June 26, 2007 **2007-008**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-008

Eastern Regional Integrated Health Authority ("Eastern Health")

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to the results of hormone receptor tests conducted by Eastern Health for 866 cancer patients and to the results of the subsequent retests for those patients conducted by Mount Sinai Hospital. The Applicant was not requesting disclosure of the names of the patients or of any other information that would identify the individual patients. Eastern Health refused to release the test results claiming that the responsive record contained the personal information of the patients and that it was therefore prohibited by section 30(1) of the *ATIPPA* from releasing the records. The Commissioner found that information in the records could be severed such that their release would not disclose personal information to the Applicant. The Commissioner recommended that the responsive record be disclosed with all identifying information severed.

Statutes Cited: *Access to Information and Protection of Privacy Act*, S.N.L. 2002, c. A – 1.1, as am, ss. 2(o), 3, 7, 30, 46, 47, 49, 50, 60, and 64; *Freedom of Information and Protection of Privacy Act, 1987* (Ontario)*; Freedom of Information and Protection of Privacy Act,* R.S.O. 1990, c. F.31; *Municipal Freedom of Information and Protection of Privacy Act*, R.S.O. 1990, c. M.56; *Freedom of Information and Protection of Privacy Act*, R.S.B.C. 1996, c. 165; *Freedom of Information and Protection of Privacy Act*, S.N.S. 1993, c. 5; *Freedom of Information and Protection of Privacy Act*, S.P.E.I. 2001, c. 37.

Authorities Cited: Newfoundland and Labrador OIPC Report 2007-004 (2007); *Ontario (Attorney General) v. Pascoe* (2001), 154 O.A.C. 97 (Ont. Div. Ct.); Ontario OIPC Order P-230 (1991); Ontario OIPC Order P-644 (1994); Ontario OIPC Order P-1389 (1997); Ontario OIPC Order PO-1880 (2001);

Ontario OIPC Order MO-1865-I (2004); British Columbia OIPC Order 03-42 (2003); Nova Scotia Review Office Report FI-99-103 (2000); Nova Scotia Review Office Report FI-00-109 (2001); Prince Edward Island OIPC Order No. 05-005 (2005).

I BACKGROUND

[1] Under the authority of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") the Applicant submitted an access to information request dated 9 February 2007 to Eastern Health, wherein the Applicant requested access as follows:

> *The results of the hormone receptor tests in this province that were sent for retesting from 1997 to the present.*
>
> *I'm requesting the original result of the first test and the result for each re-test. I'm looking for the percentage changes that were found.*
>
> *In each case: What percentage of hormone receptor positivity did the original show? What result did the retest find?*
>
> *I am not requesting the names of the patients or any information that might identify them.*

[2] Eastern Health received the Applicant's request on 15 February 2007 and in correspondence dated 16 March 2007 Eastern Health advised the Applicant that access to the responsive record was being denied under the mandatory exception to disclosure set out in section 30(1) of the *ATIPPA,* advising the Applicant as follows:

> *The results of each patient's hormone receptor tests are considered the personal information of these individuals. The results are reported as percentage of positivity, and we cannot therefore provide the specifics that you requested.*

[3] In a Request for Review dated 21 March 2007 and filed with this Office on 26 March 2007, the Applicant requested a review of the decision of Eastern Health to deny access to the responsive record.

[4] Attempts to resolve this Request for Review by informal means were not successful. By correspondence dated 16 May 2007 the Applicant and Eastern Health were both notified that the Request for Review had been referred for formal investigation pursuant to section 46(2) of the

ATIPPA and both were given an opportunity to provide written representations to this Office pursuant to section 47 of the *ATIPPA*.

II EASTERN HEALTH'S SUBMISSION

[5] The submission of Eastern Health has been set out in correspondence dated 16 March 2007, 13 April 2007, and 1 June 2007.

[6] The submission of Eastern Health includes the following in correspondence dated 13 April 2007:

> *The request for information in this case relates to and, presumably, arises out of circumstances which have been reported upon in the local and national media. Eastern Health laboratories test for hormone receptors in cancer cells of patients to determine if the cancer cells test positive for hormone receptors. In July, 2005 Eastern Health began to send tissue samples to Mount Sinai Hospital in order to retest the tissue samples for hormone receptivity. Eastern Health then announced to the public at large and disclosed to the patients involved that retesting had been initiated and reports of retesting received.*
>
> [*The Applicant's*] *request is for Eastern Health to provide him with the results of the original test for hormone receptivity and the retests by Mount Sinai.* [*The Applicant*] *makes the point that he is not requesting the names or any other identifiers for the individuals involved.*
>
> *Eastern Health nevertheless takes the position that the request by* [*the Applicant*] *is a request for the disclosure of personal information.*
>
> *Section 30(1) of the Access to Information and Protection of Privacy Act states that, "the head of a public body shall refuse to disclose personal information to an applicant."*
>
> *Personal information is defined in Section 2(o) of the Act as:*
>
> > "*recorded information about an identifiable individual including:*
> >
> > > *(vi) information about the individual's health care status or history including a physical and mental disability."*

