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OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER
NEWFOUNDLAND AND LABRADOR

A-2010-002

March 17, 2010

Department of Business

Summary:

The Applicant on May 29, 2008 filed two requests under the *Access to Information and Protection of Privacy Act* ("the *ATIPPA*" or "the *Act*") with the Department of Business (the "Department") for correspondence between the Department and two named companies. The Department refused to disclose any of the requested information, citing paragraphs 24(1)(d) and (e) of the *ATIPPA* (disclosure harmful to the financial or economic interests of a public body). The Applicant filed Requests for Review with this Office. During attempts to resolve these matters informally the Department claimed additional exceptions under section 23 (disclosure harmful to intergovernmental affairs or negotiations), section 27 (disclosure harmful to business interests of a third party) and section 30 (disclosure of personal information). Written representations were received from the Department and from three affected third parties with respect to the application of section 27. The Commissioner found that the Department had failed to meet its burden of proof in the application of sections 23 and 24. However, the Commissioner nevertheless found that certain information so clearly met the test for the application of section 24 that he recommended that it be withheld. The Commissioner found that the Department was required to withhold some information on the basis of section 27 and that some personal information was required to be severed under section 30. Accordingly the Commissioner recommended release to the Applicant of all of the information in each of the records not protected from disclosure by sections 24, 27 or 30. The Commissioner also commented on other issues, including the refusal to confirm or deny the existence of a record, the blanket application of exceptions, and the process to be followed in cases where section 27 is applicable.

Statutes Cited:

Access to Information and Protection of Privacy Act, S.N.L. c. A-1.1, as amended, sections 3, 7, 9, 12(2), 23, 24, 27, 28, 30(2)(f), 47, 56, 60, 64; *Freedom of Information and Protection of Privacy Act,* R.S.B.C. 1996, c.165, section 17.

Authorities Cited:

Newfoundland and Labrador OIPC Reports 2005-002, 2005-003, 2006-001, 2006-005, 2006-006, 2006-011, 2007-004, 2007-005, 2007-007, A-2008-010, A-2008-012, A-2009-007, A-2009-002, A-2009-010; British Columbia OIPC Order 02-50;

Other Resources Cited:

Access to Information Policy and Procedures Manual, Access to Information and Protection of Privacy Coordinating Office, Department of Justice, Newfoundland and Labrador, 2008.

I BACKGROUND

[1] On May 29, 2008 the Applicant filed two access requests under the *Access to Information and Protection of Privacy Act* (the *"ATIPPA"* or the *"Act"*) with the Department of Business (the "Department"), each of which read as follows:

> *Correspondence – in any and all formats, including paper and electronic – between* [a named company] *and/or its representatives (including consultants and/or lawyers acting on behalf of the company) and the minister or deputy minister or assistant deputy minister of the Department of Business. Date range of the request is Jan. 1, 2008 to the present.*

The two requests were essentially identical, differing only in the names of the two companies, which were separate businesses but with a number of common features, including common ownership. They will be referred to in later discussion in this Report as "Company A" and "Company B."

[2] On June 30, 2008 the Department replied to the Applicant's two requests in separate but essentially identical letters. In each case the Department refused to disclose any information, citing paragraphs 24(1)(d) and (e) of the *ATIPPA* (disclosure harmful to the financial or economic interests of a public body).

[3] On July 3, 2008 the Applicant filed two identical Requests for Review with this Office in relation to the Department's decisions. An Investigator from this Office wrote to the Department on July 7, 2008 giving notice of the Requests for Review, and asking the Department to forward relevant documentation, including complete copies of the records responsive to each of the requests, for our review. That documentation was provided to our Office on August 1, 2008.

[4] Formally these matters are two separate files, and although there is significant overlap, the responsive records are by no means identical. From the outset, however, the Applicant, the Department and this Office have in practice dealt with the two files together, and the written representations and legal arguments have been essentially the same for both files. As a matter of convenience, therefore, I am dealing with both Requests for Review in a single Report.

Informal Resolution

[5] In the statutory process set out for the review of access requests by this Office there are two distinct phases. In the initial phase, the investigator to whom a file is assigned will, under normal circumstances, first review the documentation received from the public body (the "responsive record") and will initiate an informal process under section 46 of the *ATIPPA* aimed at resolving the matter. In the majority of cases this process is successful, either because the public body agrees to release further information to the satisfaction of the Applicant, or because the Applicant is ultimately persuaded that he has been provided with all of the information to which he is entitled under the provisions of the *Act*.

[6] In those cases in which informal resolution is not achieved, the matter proceeds to the second phase, which consists of a formal review and investigation of the decision, act or failure to act of the head of the public body. During this phase the parties are asked to provide written representations in support of their positions, and a formal report is then completed pursuant to section 48 of the *ATIPPA*.

[7] In the present case, informal resolution was not successful, and on July 18, 2008 the parties were advised that the matter would move to formal review. The parties were invited to provide our Office with written submissions representing their views.

[8] In the meantime, the Department had done a further review of the records responsive to the requests, and had concluded that additional exceptions to disclosure were applicable. The guidelines for responding to a Request for Review developed by this Office provide that a public body wishing to claim additional discretionary exceptions to disclosure must do so within 14 days of being notified of a Request for Review. Accordingly the Department wrote to this Office and to the Applicant on July 21, 2008 to advise that in addition to the exception originally claimed (section 24 of the *ATIPPA* - disclosure harmful to the financial or economic interests of a public body) the Department also wished to invoke section 23 (disclosure harmful to intergovernmental relations or negotiations), section 27 (disclosure harmful to business interests of a third party) and section 30 (disclosure of personal information).

[9] In view of the additional exceptions to disclosure claimed by the Department the Applicant filed further written submissions with this Office on August 4, 2008, outlining his argument against the application of those sections of the *ATIPPA*.

[10] The formal review process had been suspended for a time to allow for a further attempt at informal resolution. Unfortunately, those efforts did not succeed, and on October 16, 2008 the formal review process was reinstated. The parties were asked to provide any further written representations by November 6, 2008. The Applicant advised that he would rely on the submission he had already made. The Department delivered written representations for each of the two files on November 5, 2008, setting out its position on the application of sections 24 and 27.

Third Party Involvement

[11] It should be noted that in the usual case in which a public body invokes section 27 (disclosure harmful to the business interests of a third party) the public body will notify the third party or parties in question of the access request, as provided for by section 28. This gives the third party the opportunity to either consent to the disclosure or to make representations to the public body explaining why the information should not be disclosed. Such representations may very well help the public body in assessing the validity or strength of the section 27 claim. Notification also sets in motion a process that in due course may enable a third party to make, or participate in, a Request for Review to this Office, which may include formal written submissions.

[12] Under section 28 a public body *may* notify a third party, at its own discretion, regardless of whether or not it intends to release the information in question. However, the *ATIPPA* only *requires* notification of a third party where the public body intends to release the information. In the present case the Department did not intend to disclose any of the information and it chose not to notify the third parties. For this reason no submissions were initially received from the third parties, and so the only submissions initially received by this Office were those of the Department and the Applicant.

[13] However, once the Applicant had filed the Request for Review, the possibility arose that our Office might reach different conclusions from the Department about the application of section 27 and might then recommend the release of information relating to third parties. At that point it was

clearly necessary that the third parties be notified. After all, it is the interests of third parties that are intended to be protected by section 27. Furthermore, section 47 of the *ATIPPA* (representation on review) requires the Commissioner, during the formal investigation, to give an opportunity to make representations to a third party that was notified under section 28, *or would have been notified had the public body intended to give access*. This is a procedural safeguard provided to third parties to ensure that even if they have not been previously notified pursuant to section 28, no recommendation that affects their interests will be issued without their being given an opportunity to make representations to this Office during the course of a review.

