

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

A **REQUEST FOR REVIEW** of a decision of the **DEPARTMENT OF HEALTH** to disclose records related to a third party.

REVIEW OFFICER: Darce Fardy

REPORT DATE: December 21, 2004

ISSUE: Whether Section 21 of the Act requires the Department of Health to change its decision to disclose records related to the Department of Health and a drug company.

In Request for Review, pursuant to the Nova Scotia **Freedom of information and Protection of Privacy Act** (FOIPOP), dated November 16, 2004, a third party asked that I recommend to the Department of Health (the Department) that it reverse its decision to provide records related to the third party to the Applicant.

The Applicant had asked for copies of correspondence between the Department and a drug company with respect to a specific drug, as well as copies of any memos and briefing notes prepared for the Minister of Health or other officials.

Having notified the third party of the application, in accordance with **Section 22** of *FOIPOP*, and having heard objections to disclosure from the third party, the Department decided to

disclose the requested records. The third party was notified of the decision and told it could ask for a review of the decision by this Office within 20 days of being notified of the decision.

The third party cited **Section 21(1)** which obliges a public body to refuse to disclose information regarding a third party under certain conditions. This section reads:

- 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.

Section 45(3)(b) of *FOIPOP* lays the burden of proof on the third party to show why the Applicant has no right of access to the information.

Arguments of the third party:

- the records at issue contain commercial and financial information of the drug company relating to the company's efforts to obtain payment;

- a review of the records makes it clear they were provided to the Department in confidence;
- the records address the negotiations that took place between the two parties.
- disclosure of the records would mean that competitors would become aware of the details of the third party's approach to commercialize their drug in Nova Scotia. The third party is also in negotiations with other provincial governments and, therefore, could suffer undue financial loss if the content of the records were known to competitors.

The above arguments were provided to the Department. The third party did not respond to the Review Office's request for a submission to support its case.

In accordance with Section 38(1) of *FOIPOP* I have been provided with copies of all the relevant records.

Conclusions:

The records at issue include: an e-mail from the drug company to an official of the Department of Health attached to a document headed "Guidelines"; an e-mail from the company with wide national distribution attached to a news release; letters to both the Minister and the Deputy Minister inviting them to a policy discussions forum; and a copy of the agenda.

In order for s.21(1) to stand all three subsections [(a),(b) and (c)] must apply.

Having read the records, I concluded that they do not contain commercial or financial information and that s.21(1)(a) does not support the arguments of the third party against disclosing the records.

Although there is no need for me to consider sub-sections (b) and (c) I will provide my views on those two parts. It is difficult to see how there was an expectation of confidence by the company when it sent invitation letters to the Minister and Deputy because the invitation to the forum had a wide circulation.

The records contain no information that could reasonably be described as a form of negotiation with the Department.

As far as subsection (c) is concerned, there is no evidence that the letters of invitation or the document containing the guidelines could reasonably be expected to do significant harm to the third party.

Recommendations:

- that the department confirm in writing to the third party, with a copy to the Review Officer its decision to disclose the records.

Dated at Halifax, Nova Scotia this 21st day of December, 2004.

Darce Fardy, Review Officer