Office of the Information and Privacy Commissioner for Nova Scotia
Report of the Commissioner (Review Officer)
Catherine Tully

REVIEW REPORT 17-08

October 10, 2017

Department of Health and Wellness

Summary: Where a third party objects to the disclosure of information on the basis that it believes disclosure would be harmful to its business interests, it is the third party that bears the burden of proving that the applicant has no right of access. In this case the evidence provided by the third party fell short of establishing that the information at issue was supplied in confidence and that the disclosure of the information would result in a reasonable expectation of harm.

Statutes Considered: *Access to Information Act,* RSC 1985, c A-1, s. 20; *Freedom of Information and Protection of Privacy Act,* SNS 1993, c 5, ss. 21, 45.

Authorities Considered: Nova Scotia: Review Reports FI-09-100, 2015 CanLII 70493 (NS FOIPOP); 16-06, 2016 NSOIPC 6 (CanLII); 16-09, 2016 NSOIPC 9 (CanLII); 17-03, 2017 NSOIPC 3 (CanLII); 17-06, 2017 NSOIPC 6 (CanLII).

Cases Considered: *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD); *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NS SC); *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII); *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII); *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII); *Shannex Health Care Management Inc. v. Attorney General of Nova Scotia representing the Nova Scotia Department of Health*, 2004 NSSC 54 (CanLII); *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*, 2005 NSCA 52 (CanLII); *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC).

Other Sources: *Concise Oxford English Dictionary*, 12th ed. (New York: Oxford University Press, 2011) "commercial", "finance", "of"; Nova Scotia Procurement Services, Request for Proposal, Tender Number 60131638, March 26, 2007, Appendix 1: Detailed RFP Evaluation Weights.

INTRODUCTION:

[1] In 2014, the Department of Health and Wellness (Department) received two access to information requests from an applicant in relation to the funding of licensed homes for special care in Nova Scotia. In the first request the applicant sought access to the amount paid by the Department for operations of each facility for 2012 – 2014 and any record which showed how that amount was determined. In the second request that applicant sought a copy of the approved budget report for each licensed home including approved budget, depreciation, capital cost, per diem and mortgage information.

[2] This review was filed by a third party who operates multiple licensed homes for special care in Nova Scotia.

ISSUE:

[3] Is the Department required to refuse access to information under s. 21 of the *Freedom of Information and Protection of Privacy Act* (*FOIPOP*) because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

DISCUSSION:

Background

[4] As noted above, this is a third party review that relates to two access to information requests in relation to the funding of licensed homes for special care in Nova Scotia. The background in this case is the same as set out in Review Report 17-07. After collecting fees and confirming the scope of each request the Department sent out third party consultation letters to all of the operators of licensed homes for special care in Nova Scotia. In response, operators of 38 homes consented to the disclosure of the requested records. The third party in this case filed an objection to the disclosure of the information with the Department claiming that s. 21 applied to all of the information contained in the responsive records.

[5] In January 2015, the Department informed the remaining third parties and the applicant that it would release the requested information in full. The Department was of the view that s. 21 did not apply to the responsive records. In response, eight third parties (operating 22 homes) filed requests for review with this office.

[6] After the expiry of the appeal time limit for all third parties, the Department proceeded to disclose the requested information in relation to 72 homes where no objection to disclosure was received. With respect to the eight third parties who did file a request for review, following informal mediation, only two parties (operating 16 homes) continued to object to the disclosure of the requested information. In total then, the Department disclosed the requested information in relation to 116 homes.

[7] The original applicant was provided with notice of these proceedings but declined to participate or provide any submissions in relation to the issue of whether or not s. 21 applies to the records.

Burden of Proof

[8] Usually it is the Department who bears the burden of proving that the applicant has no right of access to a record. However, in accordance with s. 45(3)(b) of *FOIPOP*, where the review is of a decision to give an applicant access to all 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 under s. 21 of *FOIPOP*.

Is the Department required to refuse access to information under s. 21 of *FOIPOP* because disclosure of the information could reasonably be expected to be harmful to the business interests of a third party?

