

**THE NOVA SCOTIA FREEDOM OF INFORMATION  
AND PROTECTION OF PRIVACY ACT**

A **REQUEST FOR REVIEW** of a decision by the **DEPARTMENT OF HEALTH** to deny in part or in their entirety records related to drugs used in the treatment of Fabry disease.

**REVIEW OFFICER:** Darce Fardy

**REPORT DATE:** March 2, 2005

**ISSUE:** Whether exemptions under Sections 14 (advice), 16 (solicitor-client privilege), 17 (financial loss to the government), 20 (personal information) and 21 (confidential information of a third party) support the decision to withhold some records and provide others in part.

In a Request for Review, in accordance with the **Freedom of Information and Protection of Privacy Act (FOIPOP)**, dated October 18, 2004, the Applicant asked that I recommend to the Department of Health (the Department) that it reverse its decision on his application. He asked for:

All records, including, without limiting the generality of the foregoing, all correspondence between the government and individuals, associations, physicians, pharmacists, hospitals (and Health Region/Authorities as relevant) other governments, agencies or corporations, and all notes, analyses or opinions, relating to Replagal, Fabrazyme or Agalsidase between November 1, 2003 and June 9, 2004.

The Department, after notifying third parties of the application, in accordance with **Section 22** of *FOIPOP*, told the Applicant in writing it had decided to provide him with parts of

some of the records while denying access to the others in their entirety. To support its decision it cited exemptions found in **Sections 14, 16, 17 and 20**.

**s.14 (1)** The head of a public body may refuse to disclose to an applicant information that would reveal advice, recommendations or draft regulations developed by or for a public body or a minister.

**s.16** The head of a public body may refuse to disclose to an applicant information that is subject to solicitor-client privilege.

**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:

- (a) trade secrets of a public body or the Government of Nova Scotia;
- (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;
- (c) plans that relate to the management of personnel of or the administration of a public body and that have not yet been implemented or made public;
- (d) information the disclosure of which could reasonably be expected to result in the premature disclosure of a proposal or project or in 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.

**s.20 (1)** The head of a public body shall refuse to disclose personal information to an applicant if the disclosure would be an unreasonable invasion of a third party's personal privacy.

While **s. 21** was not cited in the Department's decision letter to the Applicant, it was cited on some of the records it provided to the Review Officer. Since this is a mandatory exemption, I am prepared to consider this exemption which offers protection for third party interests.

**s.21 (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.

The Department and the third party which objected to the disclosure of the requested records both made submissions to the Review Officer.

*The Department's submission:*

*Section 14:*

The Department said it had requested a third party to offer advice and opinions on the treatment of Fabry Disease and the issues involved and to provide options. All of that advice and opinion, in the view of the Department, can be exempted from disclosure.

*Section 16:*

Those records denied under s.16 which contain legal advice from solicitors are privileged and the Department has used its discretion in deciding not to waive privilege.

*Section 17:*

The Department said that negotiations are ongoing among those provinces which are involved in what is described as a “Common Drug Review” (CDR). They offer advice to each other on matters involving drug companies and patients. Disclosing some of the records in dispute would reasonably be expected to harm the financial and economic interest of the Government and interfere with ongoing and future negotiations.

*Section 20:*

The Department said that some of the records contain references to the treatment of people suffering from Fabry Disease and, because the disease is rare and the number of those affected is small, the references to the medical history and treatment of the patients could enable others to identify them.

*Section 21:*

The Department said some of the records at issue contain commercial information; that it was provided in confidence; and that disclosing it could reasonably be expected to harm the third party’s financial and competitive position.

The Department concluded that “Enzyme Replacement therapy for the treatment of Fabry disease is a highly sensitive issue. The CDR looks at the evidence for drugs, with respect to

clinical efficacy and cost-effectiveness, and makes recommendations back to the provinces on funding. A recommendation has been received by the provinces however no province has yet made a decision regarding the recommendation.”

The Department’s Drug Program Manager made an oral submission to the Review, further explaining the problems that would result from disclosing the information that has been withheld.

*The third party’s submission:*

The third party said disclosing the advice he provided to the Department would be an unreasonable invasion of his personal privacy (s.20) because he is neither an employee of nor a consultant to the Department. He said his advice to the Department was “supplied in confidence” and that “(a)t no time was there any indication that any communication between myself and the Department of Health was to be made public”.

With respect to s.21, the third party said he was currently involved in treating people with Fabry disease. He said disclosing the advice he gave the Department would interfere significantly with his negotiating position with the two companies which supply the drug.

**Conclusions:**

**Section 45** of the **Act** places the burden of proof on the Applicant to show that disclosing the information would not be an unreasonable invasion of the third party’s personal privacy. Without a submission from the Applicant, I can only agree with the third party’s position.

After reading the records and considering the written and oral submissions, I am satisfied that all of the exemptions cited by the Department apply. I am also satisfied that the Department has properly used its discretion arriving at its decision.

**Recommendations:**

That the Department confirm in writing to the Applicant its refusal to disclose the records in dispute.

**Dated** at Halifax, Nova Scotia this 2<sup>nd</sup> day of March, 2005.

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Darce Fardy, Review Officer