of information about negotiations, deliberations or

consultations. According to the Department, the MOU reflects an ongoing relationship between this Government and the Government of New Brunswick, as well as a broader relationship between all Atlantic Provinces and Health Canada, thereby reflecting a multi-jurisdictional strategy. The Department argues that "…a more certain reaction would be to cause harm to the negotiating position of the Province for future multijurisdictional projects, continuation or extension to the existing agreements, or for accessing future funding under the Primary Health Care Transition Fund."

[10] The Department also submits that releasing the responsive record "…could reasonably cause financial or economic harm to the province," as provided for in section 24 of the *ATIPPA*. In support of this position, the Department points out that the MOU with the Province of New Brunswick establishes that Province as the agent for the Province of Newfoundland and Labrador with respect to the selfcare/telecare initiative. As such, the MOU allows this Province to avail of the existing expertise and experience of Clinidata and the Province of New Brunswick while achieving both operational and financial savings. The Department argues that disclosure of the responsive record may harm such an arrangement:

> *Should the Province of New Brunswick decide to terminate the MOU or refuse to negotiate extensions to the MOU or any future agreement, this would result in financial and technical loss and subsequent harm to the Province of Newfoundland and Labrador. Public disclosure of the responsive documents may also negatively impact the capacity of New Brunswick as the agent, in negotiations respecting other private sector vendors, for professional services or for acquisition of capital assets and may have adverse effects for the relationship between the two Provinces and Clinidata Corporation.*

[11] The third and final exception claimed by the Department deals specifically with the agreement between Clinidata and the Province of New Brunswick, as appended to the MOU. The Department submits that disclosure of this agreement would cause commercial, financial or technical harm to a third party, namely Clinidata, and as such must be withheld in accordance with section 27 of the *ATIPPA*. The Department also submits that such disclosure would reveal trade secrets of Clinidata, as defined by *Black's Law Dictionary*.

[12] The Department acknowledges the harms test set out in section 27 and in particular the criteria outlined in sections 27(1)(a), (b) and (c). However, the Department does not provide specific arguments in support of this test, but instead refers to the submission of the third party: "We support [Clinidata's] reasoning and as such will not reproduce specific comments in this representation."

III APPLICANT'S SUBMISSION

[13] In its submission, the Applicant provides a description of its structure, experience and the services it provides. With respect to the responsive record, the Applicant acknowledges the need to maintain pricing confidentiality, but feels it is entitled to program requirements and specifications. The Applicant states that it "…should be granted access to information of the current, **un-tendered** service requirements and allowances…" (emphasis in original).

[14] The Applicant has acknowledged that for the purposes of this Request for Review, the responsive record consists of the MOU and attached schedules.

IV THIRD PARTY'S SUBMISSION (CLINIDATA)

[15] Clinidata refers specifically to its "commercial contracts" with the Province of New Brunswick, as appended to the MOU between the Province of Newfoundland and Labrador and the Province of New Brunswick. Clinidata submits that these contracts are "…outside the scope of the access request and ought not to be produced on that basis." In the event, however, that the head determines the contracts to be within the scope of the request, and are not withheld under authority of section 23, Clinidata submits that the contracts "…ought not to be disclosed or certain identified provisions redacted in accordance with section 27 of the *Act*."

[16] In its submission, Clinidata points out that it did not receive a copy of the MOU and, as a result, is unable to make a submission with respect to disclosure of the MOU. In the event the

Department decides to disclose all or part of the MOU to the Applicant, Clinidata requests an opportunity to review the MOU and "…to make submissions regarding its disclosure that may negatively impact [its] competitive position."

[17] In support of its position with respect to the potential disclosure of its "commercial contracts," Clinidata states in general that "…any disclosure would prejudice its competitive position and significantly interfere with contractual and other negotiations in which it may be involved presently and in the future." Clinidata also provides more detailed submissions with respect to a number of identified sections of the contracts and in each case it claims various provisions of section 27.

[18] In claiming section 27, Clinidata refers to its experience in the telehealth area and submits that certain information and processes were developed through this experience as well as through extensive research and development. As such, Clinidata claims that considerable information contained in the responsive record is the "intellectual property/trade secret of the company" and "key commercial information." It also claims that such information was supplied in confidence and disclosing it would harm its competitive position. Clinidata also states that it sees the disclosure of certain information "…as potentially adversely impacting negotiations with other customers and potentially providing competitors with an advantage."

IV DISCUSSION

[19] Before dealing specifically with the exceptions to access as claimed by the Department, I will first deal with the claim by Clinidata that its "commercial contracts" with the Province of New Brunswick "…are outside the scope of the access request and ought not to be produced on that basis." It is important at this point to provide some clarity with respect to the documents at issue and the terminology used by the various parties.

[20] The MOU consists of an "Agreement" between the Province of Newfoundland and Labrador and the Province of New Brunswick and includes a number of appended Schedules. As indicated

earlier, the Department provided two versions of this Agreement, with one being the original Agreement and the other being the amended Agreement. For ease of reference I will refer to both versions together as the "Provincial Agreement." Attached to this Provincial Agreement as appended Schedules are copies of an "Agreement" and a subsequent "Amending Agreement" between Clinidata and the Province of New Brunswick. The reference in the Clinidata submission to its "commercial contracts" is a reference to this latter Agreement and Amending Agreement. Again, for ease of reference I will refer to these two documents together as the "Clinidata Contract."

[21] Notwithstanding Clinidata's claim that the Clinidata Contract is outside the scope of the request, the Department has taken the position that as an appended Schedule to the Provincial Agreement this Contract is considered responsive to the request. I agree with the Department on this point and am considering the Provincial Agreement in its entirety (the MOU), including the appended Clinidata Contract, to be the responsive record for the purpose of this Review. Having so decided I will now look to the exceptions as claimed by the Department.

[22] In its submission, the Department acknowledged that the documents in question were reviewed and assessed in accordance with purposes of the *ATIPPA*, as set out in section 3:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
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> *(a) giving the public a right of access to records;*
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> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
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> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*

(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.

[23] I have spoken in a number of Reports on the importance of section 3 and its influence on the overall interpretation of the legislation. In my Report 2007-003 I said that

51 It is clear from my previous comments that I consider the express purposes of the legislation to be very important when determining whether or not a public body has appropriately withheld information from an Applicant. While I do not diminish the importance of the specific wording of the legislation, I believe that any exception to the general right of access must be applied within the spirit and intent of the legislation. Section 3 clearly establishes this intent as one of accountability and it is within this context that I must interpret the wording of the ATIPPA.

[24] An important element of the accountability inherent in section 3 is the burden of proof as mandated by section 64. When an exception to access is claimed, the *ATIPPA* clearly places the burden on the public body or a third party to prove that an applicant has no right of access:

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.

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

[25] The Department has denied access to the responsive record in its entirety, citing sections 23, 24 and 27 of the *ATIPPA*. Sections 23 and 24 are discretionary in nature in that they *permit* a public body to refuse access to records. Section 27 is mandatory and *requires* a public body to refuse access to any record which it deems to fall within the scope of the exception. Each of the three exceptions claimed, other than paragraph (b) of section 23(1), is predicated on the probability of harm. My expectations with respect to harm have been clearly set out in a number of previous Reports. For example, in my Report 2006-011 I commented on the test of harm in the context of section 24:

> *16 The application of section 24(1) relies on a reasonable expectation of harm test. I have discussed this issue in previous reports and have concluded that any claim of harm under access to information legislation must meet a test of probability. The mere possibility of harm does not meet the test anticipated by the legislation and, as such, does not invite the protection of the legislation. In my Report 2005-002 I established that this concept has been clearly supported by the Courts:…*
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> *19 In light of the burden of proof mandated by section 64 of the ATIPPA, and the extensive body of case law, it is the responsibility of the* [*public body*] *to clearly show a reasonable expectation of probable harm through the presentation of detailed and convincing evidence...*

[26] In the context of sections 3 and 64, and in consideration of the Department's responsibility to provide detailed and convincing evidence that releasing the responsive record to the Applicant would probably cause harm, I now turn to each of the exceptions claimed by the Department.

