

**REPORT WITH RESPECT TO THE APPLICATION
FOR REVIEW OF ██████████ IN RELATION TO INFORMATION
REQUESTED FROM SASKATCHEWAN HEALTH**

[1] By two Access to Information Request forms (sent with a letter to Saskatchewan Health dated September 12, 2001), ██████████ (the "Applicant") requested information from the Saskatchewan Department of Health (the "Respondent") regarding correspondence between Nu-Pharm Inc. and the Saskatchewan Department of Health between August 1999 and August 2001, in connection with the product Nu-Enalapril. The requests were worded as follows:

1. "Time period - August 1999 to August 2001. Request for copies of all records including 'clarifaxes', letters, memoranda, emails and records of telephone conversations to/from the Ministry of Health from/to Nu-Pharm Inc. in connection with the product 'Nu-Enalapril'".
2. "Request for copies of any letters from/to Nu-Pharm Inc. to/from the Ministry of Health sent/received in August 2001, in connection with the product 'Nu-Enalapril'".

[2] In a letter from ██████████ Senior Policy Analyst with the Respondent dated January 4, 2002, the Respondent advised the Applicant as follows:

"Thank you for your Freedom of Information (FOI) Access Requests received November 5, 2001. I note that your initial applications requested the following:

1. *FOI Application Number ██████████
"Time Period - August 1999 to August 2001. Request for copies of all records including "clarifaxes", letters, memoranda, emails and records of telephone conversations to/from the Ministry of Health from/to Nu-Pharm Inc. in connection with the product Nu-Enalapril."*
2. *FOI Application Number ██████████
"Request for copies of any letters from/to Nu-Pharm Inc. to/from the Ministry of Health sent/received in August 2001, in connection with the product Nu-Enalapril."*

Further to our December 5, 2001 letter, we have now completed consultations with a third party regarding the records we have identified related to your request. In response to your request, attached please find the following documents:

1. Facsimile and letter dated April 26, 2000 from ██████████ Nu-Pharm Inc., to ██████████ Saskatchewan Health Drug Plan & Extended Benefits.
2. Facsimile dated April 25, 2000 from ██████████ Nu-Pharm Inc., to ██████████ Saskatchewan Health Drug Plan & Extended Benefits, and attached letter from ██████████ Nu-Pharm Inc. to pharmacists.

3. Facsimile and letter dated March 27, 2000 from [REDACTED] Nu-Pharm Inc., to [REDACTED] Saskatchewan Health Drug Plan & Extended Benefits.
4. Letter dated March 27, 2000 from [REDACTED] Nu-Pharm Inc., to [REDACTED] Saskatchewan Health Drug Plan & Health Benefits.
5. Facsimile and letter dated March 15, 2000 from [REDACTED] Nu-Pharm Inc., to Jean Sloboda, Saskatchewan Health Drug Plan & Extended Benefits.
6. Facsimile and letter dated March 15, 2000 from [REDACTED] Nu-Pharm Inc., to [REDACTED] Saskatchewan Health Drug Plan & Extended Benefits.
7. Letter dated December 6, 1999 from [REDACTED] Nu-Pharm Inc. to [REDACTED] Saskatchewan Health Drug Plan & Extended Benefits, and attached Order of the Federal Court of Canada dated December 6, 1999 between Merck & Co. Inc. and Merck Frosst Canada & Co. (Applicants) and The Attorney General of Canada, The Minister of Health and Nu-Pharm Inc. (Respondents).
8. Letter dated December 6, 1999 from [REDACTED] Nu-Pharm Inc. to [REDACTED] Saskatchewan Health Drug Plan & Extended Benefits, and attached Order of the Federal Court of Canada dated December 6, 1999 between Merck & Co. Inc. and Merck Frosst Canada & Co. (Applicants) and The Attorney General of Canada, The Minister of Health and Nu-Pharm Inc. (Respondents).
9. Letter dated November 26, 1999 from [REDACTED] Nu-Pharm Inc., to [REDACTED] Saskatchewan Health Durg [sic] Plan & Extended Benefits.

We also wish to inform you that there were other records identified related to your request which we will not be disclosing pursuant to clause 19(1)(c)(ii) of *The Freedom of Information and Protection of Privacy Act*. Clause 19(1)(c)(ii) states:

19(1) Subject to Part V and this section, a head shall refuse to give access to a record that contains:

- (c) information, the disclosure of which could reasonably be expected to:
 - (ii) prejudice the competitive position of;
a third party;

If you wish to request a review of this response, you may do so within one year of this notice. To request a review, please complete a "Request for Review" form, which is available at the same location where you applied for access. Your request should be sent to Mr. Gerald Gerrand, Q.C., Acting Information and Privacy Commissioner, #700 - 1914 Hamilton Street, Regina, Saskatchewan, S4P 3N6.

If you have any questions concerning the FOI process, you may contact me at 787-3199 or Duane Mombourquette, FOI Co-ordinator (787-3160)."

[3] In a formal Request for Review dated January 16, 2002, addressed to me, the Applicant indicated that she had been refused access to all or part of the record that she had requested. In the letter accompanying the Request for Review, she stated that:

"Please accept this letter as an appeal from the decision of [REDACTED] Senior Policy Analyst for the Department of Health. I am attaching Form B, Request for Information, as per the *Freedom of Information and Protection of Privacy Regulations* s.20.

[REDACTED] decision was communicated to me by letter dated January 4, 2002. I am enclosing a copy of this letter.

This appeal arises from the requests for information I made pursuant to the *Freedom of Information and Protection of Privacy Act* ("FIPPA"). The original requests [REDACTED] [REDACTED] are also enclosed.

As you will see, the original requests were (1) for copies of any letters from/to Nu-Pharm Inc. to/from the Ministry of Health sent/received in August 2001, in connection with the product Nu-enalapril; and (2) for copies of all records, including "clarifaxes," letter, memoranda, emails and records of telephone conversations to/from the Department of Health from/to Nu-Pharm Inc. in connection with the product Nu-enalapril. From the Department's letter to me, I know that I was refused access to some of the information identified relevant to my request. In refusing access to the documents, the Department applied sub-section 19(1) of the Act.

The Order sought from this appeal is for the release of the information found, or alternatively for the release of a redacted version of the information.

The grounds for the appeal are as follows:

1. It is unlikely that **all** the withheld documents found in the preliminary search fall within the exemptions contained in sub-section 19(1) of the *FIPPA*. Please investigate the validity of the exemptions applied.
2. In the alternative, the Department of Health has failed to comply with the subsection 8 of the Act with respect to the withheld documents. That sub-section states:

Where a record contains information to which an applicant is refused access, **the head shall give access** to as much of the records as can reasonably be severed without disclosing the information to which the applicant is refused access.
(emphasis added)

Therefore the Department of Health must, at a minimum and assuming that some of the withheld documents did contain some information which could be exempt from release, release a redacted version of the information.

I have retained the services of a lawyer [REDACTED] to assist me in my appeal. Please direct any further communications to him. He can be reached at [REDACTED] or fax [REDACTED]."

[4] I determined that I would undertake the review as requested by the applicant and duly advised the Respondent. Further, I requested that the Respondent, pursuant to the provisions of

Section 54 of *The Freedom of Information and Protection of Privacy* (the “Act”), provide me with a copy of the documents that were withheld from the Applicant. Copies of the relevant documents were duly forwarded to me by the Respondent, and I have had an opportunity to review them.

[5] The provisions of the Act upon which the Respondent relies are as follows:

“Section 19 (1) Subject to Part V and this section, a head shall refuse to give access to a record that contains: . . .

(c) information, the disclosure of which could reasonably be expected to:

- (i) result in financial loss or gain to;
- (ii) prejudice the competitive position of; or
- (iii) interfere with the contractual or other negotiations of;
a third party;...

(2) A head may give access to a record that contains information described in subsection (1) with the written consent of the third party to whom the information relates.

(3) Subject to Part V, a head may give access to a record that contains information described in subsection (1) if:

(a) disclosure of that information could reasonably be expected to be in the public interest as it relates to public health, public safety or protection of the environment; and

(b) the public interest in disclosure could reasonably be expected to clearly outweigh in importance any:

- (i) financial loss or gain to;
- (ii) prejudice to the competitive position of; or
- (iii) interference with contractual or other negotiations of;
a third party.”

[6] As noted above, the Respondent contends that the portion of documents not provided to the Applicant is exempt from disclosure pursuant to Section 19 (1)(c)(ii) of the Act.

[7] After considering the content of the documents which the Respondent has declined to produce to the Applicant and the relevant provisions of the Act, it is my view that, with

one exception, disclosing the documents in question could prejudice the competitive position of the third party, Nu-Pharm Inc., given the information contained in the documents. The third party has advised the Respondent that it opposes production of the documents withheld by the Applicant. Disclosure of the requested information, again, with one exception, could reasonably be expected to prejudice Nu-Pharm Inc.'s competitive position if publicly released.

[8] I conclude that a portion of one letter can be severed and released to the Applicant. I recommend that the portion of the August 17, 2001 letter from Nu-Pharm Inc. commencing at the second paragraph of page 1 ("The relevant history..."), and concluding at the end of the paragraph numbered "5.", be severed from this letter and released to the Applicant. I recommend that everything before and after this section of the letter (including the name, title and address of the addressee) be withheld from the Applicant.

[8] With respect to Section 19(3), though disclosure of the balance of the requested information could reasonably be expected to be in the public interest as it relates to public health, in my view, the public interest in disclosure could not reasonably be expected to clearly outweigh in importance any prejudice to the competitive position of Nu-Pharm Inc. Section 19(3) does not, in this situation, override the exemption contained in Section 19(1)(c)(ii). In conclusion, I recommend that the remaining documents in question not be disclosed to the Applicant.

[9] Dated at Regina, in the Province of Saskatchewan, this _____ day of April, 2002.

GERALD L. GERRAND, Q.C.
Commissioner of Information
and Privacy for Saskatchewan