> *Consequently, Eastern Health takes the position that the information requested is personal information if it constitutes recorded information about an identifiable individual.*

[7] In its correspondence dated 1 June 2007, Eastern Health made the following comment about the term "identifiable individual":

> *The test for whether an individual can reasonably be expected to be identified has been stated in the case law as:*
>
> > "*The test, then, for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identified from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the record.*

[8] In its correspondence dated 13 April 2007, Eastern Health referred to certain information that it believes is "from sources otherwise available", which could be combined with information from the responsive record to make its tested patients "identifiable individuals." It made the following comments:

> *In this case, the people whose tests results have been requested are a group which is coincident with the class definition of being utilized in a proposed class action entitled* [*Court docket number*] *between* [*Name of Plaintiff*]*, Plaintiff and Eastern Regional Integrated Health Authority, Defendant, in respect of which there is a pending Application for Certification of a class action. That class action purports to be taken on behalf of a class defined as women who underwent breast cancer tissue biopsies and hormone receptor tests in respect of whom the tissue samples were tested at Eastern Health and tissue samples were subsequently sent by Eastern Health for retesting at Mount Sinai.*
>
> *Consequently, the request by* [*the Applicant*] *is essentially a request for the medical record of the people who fall within the proposed class definition.*
>
> *In the context of the class action proceeding, there are several individuals who have identified themselves or been identified by class counsel in Affidavits, pleadings, and other materials filed with the Court. Further, there was at least one other individual action brought on behalf of a Plaintiff who has been identified as being a member of the class. Therefore, although the request from*

> [*the Applicant*] *is not for disclosure of records which would allow him to match the results with the individuals identified already within the context of the class proceeding, it is quite possible that this would become the case as the class action progress* [sic] *and further disclosure is required in the context of that proceeding.*
>
> *Moreover, if the class action proceeding is certified, or even in connection with the Application for Certification, a list of people who have identified themselves to class counsel as being within the class will be disclosed. As a result, it is quite likely that if the class action is certified, then within the context of that class action the names of all the individuals whose test results are now being requested by* [*the Applicant*] *will be disclosed. It is the position of Eastern Health that this renders the information requested by* [*the Applicant*] *as information about an identifiable individual and therefore personal information within the meaning of the Act.*
>
> *Furthermore, if the proposed class proceeding is not certified as a class action, then it is a significant possibility that all of the people who are putatively part of the class would begin individual actions against Eastern Health. As a consequence, their names will be disclosed within the context of Court proceedings and this would then render the information requested by* [*the Applicant*] *as information about an identifiable individual and therefore personal information within the meaning of the Act.*
>
> [I note here that the Supreme Court of Newfoundland and Labrador, Trial Division granted the Application for Class Certification on 28 May 2007 and Mr. Justice Carl Thompson certified the action against Eastern Health as a Class Action]

[9] Eastern Health commented on the likelihood of the tested patients being identified in its correspondence of 1 June 2007 by stating the following:

> *The information that is requested has an increased likelihood of identifying individuals for several reasons. First of all, the information requested relates to two test results for the same individual. Although,* [*the Applicant*] *has indicated that identifying information be removed from the results, some form of linkage will have to be made to show if each individual test changed/converted. As such, two pieces of information will be revealed about one individual. For example, if one piece of information is known about an individual, it is possible to link back to obtain additional information about that individual.*
>
> *Secondly, the nature of the test results is very patient specific. Two patients may have had the same result on the initial test, but that does not guarantee that they would have had the same result on the second test. As such, this increases the*

> *likelihood that by knowing the test results of one patient, then through a process of elimination, another patient(s) could be identified.*
>
> *Thirdly, because of the media coverage (both print and radio) in the past few weeks, it may be possible that women who have had their results retested may have made inadvertent (or purposeful) disclosures through media in relation to their test results. In so doing, they have increased the number of known test/retest results that are in the public domain.*
>
> *Fourthly, information that is available through the court record for the class action certification as well as a separate individual action filed prior to the class action certification materials provides a method for identifying at least some of the women. In consideration of the information that is currently available and the nature of the test results, a release of the information that* [*the Applicant*] *is requesting is likely to link sufficient information to identify individual patients. Even if all women affected cannot be identified through linkage, the fact that any one women could be is enough to refuse to disclose this information as it is personal information.*

[10] Eastern Health has set out the rationale for its position that the requested records should not be disclosed in its correspondence dated 13 April 2007, as follow:

> *We trust that you will understand the position taken by Eastern Health in respect of this matter. We also trust that you will understand that it is not a position taken lightly, but after significant consideration by Eastern Health of the question as to whether in fact the information requested constitutes personal information. Although Eastern Health is not entirely in a position to say this at this time, Eastern Health expects that each of its patients whose test results are sought to be disclosed in the context of this Application by* [*the Applicant*] *would be somewhat distressed in the event that they saw their test results reported in the media. This consideration militates in support of the position taken by Eastern Health in this matter.*

[11] Eastern Health also commented on its rationale for refusing disclosure in its correspondence dated 1 June 2007, where it stated as follows:

> *Because of all the recent media coverage, some of which is inaccurate, we have had many calls from women affected by this matter. We would reiterate our assumption that providing their personal hospital test results to the media would cause additional distress to these women who are already trying to cope with the physical and emotional challenges of a cancer diagnosis.*

[12] Eastern Health made an additional comment in support of its position when it stated in its correspondence dated 1 June 2007 as follows:

> *We also note that the draft form of the new Personal Health Information Act refers to the concept of identifying an individual through the linkage of information. Although this legislation does not have the force of law, it does recognize the fact that although individual pieces of information on their own may not result in identifying an individual, it is possible to identify an individual if such information is combined.*

III APPLICANT'S SUBMISSION

[13] The Applicant's position is set out in his Request for Review dated 21 March 2007, as follows:

> *I'm questioning if section 30(1) of the Access to Information and Protection of Privacy Act applies.*
>
> *I am not asking for information about an identifiable individual(s).*
>
> *I am not requesting the names of patients or any information that might identify them.*
>
> *I am asking Eastern Health to please remove any information, identifying number, symbol, or other particular assigned to an individual.*
>
> [emphasis in original]

IV DISCUSSION

[14] A reading of the submission of Eastern Health and the Applicant's Request for Review indicates that the issue to be discussed in this Report is whether the information requested by the Applicant constitutes personal information within the meaning of the *ATIPPA*, specifically whether the requested information is about an "identifiable individual." Before discussing that issue, I will make some general comments on the *ATIPPA*.

[15] The purposes of the *ATIPPA* are set out in section 3, as follows:

> *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;*
>
> *(b) giving individuals a right of access to, and a right to request correction of personal information about themselves;*
>
> *(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.*

[16] Section 7 of the *ATIPPA* establishes the principle that there is a general right of access to records in the custody or control of a public body, subject to limited and specific exceptions, as follows:

> *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.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[17] Section 64 of the *ATIPPA* sets out the burden of proof to be applied on a Request for Review made to the Information and Privacy Commissioner as follows:

> *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.*

[18] A reading of sections 3, 7, and 64 indicates that the purpose of the *ATIPPA* is to make public bodies more accountable to the public by giving the public a general right of access to records in the custody of or under the control of a public body subject only to limited and specific exceptions. When a public body has denied access to a record and the Applicant has requested a review of that decision by the Information and Privacy Commissioner then the public body bears the burden of proving that the applicant has no right of access to the record or part of the record pursuant to section 64(1).

[19] As I discussed in my Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body in order to prove that an applicant has no right of access to a record under section 64(1). In my Report 2007-004, I adopted the civil standard of proof as the standard to be met by the public body under this section. In order for the public body to meet the burden of proof in section 64(1), the public body must prove on a balance of probabilities that the applicant has no right to the record or part of the record.

[20] I will now discuss the issues before me in this Request for Review.

[21] In this Review, Eastern Health has refused access to the requested information, claiming that it is excepted from disclosure pursuant to section 30(1) of the *ATIPPA*, which provides as follows:

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

[22] Section 2(o) of the *ATIPPA* provides the definition of personal information as follows:

> *2. (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*;

[23] Section 30(1) is a mandatory provision of the *ATIPPA*. Once a public body determines that this section applies, no discretion lies with the public body to decide to release the record that has been requested, unless one of the conditions indicated in section 30(2) applies. Neither of the parties to this Review has referred to any of the provisions in section 30(2) and I find that none of those exceptions apply.

[24] The issue to be discussed is whether the responsive record contains personal information as defined in section 2(o) of the *ATIPPA*.

[25] Eastern Health cites paragraph (vi) of section 2(o) which provides as follows:

> *(o) "personal information" means recorded information about an identifiable individual, including*
>
> . . .
>
> *(vi) information about the individual's health care status or history, including a physical or mental disability,*
>
> [emphasis added]

[26] The Applicant's Request for Review states that section 30(1) of the *ATTIPA* is not applicable because he is not asking for information about an "identifiable individual."

[27] Eastern Health takes the position that the information is about an "identifiable individual" and provides a test as to when information is about an identifiable individual as follows:

> *The test, then, for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identified from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the record.*

[28] Eastern Health submits that in the present case the test has been met and the requested information is about an identifiable individual.