Intergovernmental Relations (Section 23)

[27] Section 23 of the *ATIPPA* is a discretionary exception which allows a public body to withhold information that could reasonably be expected to cause harm to intergovernmental relations or negotiations or would reveal information received in confidence from a government body. Section 23(1) provides as follows:

> *23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
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> *(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*
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> *(i) the government of Canada or a province,*
>
> *(ii) the council of a local government body,*
>
> *(iii) the government of a foreign state, or*
>
> *(iv) an international organization of states; or*
>
> *(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*

Specifically, the Department refers to section 23(1)(a)(i) and section 23(1)(b). In so doing, the Department is claiming that release of the responsive record would reveal information provided in confidence by another Province and that such release would likely cause harm to inter-provincial relations. Notwithstanding my comments with respect to harm, I noted in my Report 2006-006 that there is an important distinction between sections 23(1)(a) and 23(1)(b). Section 23(1)(a) clearly anticipates a reasonable expectation of harm. Section 23(1)(b), however, requires only that the information be “received in confidence” and does not require a determination of harm. I will first look to the application of section 23(1)(b).

[28] Section 23(1)(b) requires the satisfaction of two conditions. First, the information in question must have been received from one of the entities listed in paragraph (a) and, second, it must have been received in confidence. With respect to the first condition, it is important to focus on the word “received.” In my Report 2006-001 I dealt with a similar issue in the context of section 27(1)(b). In that case, I relied on the conclusions of the British Columbia Information and Privacy Commissioner and agreed that there is a distinction between information that is “supplied” and information that is “negotiated:”

> *61 ...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...*

I acknowledge the difference between the term “supplied” and “received” in the context of the *ATIPPA*, but I believe the concept as articulated in my Report 2006-001 is equally relevant to the case at hand. Information that is negotiated between two or more parties is neither supplied nor received by either of those parties.

[29] The Agreement between the Province of Newfoundland and Labrador and the Province of New Brunswick (the Provincial Agreement) has clearly been negotiated and duly signed by the parties. I do not accept that it has been “received” for the purposes of section 23(1)(b) and, as such, it is not necessary to look to the issue of confidentiality. The Department, therefore, cannot rely on this provision to deny access to this particular document.

[30] It is important to note at this point, however, that appended to the Provincial Agreement is an Agreement between Clinidata and the Province of New Brunswick (the Clinidata Contract). The Province of Newfoundland and Labrador is not a signatory to the Clinidata Contract and, as a result, appears not to have participated in the negotiations. I accept, therefore, that the Clinidata Contract does meet the condition of having been received by the Department, for the purposes of section 23(1)(b).

[31] Having accepted that the Clinidata Contract, as appended to the Provincial Agreement, was received by the Department I will now look to the issue of confidentiality as required by section 23(1)(b). I dealt specifically with this issue in my Report 2006-006:

> *20 … The British Columbia Commissioner goes on to say that*
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> > *In cases where information is alleged to have been "received in confidence", in my view, there must be an implicit or explicit agreement or understanding of confidentiality on the part of both those supplying and receiving the information. For example, it may be that if a public body asks the British Columbia government for information, and says the request is made in confidence, the information will have been received in confidence. But if the government declines at the outset to treat the supply as being confidential, the information will not have been received in confidence. This interpretation accords with what I think is the legislative policy underlying s. 16(1)(b), i.e., to promote and protect the free flow of information between governments and their agencies for the purpose of discharging their duties and functions.*
>
> *21 I agree with the analysis of the Commissioner in Order 331-1999 and believe that for the purposes of section 23(1)(b) of the ATIPPA, the intent of the Department in receiving the information at issue is an important consideration in determining confidentiality, in addition to the intent of the supplier of the information. As such, the Department maintains the onus of establishing that it fully intended to receive the information in confidence. This differs from the requirement of section 27(1)(b), where the focus is on establishing whether or not the supplier of the information intended that it be supplied in confidence.*

[32] I also noted in my Report 2006-006 that section 23(1)(b), unlike section 27(1)(b) for example, does not allow for implicit confidentiality. As such, I concluded that the Legislators "…in leaving out the phrase 'implicitly or explicitly' in [section 23(1)(b)], intended a more strict

interpretation of confidentiality and placed a higher standard on public bodies to show that information had been received in confidence."

[33] In establishing the level of confidentiality intended by the Department I first looked to the wording of the Provincial Agreement. While I have concluded that the Agreement itself was negotiated and therefore not received for the purposes of section 23(1)(b), the Agreement clearly establishes an express expectation of confidentiality with respect to information obtained by the parties to the Agreement. Given that both the supplier (New Brunswick) and the receiver (Newfoundland and Labrador) of the Clinidata Contract are signatories to the Provincial Agreement, I believe there is a clear expectation of confidentiality on both Provinces. As such, I accept that the Clinidata Contract has been "received in confidence" from an entity set out in section 23(1)(a) and has been appropriately withheld from disclosure.

[34] Having reached my conclusions on section 23(1)(b), I will now look to the Departments claim of harm as anticipated by section 23(1)(a). Based on my conclusion that section 23(1)(b) applies to the Clinidata Contract, I need only analyze section 23(1)(a) in the context of the Provincial Agreement (for clarity, any reference to the Provincial Agreement throughout the remainder of this Report specifically excludes the Clinidata Contract). As I indicated earlier in this Report, in order to accept the application of section 23(1)(a), I expect detailed and convincing evidence of a reasonable expectation of probable harm. This is particularly important in the context of section 3 of the *ATIPPA*. 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.

[35] On reviewing the Provincial Agreement I am not convinced that release of the majority of the Agreement could reasonably be expected to harm relations between the Province of Newfoundland and Labrador and the Province of New Brunswick. The submission of the Department provides general statements that disclosure of the record may cause such harm, particularly as it relates to the Province's future negotiating position. I do accept, however, that

release of a single page of financial information, appended to the Provincial Agreement as Schedule "C", may lead to the harm anticipated by section 23(1)(a).

[36] Of particular interest is the response of the Province of New Brunswick to the Department's claim of possible harm. In its third party notification letter to the Province of New Brunswick, dated 27 September 2006, the Department expressly referred to section 23 of the *ATIPPA* and the potential harm to intergovernmental relations that release of the responsive record may cause. The Province of New Brunswick was given an opportunity to make representations as to why the record should not be disclosed. Such representations were to be made in writing within 20 days from the date of the letter. I note that the Province of New Brunswick did not respond to this letter. As a follow-up to this letter the Department initiated a series of e-mails in which the issue of harm was again raised. In this case a representative of the Province of New Brunswick did respond, but simply agreed with the Department that release of the responsive record would be injurious to relations between the two Provinces. I believe the Province of New Brunswick's failure to respond to the initial letter and its failure to subsequently provide any evidence to support a claim of harm, supports my conclusion that a reasonable expectation of probable harm does not exist in this case. In the absence of any detailed and convincing evidence from either of the parties to the Provincial Agreement, I cannot accept a claim of harm as anticipated by section 23(1)(a) of the *ATIPPA*, except as it relates to Schedule "C".

[37] In further support of my conclusions in this regard, I would again refer to the specific wording of the Provincial Agreement. While it is not my intent to reveal the content of this Agreement, it is important to note that the parties to the Agreement did acknowledge that notwithstanding reasonable efforts to preserve confidentiality, they understand that information or other material may be released in accordance with right to information requests. I believe such an express acknowledgement of the potential for release of information through access legislation weakens the argument for harm. If a reasonable expectation of probable harm to inter-provincial relations truly existed I do not believe that both parties would have endorsed such language.

Harm to Financial or Economic Interests of a Public Body (Section 24)

[38] Section 24 is a discretionary exception which establishes a reasonable expectation of harm to the financial or economic interests of a public body. Section 24(1) provides as follows:

> 24. (1) *The head of a public body may refuse to disclose to an applicant information the disclosure of which could reasonably be expected to harm the financial or economic interests of a public body or the government of the province or the ability of the government to manage the economy, including the following information:*
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> *(a) trade secrets of a public body or the government of the province;*
>
> *(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province and that has, or is reasonably likely to have, monetary value;*
>
> *(c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;*
>
> *(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in the undue financial loss or gain to a third party; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

[39] In my Report 2006-011 I accepted the conclusions of the Information and Privacy Commissioner for British Columbia with respect to that Province's equivalent provision to section 24(1) of the *ATIPPA*:

> *18 In dealing specifically with the potential harm to the financial or economic interests of a public body, the British Columbia Commissioner in his Order 02-50 referenced a number of Court cases, including Canada Packers Inc. On reviewing the pertinent case law he summarized as follows:*
>
>> *137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic*

> *interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information....There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*

Section 17(1) of British Columbia's Freedom of Information and Protection of Privacy Act is, in all material respects, equivalent to section 24(1) of the ATIPPA.

[40] In claiming section 24 of the *ATIPPA* the Department is relying on its claim of harm to inter-provincial relations under authority of section 23. In the event such relations are harmed to the point of adversely affecting the existing Provincial Agreement and/or future negotiations, the Department submits that this would "…result in financial and technical loss and subsequent harm to the Province of Newfoundland and Labrador." In light of my earlier conclusion that release of the majority of the Provincial Agreement portion of the responsive record would not likely cause the harm anticipated by section 23, I am unable to accept a claim of harm to the financial or economic interests of the Province. Based on my conclusion with respect to section 23 together with the evidence presented in support of section 24, I do not believe that a clear and direct connection between the disclosure of the record and the harm alleged has been established in this case. As such, it is my opinion that there is no basis to withhold the Provincial Agreement under authority of section 24(1).

[41] The Department also argues that disclosure may have a negative impact on the capacity of New Brunswick to act as agent in negotiations with private sector vendors and, more particularly, may adversely affect the relationship between the two Provinces and Clinidata. The Department submits that such harm is more probable should the Clinidata Contract be released. Having concluded that the Clinidata Contract portion of the responsive record has been appropriately withheld in accordance with section 23(1)(b), it is not necessary to address any potential harm that release of this portion of the record may cause in accordance with section 24(1).

Harm to Business Interests of a Third Party (Section 27)

[42] Section 27(1) of the *ATIPPA* 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.*

[43] "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.

[44] The Department has identified the Province of New Brunswick and Clinidata as third parties for the purpose of section 27. Both the Department and Clinidata provide arguments in support of the section 27 exception, but in each case these arguments relate directly to the Clinidata Contract portion of the responsive record, as appended to the Provincial Agreement. In light of

my conclusion that this portion of the responsive record has been appropriately withheld under authority of section 23(1)(b), it is not necessary for me to decide on the application of section 27 as it relates to the Clinidata Contract.

[45] I note that in its submission, Clinidata states that it did not receive a copy of the MOU from the Department and therefore is "…unable to make submissions regarding disclosure of that document." Clinidata further states that in the event the Department decides to release the MOU, or portions thereof, it would like an opportunity to review the MOU and to "…make submissions regarding its disclosure that may negatively impact [its] competitive position." On this issue, I would refer to section 28 of the *ATIPPA*:

> *28. (1) Where the head of a public body intends to give access to a record that the head has reason to believe contains information that might be excepted from disclosure under section 27, the head shall give the third party a written notice under subsection (3).*
>
> *(2) Where the head of a public body does not intend to give access to a record that contains information excepted from disclosure under section 27, the head may give the third party a written notice under subsection (3).*
>
> *(3) The notice shall*
>
> *(a) state that a request has been made by an applicant for access to a record containing information the disclosure of which may affect the interests of the third party;*
>
> *(b) describe the contents of the record; and*
>
> *(c) state that, within 20 days after the notice is given, the third party may, in writing, consent to the disclosure or may make written representations to the public body explaining why the information should not be disclosed.*
>
> *(4) When notice is given under subsection (1), the head of the public body shall also give the applicant a notice stating that*
>
> *(a) the record requested by the applicant contains information the disclosure of which may affect the interests of a third party;*
>
> *(b) the third party is being given an opportunity to make representations concerning disclosure; and*

(c) a decision will be made within 30 days about whether or not to give the applicant access to the record.

[46] In correspondence dated 27 September 2006, the Department notified Clinidata that it had received a request under the *ATIPPA* for access to records and that disclosure of information contained within these records may affect the business interests of Clinidata as described in section 27. The information at issue was the Agreement and the Amended Agreement between Clinidata and the Province of New Brunswick (the Clinidata Contract), copies of which were attached to the Department's notice. The Department did not include a copy of the Provincial Agreement. Clearly, the Department had reason to believe that the Clinidata Contract contains information that is or might be excepted from disclosure under section 27, thereby engaging section 28. It is also clear, however, that the Department did not have reason to believe that information contained in the Provincial Agreement may be harmful to the business interests of Clinidata. As such, they did not engage the section 27 exception with respect to the Provincial Agreement and the third party Clinidata. I have no reason to question the decision of the Department in this regard and see no reason why Clinidata is entitled to a review of the MOU in its entirety, nor to make submissions with respect to the release of the Provincial Agreement portion of the MOU.

[47] In addition to its notice to Clinidata, the Department notified the Province of New Brunswick in accordance with section 28. In this case, however, the Department engaged section 27 with respect to the entire responsive record, suggesting that disclosure of information contained in the record "…may affect the financial interests of the Government of New Brunswick, as described in section 27 of the *Act*." The Province of New Brunswick chose not to respond to this notice within the 20 days provided for in section 28(3)(c). In subsequent correspondence between the Province of Newfoundland and Labrador and the Province of New Brunswick, the Province of New Brunswick did agree that release of the documents in question would be injurious to relations between the two Provinces, as provided for in section 23. At no point, however, did the Province of New Brunswick provide any evidence in support of a claim of harm to its business interests, in accordance with the three-part harms test set out in section 27. I also note that the Province of New Brunswick chose not to provide a submission to this Office.

[48] It is also important to note that the submission of the Department with respect to section 27 referred specifically to the Clinidata Contract. The Department did not submit evidence in support of potential harm to the business interests of the Province of New Brunswick. Based on the absence of any submission and/or evidence in support of the application of section 27 in the context of the Province of New Brunswick, I conclude that neither the Department nor the Province of New Brunswick has proven that section 27 applies to the responsive record, or some portion thereof.

[49] Notwithstanding my conclusions with respect to section 27, I believe it would be useful to again refer to my earlier reference to Report 2006-001. In that Report I concluded that information that has been negotiated has not been "supplied" for the purpose of section 27(1)(b). Given that the Provincial Agreement has been negotiated between the parties, it would not meet the second part of the three-part harms test mandated by section 27 and, therefore, section 27 cannot be relied upon to prevent its disclosure.

IV CONCLUSION

[50] It was necessary in this Report to distinguish between certain portions of the responsive record. The appended Clinidata Contract was considered as a separate document from the remainder of the MOU, which was referred to as the Provincial Agreement. While both the Provincial Agreement and the Clinidata Contract comprise the responsive record, I have reached separate conclusions with respect to these documents.

[51] The Department submitted that the MOU should be withheld from disclosure in its entirety in accordance with sections 23, 24 and 27 of the *ATIPPA*. On reviewing the responsive record, I accepted that the Clinidata Contract, as appended to the MOU, was provided to the Province of Newfoundland and Labrador by the Province of New Brunswick in confidence. As such, I concluded that this portion of the responsive record was appropriately withheld in accordance with section 23(1)(b). I also concluded that a single page of the responsive record, identified as Schedule "C" to the Provincial Agreement, was appropriately withheld in accordance with

section 23(1)(a). With respect to the remainder of the responsive record, I was not convinced that its disclosure could reasonably be expected to lead to the harm anticipated by section 23 and section 24.

[52] With respect to section 27, it was not necessary to consider this exception in the context of the Clinidata Contract, in light of my conclusion with respect to section 23(1)(b). Likewise, it was not necessary to consider the submission of Clinidata. I have acknowledged the request by Clinidata to review and provide submissions on the release of the MOU, but have rejected this request on the grounds that the Department made no claim that disclosure of the MOU, other than the Clinidata Contract portion, may be harmful to the business interests of Clinidata. With respect to the application of section 27 in the context of the Province of New Brunswick, there was no evidence to suggest that the disclosure of the Provincial Agreement would be harmful to the business interests of the Province of New Brunswick. As a result, I have concluded that section 27 does not apply to the responsive record.

V RECOMMENDATION

[53] Under authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Department of Health and Community Services provide the Applicant with a copy of the responsive record, identified as the Memorandum of Understanding between the Province of Newfoundland and Labrador and the Province of New Brunswick, including the original Agreement and the amended Agreement and all Schedules, with the exception of Schedule "C" and the Schedules identified as the Agreement and the Amended Agreement between Clinidata and the Province of New Brunswick . Schedule "C" and the Agreements between Clinidata and the Province of New Brunswick have been appropriately withheld from disclosure.

[54] Under authority of section 50 of the *ATIPPA*, I direct the head of the Department of Health and Community Services to write to this Office, the Applicant and the third parties within 15 days after receiving this Commissioner's Report to indicate the Department's final decision with respect to this Report.

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

[56] Dated at St. John's, in the Province of Newfoundland and Labrador, this 4th day of May 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador