REPORT **FI-02-06**

THE NOVA SCOTIA FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

A REQUEST FOR REVIEW of a decision of the **DEPARTMENT OF HEALTH** to deny access to copies of all correspondence between the Ministry of Health and a pharmaceutical company producing generic drugs.

REVIEW OFFICER:	**Darce Fardy**
REPORT DATE:	**May 2, 2002**
ISSUE:	Whether exemptions covering third party information and protection of the government's economic and financial interests support the decision of the Department to deny access to records.

In a Request for Review under the **Freedom of Information and Protection of Privacy Act** (FOIPOP), the Applicant asked that I recommend to the Department of Health that it reverse its decision to deny access to "copies of all records, including 'clarifaxes,' letters, memoranda, emails and records of telephone conversations" between the Ministry of Health and a pharmaceutical company.

In a response to the Applicant the Department denied access to the documents using exemptions under s.21(1)(a)(i) and (ii) and (b) of the **Act**. During the Review process, the Department added s.21(1)(c)(i) and (iii) and s.17(1)(b)(d)(e). The relevant subsections are:

> 21 (1) The head of a public body shall refuse to disclose to an applicant information
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> (a) that would reveal
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> (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,

(iii) result in undue financial loss or gain to any person or organization.

S.17 (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 Nova Scotia or the ability of the Government to manage the economy and, without restricting the generality of the foregoing, may refuse to disclose the following information:

(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of Nova Scotia and that has, or is reasonably likely to have, monetary value;

(d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in undue financial loss or gain to a third party;

(e) information about negotiations carried on by or for a public body or the Government of Nova Scotia.

In accordance with the requirements of s.22, the Department notified a third party whose interests would be affected by the disclosure of the information sought. The third party dealt only with confidentiality [s.21(1)(b)]. It referred to the policy of Health Canada and other provinces to keep confidential all information about a pending application until after the application is approved. It said the fact that an application is pending is commercially sensitive information. The third party also wrote that the confidentiality of the information, at least until the product is listed, is confirmed in the correspondence between the pharmaceutical company and the Department of Health.

The Department, in a written representation to the Review, confined its arguments to s.21(1), the exemption it had used in its decision letter to the Applicant. It explained that in accordance with *Chapter 39, Statutes of Nova Scotia*, 1983, s.1(1)(a), it is required to put a process in place to determine interchangeability among the pharmaceutical products in Nova Scotia. Standards and requirements have been set and generic manufacturers must submit all required information. This information is submitted and accepted with the understanding that the material is confidential and will be used for the sole purpose of determining interchangeability.

The Department said information submitted contains very detailed chemical formulas and disclosing it would harm a manufacturer's competitive position.

In a subsequent oral representation to the Review, the Department made its case primarily on s.17(1), as it relates to potential harm to the Government. The Department contends that Nova Scotia's reputation with the pharmaceutical industry would be harmed if it disclosed information about an application. Its practice, it said, is not to reveal even that an application from a company has been received.

The Department explained that because Nova Scotia is such a small part of the pharmaceutical market in the country companies may back off offering generic drugs to this Province if they believed there was a risk that the Province would disclose their confidential information. In other words, the Province, because of its size, would need the generic drug companies perhaps more than the companies need the Nova Scotia market. The Department thus believes that this offers the proof necessary to show a reasonable expectation that the Province would incur financial or economic harm if pharmaceutical companies did not offer their generic products.

The Applicant, in her representation, objected to the late introduction of the exemptions under s.17(1) and the change to s.21(1). Recognizing, as many applicants do, that it is difficult to marshal arguments against a public body's case without knowing what is in the documents, the Applicant questions the citing of subsection 17(1)(b). She doubts that the documents contain financial, commercial, scientific or technical information that **belongs** to the Department and has **monetary value**.(applicant's emphasis).

She also questions the Department's opinion that disclosing information would be premature, given that the Federal Court had rendered a decision with respect to the generic drug in question. The Applicant also doesn't accept that there are negotiations going on between the drug company and the Government with respect to the approval of a generic drug.

Conclusions:

I understand the Applicant's chagrin that the Review Officer is considering a late exemption [s.17(1)] which was not used when the Department was making the decision to deny access. I would not accept a late exemption if an applicant did not have enough time to consider it for a representation to the Review. In this case, however, the Applicant was offered ample time to respond and did so.

The Department added a subsection to the s.21(1) exemption because it realized after writing its decision to the Applicant that the section must be read conjunctively. All three subsections [(a), (b) and (c)] must apply for the exemption to hold. The Applicant had time to consider this addition as well and to respond.

In accordance with s.38, I have been provided with copies of the relevant

documents by the Department. The majority of the documents are letters exchanged between the Department and the company. There are no records of telephone calls or "clarifaxes."

Whatever the merits of the Applicant's arguments with respect to s.21(1), it is my view that the documents provided to me do not contain "detailed chemical formulas" which, under normal circumstances, might be protected under s.21(1). Therefore, the first part of the three-way test has not been met.

With respect to s.17(1), while the Department feels the Government's interests would be harmed if it acknowledged receipt of an application from a drug company, the company's name was included in the application and while refusing to provide the documents, the Department, by inference, confirmed receipt of the application from the named company.

The Applicant sent me copies of documents she received from a similar application to the Alberta government. Except for documents which appear to have already been in the public domain, letters and faxes provided by Alberta were severed under the same exemptions detailed in the Nova Scotia FOIPOP Act.

It is difficult to conclude that the documents I have seen contain financial, commercial, scientific or technical information or that they have monetary value [s.17(1)(b)], or that disclosure would be premature or result in undue financial loss or gain to anyone [17(1)(d)]. Nor, in my view, do they contain information about negotiations [s.17(1)(e)]. However, the information identified in these subsections is not intended to restrict the generality of s.17(1) and I am satisfied that disclosure of the documents could reasonably be expected to harm the financial interests of the Government.

I have considered whether the documents could be severed in accordance

with s.5(2) but have concluded, to use the words in that section, that the documents could not "reasonably be severed" because exempt information appears throughout them.

I support the decision of the Department to deny access to the documents.

Dated at Halifax, Nova Scotia, May 2, 2002.

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Darce Fardy
Review Officer