[29] The test outlined by Eastern Health has been applied by Courts and Commissioners to determine whether information is about an identifiable individual. In *Ontario (Attorney General) v. Pascoe* (2001), 154 O.A.C. 97 (Ont. Div. Ct.), Lang J. speaking for the Court on a judicial review of Order PO-1880 of the Ontario Information and Privacy Commissioner stated at paragraphs 13 to 15:

> *13 The primary question before the commissioner was whether the information requested was "personal information," which is defined at s. 2(1), in the relevant part, as "information about an identifiable individual." Section 21(1) prohibits the head of an institution, in this case the Ministry, from disclosing such information to any person other than the individual to whom it relates, with certain exceptions. One of the exceptions is contained in s. 21(1)(f) permitting the disclosure of personal information if it "does not constitute an unjustified invasion of personal privacy."*
>
> *14 While the records in question do not name the physician, it is common ground that the records may themselves, or in combination with other information, identify the individual even if he or she is not specifically named. The test is accepted as follows:*

> *If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information.*
>
> *Order P-230, [1991] O.I.P.C. No. 21*
>
> *15 The test, then, for whether a record can give personal information asks if there is a reasonable expectation that, when the information in it is combined with information from sources otherwise available, the individual can be identified. A person is also identifiable from a record where he or she could be identified by those familiar with the particular circumstances or events contained in the record. See Order P-316, [1992] O.I.P.C. No. 74, and Order P-651, [1994] O.I.P.C. No. 104.*

[30] The test as to what constitutes an identifiable individual that was stated by Eastern Health and outlined in *Pascoe* was first articulated in a decision of the Ontario Information and Privacy Commissioner in Order P-230. In that decision, the Commissioner had to decide whether the scores of two successful candidates on a job competition constituted personal information within the definition set out in the Ontario *Freedom of Information and Protection of Privacy Act, 1987* and, if so, would severing personal identifiers remove the remaining information from the scope of the definition of personal information under the *Act.* The Commissioner found that the scores were the personal information of the successful candidates and that the severing of the personal identifiers would not remove the scores from the definition of personal information. The Commissioner stated at pages 9-10:

> *The appellant's argument is that, in view of the fact that there were two winning candidates rather than one, the release of the two aggregate scores without any other personal identifiers would not enable him to identify which score belonged to which individual.*
>
> *He contends that a score alone would not be personal information, as it is not recorded information about <u>an identifiable</u> individual. In effect, he is stating that by severing the names of the candidates from the record, the remaining information would not constitute personal information.*
>
> . . .
>
> *In this appeal, the appellant has requested the aggregate total scores of "the two successful applicants". The nature of the request is essentially the same as that considered in Order 20, in spite of the fact that there are two successful candidates in this case, and only one in the former. In my view, any release of information concerning these two persons would be tantamount to disclosing their*

> *names. The information at issue in this appeal relates to only two individuals, both of whom are known to the appellant. As such, the ability to identify which score belongs to which person is markedly increased.*
>
> *I believe that provisions of the Act relating to protection of personal privacy should not be read in a restrictive manner. If there is a reasonable expectation that the individual can be identified from the information, then such information qualifies under subsection 2(1) as personal information. In this appeal, I am of the view that there is such a reasonable expectation and that the aggregate scores of the two successful candidates fall within the definition of personal information under subsection 2(1).*
>
> [emphasis in original]

[31] The Ontario Commissioner was influenced in Order P-230 by the small number of individuals to whom the information related. The number of individuals involved was also a factor taken into account in the decision of the Ontario Commissioner's Office in Order P-644. In that decision, the issue was whether, despite the fact that the information requested under the *Freedom of Information and Protection of Privacy Act* did not contain the names of individual physicians, they could nevertheless be identified given the information in the record. It is difficult to tell from a reading of the decision the number of physicians involved but it appears to have been less than five. The Commissioner's Office adopted the test articulated in Order P-230 and stated at page 3:

> *In the circumstances of this appeal, given the small number of individuals and the nature of the information at issue, I am of the view that there is a reasonable expectation that the release of the information would disclose information about* ***identifiable*** *individuals. Accordingly, I find that Record 14 contains the personal information of individuals other than the appellant.*
>
> [emphasis in original]

[32] The issue of what constitutes an identifiable individual was also discussed by the Ontario Commissioner's Office in Order P-1389. In that decision, the Commissioner's Office was dealing with a request under the *Freedom of Information and Protection of Privacy Ac*t to the Ministry of Health for access to a record that contained a list of the ten highest billing general practitioners in Metropolitan Toronto. The list contained only the ten total billing figures without any information identifying the doctors involved. The Commissioner's Office stated at page 3:

> *The Ministry further submits that there is a strong possibility that there exists some external information in the public domain or in the general practitioner community which could be linked to the information at issue to make a connection between a particular billing amount in the record and the practitioner associated with that billing.*
>
> . . .
>
> *In my view, the Ministry's arguments rely on the unproven possibility that there* ***may*** *exist a belief or knowledge of the type described. I have not been provided with any substantive evidence that information exists outside the Ministry which could be used to connect the dollar amounts to specific doctors. The scenario described by the Ministry is, in my view, too hypothetical and remote to persuade me that individual practitioners could actually be identified from the dollar amounts contained in the record. I find, therefore, that the information at issue is not about an* ***identifiable*** *individual and does not, therefore, meet the definition of "personal information" contained in section 2(1) of the Act.*
>
> [emphasis in original]

[33] Another case from the Office on the Information and Privacy Commissioner for Ontario dealing with the issue of what constitutes an identifiable individual is Order PO-1880 (upheld by the Ontario Divisional Court in *Ontario (Attorney General) v. Pascoe*). In that Order, the Commissioner's Office dealt with a request under the *Freedom of Information and Protection of Privacy Ac*t to the Ministry of Health and Long-Term Care for access to billing information in relation to the top billing doctor in the City of Toronto. The person making the access request made clear that she was not seeking access to the identity of the doctor involved. The Commissioner's Office stated at pages 7-8:

> *With respect to the current appeal, although the Ministry refers to a number of previous orders and correctly identifies the conclusions reached in those cases, the Ministry does not provide any evidence applying these general principles to the circumstances of this appeal. For example, although the Ministry refers to Order P-316 and states that "the reasonable expectation of identification is based on a combination of information sought and otherwise available", it does not provide any evidence as to what the "otherwise available" information might be. Similarly, in referring to Orders P-651, P-1208 and 27, the Ministry does not provide any specific information as to how it would be possible to identify the affected person given the circumstances of this particular case.*
>
> . . .

> *Unlike in Order P-644, where former Adjudicator Fineberg concluded that, given the small number of physicians that performed certain types of services and the nature of the information at issue, there was a reasonable expectation that the release of the information would disclose information about* ***identifiable*** *individuals, the Ministry and the affected person have not provided me with a sufficient basis on which to reach this conclusion in the present appeal.*
>
> *As outlined above, the affected person argues that the information at issue might be used in conjunction with other information to identify his/her practice. The affected person has not however, provided me with any evidence as to what this other information might be and/or how it can be used to identify either him/her or his/her practice.*
>
> . . .
>
> *Based on the above, I am not satisfied that there is a reasonable expectation that the affected person can be identified from the information contained in the record at issue. Accordingly, I find that the information at issue is not about an* ***identifiable*** *individual and, therefore, does not qualify as "personal information" under subsection 2(1) of the Act.*
>
> [emphasis in original]

[34] The decisions of the Ontario Commissioner's Office in Orders P-1389 and PO-1880 establish that in order for information to be about an identifiable individual, there must be information in the record or information in sources otherwise available that can be used to connect the individual involved with the information that is requested. This concept of a connection between the information and the individual involved was discussed in *Pascoe,* which I referred to earlier. In that case, Lang J. speaking for the Court stated at paragraph 20:

> *20 The Ministry, apart from its small cell count finding, did not proffer any submissions establishing a nexus connecting the record, or any other information, with the affected person. Any connection between the record and the affected person, in the absence of evidence, is merely speculative. The Ministry made no submissions explaining its small cell count finding or showing how it applied to the facts of this case. No other information was identified by the Ministry or by the affected person that could link the record to an identifiable individual. For example, the Ministry, which has ready access to such data, provided no evidence that the services billed were only provided by a small number of physicians in Toronto, unless its reference to its small cell study was intended to constitute such evidence. In the absence of detailed and convincing evidence from the Ministry or*

> *the affected person, I am unable to conclude that the commissioner acted other than reasonably, or indeed had any other option given the onus on the Ministry when she concluded that the affected person was not identifiable.*

[35] The concept of establishing a connection between the record and the affected person when determining if information is about an identifiable individual referred to in *Pascoe* was discussed by the Ontario Assistant Commissioner in Interim Order MO-1865-I. In that case, the request under the Ontario *Municipal Freedom of Information and Protection of Privacy Act* was made to the City of Toronto for access to all documents related to the SARS outbreak in March 2003. Some of the requested documents were in the possession of Toronto Public Health and outlined the details of the symptoms, assessment, and treatment of SARS patients. The requester had made it clear that he did not want the names, dates of births, telephone numbers, or "other identifying information" in relation to the SARS patients. The Assistant Commissioner stated one of the issues to be discussed on page 18:

> *While the appellant and the City appear to agree that certain types of personal information that might be described as information directly relating to SARS patients falls outside the scope of the request (e.g. names, birthdates), the parties do not appear to agree on what the appellant means by the term "other identifying information", and whether portions of the records that might not appear to contain personal information of patients could, if disclosed, lead to the identification of these individuals.*

[36] In Interim Order MO-1865-I, the Assistant Commissioner outlined the concerns of the City of Toronto regarding the identification of SARS patients at page 18:

> *The City further submits that all the severed information found in the records would be identifiable as about the individuals to whom it relates because of the extensive media coverage of the SARS outbreak, not only in the traditional media but also on a large number of SARS-related internet sites and, therefore, this information is also about identifiable individuals and falls under the definition of personal information.*

[37] In discussing the issue of what is an identifiable individual the Assistant Commissioner referred to the decision of the Ontario Divisional Court in *Pascoe* and stated at pages 22-23:

> *The Divisional Court has also considered the issue of "identifiability" as it applies to the definition of personal information. In its review upholding Order PO-1880, the Divisional Court stated that in order to establish that information is identifiable, an institution must provide submissions establishing a nexus connecting the record, or any other information, with an individual. In the Court's view, any connection between a record and an individual, in the absence of evidence, is "merely speculative".*
>
> . . .
>
> *Applying the reasoning from these past orders and the direction of the Court, I find that if the City can establish that disclosing what it describes as "clinical tests, symptoms or treatment details, information about travel, or about exposure and contact history of a SARS patient", even when the names, addresses and other direct personal information of these patients have been severed, could reasonably be expected to identify these patients, when combined with information from sources otherwise available, then the information is "identifiable". Information that meets this description is excluded from the scope of the appellant's request as "other identifying information".*

[38] The Assistant Commissioner then after a careful review of the various records requested, decided that certain records would not be disclosed because they could reasonably be expected to identify patients while other records could be disclosed because they would not identify any patient. The Assistant Commissioner stated at page 23:

> *1. Only a relatively small proportion of records contain information relating to clinical tests, symptoms or the treatment of the specific SARS patients whose direct personal information has been withheld. While, for the most part, the City has not provided the appellant with records or portions of records outlining symptom and treatment details for these patients, some details have been released . . . . Given the particular circumstances in which the records in this appeal were created, and because it is acknowledged by both parties that information about these early SARS patients is available from other public sources, I find that disclosing specific clinical test results, symptoms and treatment details of these patients (other than the type of information the City has already disclosed to the appellant), even when direct personal identifiers have been removed, could reasonably be expected to identify the patients. As such, in my view, these clinical test results, symptoms and treatment details of specific SARS patients is accurately described as "other identifying information" and therefore falls outside the scope of the appellant's request.*
>
> *2. Other records contain treatment details or symptoms relating to SARS generally or to patients who are not otherwise identified directly in the records. I*

> *find that there is insufficient evidence to establish a nexus connecting this information to any specific SARS patient, and therefore disclosing the portions of records containing this type of information would not identify any individual and these portions fall within the scope of the appellant's request.*

[39] The "reasonable expectation" test as applied by the Courts and the Office of the Information and Privacy Commissioner for Ontario to determine whether information is about an identifiable individual has been applied in other jurisdictions in Canada. The Information and Privacy Commissioner for British Columbia in Order 03-42 dealt with a request under the British Columbia *Freedom of Information and Protection of Privacy Act* for all records related to physicians in a specified hospital who performed a specified procedure. In that case, the issue for the Commissioner was whether without the names, positions, or practitioner numbers for the physicians the rest of the disputed information in audit reports could, if disclosed, reasonably be expected to identify the individuals. In discussing the issue the Commissioner stated at paragraph 22:

> *[22] Whether the disclosure of information can reasonably be expected to identify an individual is a question of fact. Financial or occupational information may relate to an individual, but be anonymized on its face. The information will not be personal information unless it is about an identifiable individual. There may be circumstances, however, when information that is on its face anonymous can reasonably, even easily, be connected to an identifiable individual.*

[40] The Nova Scotia Freedom of Information and Protection of Privacy Review Office has applied the "reasonable expectation" test in its Reports. In Report FI-99-103, the Review Officer dealt with a request to the Department of Justice under the Nova Scotia *Freedom of Information and Protection of Privacy Act* for access to documents related to payments made to claimants of institutional abuse at a youth centre. The Applicant requesting access indicated that she was not asking for the names of the people to whom the payments were made. The Review Officer in discussing what is meant by an identifiable individual stated on pages 7-8:

> *In other Reviews I have pointed out that s.20 applies only to "personal information" which is defined in Section 3(i) as recorded information about an "identifiable individual". It is difficult to see how the release of individual amounts paid out in compensation, without revealing to whom they were paid, would constitute information relating to an "identifiable individual." This line of*

> *reasoning was followed by the Ontario Information Commission (Order P-1389) where it was found that because information about billing figures for medical doctors in Toronto made no reference to specific individuals, the information was not exempt from disclosure. There could be circumstances where the group involved would be so small that it would be relatively easy to identify which amount was paid to which individual. However, it is my view that, with a significant number of people involved, the release of information with no names attached would not reveal personal information.*
>
> . . .
>
> *There should be something in the information which, if disclosed, could reasonably lead to the identification of the individuals concerned before it qualifies as personal information. In my view it is not reasonable to conclude that because the names are listed alphabetically claimants could be identified by the disclosure of the information sought by the Applicant.*

[41] In an access request similar to that dealt with in Report FI-99-103, the Nova Scotia Freedom of Information and Protection of Privacy Review Office also applied the "reasonable expectation" test in Report FI-00-109. In that Report, the Review Officer dealt with a request to the Department of Justice under the *Freedom of Information and Protection of Privacy Act* for access to records revealing the amounts paid by the government to settle law suits filed by people seeking damages for abuse suffered at provincial youth training centres. The Applicant indicated that he was seeking only information on the amounts paid and did not want any information that would identify the people who received the payments. The Review Officer discussed the term "identifiable individual" on page 3:

> *Before the exemption under s.20 can be cited, it must first be determined that the information being sought meets the definition found in s. 3(i) of the Act: "'personal information' means recorded information about an identifiable individual." The Department maintains that the individuals settlement amounts could "possibly" be traced back to the original litigants. Black's Law Dictionary defines "possibility" as "an uncertain thing which may happen". The identification of the individuals must be probable. Black's defines "probable" as "likely" and "having more evidence for than against". In my view, there must be a "reasonable expectation" that individual amounts would betray the individual names. I am not convinced that disclosing individual amounts is likely to lead to the identification of individuals.*

[42] The Information and Privacy Commissioner for Prince Edward Island has applied the "reasonable expectation" test to determine when information is about an identifiable individual. In Order No. 05-005, the Commissioner dealt with a request under the Prince Edward Island *Freedom of Information and Protection of Privacy Act* made to the Workers Compensation Appeal Tribunal for all of the decisions made by the Tribunal from 1995 to the date of the request. In discussing whether the requested records contained information about an identifiable individual, the Commissioner cited the test as set out by the Ontario Divisional Court in *Pascoe* and adopted it as a reasonable approach to section 1 of the *Act*, which defines "personal information" as "recorded information about an identifiable individual." The Commissioner in reaching her conclusion made the following comment on page 10:

> *I have considered all of these submissions in my detailed review of the two decisions at issue. I agree with the Public Body and the Third Party that the two decisions contain personal information of the Third Party. The question which I must now ask is whether, following the severances made by the Public Body, the remaining information can reasonably be expected to identify the Third Party in accordance with the definition of personal information in the Act. In my view, it cannot.*
>
> *In reaching my conclusion, I have considered all of the parties' submissions. I have also considered the small province in which we live, and that in this context, sometimes a small amount of information can identify an individual. However, I am mindful of the test set out by the Ontario Supreme Court, and I adopt it as an appropriate test under section 1 of our Act. I have asked whether the Third Party can reasonably be expected to be identified through the combination of the remaining information in the two decisions, with information from sources otherwise available. Apart from the authors of the decisions, and the witnesses associated with the hearings (the former who are bound by confidentiality, and the latter, a necessary part of a fair hearing), I have concluded that the Third Party could not reasonably be identified from the information remaining in the decisions.*

[43] My review of the cited decisions from the Courts and Commissioners across Canada leads me to adopt the following principles regarding when recorded information is about an "identifiable individual" within the definition of "personal information" in section 2(o) of the *ATIPPA*:

1. A record contains information about an identifiable individual when there is a reasonable expectation that the information in the record by itself, or in combination with information from sources otherwise available, can lead to an identification of the individual involved;

2. One factor to be taken into account in determining whether there is a reasonable expectation of identifying the individual is the number of people in the group to which the individual belongs and to which the information relates;

3. There must be a connection, link, or nexus between the information and the specific individual to be identified in order to have an identifiable individual; and

4. There must be more than a possibility that the information could identify the individual, that is, there must be more than speculation or conjecture that the information may identify the individual; there must be evidence provided that establishes a probability that the individual will be identifiable from the information available.

[44] I will now apply these four principles to the records requested by the Applicant.

[45] The Applicant has requested access to the results of hormone receptor tests performed for patients of Eastern Health. The Applicant requests for each patient the results of the original test performed by Eastern Health and the results of the retest performed by Mount Sinai Hospital. A review of an Affidavit filed by Eastern Health in the Supreme Court of Newfoundland and Labrador, Trial Division for the purpose of responding to the Application for Certification of a class action indicates that there were 866 patients of Eastern Health who had their tissue samples retested by Mount Sinai Hospital. This figure was confirmed by an official of Eastern Health in a conversation with an Investigator from this Office on June 6, 2007. Therefore, the information being requested by the Applicant is the test results for 866 patients who had hormone receptor tests performed by Eastern Health and who subsequently had their samples retested by Mount Sinai Hospital.

[46] The Applicant has made it clear that he is not interested in obtaining the names or any other identifying information in relation to these 866 patients. He wants only the two test results for each patient; the result of the test performed by Eastern Health and the result of the subsequent retest performed by Mount Sinai Hospital.

[47] The issue to be resolved then is whether the disclosure of the records containing the test results with all identifying information severed from those records would amount to the disclosure of recorded information about an identifiable individual, thereby resulting in the disclosure of personal information about the patients involved.

[48] I adopt the "reasonable expectation" test as the proper test to be applied when determining whether a record contains personal information. Therefore, I must decide whether there is a reasonable expectation that the information in the records by itself (following the severing of all identifying information), or in combination with information from sources otherwise available, would lead to an identification of the individual patients. In order to identify an individual patient there must also be evidence that links or connects that patient's identity with a particular test result or results.

[49] Eastern Health in its submission has suggested that the names of patients may be available from documents filed in or evidence given in court proceedings involving Eastern Health and the tested patients or that the names may be available from media reports. Eastern Health has also suggested that some of the test results of patients may have been disclosed in the media. However, in order to meet the "reasonable expectation" test there must be evidence that links the name of the patient with one of that patient's test results. As Lang J. of the Ontario Divisional Court stated in *Pascoe*: "Any connection between the record and the affected individual, in the absence of evidence, is merely speculative."

[50] I have noted that one factor to be taken into account in determining whether there is a reasonable expectation of identifying the individual involved is the number of people in the group to which the individual belongs and to which the information relates. The Applicant is requesting the test results for 866 patients. Given this number of patients, I am not convinced that

there is a reasonable expectation that the disclosure of the records containing the test results, with the identifying information severed, would result in the disclosure of recorded information about an identifiable individual.

[51] I find that Eastern Health has not presented evidence that establishes a probability that the individual patients will be identified if the properly severed records are disclosed to the Applicant. Eastern Health submits that there is information available from other sources which when combined with information in the responsive record (following the severing of identifying information) would result in the disclosure of recorded information about an identifiable individual. But without evidence to support its submission, this amounts to no more than speculation or conjecture.

[52] Eastern Health has not convinced me that the disclosure of the properly severed records would amount to the disclosure of personal information. Therefore, I find that Eastern Health has not met its burden of establishing on a balance of probabilities that the Applicant has no right of access to the record or part of the record.

V CONCLUSION

[53] Eastern Health has submitted that the disclosure of the requested records, even with all identifying information of the patients severed from the records, would amount to the disclosure of personal information as defined in section 2(o) of the *ATIPPA* and that it is prohibited from disclosing personal information pursuant to section 30(1) of the *ATIPPA*.

[54] I conclude that the release of the requested records with all identifying information severed from the records would not amount to the disclosure of recorded information about an identifiable individual and, therefore, that the release would not amount to the disclosure of personal information as it is defined in section 2(o) of the *ATIPPA*.

[55] I conclude that Eastern Health has not met the burden of proof required by section 64(1) and has not proven that the release of the requested record with all identifying information severed from the record would constitute the disclosure of personal information.

VI RECOMMENDATIONS

[56] Under the Authority of section 49(1) of the *ATIPPA*, I hereby recommend that the Eastern Regional Integrated Health Authority provide the Applicant with a copy of the responsive records, identified as the documents containing the results of laboratory tests and retests for hormone receptors performed for 866 cancer patients of Eastern Health who subsequently had their samples retested by Mount Sinai Hospital (the tests having been carried out by Eastern Health and the retests having been carried out by Mount Sinai Hospital), with all names, identifying numbers, symbols, or other identifying information severed from the documents. However, the documents should be marked such that the Applicant is able to determine the original test result and the subsequent retest result for each of the 866 patients. I would suggest that perhaps each patient could be randomly assigned a number and this number would be marked on each patient's original test result and the subsequent retest result.

[57] Under authority of section 50 of the *ATIPPA* I direct the head of Eastern Health to write to this Office and to the Applicant within 15 days after receiving this Report to indicate Eastern Health's final decision with respect to this Report.

[58] Please note that within 30 days of receiving a decision of Eastern Health under section 50, the Applicant may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division in accordance with section 60 of the *ATIPPA*.

[59] Dated at St. John's, in the Province of Newfoundland and Labrador, this 26th day of June 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador