

# ALBERTA

## OFFICE OF THE INFORMATION AND PRIVACY COMMISSIONER

### ORDER F2005-011

May 10, 2005

### ALBERTA HEALTH AND WELLNESS

Review Number 3059

Office URL: [www.oipc.ab.ca](http://www.oipc.ab.ca)

**Summary:** Genzyme Canada Inc. (the “Third Party”) asked the Commissioner to review the decision of Alberta Health and Wellness (the “Public Body”) to disclose to an Applicant communications between the Third Party and the Minister of Health about a pharmaceutical product. The Third Party claimed the disclosure would be harmful to its business interests within the terms of section 16(1) of the *Freedom of Information and Protection of Privacy Act*. The Commissioner upheld the Public Body’s decision to disclose on the basis that the Third Party had not established that the information fell within section 16(1).

**Statutes Cited: AB:** *Freedom of Information and Protection of Privacy Act*, R.S.A. 2000, c. F-25, ss. 16(1), 16(1)(a), 16(1)(b), 16(1)(c), 71(3)(b), 72.

**Authorities Cited: AB:** Orders 96-016, 99-018, 2001-019, F2004-013.

#### I. BACKGROUND

[para 1] On May 10, 2004, an Applicant made a request for information to Alberta Health and Wellness (the “Public Body”) under the *Freedom of Information and Protection of Privacy Act* (the “Act”). It requested correspondence, dated between January 1, 2004 and the date of the request, between Health and Wellness and Genzyme Canada Inc (the “Third Party”) relating to the drug Fabrazyme, as well as for related

memoranda and briefing notes and internal Ministry correspondence discussing patient access to and funding of the drug Fabrazyme and one other drug.

[para 2] The Third Party was given notice of the access request, and objected to disclosure of the records under section 16(1) of the Act on the basis that the disclosure would harm its business interests.

[para 3] The Public Body considered the objections, but decided to allow access to particular records (those in dispute in this inquiry).

[para 4] On August 9, 2004, the Third Party asked the Commissioner to review the Public Body's decision on the basis that the records/information fall within section 16(1) of the Act. Mediation was authorized but was not successful, and the matter was set down for inquiry.

## **II. RECORDS AT ISSUE**

[para 5] The records at issue are three letters from the Third Party to the Minister of the Public Body, as well as a fax cover sheet and an e-mail.

## **III. ISSUE**

[para 6] Does section 16 (business interests) apply to the records/information?

## **IV. DISCUSSION OF THE ISSUE**

[para 7] Section 16(1) has a three-part test.

*16(1) The head of a public body must 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, explicitly or implicitly, 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.*

[para 8] According to section 71(3)(b) of the Act, the Third Party has the burden to show that the information should not be disclosed under section 16. This burden is to be discharged on a balance of probabilities. (See Order 2001-019.)

[para 9] Order F2004-013 held that to qualify for the exception in section 16(1), a record must satisfy the following three-part test:

Part 1: Would disclosure of the information reveal trade secrets of a third party or commercial, financial, labour relations, scientific or technical information of a third party?

Part 2: Was the information supplied, explicitly or implicitly, in confidence?

Part 3: Could disclosure of the information reasonably be expected to bring about one of the outcomes set out in section 16(1)(c)?

#### *Part 1*

[para 10] With the exception of the fax cover sheet, the records contain information relating to the Third Party's efforts to obtain payment by the Alberta government for the supply by the Third Party of the drug Fabrazyme for use in Alberta. This is a third party's commercial and financial information.

[para 11] However, the Public Body and the Applicant have both provided evidence that shows that the letters at issue are in the public domain. They have shown that the letters are available on the internet on the website of the Fabry Society, an organization for persons concerned about the illness 'Fabry disease'. The letters themselves reveal that each of them was copied to the Fabry Society. The Society posted them on its website. I cannot find with respect to the letters, therefore, that they would *reveal* the Third Party's commercial or financial information. The Applicant has also shown that substantially similar information has been released to the Applicant through freedom of information requests in other provinces. It appears that similar information from other provinces is also posted on the internet.

[para 12] As the e-mail is not in the public domain, its disclosure could reveal some commercial or financial information of a third party.

#### *Part 2*

[para 13] The second part of the three-part test requires that the information be supplied, explicitly or implicitly, in confidence.

[para 14] First with respect to whether the information was “supplied to” the Public Body by the Third Party, the letters and fax cover sheet were communications to the Public Body by the Third Party, and as such were so supplied. With respect to the e-mail, this was in the possession of the Public Body, but it is not clear from the material before me who the recipient was, so I cannot say with certainty whether this document was “supplied to” the Public Body by the Third Party. However, I will assume for the purpose of the present argument that the document was conveyed from the Third Party to an official of the Public Body.

[para 15] I must decide whether the records that were supplied (or that I have assumed were supplied) to the Public Body were supplied, explicitly or implicitly, in confidence.

[para 16] The Third Party argued that the records themselves make it clear that they were so supplied. It also asserted that “[the Third Party] consistently treats information about its pricing and marketing policies as confidential”.

[para 17] Neither the letters nor the e-mail are marked ‘confidential’, nor do they contain any other explicit references to confidentiality or indicators of confidentiality on their face. I find that these documents themselves do not indicate that they were supplied explicitly in confidence. The fax cover sheet, which is nearest in date to the second of the letters and may be the cover for the conveyance of that letter, does have a standard-form confidentiality notice at the bottom. However, this notice is intended to notify possible recipients other than the addressee that it is intended for the addressee only. The confidentiality notice has no bearing on what use the addressee is to make of the fax or the attached material.

[para 18] I must consider whether there are any other indicators that any of the records were supplied in confidence.

[para 19] In Order 99-018, the Commissioner held that, in deciding whether there was an expectation of confidentiality based on reasonable and objective grounds, it was necessary to consider all the circumstances of the case, including whether the information was:

- (1) communicated to the public body on the basis that it was confidential and that it was to be kept confidential;
- (2) treated consistently in a manner that indicates a concern for its protection from disclosure by the Third Party prior to being communicated to the government organization;
- (3) not otherwise disclosed or available from sources to which the public has access;
- (4) prepared for a purpose which would not entail disclosure.

[para 20] With respect to the letters, there is no suggestion that there were any verbal indicators, nor anything in the manner of communicating the letters, that suggested confidentiality. Further, as already noted, all the letters were copied by the Third Party to the Fabry Society as well as to various other government and hospital officials. They were thereupon posted on the internet by the Society, where they are available to the public. There is no mention in the materials that this posting was a breach by the Society of any direction by the Third Party that they be held in confidence. This contradicts the assertion made by the Third Party that it treats its 'pricing and marketing policies', insofar as these are contained in the letters, as confidential.

[para 21] I find that the letters were not supplied to the Public Body, explicitly or implicitly, in confidence.

[para 22] With respect to the fax cover sheet, aside from the standard-form notice at the bottom, which I have already discussed, there is no other factor that indicates confidentiality. I find, therefore, that the fax cover sheet itself was not supplied to the Public Body in confidence.

[para 23] As noted, the e-mail is not expressly marked 'confidential'. In the absence of any evidence or argument that this was a confidential document, or any other background information about it, I cannot conclude that it was supplied to the Public Body in confidence.

### *Part 3*

[para 24] The third part of the test is whether there was a reasonable expectation of one of the outcomes in 16(1)(c). In this regard, the Third Party argued that all the records address the negotiations and discussions that took place between it and the Alberta Government with respect to its efforts to make the drug Fabrazyme available on a commercial basis for treatment programs and hospitals in Alberta, and the terms and conditions pursuant to which it would continue to make the drug available after the initial trials. It said disclosure of these records could reasonably be expected to harm significantly its competitive position or interfere significantly with its negotiating position – in particular, that competitors would become aware of "the details of the approach being taken by [the Third Party] to commercialize Fabrazyme in Alberta". It said disclosure would also "significantly interfere with on-going negotiations" between it and other provincial governments across Canada.

[para 25] Order 96-016 held that "it is not reasonable to expect that harm will result from disclosure of information that is already in the public domain".

[para 26] The Public Body has provided evidence that shows that the letters at issue are in the public domain. In view of this I cannot see how their disclosure could cause the sort of harm the Third Party apprehends.

[para 27] The fax cover sheet contains no substantive third-party commercial information. It therefore cannot meet the condition that the disclosure of such information is likely to cause harm, or any of the other outcomes in section 16(1)(c).

[para 28] With respect to the e-mail, this record is of one person, whose employment position is unknown to me, forwarding to another person, also unknown, an e-mail received from an employee of the Third Party. By reference to the dates on this document, it does not seem to correspond or refer to any of the 'letters'. The e-mail has some hand-written notes on it, the significance of which is unclear. It does not reveal "the details of the approach being taken by the Third Party to commercialize Fabrazyme in Alberta". Neither do I see by reference to its contents how this e-mail could "significantly interfere with on-going negotiations" between the Third Party and other provincial governments across Canada. In the absence of any further explanation by the Third Party, I have no basis on which to conclude that this record would harm the Third Party's business interests, or bring about any of the other outcomes, listed under section 16(1)(c).

[para 29] Further, the Third Party has provided no evidence that disclosure of any of the information would harm significantly its competitive position (it has not suggested who its competitors might be), or that it could be expected to suffer undue financial loss.

[para 30] Accordingly I cannot find that disclosure of the records would harm the Third Party's business interests within the terms of section 16(1)(c).

### *Conclusion*

I find the Third Party has failed to discharge its burden to show that section 16(1) of the Act applies to the Records.

## **V. ORDER**

[para 31] I make this Order under section 72 of the Act.

[para 32] I uphold the decision of the Public Body to release the information.

Frank Work, Q.C.  
Information and Privacy Commissioner