November 15, 2007 **2007-017**

NEWFOUNDLAND AND LABRADOR

OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

REPORT 2007-017

Department of Natural Resources

Summary: The Applicant applied under the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*") for access to records in the custody of the Department of Natural Resources (the "Department"). The Department determined that releasing the requested information might affect the business interests of the Third Party as contemplated by section 27 of the *ATIPPA*. The Department advised the Third Party of this, but after further consideration, it informed the Third Party that it intended to release the information, because it had determined that the information it intended to disclose to the Applicant did not fall under the exception to access as set out in section 27. The Third Party then filed a Request for Review with the Office of the Information and Privacy Commissioner with the intention of preventing the records from being released to the Applicant. The Commissioner found that the Third Party had failed to meet the threshold of proof required for the Commissioner to recommend that the information be withheld. The Commissioner recommended that the Department proceed to release the records as per its previous decision.

Statutes Cited: *Access to Information and Protection of Privacy Act*, SNL 2002, c. A-1.1, as am, ss. 27, 49(1), 50(1), 60 & 64; *Meat Inspection Act*, RSNL 1990, c. M-2, ss. 6 & 7.

Authorities Cited: *Canada Packers v. Canada (Minister of Agriculture)* 1988 CarswellNat 667; Ontario OIPC Order PO-1688; Newfoundland and Labrador Reports 2005-003 & 2006-001.

I BACKGROUND

[1] This Report stems from a request by a Third Party asking me to review a decision by the Department of Natural Resources ("the Department") to release information which the Third Party maintains would harm its interests as set out in section 27 of the *Access to Information and Protection of Privacy Act* (the "*ATIPPA*"). On 9 August 2007 the Department of Natural Resources received a request from the Applicant under the *ATIPPA* for the following information:

> *Inspector reports and/or audits of all provincially licensed abattoirs completed between 2005 and the present date, including any cabinet briefings or cabinet reports on provincially licensed abattoirs. Also any memoranda of understanding between the provincial government and federal department of agriculture over abattoir inspection.*

[2] The Department issued a letter to the Applicant advising him that they had determined that the requested records may contain information which, if disclosed, might affect the business interests of a number of third parties as described in section 27 of the *ATIPPA*. The Department further explained to the Applicant that it would have to notify the third parties as per section 28 of the *ATIPPA* and give each third party an opportunity to either consent to the disclosure or to make its case as to why the information should not be disclosed. The Department sent its letter of notice to the Third Party (and to other third parties who are not party to this Review) on 16 August 2007, along with a copy of the information which was responsive to the Applicant's request.

[3] No representations had been received from the Third Party by the Department by 14 September 2007, and on that date a letter was sent to the Third Party advising that the Department had "… done a further review of the request based upon information received…" from other third parties it had notified, involving similar records. The Department indicated to the Third Party that it had determined as follows:

> *The information to be provided does not fall within the exceptions under section 27 of the Act, thus the information requested will be released with the exception of personal information as defined in section 2(o).*

[4] The Third Party was then advised of his right to appeal to this Office. On 28 September 2007, this Office received a copy of a Request for Review from the Third Party objecting to the Department's decision to release the responsive records.

[5] Staff at this Office pursued some preliminary discussions with the Third Party and the Department with the goal of settling this matter, but these efforts were not successful in establishing a basis for informal resolution.

[6] On 12 October 2007, the Applicant, the Third Party, and the Department were advised that no informal resolution had been attained, and as a result this matter was being referred to the formal investigation process in accordance with section 43 of the *ATIPPA*. The parties were advised that, under authority of section 47 of the *ATIPPA*, they should provide their written representations to this Office no later than 29 October 2007. The parties were also advised that "if we do not receive a response by 29 October 2007 we will proceed with our investigation based on the information currently on file."

II PUBLIC BODY'S SUBMISSION

[7] The Department forwarded a submission to this Office on 26 October 2007, in which it briefly described the responsive records as a Risk Analysis document and "Meat Inspection Program Slaughterhouse Assessment Form In-Depth Inspection" document, both relating to one particular slaughterhouse, operated by the Third Party. The Department states in its submission that upon reviewing these records, it determined that only personal information could be withheld from the Applicant, and the only information which qualified as personal information in the responsive records was the name of the Third Party, which was "blocked out" from the version it intends to release to the Applicant.

[8] With regard to its decision to release the remainder of the information, the Department indicated in its submission that its analysis was based on section 27 of the *ATIPPA*. The Department outlined two particular considerations which it says were factors in its decision:

> *The information being requested was not "supplied" by* [*the Third Party*]*, as it was gathered by Government inspectors. These inspections are required as per the Meat Inspection Act in order for abattoirs to obtain a license to operate. As well, the Risk Assessment was information that was prepared by the Auditor with the Animal Health Division of the Department of Natural Resources based upon the Meat Inspection Report of the abattoir.*
>
> *The information was not provided in confidence, nor was there an expectation of confidence as this information was gathered by Government inspectors as per the Meat Inspection Act. As well, the risk assessment was prepared by the Auditor with the Animal Health Division of the Department of Natural Resources based upon the Meat Inspection Report of the abattoir.*

[9] The Department concluded its submission by stating that, "given that conditions of section 27 of the *ATIPP Act* are not met, the Department of Natural Resources believes that we do not have grounds to refuse the disclosure of the information pertaining to this third party."

III THIRD PARTY'S SUBMISSION

[10] The Third Party did not forward a formal submission for consideration by this Office when invited to do so. He did, however, provide a few written comments at the time of making his Request for Review, of which I will summarize the most relevant.

[11] The Third Party indicated that he saw the particular inspections which resulted in the creation of the responsive records as part of a process which had been underway "… over the past few years…" He further commented that "…the untimely release of pieces of info […] will create much furrow [sic] over very little which needs to work through our present systems."

[12] The Third Party also made reference to particular parts of section 27 of the *ATIPPA*. Regarding section 27(1)(b), he says that "the information supplied to Gov't reps and agents was

'strictly private' and 'confidential' given <u>only</u> upon the understanding of <u>privacy</u>" [emphasis in original].

[13] Regarding section 27(1)(c)(ii), the Third Party indicated that if this information is released, "in future, there will be zero effort to give any info 'voluntary' or 'otherwise' to future agents or officials." The Third Party indicated that he and other slaughterhouse operators had previously offered their cooperation in such matters, but would not do so in the future.

[14] Finally, regarding section 27(1)(c)(iii) he offered the following statement: "This releasing of private and confidential material will result in 'substantial' financial loss to some of the producer operators and farmers. The perception alone will be very damaging to our Industry."

IV APPLICANT'S SUBMISSION

[15] The Applicant forwarded a submission which was received at this Office on 18 October 2007. He began by noting that his request had already resulted in the release of inspection records relating to over 20 provincially-licensed abattoirs, "… many of which reveal serious public health and safety issues…"

[16] With respect to section 27 of the *ATIPPA*, the Applicant commented that the information does not meet the standard required by section 27(1)(a), in that the disclosure of records would not reveal trade secrets, nor would it reveal commercial, financial, labour relations, scientific or technical information. The Applicant says that the records in question are actually comprised of health and safety reports on practices which are common to all operators in the same line of business as the Third Party.

[17] Furthermore, the Applicant states that the information was not supplied implicitly or explicitly in confidence, by which the Applicant is indicating that he does not believe that the information meets the standard set out in section 27(1)(b).

[18] The Applicant does, however, concede some ground on the notion of harm, as outlined in section 27(1)(c) of the *ATIPPA*. He indicates that it could be argued that the release of this information could harm the competitive position of some of the companies named, and could result in a financial loss or gain for some parties. Again in relation to 27(1)(c), he further indicates that the records do not 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. By this, the Applicant is stating that he does not believe that the responsive records meet the standard set out by section 27(1)(c).

[19] The Applicant also noted in his submission his belief that the release of the responsive records is a "… fundamental issue of public health safety…" He indicated that even if some financial harm were to come to the Third Party from the release of this information, "the safety of the general public should outweigh any financial concerns that may exist for an individual business owner …"

V DISCUSSION

[20] Section 27 of the *ATIPPA* is a mandatory provision relating to third party business information. Public bodies are required to withhold any information which falls within this exception:

> *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.

[21] The application of this exception has been considered in several previous Reports issued by this Office, but my initial comments on it were found in Report 2005-003:

> *[38] Section 27(1) and similar sections in other access legislation is considered to be a three-part "harms test," as established in Re Appeal Pursuant to s. 41 of the Freedom of Information and Protection of Privacy Act, S.N.S. 1993, c. 5, [1997] N.S.J. No. 238 (N.S. S.C.). In that decision, Kelly, J at paragraph 29 set out this three-part test with regard to Section 21 in Nova Scotia's legislation:*
>
> > *(a) that disclosure of the information would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;*
> >
> > *(b) that the information was supplied to the government authority in confidence, either implicitly or explicitly; and*
> >
> > *(c) that there is a reasonable expectation that the disclosure of the information would cause one of the injuries listed in 21(1)(c).*
>
> *[39] Note that all three parts of the test must be met in order to sever a record. It should also be noted that Nova Scotia's 21(1)(c) is identical to Newfoundland and Labrador's 27(1)(c) except the ATIPPA adds a fourth injury in relation to the release of information in a report which has been completed by a person or body appointed to resolve a labour relations dispute, which in any case is irrelevant to the present matter.*

[22] Section 64(2) of the *ATIPPA* establishes the burden of proof in cases where a third party has requested a review of a decision by a public body to give an applicant access to a record:

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

[23] I will begin by considering the first part of the harms test as outlined above. To do this, I must determine whether any of the information, if disclosed, would reveal trade secrets or commercial, financial, labour relations, scientific or technical information of the Third Party. It is important here to consider the precise nature of the records, which consist of an assessment form which is completed by a government Inspector. The form consists primarily of a listing of the many regulations which apply to abattoir operators through the *Meat Inspection Act*, and next to each regulation, a box where "yes," "no" or "n/a" is written by the Inspector to denote whether the operation complies with each particular regulation. The second part of the record consists of a "Risk Analysis" document, which is completed by a Food Safety Specialist employed by the Department, using the information provided on the Inspector's assessment form to comment more specifically as to any risks to food safety which may be present at the inspected location.

[24] It is clear that none of this information reveals commercial, financial, labour relations, or scientific information of the Third Party, nor does it reveal trade secrets of the Third Party. The records primarily contain the observations and analysis of government employees, rather than information which would reveal something proprietary or particular about the processes used by the Third Party. For example, the records do not disclose any information about its operations as a commercial undertaking, nor financial statements of the Third Party, nor does it disclose anything about any employees of the Third Party, nor any scientific research undertaken by the Third Party.

[25] Part one of the three part harms test also says that trade secrets of the third party should not be disclosed. It is interesting to note that records such as these have previously been the subject of access to information requests and subsequent litigation initiated by Third Parties who opposed the release of reports by government inspectors. In *Canada Packers v. Canada (Minister of Agriculture)* 1988 CarswellNat 667, the Federal Court of Appeal ruled that similar information must be disclosed. Although the comparable federal access provision on third party

business interests has some significant differences with the *ATIPPA*, it also states that a government institution shall refuse to disclose trade secrets of a third party. In *Canada Packers*, the Third Party who initiated the appeal did not even attempt to make an argument that the information contained trade secrets. In addition, the Court specifically stated at paragraph 12 of its decision that it would see no basis to conclude that the provision regarding trade secrets would apply to the responsive records.

[26] Finally, in relation to part one of the harms test, the Ontario Information and Privacy Commissioner's Office has commented on the meaning of the term "technical information," which may be relevant to the parties in this case. In Order PO-1688, Senior Adjudicator Goodis, while admitting that the term is difficult to define precisely, indicated that "… it will usually involve information prepared by a professional in the field and describe the construction, operation or maintenance of a structure, process, equipment or thing." To the extent that some of the information in the records discloses technical information of the Third Party, the first part of the test has been met, but only in relation to a small proportion of the information in the records which describe the operation and maintenance of the Third Party's process and equipment.

[27] Part two of the three part harms test requires, in order to meet its threshold, that the information must have been supplied to the government authority in confidence, either implicitly or explicitly. While the term supplied has been commented on in some of my previous Reports, I think it is useful in this case to refer again to the *Canada Packers* decision, in which the same type of records were considered as those which are at issue here. In paragraph 11 of that case, the Court stated as follows with regard to the term "supplied":

> *[11] … Apart from the employee and volume information which the respondent intends to withhold, none of the information contained in the reports has been supplied by the appellant. The reports are, rather, judgments made by government inspectors on what they have themselves observed. In my view no other reasonable interpretation is possible, either of this paragraph or of the facts…*

[28] Given this analysis in relation to very similar records, I have come to a similar conclusion, and I find that the information was not "supplied" within the meaning of the *ATIPPA*. Therefore, the second part of the test has not been met. I will comment briefly, however, on the issue of

whether the information was of a confidential nature, as that was one of the arguments presented by the Third Party. In doing this, I will refer to my Report 2006-001, in which I stated as follows:

> *[60] I would also point out that the Third Party failed to provide clear evidence that the information in question had been provided to the Department in confidence. They merely provided a statement to that effect. I do not accept that a mere statement should establish implicit confidentiality. The Supreme Court of Nova Scotia spoke to this issue in Chesal v. Attorney General of Nova Scotia, 2003 N.S.S.C. 10. Although this case dealt with a different exception to access, the comments of Coughlan, J. at paragraph 43 are relevant:*
>
> > *43 In determining whether particular information is received in confidence, the Court must consider the circumstances as a whole including the content of the information, its purposes and the purposes and conditions under which it was prepared and communicated. It is not enough that the supplier of the information states, without further evidence, that it is confidential; otherwise, a party supplying the information could ensure the information was not released…*

[29] In this case, the Third Party has claimed that the information is confidential in nature. First of all, we have nothing more than the assertion of the Third Party to go by. No evidence has been presented to support his position on this point. Furthermore, in order to consider whether there may be an implicit understanding of confidentiality, we must consider "… the content of the information, its purposes and the purposes and conditions under which it was prepared and communicated." Once again, as noted above, the information is primarily composed of the observations and analysis of government employees in relation to inspections conducted and mandated by the *Meat Inspection Act*. The *Meat Inspection Act* states at section 6(1)(a) and (b) and section 7 that operators must cooperate with such inspections:

> *6. (1) An inspector may, upon production of his or her certificate of appointment or, in the case of an inspector acting according to an agreement under section 8, upon production of a certificate issued to him or her under the Meat Inspection Act (Canada)*
>
> *(a) enter and search land and premises on or in which he or she has reasonable cause to believe animals are being slaughtered, or meat is being sold, offered for sale, given, transported, delivered or dealt in;*
>
> *(b) require the owner or occupier or an employee of the owner or occupier of the land and premises to answer inquiries reasonably made and to*

produce for inspection records, accounts, documents, and papers in his or her possession concerning a business being carried on the land or premises relating to the slaughter of animals or the selling of meat, offering of meat for sale, giving of, transporting, delivering or dealing in meat

[…]

7. (1) An owner or occupier of land or premises described in section 6, and an employee of that owner or occupier, shall help an inspector in carrying out his or her duties under this Act.

(2) A person shall not

(a) hinder, obstruct or interfere with the inspector in the course of his or her duties;

(b) provide an inspector with false information or refuse to provide him or her with information; or

(c) fail to produce for inspection or seizure and detention anything that by section 6 the inspector may inspect or seize and detain.

[30] Although not explicitly stated in the legislation itself, in my view one of the obvious primary purposes of the *Meat Inspection Act* would be to ensure that a reasonable standard of food safety is established to protect public health. If this information were confidential and could not be released by government, it could impact on public confidence in the safety of the meat we consume. Unsurprisingly, there is no reference in the *Meat Inspection Act* to any inspections or subsequent analysis being considered as confidential information, not to be disclosed to parties outside of government. Inspection and testing through legislative mandate by government and other public bodies of all manner of products for public use and consumption is an important part of the role of government in regulating and ensuring the safety of such products. Generally speaking, the purpose of the *Meat Inspection Act* would be defeated if government was prevented by the *ATIPPA* from releasing to an applicant the findings of such inspections and subsequent analysis, provided that the information released does not meet the standard of the three part harms test.

[31] Lacking an objective basis upon which to establish an explicit understanding of confidentiality, an analysis of the records themselves has also lead me to conclude that there is no implicit expectation of confidentiality in relation to the responsive records. Based on the foregoing analysis, I therefore conclude that the records requested were not supplied to the Department implicitly or explicitly in confidence by the Third Party, which further reinforces my conclusion that the second part of the harms test has not been met.

[32] Regardless of this determination, I will comment briefly on the third part of the three part test. To meet the third part of the test, the Third Party must present evidence of a reasonable expectation of probable harm, specifically in reference to one of the harms outlined in section 27(c). Although the Third Party stated in writing at the time of filing his Request for Review that the disclosure of the information would harm the industry as a whole, he made no specific arguments with regard to the operation of his own business, nor how the release of these particular records would harm his own particular business interests. Were any arguments or evidence presented by the Third Party, they would have had to be relevant to how the release of information might harm his own operation. Comments about harm to the industry as a whole are not relevant to this particular Review. It is noteworthy, in this context, that all of the other operators in the Third Party's industry have either consented to disclosure or not proceeded with formal objections to this Office regarding the release of similar information. There has already been media coverage regarding this disclosure, so any impacts on the industry as a whole, whatever their degree, have already been felt, and the release of this last set of records is unlikely to alter that effect at this point.

[33] The Third Party did, however, provide a comment in relation to the harm described in section 27(1)(c)(ii), which applies to the disclosure of information which could reasonably be expected to 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. The *Meat Inspection Act* resolves this issue, however. As noted above, sections 6 and 7 of that *Act* require an operator to cooperate with inspections if an operator wishes to carry on a commercial enterprise of that nature. Cooperation is not voluntary, which means that an operator will not be allowed to carry on as a

commercial enterprise if it refuses to cooperate with the inspection process. Therefore, the threshold of part three of the three part harms test has not been met by the Third Party.

VI CONCLUSION

[34] As noted above, all three parts of the harms test set out in section 27 must be met in order to withhold information under that exception. Having failed to meet the threshold necessary to meet parts two and three of the test, and only meeting the threshold for part one in a small proportion of the records, I have determined that the Third Party has not discharged its burden of proof, and the records should be released to the Applicant. I believe the Department's previous decision to release the responsive records is in compliance with section 27 of the *ATIPPA*, and therefore I conclude that the Department acted appropriately.

VII RECOMMENDATIONS

[35] Under authority of section 49(1) of the *ATIPPA*, I find that the threshold of proof required in order to recommend that the Department withhold records on the basis of section 27 has not been attained. I hereby recommend that the Department of Natural Resources release to the Applicant all information in the records which were subject to this Review which it had previously decided to release as of its letter to the Third Party on 14 September 2007.

[36] Under authority of section 50(1) I direct the head of the Department of Natural Resources to write to this Office and to the Third Party and to the Applicant within 15 days after receiving this Report to indicate the Department's final decision with respect to this Report.

[37] As per section 60 of the *ATIPPA*, the Third Party may appeal the decision of the Department with respect to these recommendations to the Supreme Court Trial Division. This appeal must be filed within 30 days of receiving the decision of the Department, as per paragraph 36 of this

Report. **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*.**

[38] Dated at St. John's, in the Province of Newfoundland and Labrador, this 15th day of November, 2007.

Philip Wall
Information and Privacy Commissioner
Newfoundland and Labrador