

## ***The Access to Information Act; How it is being Applied*** **to Health Canada's Pharmaceutical Files**

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### **Background to Access to Information**

The control of information in Canada is governed by a patchwork of federal and provincial legislation. The various legislation can be broadly divided into access and privacy legislation. Access legislation deals with the availability of information under the government's control and as such this type of legislation is entirely public in nature. Privacy legislation circumscribes the dissemination and use of personal information. Until recently, most privacy legislation governed the public sector exclusively. With the introduction of the *Personal Information Protection and Electronic Documents Act*<sup>1</sup>, the federal government made its first foray into the governance of private sector information. Most of the provinces, with the notable exception of Quebec, continue to struggle with legislation dealing with private sector privacy.

The provinces and the federal government have taken different legislative approaches to the control of information. The provinces have enacted legislation that combines public sector privacy and access legislation, such as Ontario's *Freedom of Information and Protection of Privacy Act*<sup>2</sup> and the *Municipal Freedom of Information and Protection of Privacy Act*<sup>3</sup>. The federal government chose to legislate separately, and the *Access to Information Act*<sup>4</sup> and the *Privacy Act*<sup>5</sup> came into force on July 1, 1983.

This paper will focus exclusively on the federal access legislation, and on the disclosure of information related to business entities in particular, or "third party information". The federal access legislation governs the disclosure of any information held by any of the enumerated government institutions found in Schedule 1 to the *ATIA*, including Health Canada. Health Canada requires significant documentation by pharmaceutical companies as a condition to approval of new drug products, and the accessibility of these documents through the Access

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<sup>1</sup> R.S.C. 2000, c. 5.

<sup>2</sup> R.S.O. 1990, c. F.31.

<sup>3</sup> R.S.O. 1990, c. M.56.

<sup>4</sup> R.S.C. 1985, c. A-1 [hereinafter *ATIA*].

<sup>5</sup> R.S.C. 1985, c. P-21.

legislation has made it a prime source of information for companies seeking to keep up to date on industry developments as well as competitors.

The introduction of the federal access legislation in 1983 signified the recognition of general access rights in Canada. The stated purpose of the *ATIA* is found at s. 2 as follows :

2.(1) The purpose of this Act is to extend the present laws of Canada to provide a right of access to information in records under the control of a government institution in accordance with the principles that government information should be available to the public, that necessary exceptions to the right of access should be limited and specific and that decisions on the disclosure of government information should be reviewed independently of government.

From this provision, we can extract two key features of the *ATIA*. The first is the existence of a general right to access information held by the government. The second is that the exceptions to disclosure should be limited and specific. The courts have agreed stating :

“It is clear law that under the Act disclosure is the general rule and exemption the exception, and that the burden is on those who claim an exemption to prove their entitlement in this regard (see for example *Rubin v. Canada*, [1989] 1 F.C. 265 at 276-277 (F.C.A.); *The Information Commissioner of Canada v. The Prime Minister of Canada*, [1993] 1 F.C. 427 at 441 (F.C.T.D.) and *Société Gamma Inc. v. Canada (Secretary of State)* (1994), 79 F.T.R. 42 at 45 (F.C.T.D.).”<sup>6</sup>

### **The Statistics**

It is without question that Access to Information requests have been on the increase. Health Canada has had to drastically increase the resources it has invested in fielding such requests. In 1993-1994, Health Canada received 648 new access requests. That number has since more than doubled to 1345 new requests in 2000-2001.<sup>7</sup>

Businesses, consisting primarily of drug companies, are significant users of access legislation, accounting for 66 percent of all Health Canada access requests in 2001. The media (14 percent), various professional associations (13 percent), the public (6 percent) and academia (1 percent) make up the balance.<sup>8</sup>

The most recent statistics indicate that the majority of requests generally result in full or partial disclosure of the requested records. Of the 1,349 requests completed by Health Canada in 2000-2001, full disclosure was granted to 471 requests and partial disclosure was granted to 464 requests. Records were denied for only 116 requests, with the remaining requests being

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<sup>6</sup> *Merck Frosst Canada Inc. v. Canada (Minister of National Health)*, [2000] F.C.J. No. 1281 (T.D.) [hereinafter *Merck Frosst*] at para. 6, aff'd [2002] F.C.J. No. 150 (C.A.).