[9] Section 21 of *FOIPOP* provides in part:

> 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
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> (ii) commercial, financial, labour relations, scientific or technical information of a third party;
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> (b) that is supplied, implicitly or explicitly, in confidence; and
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> (c) the disclosure of which could reasonably be expected to
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> (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…

[10] The burden is on the third party to establish that:

1. the disclosure of the requested information would reveal trade secrets or commercial, financial, labour relations or technical information of a third party;
2. the information in question was supplied implicitly or explicitly in confidence; and
3. the disclosure of the requested information could reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c).

[11] There are two types records at issue. The first, in response to the first access request, is a single page document entitled "Summary of CPI Increments for Service Agreement Beds (New and Hybrid), Increments implemented each August 1." The document itself lists the homes operated by the third party and for each home lists the total number of beds, the total operations budget for 2012/13 and the annual increases for 2012/13, 2013/14 and 2014/15.[1]

[1] The operations total and bed numbers found on the Summary of CPI Increments is also found in the approved budget reports responsive to the second request. Therefore, my analysis of the application of s. 21 to the operations budget total and bed numbers contained in the approved budget reports applies equally to the same information on the Summary of CPI Increments document.

[12] The second record type at issue in response to the second access request is a two page report for each of the homes operated by the third party in this case. These reports are entitled "Nursing Homes and Homes for the Aged, Approved Budget and Per Diem." Each report appears to be the first and second page of a longer report. The original applicant for the information did not raise any objection to this approach and so it is not an issue in this review or any other review.

[13] The information contained on the approved budget reports for each home consists of four categories of information as follows:

- **Budget summary**: Salaries, benefits, operations, mortgage, recoveries, total budget approved and approved FTEs, facility square footage and capital renewal fund amount.
- **Bed license**: For licensed nursing care beds – number of beds, occupancy rate and resident days. For licensed respite beds – number of beds, occupancy rate and resident days.
- **Approved per diem rates**: Approved protected and unprotected per diem rate and total approved per diem rate.
- **Schedule 2** – **mortgage**: Per diem, start and end date and annual funding. For older (regular) homes the mortgage information is in schedule 4 and includes annual funding for the mortgage and depreciation.

[14] There are two types of approved budget reports at issue here. Some report only one set of budget numbers and another group have three columns of budget numbers: protected, unprotected and total.

[15] The distinction between the protected and unprotected funding is significant and will be discussed below. In the case of the records relating to the facilities operated by this third party, nine include information about protected and unprotected budgets. The remaining six have only one set of budget numbers and per diem rates.

[16] According to the Department, the budget reports with only one column of numbers relate to homes under the old (1979) *Homes for Special Care Act*. For clarity, I will refer to these homes as "legacy" homes. The budget reports with protected and unprotected columns relate to homes that were built following a competitive process in 2007.

[17] A director with 12 years experience in the Continuing Care Branch of the Department provided evidence regarding the source of the data on the responsive records. The third party's evidence was provided by two individuals with extensive experience in the continuing care industry: the President and CEO and the VP of Finance.

1. Does the withheld information reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party? (s. 21(1)(a)(i) & (ii))

[18] Section 21(1)(a) requires that two things be true. First, that the withheld information reveal trade secrets or commercial, financial, labour relations, scientific or technical information and second that the information be "of a third party."

[19] Recently, I examined the meaning of "commercial" information in the *Municipal Government Act* provision equivalent to s. 21 of *FOIPOP* and determined that commercial information includes information about exchange of services and could include pricing structure.[2] The term "financial" is best understood using dictionary meanings. The Concise Oxford English Dictionary defines "finance" as including "the monetary resources and affairs of a state, organization or person."[3]

[20] In Review Report 17-06, I addressed the s. 21(1)(a) requirement that not only must the withheld information be commercial or financial information, but that the information be "of a third party." In Nova Scotia we have the benefit of the Supreme Court's decision in *Atlantic Highways Corp. v. Nova Scotia* (1997).[4] In that decision, the Court determined that information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal or modified by the negotiation process that it clouded the third party's claim to a proprietary interest in the information.

[21] Both parties are in agreement that the responsive records in relation to both requests are produced by the Department. Therefore, the question is whether or not the disclosure of the records would reveal information of the third party. The approved budget reports consist of three sections: budget summary, bed license/occupancy rate/resident days and approved per diem. On the second page is further information relating to mortgages also found in the budget summary portion of the report.

Bed license/resident days/approved per diem:

[22] The approved number of nursing care and residential care beds listed in the bed license portion of the approved budget reports is established by the Department based on need and is publicly available information. It can be found in at least two publicly disclosed documents: the Nursing Homes and Residential Care Facilities Directory, December 2016 and for newer homes, the number of approved beds is also contained in the Department's 2007 request for proposal (RFP).

[23] The bed license portion of the approved budget also reflects occupancy rate and resident days.[5] The Department's evidence was that the occupancy rate of nursing care beds in Nova Scotia is well known and consistent across all operators. The occupancy rate for residential care beds can vary slightly depending on the location of homes, but according to the Department, this information is also well known and consistent in each location. The third party provided no evidence to establish that any of the information contained in the bed license portion of the approved budgets revealed commercial or financial information of the third party.

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[2] NS Review Report 16-06, paras 16-23.
[3] Concise Oxford English Dictionary, (12th ed.), p. 532.
[4] *Atlantic Highways Corp. v. Nova Scotia (1997)* 1997 CanLII 11497 (NSSC) [*Atlantic Highways*].
[5] Resident days is a Department created formula which = number of beds x occupancy rate x 365.

[24] I find that the information contained in the bed license portion of the approved budgets and the number of beds listed on the Summary of CPI Increments document does not reveal commercial or financial information of the third party.

Budget summary, approved per diem rates and mortgage:
[25] The remainder of the approved budget documents consists of a breakdown of the budget for facilities operated by the third party and include such details as the amount of salaries, benefits, operations costs, mortgage, approved full time equivalents (FTE) and square footage. The per diem rates are based on a formula set out by the Department and if disclosed would reveal the total budget for each facility. For newer facilities the disclosure would also reveal the total protected and unprotected budgets.

[26] I am satisfied that the information contained in the budget summary, approved per diem rates and mortgage sections of the approved budgets is financial and commercial information within the meaning of s. 21(1)(a). Next I must determine whether disclosure of this information would reveal information "of a third party"?

[27] As noted above, the leading Nova Scotia decision on this topic is *Atlantic Highways*, where the Court held:

> Information in an omnibus agreement to construct a toll highway was not commercial or financial information of a third party because the information had either already been exposed to publication or was so intertwined with the Provincial input by way of the requirements of the request for proposal or modified by the negotiation process that it clouded the third party's claim to a proprietary interest in the information.[6]

[28] The Court was clear that information that originates via Provincial input does not qualify as information "of a third party." This makes sense since the term "of" indicates an association between two entities, typically one of belonging.[7]

[29] The Department's evidence is that all financial data (salaries, benefits, operations, mortgage, recoveries, total budget approved, approved FTEs and per diem rate) in relation to "protected" budgets is dictated and determined by the Department based on the amount of funding the Department is willing to provide. Protected budgets relate to the clinical care costs, resident supplies, over-the-counter medications, incontinence supplies, some recreational costs and raw food costs. The Department dictates these costs to ensure that vulnerable elderly residents receive an appropriate and consistent standard of care in every licensed home in Nova Scotia.

[30] The Department's evidence was that it dictates the types and number of health care positions licensees must have and what the salary ranges, benefits and pensions payable will be based on the approved number of beds. All of this data is turned into a per person funding amount for each of these elements by the Department. According to the Department, the number of nursing care beds and residential care beds operated by licensees is authorized by the

[6] *Atlantic Highways* at p. 9.
[7] Concise Oxford English Dictionary, (12th ed.), p. 992.

Department. This information is not, in the Department's explanation, supplied by the third parties. The protected cost per person was developed using a historical analysis of costs that eventually led to a standard daily costs index.

[31] Further, the Department's evidence was that protected budgets were not part of the one competitive process that has so far occurred in relation to continuing care homes in Nova Scotia. The Department states that there are no plans to include protected budgets in any future competitive process. That is, funding for direct care will continue to be dictated by the Department; only in the unprotected funding areas is a competitive process foreseeable.

[32] With respect to the data relating to the unprotected budget, the Department's evidence was that distribution of the costs across the various categories (salaries, benefits, operations, mortgage, recoveries) was all based on the competitive bid submitted by successful third parties in response to an RFP issued in 2007. The numbers have changed somewhat over the years to reflect various authorized increases in accordance with the terms of the service contract. The Department agreed that the unprotected per diem rate is taken from the bid submitted by the third party.