[14] There is the further consideration that once a third party has been given such an opportunity, it will then have a right under section 60 of the *ATIPPA* to appeal to the Trial Division any decision of the public body to follow a recommendation I may have made to release information affecting the third party's interests. It is critical, therefore, that third parties that are potentially affected by an access request be notified, either pursuant to section 28, or during the review process in accordance with section 47.

[15] I wish to emphasize that in this case, it would have been to everyone's advantage for the public body to have taken the step, at the earlier stage in the proceedings, of notifying the third parties pursuant to section 28 that their information might potentially be disclosed. That way the third parties would have had an earlier opportunity to express their views and to either consent or object to the release of certain information. Their views might or might not have supported the position taken by the Department, but either way their participation would have been of assistance to the Department and, eventually, to this Office.

[16] Accordingly, once our Office had received the written submissions of the Department we concluded that it was necessary to notify the third parties. There were three in number: Company A and Company B (the two businesses named in the access request), and another company carrying on business as a management consultant (referred to below as "the Consultant") which had some involvement with Company A.

[17] At this point another problem arose. While there was no particular difficulty involved in our writing to the third parties to notify them that there had been an access request and to ask for their

submissions (their addresses and other particulars were contained in the record) it seemed unlikely that they would have much to contribute unless they could examine a copy of the responsive record. However, it was our view that our Office could not provide them with a copy of the record, since section 56 of the *ATIPPA* states that we must not disclose information obtained in performing duties or exercising powers under the *Act*.

[18] We therefore found it necessary to request that the Department provide copies of the responsive record to the three third parties that we had identified as being potentially affected. We made that request in September 2009. After considerable discussion with our Office about whether or not the record should be provided and if so, whether all of the record should be sent or only some portions of it, the Department sent, to each of the third parties, a complete copy of the record relevant to it on or about December 4, 2009. On those copies of the record the Department highlighted the portions that the Department considered should be withheld from disclosure under each of the claimed exceptions.

[19] Following further correspondence and telephone discussions between our Office and the third parties, we received formal written submissions from the Consultant on December 17, 2009 and from Company A and Company B on January 15, 2010.

II SUBMISSIONS OF THE PUBLIC BODY

[20] In its submissions the Department first pointed out that attracting investment to the province is the "raison d'être" for its existence:

> *The Department of Business proactively promotes the competitive and comparative advantages of Newfoundland and Labrador in target markets for the purpose of attracting provincial, other jurisdictional and foreign direct investment.*
>
> [...]
>
> *In fulfilling this mandate, the Department of Business has a duty and responsibility to represent the Department within the business community as an entity that can be trusted, approached, and respected as a legitimate business partner and negotiator.*

[21] The Department placed particular emphasis on what it viewed as the expectations of its clients with respect to discretion and confidentiality:

> *Clients expect (and often demand verbal or written confirmation) that their dealings with the Department are kept in confidence during negotiations as well as after unsuccessful negotiations. If, however, negotiations are successful* [...] *then information surrounding the funding details may be made available to the public....*

[22] It is the position of the Department that the disclosure of *any* information about such negotiations can be harmful:

> *One bad move on the part of the Department can halt negotiations and discourage other interested companies from doing business with the province – particularly if they consider their business information to be at risk.* ***It is the policy of the Department of Business to neither confirm nor deny publicly that it is or was in negotiations with a company unless those negotiations were successful*** [emphasis added].

[23] The Department, in its written submissions, went on to detail its arguments regarding the harmful effects that disclosure of information in the record could have, first on the financial or economic interests of the Department itself, within the meaning of section 24 of the *ATIPPA*, and second on the business interests of any third-party client of the Department, within the meaning of section 27 of the *ATIPPA*. I will not set out those detailed submissions here, since they will be addressed below in the "Discussion" section of this Report.

III SUBMISSIONS OF THE APPLICANT

[24] The Applicant's initial submission was received on July 3, 2008 as part of his Request for Review. The Applicant stated that it is not appropriate for the Department to apply a "blanket exemption" to the requested records. The Department, he argues, should only have redacted the records to remove specific information in accordance with section 7 of the *ATIPPA,* which provides that "...if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record." The Applicant further argues that section 24 is a discretionary exception and to use it to support a blanket refusal to disclose an entire record contradicts the principles of openness, accountability and transparency.

[25] The Applicant cited previous reports of this Office which stand for the proposition that the language of the *ATIPPA,* by providing a specific right of access and making that right subject only to limited and specific exceptions, creates a presumption in favour of disclosure.

[26] In his initial submissions the Applicant also advanced further arguments about the interpretation of section 24 of the *ATIPPA* and its application to the present case. In his supplementary submission the Applicant specifically addressed the interpretation and application of sections 24 and 27. These arguments will be dealt with in detail in the appropriate "Discussion" paragraphs of this Report.

IV SUBMISSIONS OF THE THIRD PARTIES

[27] In our requests for submissions we invited each of the third parties to specifically address the application of section 27 of the *ATIPPA* as it affected their own interests. The submissions of Company A and Company B took the position that they did not consent to the disclosure of proposals, supporting material or correspondence, or indeed any of the material in the responsive record. I will address their arguments in support of that position in the paragraphs dealing with section 27 below.

[28] The submission of the Consultant argued not only that the Department should not disclose any of the details of its relationship with Company A, but also that the very fact that it had supplied professional services to that company should not be disclosed. In addition to that general proposition, the Consultant identified specific information and particular documents that it argued should not be disclosed. As with the other third party submissions, I will deal with the arguments of the Consultant below.

V DISCUSSION

(a) The Purpose of the *ATIPPA*

[29] In every request for access and review, the documents in question must be assessed in accordance with purpose of the *ATIPPA* as set out in section 3, and the right of access as set out in section 7:

> *3. (1) The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by*
>
> *(a) giving the public a right of access to records;*
>
> *(b) giving individuals a right of access to, and a right to request correction of, personal information about themselves;*
>
> *(c) specifying limited exceptions to the right of access;*
>
> *(d) preventing the unauthorized collection, use or disclosure of personal information by public bodies; and*
>
> *(e) providing for an independent review of decisions made by public bodies under this Act.*
>
> *(2) This Act does not replace other procedures for access to information or limit access to information that is not personal information and is available to the public.*
>
> [...]
>
> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[30] As previous reports from this Office and from other jurisdictions have discussed, the fundamental underlying principles on which the *ATIPPA* is based are the accountability of government bodies and other public institutions to the public and the desirability of having better-informed members of society. This is explicitly set out in section 3 of the *ATIPPA,* and in one of

the earliest reports from this Office my predecessor stated that the *ATIPPA* demonstrates a presumption in favour of disclosure – in other words, that information should always be disclosed unless it can be clearly shown to fall within a specific exception to disclosure in the *Act*. (See NL OIPC Reports 2005-002 and A-2009-002.)

(b) The Burden of Proof

[31] When a public body has denied access to a record or part of a record, and the Applicant has requested a review of that decision by the Information and Privacy Commissioner, then pursuant to subsection 64(1) of the *ATIPPA* the public body bears the burden of proving that the Applicant has no right of access to the record or part of the record.

[32] As my predecessor discussed in Report 2007-004, the *ATIPPA* does not set out a level or standard of proof that has to be met by a public body under subsection 64(1) in order to prove that an applicant has no right of access to a record. After a review of reports from other jurisdictions and relevant case law from the courts, our Office has concluded that the standard to be met by the public body under this section is the civil standard of proof. This means that the public body must prove on a balance of probabilities (in other words, that it is more likely than not) that the applicant has no right to the record or part of the record.

(c) Refusal to Confirm or Deny

[33] The Department in its submissions stated that it was Departmental policy to "...neither confirm nor deny publicly that it was in negotiations with a company..." (see paragraph 25 above). The Department further stated that:

> *The Applicant* [...] *named specific companies in these two requests for information. Any response to this request other than "we can neither confirm nor deny" confirms that we were in negotiations with these companies. This risks exposing these companies and their information.*

The Department did not cite any statutory authority for this position, nor did it give any further concrete explanation of how the bare confirmation of the existence of a record could, in itself, lead to any risk of harm to such a company or its information.

[34] Section 11 of the *ATIPPA* requires that a public body make every reasonable effort to respond to a request in writing within 30 days and section 12 sets out the required content of that response:

> *12. (1) In a response under section 11, the head of a public body shall inform the applicant*
>
> *(a) whether access to the record or part of the record is granted or refused;*
>
> *(b) if access to the record or part of the record is granted, where, when and how access will be given; and*
>
> *(c) if access to the record or part of the record is refused,*
>
> *(i) the reasons for the refusal and the provision of this Act on which the refusal is based,*
>
> *(ii) the name, title, business address and business telephone number of an officer or employee of the public body who can answer the applicant's questions about the refusal, and*
>
> *(iii) that the applicant may appeal the refusal to the Trial Division or ask for a review of the refusal by the commissioner, and advise the applicant of the applicable time limits and how to pursue an appeal or review.*
>
> *(2) Notwithstanding paragraph (1)(c), the head of a public body may in a response refuse to confirm or deny the existence of*
>
> *(a) a record containing information described in section 22 ;*
>
> *(b) a record containing personal information of a third party if disclosure of the existence of the information would disclose information the disclosure of which is prohibited under section 30 ; or*
>
> *(c) a record that could threaten the health and safety of an individual.*

[35] It can be seen that the *ATIPPA* does address the issue of the authority of a public body to refuse to confirm or deny the existence of a record, in subsection 12(2) above. However, that subsection applies only in an extremely limited number of cases: where disclosure of that information would be harmful to law enforcement, would disclose prohibited personal information or could threaten the health or safety of an individual. There is no provision in the *ATIPPA* for refusing to confirm or deny the existence of any other category of information. On the contrary, in normal circumstances subsection 12(1) of the *ATIPPA* requires that an Applicant be informed that

access to a record (or a part of it) is either granted or refused and, if refused, the reasons for the refusal. This necessarily requires that the existence of the record must first be confirmed or denied.

[36] In addition, under section 9 of the *ATIPPA*, a public body has a duty to make every reasonable effort to assist an applicant in making a request. In Report 2007-007 at paragraph 9, my predecessor indicated that the *Access to Information Policy and Procedures Manual* (Department of Justice ATIPP Coordinating Office) provides a useful summary of section 9. Section 3.3 of the *Manual* states:

> *The duty to assist the applicant is an important, underlying provision of the Act. It is a statutory duty throughout the request process, but it is critical during the applicant's initial contact with the public body. The public body, through its Access and Privacy Coordinator, should attempt to develop a working relationship with the applicant in order to better understand the applicant's wishes or needs, and to ensure that he or she understands the process.*

[37] It is difficult to envisage the development of any working relationship where the initial response of the public body to an applicant is a refusal to even confirm or deny that the requested record exists. It is equally difficult to reconcile a departmental policy of "refusal to confirm or deny" with the letter, spirit and underlying principles of the *Act*.

[38] The Department's ostensible policy of "refusal to confirm or deny" as expressed in its submissions is in fact at variance with the Department's actual response to the Applicant in the present case. In its initial letter of June 30, 2008 the Department wrote: "Please be advised that access to these records has been refused..." in accordance with section 24 of the *ATIPPA*. Later, in its reply to the Applicant's e-mail the Department reiterated its decision to "...not provide the records you requested...." The clear implication is an acknowledgement that the requested records relating to the named companies do in fact exist.

[39] This implication is further strengthened by the Department's later decision to claim additional exceptions under sections 23, 27 and 30 of the *ATIPPA*, which was communicated in an e-mail to both the Applicant and this Office which began with the words: "After further review of the files responsive to these Requests for Review...." In addition, the fact that the Department claimed exceptions at all is, in and of itself, an implicit acknowledgment that the requested records exist. Ultimately, the Department delivered to this Office responsive records relating to both files,

together with an index for each responsive record detailing the Department's application of the additional claimed exceptions to disclosure.

[40] Finally, it is worth noting that the Applicant's access request to the Department came after a local media report recounted the decision, by the companies named in the access request, not to proceed with certain projects in this province. That media report contained comments attributed to a representative of one of the companies, in which he confirmed that the company had decided not to proceed with a planned project in Newfoundland and Labrador and further suggested that the media outlet contact the Deputy Minister of the Department of Business for further information. Clearly, the refusal of the Department to confirm or deny the existence of a record in such circumstances, where the fact of the relationship is already in the public domain, would be both unworkable and contrary to the spirit and objects of the *ATIPPA*.

[41] For all of the above reasons I have concluded that it is inappropriate for the Department (or any other public body subject to the *ATIPPA*) to respond to any access request with a refusal to confirm or deny the existence of the requested records, except as permitted in the extremely limited circumstances set out in section 12 of the *Act*.

(d) Blanket Exceptions

[42] As I have noted above, the Applicant argues in his submissions that it is not appropriate for the Department to apply section 24 of the *ATIPPA* as a blanket exception to the records in question. For the reasons that follow, I agree.

[43] Section 7 of the *ATIPPA* states:

> *7. (1) A person who makes a request under section 8 has a right of access to a record in the custody or under the control of a public body, including a record containing personal information about the applicant.*
>
> *(2) The right of access to a record does not extend to information exempted from disclosure under this Act, but if it is reasonable to sever that information from the record, an applicant has a right of access to the remainder of the record.*
>
> *(3) The right of access to a record is subject to the payment of a fee required under section 68.*

[44] I have previously discussed the application of section 7 in Report A-2008-012, as follows:

> *[13] As previous reports from this Office and from other jurisdictions have discussed, the fundamental underlying principles on which the Act is based are the accountability of government bodies and other public institutions to the public, and the desirability of having better-informed members of society. It has been said that the ATIPPA demonstrates a "bias in favour of disclosure" – that in other words, information should always be disclosed unless it clearly falls within a specific exception to disclosure in the Act. (See NL OIPC Report 2005-002.)*
>
> [...]
>
> *[14] This view of the Act is exemplified by the way in which the broad right of access is established under section 7(1), subject only to the principle in section 7(2) that excepted information should be severed and the remainder of the record should be released. The combination of the "bias in favour of disclosure" and the severability principle means that every request ought to be assessed with the object of disclosing the maximum amount of information that can be released under the Act. As the ATIPP Policy and Procedures Manual explains, to achieve this goal a line-by-line review of each document is essential, in order to determine what information may be subject to an exception to disclosure. In the process of review, information that is to be severed is covered with black marker, on a copy of the document, and the applicable section, subsection and paragraph of the Act is noted in the margin. This is a time-consuming process, and it must be carried out on every page of the document, line by line, if the result is to conform to the spirit and objects of the Act. (See ATIPP Policy and Procedures Manual, ATIPP Coordinating Office, Department of Justice, 2004, Chapter 3.)*

While I have lately chosen to use the phrase "presumption in favour of disclosure" rather than the expression "bias in favour of disclosure" used by my predecessor, the intended meaning is the same.

[45] It may happen in a particular case that after the legitimate and appropriate severing of information, nothing remains, or what remains is so scanty or disconnected that it is meaningless. In such a case, it is not "reasonable" within the meaning of section 7(2) to sever the information and disclose the rest. The public body would therefore be justified in withholding the entire page or the entire document, as the case may be. Such cases, while relatively unusual, might appear to an applicant to be the result of the application of a "blanket exception" when in fact it was the result of a careful line-by-line analysis. It is only by review of the record that this Office can confirm whether such was the case.

[46] In the usual case a responsive record may consist of a number of quite different documents. To conform to the letter and the spirit of the *ATIPPA* the public body must review each document on its own and sever it if appropriate. Certain exceptions may apply to one kind of document but not to another. Following review and severing in accordance with the *ATIPPA*, the result will often be that while one particular document may be released in its entirety, another may be completely withheld or released in part.

[47] Following the initial severing process, the public body should assess whether it may be necessary to again review the documents that remain in relation to each other to determine whether (for example) there might be information in one document that, taken together with information in another document, would constitute personal information of an identifiable individual. In that case, further severing may be required. Again, the result of such a process, though it may result in a considerable amount of information being withheld, is not to be confused with the application of a "blanket exception."

[48] In summary, in my view there is generally no justification under either the letter or the spirit of the *ATIPPA* for adopting the expedient of simply withholding an entire record on the basis of one or another of the statutory exceptions to disclosure. This is so whether the exception in question is mandatory or discretionary, or whether it involves personal information, commercial information or cabinet confidences. It is incumbent on every public body to carry out the required line-by-line, page-by-page analysis and to justify each specific decision to withhold information from disclosure.

(e) Section 24 (harm to the financial or economic interests of a public body)

[49] Section 24 of the *ATIPPA* is a discretionary exception that permits (although it does not require) a public body to withhold information where the disclosure could reasonably be expected to result in harm to the financial or economic interests of a public body. Subsection 24(1) reads:

> *24. (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 the province or the ability of the government to manage the economy, including the following information:*
>
> *(a) trade secrets of a public body or the government of the province;*

> *(b) financial, commercial, scientific or technical information that belongs to a public body or to the government of the province 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; and*
>
> *(e) information about negotiations carried on by or for a public body or the government of the province.*

[50] In its written submissions the Department has specifically invoked and relied upon paragraph 24(1)(d) (the premature disclosure of a proposal or project, or undue financial loss or gain) and paragraph 24(1)(e) (information about negotiations).

[51] Section 24 of the *ATIPPA* has been considered by this Office on a number of occasions. In Reports 2005-002, 2006-011 and 2007-005 my predecessor referenced a number of reports from this Office and from the Information and Privacy Commissioners of other provinces and decisions of the appellate courts dealing with similar language. In my view the essence of the issue is fairly and succinctly captured by the following passage from Order 02-50 of the British Columbia Information and Privacy Commissioner in which he reviewed and summarized the pertinent case law as follows:

> *137 Taking all of this into account, I have assessed the Ministry's claim under s. 17(1) by considering whether there is a confident, objective basis for concluding that disclosure of the disputed information could reasonably be expected to harm British Columbia's financial or economic interests. General, speculative or subjective evidence is not adequate to establish that disclosure could reasonably be expected to result in harm under s. 17(1). That exception must be applied on the basis of real grounds that are connected to the specific case. This means establishing a clear and direct connection between the disclosure of withheld information and the harm alleged. The evidence must be detailed and convincing enough to establish specific circumstances for the contemplated harm to be reasonably expected to result from disclosure of the information.…There must be cogent, case-specific evidence of the financial or economic harm that could be expected to result.*

Subsection 17(1) of British Columbia's *Freedom of Information and Protection of Privacy Act* is, in all material respects, identical to subsection 24(1) of the *ATIPPA*.

[52] It is important to note that section 24 of the *ATIPPA* is a *discretionary* provision: it permits but does not require the public body to withhold information that falls within the section, and then only if the required test is met. It is the responsibility of the public body to demonstrate, on a balance of probabilities and through detailed and convincing evidence, that there is a reasonable expectation of probable harm from disclosure of specific information. There must be a clear and direct causal link between the disclosure of the information specified and the harm alleged. That link must be based on evidence, not merely speculation or argument. The evidence must be convincing, not just theoretically possible. The alleged harm must be specific. The public body must demonstrate the nature of the harm that is expected to result and how it is likely to result, and it must show the harm to be probable, not merely possible.

[53] In the present case the Department provided in its formal written submissions a "Rationale for Use of Section 24." In it, the Department reasserted its position that it can "neither confirm nor deny" the existence of any of the information requested, and alleged that the release of *any* information would result in harm. The submission does not distinguish between disclosures of different kinds of information; indeed, it does not refer to specific disclosures at all. This amounts to the claim of a blanket exception, which, as I have stated above, is not applicable in the circumstances of this request.

[54] The Department set out a number of kinds of harm that it alleged "could reasonably be expected to result" from any disclosures. Its main allegations, in summary, are that:

- the Department's mandate would be compromised and that it would diminish and impair the Government's ability to attract new business to the province and manage the economy;

- the Department's actions could be perceived in the business community as contrary to professional business practices, thus hindering and undermining its ability to work effectively within this community;

- the Department's clients have demanded confidentiality and to release confidential information in the face of these demands could undermine both its relationship with existing clients and its relationship with other potential clients who similarly expect confidentiality;

- the withdrawal of one application would not preclude a client from making another such application in future and so releasing information now would undermine other potential opportunities;

- clients would be wary of communicating with the Department and may not supply the documentation necessary for due diligence, and this would hinder the Department's ability to negotiate successful deals with future clients.

[55] Clearly these are serious matters. As outlined above, in order to establish that information may be withheld under subsection 24(1) the Department must not only state what types of harm it alleges can reasonably be expected to result from the disclosure, it must also provide convincing evidence of how this is likely to occur. However, the Department has provided virtually no evidence linking the disclosure of any of the different kinds of information in the responsive record to any of the different types of harm alleged, or even demonstrating that factual circumstances exist that could lead to the harm alleged.

[56] For instance, the Department argued that certain kinds of disclosures might be perceived as contrary to professional business practices. Yet the Department provided no examples, from this or other jurisdictions, to illustrate the argument, nor did it explain what particular business practices it might be referring to by that term.

[57] The Department also argued that some clients have "demanded confidentiality." In the present case there is some evidence in the record itself that certain claims to confidentiality were made. However, the Department did not show that the entire record is, or might be, subject to such a demand in this particular case, nor, in the alternative, did it distinguish between information that might reasonably be subject to confidentiality and information that might not. Moreover, a demand for confidentiality in and of itself does not lead automatically to the right to withhold information. This is discussed in more depth below in the part of this Report dealing with section 27 (harm to the business interests of a third party).

[58] Likewise, the Department invoked the prospect that businesses with which it might be negotiating in future might refuse to supply the documentation necessary for due diligence. However, it offered no evidence to support this proposition, and so it remains speculative at best.

As much as officials of the Department may strongly believe in the positions they put forward, vigorous assertions alone are not sufficient to meet the burden of proof.

(f) Negotiations

[59] I wish to comment specifically on one other aspect of section 24. The Department argued that paragraph 24(1)(e) (information about negotiations) applies to the records. The Department interprets "information about negotiations" to include everything about its relationship with a company, including the name of that company. In my view, this is an overly broad interpretation. Negotiation is the process of attempting to reach agreement by discussion with others. Information "about negotiations" would therefore include information about the process itself, including negotiating strategies and techniques. It would also include the positions a party intended to take and the objectives it intended to try to achieve. It would not include everything about a public body's relationship with another party, and certainly not all of the information that a public body may have accumulated about the other party. Neither would "information about negotiations" include the *results* of completed negotiations such as, for example, a signed contract. Likewise, communications which are exchanged prior to or subsequent to negotiations are not "about negotiations." To apply paragraph 24(1)(e), then, it would be necessary for the Department to review the record, page by page and line by line, to show how certain information in each specific case would constitute information about the process of negotiation, and then show how or why such a disclosure is reasonably likely to be harmful.

[60] In the present case, the Department alleged that disclosing *any* information about its negotiations would set a damaging precedent. It did not, however, provide supporting evidence to show that this is so.

(g) Application of Section 24

[61] I have noted above the need for a line-by-line analysis when a public body proposes to sever information from a record. The Department did not provide any such analysis to the Applicant in the present case, since it provided no documents at all in response to the request. Rather, it simply notified him that access to the entire record had been refused and cited paragraphs 24(1)(d) and 24(1)(e) without elaboration or explanation. Similarly, when the Department provided our Office

with a copy of the record, it indicated that the whole of every document had been withheld, based on section 24 or section 27 of the *ATIPPA* and, in addition, that certain highlighted passages were subject to other exceptions, such as section 30 (personal information). However, there was no accompanying explanation of the reasons for the application of any of these exceptions.

[62] Finally, when the Department subsequently made its formal submissions to our Office, the written argument was accompanied by a multi-page index, which specifically listed certain pages and lines of the record in question, the applicable *ATIPPA* section that the Department claimed for each, and a brief comment. For the section 24 exceptions claimed, however, the only comment provided was simply: "see Part A" – a general reference to that part of its written submission that dealt with section 24. I have summarized that argument above. Thus, although the Department provided an index showing that line-by-line severing apparently had been done, there was no additional commentary explaining how, why or even which parts of section 24 were applicable to each severed portion of the record.

[63] This is not an adequate response to a Request for Review, or indeed, to an Applicant on an initial access request. Subsection 12(1), in setting out the required response of a public body to an access request, requires that where the public body refuses access to a record it must not only cite the provision of the *ATIPPA* on which the refusal is based, it must also state the reasons for the refusal. This is particularly important where the provision relied upon for a refusal of access is a discretionary exception. The public body must in all cases show that the information in question falls into the category of information described by a claimed exception, but in the case of a discretionary exception it must also show that there are reasonable grounds for withholding the information. In short, as I have discussed in more detail in Report A-2009-010, the public body must demonstrate that its discretion has been properly exercised, that is, in good faith and for some reason rationally connected to the purpose of the exception. In order to do that it is necessary that reasons be given for each discretionary exception.

[64] For the above reasons I have concluded that the Department has not met the burden imposed on it by the *ATIPPA* to demonstrate, through clear and convincing evidence, that there is a reasonable expectation of probable harm to the financial or economic interests of the province that

would result from the disclosure of any of the requested information. The Department cannot therefore rely on section 24 of the *ATIPPA* to withhold it.

[65] That, however, does not end the matter. In previous cases placed before this Office for review, there have been circumstances where it was apparent to the experienced reviewer that a discretionary exception would in fact apply to some of the information in the record, despite the failure of the public body to meet the required burden of proof. In Report A-2009-007, dealing with a situation in which the public body had claimed a discretionary exception (in that case section 20 – advice and recommendations) but had failed to address that section in its submissions, I commented as follows, at paragraph 18:

> *I will note here that the Department has not provided a written submission in this matter and, therefore, there is an "absence of evidence to discharge the burden of proof." As a result, I have been put in the position that I can only find that section 20(1)(a) is applicable in the "clearest circumstances" where it is clear to me on its face that the information reveals advice or recommendations. In those circumstances where the application of section 20(1)(a) is not clear, absent any submission or explanation from the Department, I will have to find that it is not applicable.*

[66] In the present case, upon review of the responsive records, there are certain identical e-mail exchanges, amounting to about two-and-one-half pages in each of the records, which I have concluded meet the requirements of section 24. Because of the nature of the information it is not possible for me to describe it in detail without disclosing it. Suffice it to say that the record itself contains clear and convincing evidence that points directly to the likelihood of injury to the interests of the Department and the government if this particular information were to be disclosed. I am therefore satisfied that this is one of the "clearest of circumstances" in which the disclosure of this information could reasonably be expected to harm the financial or economic interests of the government of the province. I have highlighted the information that the Department is entitled to withhold on the basis of section 24 on a copy of each of the records that I have provided to the Department along with this Report.

(h) Section 23 (harm to intergovernmental relations or negotiations)

[67] Section 23 is a discretionary exception that permits (although it does not require) a public body to refuse to disclose information if it could be reasonably expected to harm the relationship with

another government or to reveal information received in confidence from another government. In full, it reads as follows:

> *23. (1) The head of a public body may refuse to disclose information to an applicant if the disclosure could reasonably be expected to*
>
> *(a) harm the conduct by the government of the province of relations between that government and the following or their agencies:*
>
> *(i) the government of Canada or a province,*
>
> *(ii) the council of a local government body,*
>
> *(iii) the government of a foreign state,*
>
> *(iv) an international organization of states, or*
>
> *(v) the Nunatsiavut government; or*
>
> *(b) reveal information received in confidence from a government, council or organization listed in paragraph (a) or their agencies.*
>
> *(2) The head of a public body shall not disclose information referred to in subsection (1) without the consent of*
>
> *(a) the Attorney General, for law enforcement information; or*
>
> *(b) the Lieutenant-Governor in Council, for any other type of information.*
>
> *(3) Subsection (1) does not apply to information that is in a record that has been in existence for 15 years or more unless the information is law enforcement information.*

[68] Section 23 contains two distinct exceptions to disclosure. The first, paragraph 23(1)(a), requires the public body to prove a reasonable expectation of probable harm to a specific intergovernmental relationship. The second, paragraph 23(1)(b), requires the public body to show that the information in question was "received in confidence" but does not require proof of harm. These two exceptions have been discussed in detail in previous reports (see for example Reports 2005-002, 2006-006 and A-2008-012). I will not repeat that discussion in the present Report because the Department has not taken any of the necessary steps to demonstrate that section 23 applies.

[69] In each file, subsection 23(1) is cited in relation to a few partial lines of text on one page of that record. The Department has not stated whether it is paragraph 23(1)(a) or paragraph 23(1)(b) that is

referred to, and it has made no argument in its written submissions in support of it. After reviewing the record, it is not evident to me how either of those paragraphs might apply. Accordingly, I conclude that the Department has not met the burden imposed on it by the *ATIPPA* and consequently it cannot rely on section 23 to withhold any information.

(i) Section 27 (harm to the business interests of a third party)

[70] Section 27 is an example of an exception to disclosure that (along with section 18 - cabinet confidences, section 30 - personal information, and section 30.1 – disclosure of House of Assembly service and statutory office records) is *mandatory* as opposed to discretionary. If a mandatory exception applies there is no room for the exercise of discretion. The public body is simply *not permitted* to disclose the information. Section 27 reads as follows:

> *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.*
>
> *(2) The head of a public body shall refuse to disclose to an applicant information that was obtained on a tax return or gathered for the purpose of determining tax liability or collecting a tax.*

> *(3) Subsections (1) and (2) do not apply where*
>
> *(a) the third party consents to the disclosure; or*
>
> *(b) the information is in a record that is in the custody or control of the Provincial Archives of Newfoundland and Labrador or the archives of a public body and that has been in existence for 50 years or more.*

[71] Section 27 has been discussed in detail in a number of Reports from this Office (see for example Report 2005-003). It contains a three-part harms test, which may be summarized as follows:

> (a) disclosure of the information will reveal trade secrets or commercial, financial, labour relations, scientific or technical information of a third party;
>
> (b) the information was supplied to the public body in confidence, either implicitly or explicitly; *and*
>
> (c) there is a reasonable expectation that the disclosure of the information would cause one of the four injuries listed in paragraph 27(1)(c).

[72] All three parts of the test must be met in order for a public body to deny access to information in reliance on subsection 27(1). If the claimed portion of a record fails to meet any one of the three parts, it does not meet the test and the public body is not entitled to rely on subsection 27(1) to sever that information from the responsive record.

[73] This is not a simple task to undertake. In order to apply the first part of the test a public body must assess each item of information in the record, and show that it falls into one of the several categories in paragraph 27(1)(a).

[74] For the second part of the test the public body must show that the information was supplied in confidence. This means either that the information was explicitly provided on the condition that it not be disclosed, or, at least, that it is reasonable to infer from all of the circumstances that it was intended to be held in confidence. In addition, it has been held, in this and other jurisdictions, that information that is the result of negotiation between the parties, such as the terms of an agreement, cannot be said to be "supplied" by a third party (see Report 2006-001).

[75] Third, the public body must show, through the provision of at least some evidence and some argument, that harm would likely result from its disclosure. Moreover, the harm that is expected to result must be one of the four types of harm described in paragraph 27(1)(c), that is: harm to the third party's competitive or negotiating position; similar information no longer being supplied; undue loss or gain to someone; or the disclosure of sensitive labour relations information.

[76] As with other exceptions to disclosure, each of the three parts of the section 27 test must be applied, not in a blanket approach, but as part of a page-by-page, line-by-line assessment of the record.

[77] The Department in its written submissions dealt with section 27 in much the same way it had dealt with section 24. "Part B" of its submissions consisted of a number of arguments for withholding information based on section 27. The Department's main arguments may be summarized as follows:

- If even a client's name is confirmed, it would reveal financial information about the company, as competitors would then know the company was seeking financial assistance from the Department.

- Clients often provide sensitive financial and commercial documents to the Department, including financial statements, balance sheets and projections, banking information and so on.

- Communications and documents are given and received in confidence.

- There is a reasonable expectation that disclosure of these communications and documents could cause harm to the competitive and negotiating position of a client. In particular, the question could be asked "Why didn't the Government of Newfoundland and Labrador sign a deal with you?" This could harm a client's reputation and competitive position, resulting in financial loss.

- Other clients, fearing disclosure of their own information, would not be as forthright in submitting documents needed by the Department and therefore the Department would be at a disadvantage in conducting negotiations and making decisions.

[78] As with section 24, these are clearly serious matters; however, the Department has provided no evidence to support its arguments. It has not systematically identified the category of information

under section 27 into which any part of the record arguably falls, nor has it shown what kind of harm might ensue from the disclosure of any particular item or category of information. As a result, it has not met all of the separate parts of the three-part harm test for the application of section 27.

[79] In circumstances like those present in this case, where the public body has claimed a mandatory exception but has not provided sufficient evidence to support its claim, this Office is presented with a dilemma.

[80] On the one hand, as discussed above, the *ATIPPA* provides that the burden is always on the public body to prove that an exception to disclosure applies. This means that if the public body does not claim any exception with respect to a particular item of information or if it claims a discretionary exception but does not offer any evidence to support it, then the information ought to be disclosed and I will so recommend. The only exception to this general rule is a case in which the application of a discretionary exception is so clear and unmistakeable that it is immediately obvious to the reviewer that the information should be withheld. In such a case I will recommend that the information be withheld, as I have done in some instances involving section 24 in the present Report (see above).

[81] Mandatory exceptions are a different matter. If in truth a mandatory exception applies, the *ATIPPA* simply does not permit the information to be disclosed, even if the public body has failed to claim it or to support its claim. By extension, therefore, the *ATIPPA* does not permit me to make a recommendation for disclosure in circumstances where a mandatory exception applies.

[82] In most cases, when a public body has failed to offer evidence and argument in support of a claimed mandatory exception it has been the policy of this Office to go back to the public body and ask that the line-by-line review and severing be done and that sufficient justification be provided for each exception claimed. Generally, this Office will not undertake to do the work that is the responsibility of a public body under the *ATIPPA*. However, on rare occasions the circumstances make it appropriate that this Office try to resolve the difficulty by independently reviewing the record. If on review it appears to be clear that a mandatory exception does apply to certain information, then I will recommend that the information not be disclosed, regardless of whether or not the exception has been claimed or convincingly argued by the public body. If however I am not satisfied, after our own review, that a mandatory exception applies, then by default I will recommend

that the information be disclosed. This is the process for the application of section 27 (also discussed in Report A-2008-010) which I have followed in the present case.

(j) Applying Section 27

[83] There are some general comments that I wish to make at the outset about several of the arguments advanced by the Department in its submissions on the application of section 27.

[84] First, I am not satisfied that revealing a client's name, in and of itself, is equivalent to revealing financial information about a company. Neither the term "financial information" nor any of the other categories of information contained in paragraph 27(1)(a) are defined in the *ATIPPA*. However, in Report 2006-005 my predecessor, in discussing the meaning of the term "commercial information," cited *Air Atonabee v. Canada (Minister of Transport)* (1989), 37 Admin. L.R. 245, 27 F.T.R. 194, 27 C.P.R. (3d). In that case, at page 180, MacKay J. states that in understanding the use and application of the terms "financial, commercial, scientific or technical information" regarding third party business interests it is sufficient that the information relate or pertain to matters of finance, commerce, science or technical matters "as those terms are commonly understood." In my view, the term "financial information" as it is commonly understood includes information such as a company's revenues and expenses, its assets and liabilities, and its profits, losses and solvency situation. It would include financial statements (audited or otherwise), statements of profit and loss, balance sheets, proposed budgets and all of the other data commonly included in a company's internal accounting processes, as well as annual reports. There may also be other documents that, although they do not fall into the "accounting" category, nevertheless indirectly reveal financial information.

[85] However, to disclose a client's name or the fact that a company has made inquiries, or even that it is seeking financial assistance from the Department in and of itself tells us nothing in particular about the financial status or prospects of the company. After all, the Department's core function is to attract new investment to the province, in part by offering loans, equity investments, grants or tax credits to eligible companies. It would hardly be surprising to learn that a particular company might be engaged in exploring what options are available and it would be a completely unreasonable leap to conclude, for example, that this fact indicates financial vulnerability. On the contrary, it might be

equally reasonable to suppose that if a company is prepared to satisfy the Department that it is a good prospect for investment, this is probably an indication of robust financial health. In short, financial information would consist of financial facts about a company and perhaps informed conclusions. It would not include speculation.

[86] Second, it is undoubtedly the case that any company that goes beyond the initial exploratory steps will provide the Department with the financial and other information it may require, so that the Department may determine whether that company is eligible or suitable for one of the Department's programs. However, it is important to determine specifically what information in the record falls into the category of financial information, or into another of the categories set out in paragraph 27(1)(a). If any item of information in the record does not fall into one or another of those categories, it cannot justifiably be withheld under section 27.

[87] Third, it is a truism that at times documents and other communications are supplied to government departments and other public bodies in confidence. However, it is necessary, as I have explained above, that this second part of the three-part test in section 27 be applied on a case-by-case basis to each document, or part of a document, in order to reach a conclusion, first, whether or not it was "supplied" by the third party and, if so, whether it was explicitly or implicitly supplied in confidence.

[88] In interpreting paragraph 27(1)(b), the emphasis is on the intention of the third party that has provided the information, (whereas in interpreting the expression "received in confidence" as it appears in section 23, the emphasis is on the mutual understanding of both the party providing the information and the public body to which it is provided – see Report 2006-006). Therefore it is important that there be some evidence of whether or not the third party intended the information to be kept confidential at the time that it was provided, and of whether that intention was communicated to the public body at that time. It may not be enough for the public body to state, after the fact, that confidentiality was intended (see Reports 2006-006 and A-2008-012).

[89] I should add here that, as noted earlier in this Report, an explicit demand for confidentiality on the part of a third party will usually be strong evidence that information has been supplied in confidence, but it does not by any means lead automatically to the right to withhold that information

under the *ATIPPA*. Even a prior written agreement by a public body to hold information in confidence as a condition of receiving it cannot override the requirement in section 27 that all three parts of the harm test be met in order to legitimately withhold information in response to an access request.

[90] A fourth concern expressed by the Department was that the disclosure of some information about a relationship between a company and the Department might lead to the company being asked: "Why didn't the Government of Newfoundland and Labrador sign a deal with you?" I am not persuaded that simply asking such a question is automatically injurious to a company's reputation or competitive position. A reasonable person would understand that there may be any number of possible reasons why two parties might fail to reach an agreement and that those reasons do not necessarily reflect badly on either side. Indeed, one might equally speculate that it might be the company that declined to sign a deal with the government, and then ask whether that fact might be harmful to the government's reputation. The point here is that speculation or argument are simply not enough; rather, there has to be actual evidence that some harm is likely to result from such a disclosure. The Department needs to refer to the records *in this case,* identify what part of the record is referred to, and show how disclosure of *that* information would result in harm.

[91] Finally, the Department expresses the concern that other clients, fearing disclosure of their own information, would not be as forthright in submitting documents needed by the Department. This assertion has some plausibility. However, any potential investor that wishes to take advantage of the financial assistance offered by the Department will realize that it has to satisfy the Department that it is a suitable prospect, and so the provision of supporting information is a requirement. In addition, the Department should be able to demonstrate to such a company that any information meeting the three-part harm test in section 27 will not be subject to public disclosure. In the absence of any evidence, therefore, I have to conclude that this concern is not well-founded.

[92] Many of the concerns discussed above were echoed in one form or another in the submissions of the third parties and I will not repeat them here. I will simply say that it was a common feature of all the submissions from the Department and the third parties that they adopted, for the most part, a blanket approach, failed to do the required line-by-line analysis, and therefore failed to distinguish information that meets all three parts of the section 27 harm test from information that does not.

[93] Nevertheless, there were a number of specific arguments made by the third parties, in relation to certain information, that had not been made by the Department. Those arguments were informative and useful, and I will deal with them at the appropriate points in the following paragraphs.

[94] After applying these principles to a review of the responsive records in these two cases, I have concluded that most of the information cannot be withheld on the basis of section 27, because it fails to meet one or more parts of the three-part test. The record relating to one of the companies (Company A) contains some 123 pages, of which I have concluded that one whole page and portions of 15 other pages should be withheld on the basis of section 27. Within the record relating to Company A there are some 16 full pages and parts of numerous other pages that relate specifically to the Consultant, and I have concluded that parts of several of those pages should be withheld on the basis of Section 27. My reasons for recommending the withholding of that information are more fully explained below.

[95] The record relating to the other company (Company B) contains some 257 pages, of which I have concluded that 68 full pages and portions of 11 more should be withheld on the basis of section 27. My reasons for recommending the withholding of that information are more fully explained below.

(k) Company "A" Responsive Record

[96] In the record relating to Company A (the Department's File 006-2008), pages 8 to 24 are a letter from the Consultant to Company A, setting out the terms of a feasibility study to be carried out by the Consultant. The letter is in draft form and contains numerous handwritten alterations and marginal notes. It is not evident who made those notes. The letter is introduced with the word "confidential" on page 1.

[97] I will return to the issue of confidentiality in a moment. However, the first observation I wish to make is that for the most part the information contained in the letter does not meet the first part of the three-part test, since it does not consist of trade secrets or commercial or financial information at all (belonging either to Company A, or to the Consultant). Some of it, for example, is background

information about Newfoundland and Labrador demographics or infrastructure that is public knowledge. Therefore those portions of the letter do not meet the first part of the section 27 test.

[98] Other portions of the letter contain financial or commercial information about Company A that is readily obtainable from the company's own website or by an elementary internet search. Further pages consist of information about the research and evaluation procedures that the Consultant proposes to carry out, which are fairly general and which I judge would normally be expected from a firm that provides those kinds of services. Other pages are legal "boilerplate" that can be found attached to all sorts of commercial contracts and which in this case contains no information that is specific to either of the parties. Although that sort of information might be said to fall into the category of "commercial information" within the meaning of the first part of the three-part test, I have concluded that these examples cannot have been intended to be "supplied in confidence" and therefore do not meet the second part of the test.

[99] Several portions of the letter describe in general terms the project that Company A proposed to develop in Newfoundland and Labrador. Upon review I have concluded that this is the commercial information of Company A and further that it was supplied in confidence to the Department. However, the project that the company was proposing to develop here in Newfoundland and Labrador was precisely the same sort of business that it carries on elsewhere, according to its own website. There is no evidence to demonstrate that the disclosure of this information in and of itself would lead to significant harm or undue financial loss or gain to any party. I have therefore concluded that the disclosure of this information does not meet the third part of the three-part test.

[100] There are, however, other portions of the letter that I have concluded ought to be withheld. For instance, in several places there are references to precisely what the company was proposing to manufacture and how it was proposing to do so. In addition, there are specific references to the methods, strategies and techniques by which the project would be carried out. Here and elsewhere in the record there are also detailed discussions about some of the information that Company A provided, or was asked to provide, to the Consultant and to the Department. I have concluded that possessing this kind of information at this level of detail would likely give a competitor an advantage and harm the company's competitive position. Therefore it would meet all three parts of the section 27 test, and ought not to be disclosed.

[101] In a number of places in the record there are details of the relationship between Company A and one of its supplier partners, and how that relationship relates to the Newfoundland proposal. Company A argues that disclosing *any* information about that partner company could potentially harm its business plans. I am inclined to err on the side of caution where additional third parties are concerned and therefore agree that the name of that partner company and other particular identifying information ought to be withheld. I would not go so far as to recommend severing the identity of the country in which the partner company is based. A little research shows that there are literally hundreds of companies of significant size in that industry in the country in question, as well as thousands more small to medium-sized enterprises. Under those circumstances, disclosing the nationality of the partner company leads nowhere and is unlikely to result in harm.

[102] Other portions of the draft letter contain a breakdown of the Consultant's estimated fees for the feasibility study. Elsewhere in the record are several pages of detailed invoices submitted by the Consultant and there is discussion of some of the amounts and their breakdown in some of the e-mails. I have no hesitation in concluding that such information meets all three parts of the section 27 harm test and therefore ought not to be disclosed.

[103] The Consultant in its submissions asserted that *all* of the information about it in the record, including the fact that it has supplied professional services to Company A, was supplied in confidence and the Consultant therefore objected to its disclosure. Accepting for the sake of argument that the first two parts of the three-part harm test were met, however, the Consultant has not provided any evidence or even an argument specifically on the question of how it could be harmful to the Consultant to reveal its name and the fact that it supplied professional services to Company A. My review of the Consultant's own website confirms that supplying professional services on contract is what it does, and that its client list includes a very large number of major businesses in Canada and around the world. Some of these clients have stellar reputations, while others are, let us say, controversial. That latter fact does not seem to have harmed the Consultant in the slightest, and there is absolutely no indication that revealing its relationship with Company A will cause it problems.

[104] The Consultant noted that in addition to the information related to it there are references in the record to some involvement by a management consulting firm with a similar name, in another country, which is a separate and distinct legal entity. I accept that this is so, and that the Consultant is not in a position to consent to the disclosure of any information about that other company. However, my comments in the paragraph above apply with equal force to the other company – there is no indication that any harm could ensue from merely identifying it. Therefore I do not recommend severing that information.

[105] In summary, I have concluded that there is some information in the record that is commercial or financial information, which was supplied in confidence, and the disclosure of which would be reasonably likely to significantly harm the interests of Company A or of the Consultant. I have marked all of the severable portions on a copy of the record provided to the Department. I have concluded, however, that information such as the names of the company and the Consultant, general information about the nature of the proposed project and the feasibility study, and information about what happened to the project, do not meet one or more parts of the three-part harm test and so cannot be withheld under section 27.

(l) Company "B" Responsive Record

[106] An analysis of the record relating to Company B (the Department's File 005-2008) yields similar results. For example, there is a document of some 37 pages entitled "Business Plan." That document is an introduction to Company B and a description of the services that Company B provides, the methods and technology it uses and the trends and opportunities it perceives for the future of the industry in which Company B operates. I accept that much of this information falls into the category of "commercial" information. For the most part, however, this document is a somewhat more detailed version of what can be found on Company B's website, along with details of methods and technology that may be obtained by a simple internet search for information about that industry. To that extent, the information cannot be said to have been "supplied in confidence" and it is not evident that there is any risk of harm to Company B from its disclosure.

[107] There are, however, some portions of this document that I have concluded do meet all three parts of the three-part test. Financial details on some pages, and the precise "Newfoundland

proposal" on others, are clearly proprietary information which one would expect to have been supplied in confidence, and the possession of which would likely give a competitor an undue advantage. That information ought not to be disclosed.

[108] Company B submitted that some of the information provided to the Department in the responsive record discloses the identity of its partners in the information technology industry with whom it has developed software and computer systems solutions, and argues that this information ought to be withheld. Considering that similar information has been made public in recent press releases from Company B and other associates, I cannot agree. On the other hand, details about the software or other intellectual property itself, some of which are stated to be currently under a patent review process, would be quite a different matter. Portions of the business plan that deal with such information ought not to be disclosed.

[109] Elsewhere in the record there are over 60 pages of financial statements about the company and, as I have discussed above, I have no hesitation in concluding that documents such as these meet all three parts of the section 27 harm test. In addition, in the remainder of the record (which is mostly e-mail correspondence) there are scattered references to monetary amounts and other financial details, which likewise ought to be withheld. I have highlighted all of those severable portions on a copy of the record provided to the Department. The rest of the information ought to be disclosed to the Applicant.

(m) Section 30 (disclosure of personal information)

[110] In each of the responsive records delivered to our Office there are numerous places where the Department has highlighted information in relation to which it has claimed section 30 of the *ATIPPA*. Subsection 30(1) provides that a public body must not disclose personal information in response to a request. Personal information is defined in section 2 of the *ATIPPA*. Subsection 30(2), however, provides that the prohibition in subsection 30(1) does not apply in certain circumstances, such as where the person to whom the information belongs has consented to its disclosure pursuant to paragraph 30(2)(b), or where it falls into a category of personal information which may nevertheless be disclosed, such as information about the position, functions or remuneration of an employee of a public body pursuant to paragraph 30(2)(f).

[111] Like section 27, section 30 is a mandatory exception to disclosure. While the Department has claimed section 30 in numerous places, as indicated above, it has not provided any reasons why that exception ought to apply. Our Office must therefore do the line-by-line review of the record and make our own determination.

[112] Upon review, I have concluded that section 30 has been properly applied by the Department. A few examples should suffice to illustrate this conclusion. One kind of personal information commonly encountered in e-mail correspondence is the name and the e-mail address of the sender or recipient of the message. In the present case, the Department does not propose to withhold the names and government e-mail addresses of government employees, since that is understood to be information about the employee's position or functions, and is therefore disclosable pursuant to paragraph 30(2)(f). However, the Department does propose to sever the names and e-mail addresses of individuals who are officers, employees or representatives of third parties, since they are not covered by paragraph 30(2)(f) and therefore are not excepted from the general rule against disclosure of personal information. I agree with these conclusions.

[113] As another example, the Department has indicated that it proposes to sever an entire one-page résumé of an individual representative of the Consultant. On review it is evident that the entire document is the personal information of the named individual. It must therefore be withheld.

[114] The Consultant has also, in its submissions, identified much of the same personal information in the responsive record and correctly submitted that it ought to be severed.

[115] Finally, there are numerous places in the e-mail correspondence where a writer has included material that is not business information but rather personal information such as an inquiry about a specific health problem of the recipient. The Department has properly proposed to sever it.

[116] Having reviewed each of the responsive records I have concluded that the Department has correctly applied section 30 to sever personal information from these documents. That severing is, moreover, straightforward and uncontroversial. In a few places I have also noted additional personal information that the Department appears to have inadvertently missed. The Department is required

to withhold all of that information and I have highlighted it on a copy of the records provided to the Department.

VI CONCLUSION

[117] In summary, upon review of these two files I have reached the following conclusions:

(1) The Department is not entitled to refuse to confirm or deny the existence of a record in the circumstances of these cases.

(2) The blanket application of an exception to disclosure should not be used to simply withhold an entire document or record. Instead, a public body must engage in the process of line-by-line analysis and severing in each and every case in order to justify withholding of specific information, and must be prepared to explain each and every severing decision, first to the Applicant and, in the event of a Request for Review, to this Office.

(3) The Department has not provided any justification for its application of section 23 of the *ATIPPA* (disclosure harmful to intergovernmental relations) and is therefore not entitled to withhold information from either of the records on that basis.

(4) With respect to section 24 of the *ATIPPA* (disclosure harmful to the financial or economic interests of a public body) the Department has not provided clear and convincing evidence of a reasonable expectation of probable harm. The Department is therefore not entitled to withhold most of the information from either of the records on that basis. Nevertheless, upon review I have concluded that some of the information in the responsive records clearly falls within the section 24 exception and may be withheld.

(5) With respect to section 27 of the *ATIPPA* (disclosure harmful to the business interests of a third party) the Department has not provided evidence and argument sufficient to demonstrate that all three parts of the test for application of this section have been met. However since this section is a mandatory exception to disclosure I have reviewed the

records, and I have concluded that certain information in each record meets all parts of the test and therefore must be withheld. In addition, I have accepted some of the evidence and argument provided by each of the third parties and I have therefore recommended that some additional information be withheld.

(6) Similarly, section 30 of the *ATIPPA* (personal information) is a mandatory exception to disclosure. While the Department did not in most cases provide any explanation of its proposed severing, it has adopted the proper practice of line-by-line severing of specific information, and upon review I have concluded that it has done so correctly. Accordingly, that information must be withheld.

VII RECOMMENDATIONS

[118] Under the authority of subsection 49(1) of the *ATIPPA* I recommend that the Department of Business release to the Applicant the two responsive records dealt with in this Report *except for* those portions of each record to which section 24, section 27 and section 30 of the *ATIPPA* apply, which I have highlighted on the copies of the records provided to the Department along with this Report.

[119] Under the authority of section 50 of the *ATIPPA* I direct the head of the Department of Business to write to this Office, to the Applicant and to each of the third parties within fifteen days after receiving this Report, indicating the Department's final decision with respect to the recommendations contained in this Report.

[120] If the final decision of the Department is to give access, in whole or in part, to information the disclosure of which has been objected to by a third party, I recommend that a copy of the relevant record, showing the portions which the Department has decided to disclose, be sent to that third party along with the notice of the Department's decision.

[121] Please note that within 30 days of receiving a decision of the Department under section 50, the Applicant or a third party may appeal that decision to the Supreme Court of Newfoundland and Labrador, Trial Division, in accordance with section 60 of the *ATIPPA*. **Therefore, if the decision**

of the Department is to give access, in whole or in part, to information the disclosure of which has been objected to by a third party, such access should not be given until after the expiry of the 30-day appeal period provided for by section 60.

Dated at St. John's, in the Province of Newfoundland and Labrador, this 17th day of March, 2010.

E.P. Ring
Information and Privacy Commissioner
Newfoundland and Labrador