<sup>7</sup> Health Canada, *Administration of the Access to Information Act and the Privacy Act 2000-2001* (Annual Report) (Ottawa: Publications Health Canada, 2001) [hereinafter *2000-2001 Annual Report*] at 4.

<sup>8</sup> *2000-2001 Annual Report* at 5.

classified as inadequate, transferred, abandoned or treated informally. The Department found it necessary to issue third party notices on 228 occasions.<sup>9</sup>

### **Type of information requests granted or denied**

The information and types of documents sought under the access scheme are many and varied. Despite the large number of requests handled by the Information Commissioner, recommendations made by the Commissioner are not public documents, nor are they accessible under the access statute, as the Office of the Information Commissioner is not subject to the *Act*. Although the federal Information Commissioner provides an annual report to parliament containing summaries of select issues it has mediated, interpretation of the *ATIA* is substantially fact driven and the precedent value of such decisions is limited. The ultimate decisions to allow or deny requests, as well as the decision to notify third parties, are substantially affected by such policy documents as the Operational Guidelines issued by Health Canada.<sup>10</sup>

The main information document sought through access requests to Health Canada remains the "Product Monograph". The "Product Monograph" is a document distributed to health care professionals such as physicians and pharmacists, which provide information such as safety, efficacy, side effects, drug interactions and other pertinent medical information. The general Health Canada policy is that once information is disseminated by the drug sponsor, it is no longer confidential and must be released pursuant to an access request.<sup>11</sup> Information will be considered "disclosed" by the drug sponsor if it is found in a number of public sources of information, including packaging, journals, various government applications, the internet, symposiums, advertising and various publicly available references.<sup>12</sup> Such disclosure can occur in Canada or world wide. The "Product Monograph" would no longer be considered confidential once it is has been disclosed to health care professionals and will be released pursuant to an access request. In addition, other documents filed during the drug submission process also become accessible either in whole or in part after the product is marketed. Specifically, Health Canada will generally agree to release either in whole or in part the Master Volume of the NDS, the accompanying comprehensive summaries, the internal review documents generated by Health Canada and the correspondence between the sponsor company and Health Canada.<sup>13</sup>

Section 25 of the *ATIA* allows the head of a government institution to sever information where it is reasonable to do so. Health Canada has found that certain information is usually found in the product monograph and cannot be severed, such as the pharmaceutical form, route of

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<sup>9</sup> 2000-2001 Annual Report at 7.

<sup>10</sup> Health Canada, *Access to Information Act : Third Party Information* (Operational Guidelines) (Ottawa : Publications Health Canada, 2002) [hereinafter *Operational Guidelines*].

<sup>11</sup> *Operational Guidelines* pg. 9; see *Cynamid Canada Inc. v. Canada (Minister of Health and Welfare)* (1992), 41 C.P.R. (3d) 512 (F.C.T.D.) [hereinafter *Cynamid*]; aff'd (1992), 45 C.P.R. (3d) 390 (F.C.A.).

<sup>12</sup> *Operational Guidelines* at 9-10.

<sup>13</sup> *Operational Guidelines* at 9.

administration, medicinal ingredient(s), dosage strengths, safety information and basis for clinical efficacy.<sup>14</sup> Health Canada will also refuse to sever or hear objections to the release of certain types of information that originate from Health Canada or is general or administrative information provided by third parties. Specific information falling into this category listed by Health Canada include :<sup>15</sup>

- Health Canada file numbers and submission numbers for approved submissions
- amount of submission fees (once submission is approved)
- type of submission
- class of submission
- reason for submission, etc (once approved)
- processing-related dates (e.g. dates of submissions, meetings, correspondence, etc.) for approved submissions
- names of Health Canada employees
- names of individuals on contract to Health Canada
- formats, forms, templates, etc. published by Health Canada, including those found in Therapeutic Products Directorate Guidelines
- names of employees of the third party
- administrative numbers generated by the third party (e.g. batch, lot, protocol, SOP, report numbers, etc.)
- method of manufacture of a drug substance which is in the public domain or appears in the Patent Register
- any test, parameter, specification, limit, or other required element found in Health Canada Guidelines, or in ICH or other internationally recognized Guidelines

There is also an intermediate category of information that may or may not be disclosed depending on the actions of the third party. This type of information constitutes the “grey” zone that is most likely to be the subject of litigation. The party seeking to prevent disclosure must generally identify and support specific objections and limit these objections to specific portions of the document. Information that will be considered by Health Canada as falling into this category include :<sup>16</sup>

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<sup>14</sup> *Operational Guidelines* at 10.

<sup>15</sup> *Operational Guidelines* at 10.

<sup>16</sup> *Operational Guidelines* at 11.

- formulation of dosage form (i.e. non-medicinal ingredients and amounts, if not listed in PM, CPS, labels, etc.)
- method of manufacture of dosage form
- information which reveals batch sizes
- unpublished limits, specifications, test parameters, and specific descriptions of test methods, providing they are not adopted or recommended by Health Canada
- test results (e.g. chemistry and manufacturing)
- expiry periods
- information regarding unmarketed packaging
- names of laboratories, individuals, or companies on contract to the third party
- names of suppliers, names of Product Master File owners and DMF numbers
- specific unpublished preclinical and clinical trial information
- portions of reviewer's comments containing specific confidential third party information
- information on Investigational New Drug Submissions except where they have been used in support of an approved New Drug Submission, Supplemental New Drug Submission, etc.
- reference to unapproved submissions or indications, or unnotified drug products

Objections to entire documents will only be considered under very limited circumstances. If a third party decided upon notification not to sever specific information, but rather sought to exempt large portions of the record, and it was found that such information did not generally fit within the defined exemptions, Health Canada will reject the objection. It is Health Canada's policy to consider objections to the entire document under limited circumstances only. Two examples listed by Health Canada include :

- Where a submission has not been approved, every document related to that submission is exempt under 20(1)(b)(c). An exception occurs when the submission is re-submitted and approved; if reference is made in the approved submission to the unapproved submission, then the unapproved submission cannot be exempted in its entirety.
- where an approved submission for a new dosage form has not been notified as marketed, documents related to that submission are exempt under 20(1)(b)(c), with the exception of the Notice of Compliance, Certification Letter, and Product Monograph (provided it has been disseminated)<sup>17</sup>

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<sup>17</sup> *Operational Guidelines* at 12.

## **The Access Process**

### **Informal vs. Formal Requests**

The federal *Ac*

cess legislation requires that the head of every government institution prepare an annual report for submission to Parliament on the administration of the Act within the institution during each financial year.<sup>18</sup> The various government institutions subject to the highest volume of requests have implemented defined procedures and invested in dedicated staff to deal with such requests. For the most part, most information requests are channelled through these dedicated access pathways.

Section 2(2) of the *Act* states that the legislation was designed to complement rather than replace existing procedures for access to government information. Prior to the enactment of the access legislation, a government institution could disclose any information it held subject only to statutory confidentiality requirements and civil liability. Access legislation provides for numerous exemptions and mandatory procedures for certain types of personal and third party disclosures.<sup>19</sup> By placing an informal request, it may be possible to obtain information that would otherwise be restricted under the *Act*. However, numerous government agencies have adopted the stance that all requests must follow the format of an Access to Information request. Nevertheless, it is interesting to note that in 2000-2001, 68 Health Canada access requests were documented as having been treated informally.

### **Access Rights**

The *Access to Information Act* accords access rights only to Canadian citizens and landed immigrants. However, by Cabinet order and pursuant to s. 4(2) of the *ATIA*, access rights have now been extended to other individuals and corporations “present in Canada”.<sup>20</sup> Access rights are generally not an issue of contention. However, the federal court in *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare)*<sup>21</sup> enjoined the Minister from making the proposed disclosure of records on the grounds that there was nothing of record to establish that the unidentified requester was a qualified requester. Anonymity is often valuable as a matter of strategy between competing business entities. Disclosure of information classified as “third party information” may be subject to prior notification to the third party. This drawback is easily overcome by the use of a nominee requester.

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<sup>18</sup> *ATIA* s. 72(1).

<sup>19</sup> *ATIA* s. 27.

<sup>20</sup> *Access to Information Extension Order No. 1*, SOR/89-206.

<sup>21</sup> [1990] 1 F.C. 652 (T.D.), affirmed 113 N.R. 399 (C.A.).

## Identifying the source of Government Information

Identifying the government institution holding the information to be requested is an essential preliminary step. This is important for three reasons. Unlike most other Canadian access legislation<sup>22</sup> which apply to all government departments or ministries generically, the federal *Access to Information* legislation applies only to those government bodies listed in Schedule I to the *Act*. This schedule is subject to frequent revision, and newly created government bodies must be specifically added to the list. However, if an institution claims that it is not subject to the *Act*, such refusal may be the subject of judicial review. Even if an entity is not explicitly listed in the Schedule, it is possible that the body in question will be subject to the act if it has no separate existence from a listed parent entity.

Identifying the proper government institution is also necessary because there is no central system of access. However, requests made at the wrong institution will usually be referred to the proper body.<sup>23</sup> The *Act* also allows a government institution to transfer the request if the head of the institution considers that another government institution has a greater interest in the record.<sup>24</sup>

Third, the requester must ascertain whether there is an existing system of public access available from that institution for that type of information. Although the federal access legislation is silent on this issue, the authority to divert a requester to another access system is found in access legislation for Ontario, Nova Scotia and Saskatchewan and may be applicable to the federal *Act*. It is also important to ascertain whether the information sought is already publicly available. The federal *Access* legislation specifically excludes published materials available for purchase, library and museum material and materials placed in various national archives.<sup>25</sup>

To facilitate the task of identifying the institution holding the desired information, the legislation requires the Minister responsible for the *Act* to provide a publication describing the organization of the various government institutions and their information holdings.<sup>26</sup> This requirement is satisfied by the Treasury Board publication "Info Source"<sup>27</sup>, which provides the contact information, responsibilities, legislation administered, organizational information, programs, manuals and publications of about 150 different government bodies.

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<sup>22</sup> with the exception of the New Brunswick *Act*.

<sup>23</sup> For example, Health Canada made 2 such referrals in 2000-2001.

<sup>24</sup> *ATIA* s. 8.

<sup>25</sup> *ATIA* s. 68.

<sup>26</sup> *ATIA* s. 5.

<sup>27</sup> "Info Source" is available on the internet at [http://infosource.gc.ca/Info\\_1/pdf/pdf-index-e.html](http://infosource.gc.ca/Info_1/pdf/pdf-index-e.html).

## Decision-Maker

Like all Canadian access statutes, the *ATIA* requires the “head” of each government institution to make decisions regarding the release of information. This term is defined in s. 3 of the *Act* as the member of the Queen’s Privy Council for Canada presiding over a department or ministry of state or a person designated by order in council for the purposes of the *Act* as the head of the institution. The practice of Health Canada, as in many other government institutions, is for the access department officials to conduct the investigation and to make recommendations to the Minister who then approves of the recommendation. The question of delegation of authority under the Health Canada scheme was litigated in *Cyanamid Canada Inc. v. Canada (Minister of Health and Welfare)*<sup>28</sup>, where the court concluded that the practice adopted by Health Canada was consistent with the *Act*.<sup>29</sup>

## Structure of Requests :

The *Act* requires that requests for access be made in writing, and that the request be in sufficient detail to enable “an experienced employee of the institution with a reasonable effort to identify the record.”<sup>30</sup> The wording of the request is particularly important because the disclosure must correspond with the request. This has been the subject of litigation. In *Ciba Geigy Canada Ltd. v. Canada (Minister of National Health and Welfare)*<sup>31</sup>, the requester sought access to a document which it referred to descriptively as a “Notice of Compliance”. However, at a later time, the title “Notice of Compliance” was given to a specific legal document issued by the Minister. The third party argued that since the Notice of Compliance form did not exist at the period of time in question, the requester was not entitled to the documents. The court disagreed, and held that since the term was not in use in the period of time in question, “the head of the government institution must be entitled to respond [to the request] on the basis of the words used in the request in the ordinary sense.”<sup>32</sup>

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<sup>28</sup> *Cyanamid*, *supra* note 11.

<sup>29</sup> *Ibid.*, at 521 : “With respect to the question of delegation of authority, it is clear that the Minister has retained the power to determine whether, on the basis of ss. 13-27, access to government records must be denied ... In my opinion, the practice of department officials making recommendations to their Minister is entirely consistent with the requirements of the *Act* and of the delegating instruments. It is unthinkable that the Minister must personally conduct each and every investigation herself. In any event, common sense dictates that the Minister will be guided by her officials, particularly the Minister’s most senior public servant, the Deputy Minister. The final determination must rest with the Minister. By signing, the Minister accepts the recommendation of her most senior officials and, accordingly, I reject any contention of impropriety in the delegating process of in the decision-making process at issue here.”

<sup>30</sup> *ATIA* s. 6.

<sup>31</sup> (1986), 11 C.P.R. (3d) 98 (F.C.T.D.) [hereinafter *Ciba Geigy*].

<sup>32</sup> *Ibid.*

Once a proper request has been made, the head of the government institution generally has thirty days to respond or to justify an extension of time<sup>33</sup>. At the end of the time period, the head of the government institution must give written notice to the requestor as to whether access to the record or a part thereof would be provided and if answered in the affirmative, must provide that record or part thereof.<sup>34</sup> If the head of the institution fails to give access within the prescribed time limits, the head of the institution is deemed to have refused to give access<sup>35</sup>, at which point the requestor may complain to the information commissioner.

### **Information protected from disclosure :**

As mentioned earlier, the *Access to Information Act* provides a broad right of access to information subject to defined and limited exceptions. The head of the institution is subject to a number of mandatory and discretionary exemptions to disclosure found in sections 13 to 26 of the Act. These exemptions provide the head of a government institution with the ability to refuse disclosure of information on various grounds, including : various affairs of government<sup>36</sup>, law enforcement<sup>37</sup>, safety of individuals<sup>38</sup>, economic interests of Canada<sup>39</sup>, personal information<sup>40</sup>, third party information<sup>41</sup>, solicitor-client privilege<sup>42</sup> and disclosures to government made pursuant to statutory provisions listed in Schedule II to the Act<sup>43</sup>.

In 2000-2001, Health Canada documented 1399 instances where the statutory exemptions were invoked. Unsurprisingly, the most commonly invoked exemption was the mandatory third party information exemption clause found in s. 20(1) of the *ATIA*, which was invoked 1053 times. Exemptions under s. 14 (disclosures expected to be injurious to the conduct by the Government of Canada of federal-provincial affairs), s. 19(1) (personal information) and s. 21(1)(a) (advice or

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<sup>33</sup> *ATIA* ss. 7, 8(1), 9, 11.

<sup>34</sup> *ATIA* s. 7.

<sup>35</sup> *ATIA* s. 10(2).

<sup>36</sup> *ATIA* ss. 13, 14, 15, 21.

<sup>37</sup> *ATIA* s. 16.

<sup>38</sup> *ATIA* s. 17.

<sup>39</sup> *ATIA* s. 18.

<sup>40</sup> *ATIA* s. 19.

<sup>41</sup> *ATIA* s. 20.

<sup>42</sup> *ATIA* s. 23.

<sup>43</sup> *ATIA* s. 24.

recommendations developed by or for a government institution or a minister of the Crown) made up much of the balance.<sup>44</sup>

For the purposes of the *ATIA*, a third party is a “person, group of persons or organization other than the person that made the request or a government institution”.<sup>45</sup>

Third party information is usually provided to the government institution in order to comply with a legal requirement or as a condition of obtaining a government benefit. However, information generated by the government or another party will also qualify as third party information as long as its disclosure particularly affects a third party.

When the head of a government institution intends to disclose information that might contain information subject to a third party exemption, it is required under s. 27 of the *ATIA* to provide written notice to the third party of this intention within the time limits and in the form described in that section. The third party will be given an opportunity within 20 days to consent to the disclosure or to make representations as to why the record or part should not be disclosed under s. 28 of the *ATIA*. The third party must establish that the information or documents subject to the proposed disclosure are exempt under one of the provisions set out in subsection 20(1) of the *ATIA*.

Given the importance of the third party exemption to private sector interests, it is worthwhile to lay out the provisions of the *ATIA*:

20. (1) Subject to this section, the head of a government institution shall refuse to disclose any record requested under this Act that contains

- a) trade secrets of a third party;
- b) financial, commercial, scientific or technical information that is confidential information supplied to a government institution by a third party and is treated consistently in a confidential manner by the third party;
- c) information the disclosure of which would reasonably be expected to result in material financial loss or gain to, or could reasonably be expected to prejudice the competitive position of, a third party; or
- d) information the disclosure of which could reasonably be expected to interfere with contractual or other negotiations of a third party.

Where the information in question, on its face, is clearly confidential, the courts have found that the head of the institution has an obligation to refuse disclosure pursuant to s. 20. Where the information might be confidential, it is the responsibility of the third party to identify the specific portions of the record it seeks to have withheld and to provide supporting evidence to

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<sup>44</sup> *Annual Reports 2000-2001* at 7.

<sup>45</sup> *ATIA* s. 3.

demonstrate the requisite elements to invoke the exemption.<sup>46</sup> The tests adopted by the courts for analysis under s. 20(1) are discussed below. On an application for judicial review under s. 44(1), the onus shifts to the third party to establish the requisite elements of the exemption claimed to the civil standard.<sup>47</sup>

### **Trade Secrets : Section 20(1)(a)**

If a third party claims an exemption pursuant to s. 20(1)(a) of the *ATIA*, that party must demonstrate that the information is properly classified as a trade secret. The term is not defined in the *ATIA*, but rather imports the common law concept. The area of law governing trade secrets is entirely judge-made, and continues to evolve in a manner that is difficult to predict.

A necessary first step is for the third party to show that the information in question is “secret”. In a number of cases, the argument that the subject information was a trade secret was defeated on the basis that the information had been included as part of the product monograph, and thus already public.<sup>48</sup>

In the 1994 decision of *Société Gamma Inc. v. Canada (Secretary of State)*<sup>49</sup>, it was found that the concept of trade secrets should be given a narrow interpretation. Justice Stayer stated at p. 45 that a trade secret :

“... must be something, probably of a technical nature (this impression is strengthened by the French version which uses the term “secrets industriels” as the equivalent of “trade secret”) which is guarded very closely and is of such peculiar value to the owner of the trade secret that harm to him would be presumed by its mere disclosure...”

The elements of a trade secret have been interpreted by Health Canada as follows at pg. 5 :

1. The information must be secret in an absolute or relative sense (i.e. known only by one or a relatively small number of persons);
2. The possessor of the information must demonstrate that he has acted with the intention to treat the information as secret;
3. The information must be capable of industrial or commercial application;
4. The possessor must have an interest (e.g. an economic interest) worthy of legal protection.

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<sup>46</sup> usually by highlighting or bracketing directly on a copy of the document.

<sup>47</sup> See for example *Merck Frosst*, *supra* note 6.

<sup>48</sup> See for example *Merck Frosst Canada Inc. v. Canada (Minister of Health and Welfare)*, [1988] F.C.J. No. 290 (T.D.).

<sup>49</sup> (1994), 79 F.T.R. 42 at 45 (F.C.T.D.); cited in *Merck Frosst*, *supra* note 6.

**"Financial, commercial, scientific or technical information that is confidential information" - Section 20(1)(b)**

An exemption under s. 20(1)(b) may be claimed if the information in question has been treated as confidential and if the information can be classified as "financial, commercial, scientific or technical information." The courts have stated that confidentiality is decided objectively.<sup>50</sup> Simply marking a document as "confidential" and stressing its confidential nature at the time of submission is insufficient to make that document confidential.<sup>51</sup>

The test to meet for exemption from disclosure under s. 20(1)(b) was introduced in *Air Atonabee Ltd. v. Minister of Transport*<sup>52</sup>. Justice MacKay described the four criteria that must be met as follows at p. 197:

- (1) financial, commercial, scientific or technical information,
- (2) confidential information
- (3) supplied to a government institution by a third party, and
- (4) treated consistently in a confidential manner by the third party.

Under the first criteria, the information must merely pertain or relate to matters of finance, commerce, science or technical matters, as oppose to having an independent market value.<sup>53</sup>

For information to be considered confidential under the second criteria, the court in *Air Atonabee*<sup>54</sup> reviewed the case law and determined that the following factors should be considered to determine whether information is confidential at pg. 202 :

- (a) that the content of the record be such that the information it contains is not available from sources otherwise accessible by the public or that could not be obtained by observation or independent study by a member of the public acting on his own,
- (b) that the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
- (c) that the information be communicated, whether required by law or supplied gratuitously, in a relationship between the government and the party supplying it that is either a fiduciary relationship or one that is not contrary to the public interest, and which relationship will be fostered for public benefit by confidential information

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<sup>50</sup> *International Packers Limited v. Canada (Minister of Agriculture)*, [1987] F.C.J. No. 1112 (T.D.); aff'd on different grounds [1988] F.C.J. No. 614 (C.A.); *Merck Frosst*, *supra* note 6.

<sup>51</sup> *Ottawa Football Club v. Canada (Minister of Fitness and Amateur Sports)*, [1989] 2 F.C. 480 (T.D.).

<sup>52</sup> *Air Atonabee Ltd. v. Minister of Transport* (1989), 27 C.P.R. (3d) 180 (F.C.T.D.). [hereinafter *Air Atonabee*].

<sup>53</sup> *Air Atonabee* at 198-199.

<sup>54</sup> *Air Atonabee* cited in *Merck Frosst*, *supra* note 6 at 9.

As mentioned earlier, third party information is generally supplied by the third party, but could also be generated by a different party. A feature unique to s. 20(1)(b) applications, as reflected by the third factor in the *Air Atonabee* test, is that the information must have been supplied to the government institution by the third party and not merely generated by the institution itself or provided by another party.<sup>55</sup>

The final factor is whether information had been treated consistently in a confidential manner. This generally involves an examination of prior disclosures. Access challenges often fail because the third party fails to demonstrate that the disputed information is objectively confidential because of prior disclosures in such publications as the Product Monographs.<sup>56</sup>

### **Inquiry Test: Section 20(1)(c) and 20(1)(d)**

Exemptions based on sections 20(1)(c) and 20(1)(d) are based on a reasonable expectation of injury to the third party, either by prejudicing the competitive position of the third party or by interfering with contractual or other negotiations of the third party.

The test for application of paragraphs (c) and (d) was introduced in *Canada Packers Inc. v. Canada (Minister of Agriculture)*<sup>57</sup>. The court rejected a tort "causality" analogy, and read the section in the context of the goals of the legislation as stated in s. 2.<sup>58</sup> The court stated that "... one must interpret the exceptions to access in paragraphs (c) and (d) to require a reasonable expectation of probable harm."<sup>59</sup> The approach taken in *Canada Packers* was affirmed by the Federal Court of Appeal in *St. John Shipbuilding v. Canada (Min. of Supply and Services)*,<sup>60</sup> and reiterated most recently in *Merck Frosst*<sup>61</sup>.

The main obstacle facing a third party seeking to use the paragraph (c) and (d) exceptions is the evidentiary issue. The court in *SNC-Lavalin Inc. v. Canada (Minister of Public Works)*<sup>62</sup> stated at 127 :

The applicant does not demonstrate probable harm as a reasonable expectation from disclosure of the Record and the Proposal simply by affirming by affidavit that disclosure "would undoubtedly result in

<sup>55</sup> See also *Canada Packers Inc. v. Canada (Minister of Agriculture)*, [1989] 1 F.C. 47 (C.A.).

<sup>56</sup> See for example *Merck Frosst*, *supra* note 6; *Cyanamid*, *supra* note 11; *Glaxo Canada Inc. v. Canada (Minister of National Health and Welfare)*, [1990] 1 F.C. 652 (T.D.); *aff'd* (1990), 113 N.R. 399 (F.C.A.).

<sup>57</sup> [1989] 1 F.C. 47 at para. 22 [hereinafter *Canada Packers*].

<sup>58</sup> See p. 2.

<sup>59</sup> *Canada Packers* at para. 22.

<sup>60</sup> (1990), 67 D.L.R. (4th) 315 (C.A.).

<sup>61</sup> *Merck Frosst*, *supra* note 6.

<sup>62</sup> (1994), 79 F.T.R. 113 (F.C.T.D.) at 127. See also *Matol Botanique Internationale ltée v. Canada (Ministre de la Santé nationale et du Bien-être social)* (1999), 188 F.T.R. 296 (F.C.T.D.).

material financial loss and prejudice" to the applicant or would "undoubtedly interfere with contractual and other negotiations of SNC-Lavalin in future business dealings". These affirmations are the very findings the Court must make if paragraphs 20(1)(c) and (d) are to apply. Without further explanation based on evidence that establishes those outcomes are reasonably probably, the Court is left to speculate and has no basis to find the harm necessary to support application of these provisions.

Finally, it is also interesting to note that all mandatory exemptions for third party information are subject to an override clause found at s. 20(2). The *ATIA* requires disclosure of records that contain the result of product or environmental testing carried out by or on behalf of a government institution except if done as a service to the third party for a fee.<sup>63</sup>

### **Other General Litigation issues :**

Proceedings in the Federal court will generally originate from either the requester or the third party. These actions arise from different provisions in the *ATIA* and as they have diametrically opposed goals, will be discussed separately

#### **Requester**

Section 41 of the *ATIA* allows a requester who has been refused access to apply to the Court for a review of the matter if a complaint has been made to the Information Commissioner. In addition to explicit refusal, the *ATIA* deems refusal when the head of the government institution fails to give access to the requested documents within the time limits established by the Act.<sup>64</sup> The general principles of administrative law prevents a requester from seeking relief from the Federal Court without exhausting review processes under the *ATIA*.<sup>65</sup>

Under the federal Act, the Information Commissioner has extensive investigative powers, but nevertheless plays an investigative and mediative role rather than an adjudicative role as found in some other Canadian access legislation. During the investigation, the requester, the government institution and the third party may make representations to the investigating officer.<sup>66</sup>

In a review by the court, the Information Commissioner may appear on behalf of the requester. If the Information Commissioner had supported disclosure, the requester may wish to be represented by the Information Commissioner at the Federal Court. The Commissioner may have an advantage over the requester in making arguments before the Court, as the investigating official would have obtained knowledge of the material in question during the course of the prior investigation. However, in some cases, the Federal Court has granted access to the materials to

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<sup>63</sup> *ATIA* s. 20(2).

<sup>64</sup> *ATIA* s. 10(3).

<sup>65</sup> *Cunha v. Minister of National Revenue* (1999), 164 F.T.R. 74 at 76-79.

<sup>66</sup> *ATIA* s. 35 (2).

counsel for the requester upon an undertaking not to disclose this material.<sup>67</sup> In addition, if the requester seeks the disclosure of more documents than were supported by the Information Commissioner, the requester will require independent representation.

### **Third Party**

Section 44 of the *ATIA* allows a third party to challenge a decision by the government institution to disclose third party information. The section stipulates that the only third parties that may apply for review are those that the government institution was required to give notice under paragraph 28(1)(b) or subsection 29(1). However, an unacknowledged third party may be able to challenge a decision to disclose by resorting to judicial review under the general law.

The procedural rules to be followed<sup>68</sup> do not provide a right to file material on a confidential basis, and an important preliminary step is for the third party to request a confidentiality order.<sup>69</sup> In addition, since the government institution is not required to provide reasons for its decision to disclose and the Information Commissioner's report is not generally accessible, the third party may face significant challenges in mapping its legal strategy. Finally, a court's review is an independent *de novo* examination of the facts, and the third party carries the burden of proof that the information is third party information, that it is subject to one of the above listed exceptions, and that the disclosure is not subject to one of the override provisions.

### **Further Appeal**

The right to further appeal to the Federal Court of Appeal is not found in the access legislation, but rather exists by virtue of the general right to appeal a Trial Division decision under s. 27 of the *Federal Court Act*.<sup>70</sup>

### **Limitations on use of Information following disclosure**

The federal access legislation does not stipulate any specific restrictions on the use of information by the requester and as such it would appear that use by the requester is limited only by general common law and statutory restrictions.<sup>71</sup> However, the British Columbia Supreme Court in *Fletcher-Gordon v. Southam Inc.*<sup>72</sup> found that documents released pursuant to an access request were properly classified as "public documents". The implications of this classification

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<sup>67</sup> See, for example, *Maislin Industries Ltd. v. Minister for Industry, Trade and Commerce* (1984), 10 D.L.R. (4th) 417 (F.C.T.D.). However, access granted to counsel is general a "minimal standard of disclosure" : see *Hunter v. Consumer and Corporate Affairs* (1991), 35 C.P.R. (3d) 492 (F.C.A.).

<sup>68</sup> *Federal Court Rules*, 1998 SOR / 98-106.

<sup>69</sup> *Ibid*, Rule 151.

<sup>70</sup> R.S.C. 1985, c. F-7.

<sup>71</sup> For example, *Re McKay* (1981), 35 N.B.R. (2d) 405, supplementary judgment of March 30, 1983 (N.B.Q.B.).

<sup>72</sup> (1997), 33 B.C.L.R. (3d) 118 (B.C.S.C.). [hereinafter *Fletcher*].

are that in most Canadian jurisdictions, "fair and accurate report of public documents is an occasion of qualified privilege."<sup>73</sup>

Finally, while the initial disclosure by a government institution is subject to the statutory obligations exemption found at s. 32.1 of the *Copyright Act*, the subsequent use by the requester is subject to copyright laws.

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<sup>73</sup> *Fletcher* at para. 7.