[33] With respect to the single column approved budgets for legacy homes, the Department's evidence was that the information, including the breakdowns of data into the various expense types, was based in part on Department funding methodology and in part on a legacy issue. That is, when the Department took over responsibility for licensed homes for special care, it inherited a group of homes that already had funding levels set. In the intervening years since the transfer of these legacy homes to the Department, the Department has developed a funding methodology that it applies to these homes, but according to the Department, many aspects of the funding methodology are legacy issues.

[34] In its initial written submissions the third party claimed, "Even for the components of the per diem subject to "protected envelope funding" [the third party] applies its own expertise and financial modelling to determine how to allocate protected funding." When asked to provide evidence that the budget numbers set out in the records at issue here can be traced back to third party proprietary information, the third party's evidence focussed exclusively on the unprotected budget summary information.

[35] The third party cites the Nova Scotia Supreme Court decision in *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)*[8] in support of its argument that all of the budget numbers for the nine homes with protected and unprotected funding and for the six legacy homes qualify as financial or commercial information of the third party.

[36] In *Shannex,* the Court was considering whether or not s. 21 applied to budget numbers on approved budget reports for five homes. The case was heard in 2004 and so the information at issue related to homes I have characterized here as "legacy" home approved budget reports. In finding that the budget numbers for these types of homes qualified under s. 21(1)(a), the Court states, "The Respondent [Department] has conceded that the records reveal commercial and

[8] 2004 NSSC 54 (CanLII)[*Shannex*] upheld on appeal in *Shannex Health Care Management Inc. v. Nova Scotia (Attorney General)* 2005 NSCA 52 (CanLII).

financial information of the Appellant. On this basis the first part of the Section 21(1) test has been met." [9]

[37] In this review, the Department has not conceded that the s. 21(1)(a) test has been met. Instead its written submission states that while it does not dispute that the information is financial information, it says the information is largely created by the Department and does not reflect actual spending. The implication being that the information is therefore not "of the third party."

[38] A careful review of the approved budget reports (budget summary, approved per diem and mortgage portions) and the Summary of CPI Increments document (total operations and annual increase amounts) would give a reader an understanding of cost breakdown in the core categories specific to each individual identified home. For both types of responsive records, whether the source of the data is the Department or the third party, in this particular case there is no doubt that the data is about the third party's business and reveals information about that business at the level of each individual home. On that basis, I find that the test in s. 21(1)(a) is satisfied in regard to the budget summary numbers, approved per diem rates, mortgage, total operations and annual increase amounts for legacy homes and for homes with protected and unprotected funding.

[39] In order to satisfy the test in s. 21, the third party must establish that all three parts of the test have been met.[10] Therefore, with respect to the information that has satisfied the s. 21(1)(a) test, I will go on to consider the second element of s. 21.

2. Was the information supplied explicitly or implicitly in confidence (s. 21(1)(b))?

[40] Section 21(1)(b) requires that the information must be "supplied" and that the supply must be explicitly or implicitly in confidence.

"supplied"

[41] Several general observations about the "supplied" requirement are:

- The party claiming the exemption must show that the information was supplied.
- Whether or not information was supplied will often be primarily a question of fact.
- The "supplied" requirement can be satisfied by negotiated terms that give rise to accurate inferences about third party confidential information.
- Where the information provided by the third party is immutable, or not susceptible to change in the negotiation process, that information will also be considered "supplied."
- Whether information is "supplied" does not depend on the use that is made of it once it is received.[11]

[42] The Department's evidence on the source of the information is noted above. Essentially it agrees that the unprotected financial information was supplied by the third party but it argues

[9] *Shannex* at para 27.
[10] NS Review Report 16-09 at para 16; see also *Atlantic Highways*.
[11] These factors are consistent with findings in other jurisdictions and have been discussed in a variety of OIPC NS review reports including NS Review Report FI-09-100 at paras 30-40 and NS Review Report 17-03 at para 27.

that both the protected and the legacy funding information was either dictated by the Department's funding formulas or intertwined with Departmental funding methodologies. As a result, it says that the information in the data regarding legacy homes and protected funding would not reveal information supplied by the third party, rather, it simply reveals the Department's funding strategy and formulas for legacy homes and for the protected portion of the budget of newly built homes.

[43] The third party's evidence was that the unprotected portion of the budget was the subject of a competitive process. The third party won a number of the RFPs and for each of those successful bids there was no negotiation of financial elements of the bids. The allocation of costs between salaries, benefits, operations and mortgage were accepted as submitted by the third party and were adjusted as dictated by the terms of the service agreement. The third party provided copies of financial schedules it submitted with its successful bid and using spreadsheets illustrated how the 2014 budget summary sheet numbers could be traced directly back to that schedule. The Department's evidence was that the salaries, benefits, operations, mortgage and approved FTE numbers from the unprotected budget portion of the approved budget reports were supplied by the third party in their bid documents and were not changed as part of the negotiation.

[44] With respect to the protected portion of the budgets and for the legacy homes, the third party's evidence was less clear. The third party asserts that, "Using proprietary financial analysis and modelling, [the third party] arrives at budget figures that form the building blocks of the rate paid by DHW for each home…Even for the components of the per diem subject to "protected envelope funding", [the third party] applies its own expertise and financial modelling to determine how to allocate protected funding."

[45] However, the third party failed to provide any financial statements upon which it claims the Department's approved budget reports and Summary CPI Increments document were based on (for legacy homes and protected budgets). The only evidence offered, as noted above, was in relation to the unprotected portion of the budget and that evidence was not financial reports but rather portions of the original bid.

[46] The third party points to the *Shannex* decision which dealt with approved budget reports for legacy homes and says simply that the Court in that case accepted that s. 21(1)(b) applied to this type of budget information.

[47] With respect to the decision in *Shannex*, the Court states, "It is clear that the information in the budget summaries was derived substantially from the budget data supplied by the Appellant and as such remains the Appellant's financial information. The fact that the summaries were prepared by the DOH does not take this information outside the scope of Section 21(1)."[12]

[48] In the case before me the only evidence I have from the third party tracing the source of data to information supplied by the third party is with respect to the unprotected budget data.

[12] *Shannex* at para 30.

[49] Aside from the reference to the *Shannex* decision, the third party provided no evidence tracing the budget summary data from legacy homes or from the protected data back to third party supplied data. One letter supplied by the third party made reference to regular financial reports but no such reports were supplied and no argument or evidence was provided connecting these reports to the approved budget reports. In addition, the Department's evidence is that the protected budget numbers are based on formulas dictated by the Department. The legacy home budget numbers are composed of legacy rates plus Department funding methodologies. The third party claims to apply its own expertise and financial modelling but failed to provide any evidence of this.

[50] I find that the financial data with respect to unprotected portions of each budget was supplied by the third party. I find that the third party has failed to meet its burden of proof to establish that the financial data with respect to legacy homes and with respect to protected portions of each budget was supplied by the third party.

"in confidence"

[51] The second part of the test in s. 21(1)(b) is that the information must be supplied in confidence. Since the third party has not met its burden of proof with respect to the supplied requirement for legacy homes and protected funding, I need only consider this test with respect to the unprotected portion of the budgets for newer homes.

[52] Factors relevant to determining whether information has been supplied in confidence include:

- The nature of the information: Would a reasonable person regard it as confidential? Would it ordinarily be kept confidential by the supplier or recipient?
- The purpose of the information: Was the record prepared for a purpose that would not be expected to require or lead to disclosure in the ordinary course?
- Explicit statements: Was the record in question explicitly stated to be provided in confidence? This may not be enough but it is a relevant consideration.
- Voluntary or compulsory supply: Compulsory supply will not ordinarily be confidential, but in some cases, there may be indications in the legislation relevant to the compulsory supply that establish confidentiality.
- Agreement or understanding between the parties: Was there an agreement between the parties with respect to confidentiality? Keep in mind that identifying a record as "confidential" does not automatically exempt it from disclosure and that no public body can be relieved of its responsibilities under access legislation merely by agreeing to keep matters confidential. In other words, no municipality or public body can "contract out" of access legislation.
- Actions of the public body and supplier: Do the actions of the parties provide objective evidence of an expectation of confidentiality?

[53] The Federal Court has summarized the meaning of "confidential" in the context of an analysis of s. 20(1)(b) of the *Access to Information Act* (*ATIA*). Section 20 of *ATIA* is the federal

third party business information exemption.[13] In summary, the Court states the following with respect to the requirement that information be confidential:

- It is an objective standard.
- It is not sufficient that the third party state, without further evidence, that it is confidential.
- Information has not been held to be confidential even if the third party considered it so, where it has been available to the public from some other source or where it has been available at an earlier time or in another form from government.
- Information is not confidential where it could be obtained by observation albeit with more effort by the requestor.

Nature of the information

[54] The information at issue is a budget breakdown for licensed homes for special care. These homes received funding based on the budget breakdown and the source of that funding is taxpayer money. The third party correctly points out that the Nova Scotia Court of Appeal made clear that the legislation in Nova Scotia is deliberately more generous to its citizens and is intended to give the public greater access to information than might otherwise be contemplated in other provinces in Canada.[14] As I have noted in other decisions, public expenditures are a key type of government information to which access law is intended to provide access.[15] I have also previously noted that courts have recognized that the important goal of broad disclosure must be balanced against the legitimate private interests of third parties and the public interest in promoting innovation and development.[16] Certainly with respect to the unprotected funding formula, this factor supports a finding of confidentiality. But to the extent the records disclose public expenditures and the means by which those expenditures are calculated, the nature of the information does not support a finding of confidentiality.

Explicit statements

[55] The third party argues that the information was implicitly and explicitly supplied in confidence. It points to the *Shannex* decision and states that the Court accepted that information on the approved budget reports in question in that case was supplied implicitly in confidence. In that decision, the Court notes the evidence of the third party witness to the effect that the third party considered the information confidential. On that basis, the Court determined that, "…DOH was aware that the Appellant expected its financial information to be kept confidential (though, as noted, DOH never made an explicit undertaking to do so). Accordingly, I am satisfied that the Appellant has cleared the second hurdle under Section 21(1) and satisfied me that the financial information was supplied implicitly in confidence."[17]

[56] In support of its position, in addition to citing the *Shannex* decision, the third party supplied a copy of a cover letter it sent along with its 2014 financial statements. The letter is authored by an employee of the third party and makes reference to a letter the third party says it

[13] *Stenotran Services v. Canada (Minister of Public Works and Government Services)*, 2000 CanLII 15464 (FC) at 9 citing *Air Atonabee Ltd. v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245 (FCTD).
[14] *O'Connor v. Nova Scotia*, 2001 NSCA 132 (CanLII) at para 57.
[15] See for example NS Review Report 17-06 at para 27.
[16] See for example NS Review Report 17-03 at para 15.
[17] *Shannex* at para 32.

has on file from a named individual, presumably an employee of the Department. According to the third party's letter, this Department employee gave assurances in 2003 that the information on the financial statements would not be subject to release under s. 21 of *FOIPOP*. It is unclear why the third party did not supply the letter from the Department. In essence then, the only evidence of confidentiality was the third party's assertion that it expected financial information to be kept confidential. This factor supports a finding of confidentiality.

Compulsory supply

[57] In its submission, the Department states that there is no evidence that the information was supplied either implicitly or explicitly in confidence. Initially, the Department argued that the supply of financial information is compulsory or as part of funding under the service agreement between the facilities and the Department for new facilities (protected/unprotected funding). However, in a follow up submission, the Department stated that it is no longer relying on its argument that the information was provided compulsorily.

[58] The third party supplied schedules it submitted as part of its bid in the competitive process held in 2007. Those schedules were supplied as required by the RFP. Therefore, at least the initial supply of the financial information as part of the RFP process appears to have been compulsory.

Shannex decision

[59] As noted above, the third party relies on the *Shannex* decision in support of its argument that information contained on the budget summary reports was supplied in confidence. There are three important distinctions in the case before me today compared to the *Shannex* decision in 2004. First, the Department's evidence in the current case is that information supplied in relation to legacy homes and for the protected portion of the new homes budgets is information based on Departmental formulas. Second, in the *Shannex* decision, the Court appeared to rely entirely on the assertions of the third party regarding its expectations of confidentiality. As noted above, current caselaw is clear that it is not sufficient that a third party state, without further evidence, that the information is confidential. Third, the information that remains at issue here is the unprotected portion of the budgets for newer homes which was not at issue in *Shannex*. The unprotected budget data arose from the competitive RFP initiated process. In 2004, at the time of the *Shannex* decision, there had never been a competitive process in relation to homes for special care.

[60] The third party bears the burden of proof to establish that all three elements of the s. 21 test have been met. With respect to information on the approved budget reports for the newer homes, the third party asserts, but has not proved, that the supply was confidential. Since it is the third party who bears the burden of proof, I find that the third party has failed to establish that the s. 21(1)(b) test is satisfied for the information contained on the approved budget reports and the Summary of CPI Increments document.

[61] In summary then, I find that the third party has failed to satisfy its burden of proving that s. 21(1)(b) applies to the withheld information.

3. Could the disclosure of the information reasonably be expected to cause one or more of the harms enumerated in s. 21(1)(c)?

[62] Since the third party has failed to establish that s. 21(1)(b) applies to the withheld information, I need not go on to evaluate the evidence of harm from the disclosure. However, the third party provided a number of arguments in support of its position that s. 21(1)(c) applied and so for completeness I have set out below my evaluation of this issue.

[63] Section 21(1)(c) requires that the disclosure of the information could "reasonably be expected" to cause one of the enumerated harms. The Supreme Court of Canada has examined the reasonable expectation of harm test in a number of recent decisions. It concluded that access to information statutes using this language mark out a middle ground between that which is probable and that which is merely possible. The third party must provide evidence well beyond or considerably above a mere possibility of harm in order to reach that middle ground.[18]

[64] According to the third party, if new care homes are built in Nova Scotia, they will be built using a competitive process. The information at issue here, particularly the unprotected funding related information, formed part of the third party's bid in the 2007 competitive process. The third party's approach to its unprotected funding bid was unique and highly successful since it won the majority of the contracts for building new homes in the 2007 competitive process. In essence, the third party has a funding formula, a secret sauce if you will, that led to its success. The third party says that price was the determining factor in weighing the bid last time so it will likely be the determining factor next time. In the third party's experience, competitors in other provinces will be interested in any competitive process in Nova Scotia. These outside competitors will gain an advantage if they are permitted to know this third party's successful funding formula from the 2007 competitive process.

[65] The third party points to the Nova Scotia Court of Appeal's decision in *Shannex* and notes that the Court agreed with the trial judge's determination that harm had not been proven. The third party provides the following quote from the Court of Appeal:

> [6]…Shannex's allegation of harm was premised largely on its submission before Justice Edwards that a competitive bidding process for nursing home beds would likely be implemented by the Province in the near future. The judge was not satisfied that the evidence presented by Shannex established more than speculation that such would occur…[19]

[66] The difference this time, according to the third party, is that there are much stronger indications of a future competitive process. In support of this assertion, the third party points out that in 2004 the Department had never followed a tender process for procuring new long term care beds. Now, in 2017, we have proof that the Department followed such a process in 2007. Combined with the expanding waitlists for long term care and the aging population in Nova

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[18] *Ontario (Community Safety and Correctional Services) v. Ontario (Information and Privacy Commissioner)*, [2014] 1 SCR 674, 2014 SCC 31 (CanLII) at para 54, citing *Merck Frosst Canada Ltd. v. Canada (Health),* [2012] 1 SCR 23, 2012 SCC 3 (CanLII).

[19] *Shannex Health Care Management Inc. v. Attorney General of Nova Scotia*, 2005 NSCA 52 (CanLII) at para 6.

Scotia, the third party asserts that it is more than reasonable to expect a competitive process in the foreseeable future.

[67] In support of its assertion that a competitive process is likely, the third party in this case provided a letter from a Department official dated May 30, 2014 indicating that "…if at some future date additional long term care beds are required, the Department will issue a Request for Proposals."

[68] The Department's argument is simply that there is no evidence that disclosure of the information could reasonably be expected to cause harm to the third party's business interests. It points out that the third parties operate within a low risk industry with virtually no commercial competition and further, that identical information has been disclosed for 116 facilities in the province as a result of this access to information request. Given this disclosure and the length of time since the disclosure (three years for most of the facilities) the Department argues that it is reasonable to expect that any harm would have been revealed by now. Further, the Department says that given that all of this third party's competitors have had this type of information about their facilities disclosed, this third party would not be placed in any better or worse position from the disclosure than any of its competitors.

[69] With respect to the potential for a future competitive process, the Department's evidence was that a number of different outcomes were possible, but that no new long term care beds will get built unless the Department decides this is the appropriate route.

[70] The Department acknowledged that if it chose to add beds, it would be done through a competitive process in response to an RFP. The Department's evidence was that a decision to take a competitive route is complex and would take a considerable amount of time. The Department's evidence was that there are no immediate plans to engage in a competitive process.

[71] A different competitive process may arise if, instead of adding beds, the Department chose to replace the legacy homes. According to the Department, such a competitive process is very complex and would require consideration of multiple existing provider relationships. A competitive process to replace existing beds would, the Department argued, likely differ significantly from an RFP for adding new beds.

[72] It is equally possible, and potentially more likely, that the Department will instead focus on improving support for at home care, thereby reducing the number of Nova Scotians who require homes for special care and reducing the length of time individuals stay in these facilities. This in turn would reduce the wait list of people awaiting placement in homes for special care and so reduce or potentially eliminate the need for building new care homes.

[73] The Department says that even if competitors obtained the information in question in this review, they would not be in a position to take advantage of it because it is based on the unique position of the third party - its ability to source from within its own company and its size and scale. The Department's position is that the third party's competitive advantage lies in its unique position and that this would be unaffected by a competitor knowing the particular budget ratio under which the third party was operating.

[74] The Department points out that the argument that revealing the financial information at issue might be used by a competitor to gain a financial advantage in a new competitive process is based on the assumption that any future competitive process would be identical to the previous competitive process. This argument, according to the Department, has two flaws. First, the Department has not indicated that it has any immediate plans to initiate a competitive process. Further, the conditions in 2017 are not the same as they were in 2007. Any new competitive process would be designed to address present needs.

[75] With respect to the weighting of the financial aspect of the bid, the Department said that the RFP required bidders to come within 85% of the maximum permitted per diem of $110. Any bidder who did so received the full 15% available.

[76] The third party asserts that price was the most heavily weighted criterion in bid evaluations during the 2007 process. However, a review of the RFP documents supplied by the third party reveals that the financial proposal was worth 15%. Several other factors were worth more. For example, the proposed facilities were worth 19%, the character and culture of the proponent was worth 16.25% and service delivery was worth 22.75%.[20] Further, the Department's evidence is that any bidder who came within the required 85% of the maximum received the full 15% awarded for financial information.

[77] The third party asserts that a new competitive process is likely. However, the letter it supplies in support of this assertion is dated May 2014, more than 3 years ago. The evidence of the Department is that while new homes will likely only be built using a competitive process, there is currently no plan to engage in a competitive process.

[78] The information at issue here is from reports dated from 2014. The financial information on which the unprotected data is based is from a 2007 bid. Even if the Department were to undertake a competitive process this year, the information in question is 10 years old and, as noted above, was worth only 15% of the third party's successful bid.

[79] The possibility of a competitive process is speculative at best. The information at issue is 10 years old and contributed only 15% to the success of the third party in 2007.

[80] The third party has established at best, a mere possibility of harm. The likelihood of a future competitive process is speculative. There is a lack of evidence of how exactly a competitor could use the third party's unprotected funding formula to its advantage and, in any event, anyone who met the prescribed funding requirement (within 85% of the $110 per diem maximum) received the full 15 %. On that basis, I find that the third party has failed to establish a reasonable expectation of harm as required by s. 21(1)(c).

[20] Nova Scotia Procurement Services, Request for Proposal, Tender Number 60131638, March 26, 2007, Appendix 1: Detailed RFP Evaluation Weights.

FINDINGS & RECOMMENDATIONS:

[81] I find that:

1. The information contained in the bed license portion of the approved budgets and the number of beds listed on the Summary of CPI Increments document is not commercial or financial information of the third party and so s. 21(1)(a) does not apply to this information.
2. The test in s. 21(1)(a) is satisfied in regard to the budget summary numbers, approved per diem rates, mortgage, total operations and annual increase amounts for legacy homes and for homes with protected and unprotected funding.
3. The third party has failed to satisfy its burden of proving that s. 21(1)(b) applies to the withheld information.
4. The third party has failed to establish that the disclosure of the withheld information would result in a reasonable expectation of harm as required by s. 21(1)(c).

[82] I recommend that:

1. The Department disclose in full the responsive records to request HEA-14-55 with respect to this third party.
2. The Department disclose in full the responsive records to request HEA-14-60 with respect to this third party.

October 10, 2017

Catherine Tully
Information and Privacy Commissioner for Nova Scotia