Federal Court Cour fédérale

Date: 20160712

Dockets: T-1835-13
T-806-14

Citation: 2016 FC 796

Ottawa, Ontario, July 12, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

W. JOHN MARTIN

Applicant

And

MINISTER OF HEALTH, CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is a consolidated application under section 44 of the *Access to Information Act*, RSC, 1985, c. A-1 [the *Access Act*]. Dr. W. John Martin [Dr. Martin, or the Applicant] contests the disclosure of certain documents, as proposed by the Access to Information and Privacy (ATIP) Division of Health Canada [Health Canada, or the Department] on behalf of the Minister

of Health [the Respondent, or the Minister], on the basis of statutory exemptions contained in section 17, subsection 19(1) and paragraphs 20(1)(b) and (c) of the *Access Act*.

[2] For the following reasons, the application will be granted in part. In reaching this conclusion, I have considered the fact that Dr. Martin is self-represented and the Court should allow considerable latitude when assessing pleadings made by self-represented litigants, but such considerations cannot give him any additional rights or special dispensation (*Sauve v Her Majesty the Queen*, 2011 FC 1081 at para 14; aff'd 2012 FCA 287 at para 6).

[3] The Orders dated March 5, 2014 and January 6, 2015 of Prothonotary Lafrenière concerning the treatment of the sealed, confidential materials and documents will continue to apply to the confidential filed materials and documents.

II. Background

A. *The Clinical Trial*

[4] The events giving rise to the matter before the Court began in June 2008, when a Canadian resident [the Study Monitor], visited with Dr. Martin in the United States. The purpose of the visit was to consult with Dr. Martin about the clinical outcomes of a trial that Dr. Martin was conducting on children that had a developmental disability which also affected the Study Monitor's son. The trial involved the external use of a solution [the treatment solution].

[5] Having reviewed the initial results of the clinical investigation, the Study Monitor was eager to include his son in the trial. Dr. Martin approached Health Canada and asked if it was permissible to give some of the treatment solution to the Study Monitor to bring back to Canada. Dr. Martin's evidence is that he was told by Health Canada that this was allowed, as "medical devices when imported by an individual for their own personal use are not regulated under the Food and Drugs Act (RSC, 1985, c. F-27) or the Medical Devices Regulations (SOR/98-282)."

[6] Pleased with the initial results of the treatment on his child, the Study Monitor asked Dr. Martin if he could involve other Canadian parents in the clinical trial. The Study Monitor contacted Health Canada and was left with the impression that should these other parents wish to try the treatment solution, they too would fall under the same "personal use" exemption applicable to the Study Monitor. Dr. Martin claims that he was not involved in the selection, training or communication process with these parents other than through his contact with the Study Monitor.

[7] As participation in the clinical trial grew in Canada, the Study Monitor launched a website used to provide information to participating parents. The site allowed participating parents to blog about their children's progress and share testimonials about the trial's results. While parts of the website may have been accessible to the public, certain pages were only accessible by way of a password given to participating parents and Dr. Martin.

[8] Shortly thereafter, and for reasons that Dr. Martin states were unknown to at the time, the treatment solution stopped working. A number of parents participating in the clinical trial

became angry and allegations were made that some children who had been administered the treatment solution suffered from serious adverse reactions.

B. *Health Canada Investigation*

[9] In November 2008, Health Canada was contacted by two concerned parents of children that were participating in the clinical trial. The parents expressed their worries about the safety of the treatment solution used in the clinical trial. According to files compiled by Health Canada during its review of the complaint, advertisements for the trial claimed that the Department had authorised the study.

[10] In the course of the ensuing investigation, Health Canada contacted the Study Monitor, who in turn immediately contacted Dr. Martin. Both Dr. Martin and the Study Monitor fully cooperated with Health Canada during the investigation and the clinical trial was promptly brought to an end at Health Canada's request.

C. *Auditor General's Report*

[11] In 2011, the Auditor General of Canada released a report [2011 Attorney General's report] on Health Canada's progress towards establishing/upgrading a database of clinical trials being conducted in Canada. The report included the following statement:

> 4.39 [I]n 2008, Health Canada became aware of an unauthorized clinical trial when it was contacted by parents whose child was enrolled in the trial and who had concerns about the safety of the drug being tested. The physician running the trial was not based in Canada but was recruiting Canadian participants. According to files compiled by Health Canada during its review of the

> complaint, advertisements for the trial claimed that the Department had authorised the trial. It was not until the parents contacted the Department with their concerns that they learned that it had not, in fact, authorised the trial. Electronic access to a listing of trials authorized by the Department would allow Canadians to consult official information, to verify claims made by other parties, and to make fully informed decisions.
>
> Chapter 4, Regulating Pharmaceutical Drugs – Health Canada (Report of the Auditor General of Canada - Fall 2011)

D. *Access to Information Request*

[12] On February 27, 2012, a few months after the Auditor General's report was published, Health Canada received several access to information requests relating to clinical trials in Canada. One of the requests, made in French, largely mirrored the 2011 report and asked for:

> Tous documents et rapports d'enquête relatifs à un essai clinique non autorise qui avait cours en 2008 au Canada, mené par un médecin établi à l'extérieur du Canada, et qui recrutait des participants canadiens, jusqu'à ce que Santé Canada en soit averti par les parents d'un enfant-patient qui y participait. Les publicités relatives à cet essai clinique prétendaient qu'il avait été autorisé par Santé Canada. (Note: Voir le point 4.39 du rapport du Vérificateur général du Canada sur Santé Canada, du 22 novembre 2011, faisait état d'environ 4000 centres d'essai cliniques).

[13] Below is the English version of the request that was provided to Dr. Martin:

> All document and investigation reports relating to an unauthorized clinical trial under way in 2008 in Canada being run by a physician who was not based in Canada but was recruiting Canadian participants, until it was brought to the attention of Health Canada by the parents of a child-patient who was participating in the trial. The clinical trial was advertised as having been authorized by Health Canada.

E. *T-1835-13*

[14] Dr. Martin's affidavit evidence is that he was initially contacted by Mr. Michel Parent, then a Senior Consultant with the ATIP Division at Health Canada, who notified him in September 2012 of the pending access to information request. Having already proposed certain exemptions, Mr. Parent sought representations from Dr. Martin on the remaining responsive records. Dr. Martin objected to the release of a number of records identified by Health Canada on the basis that they contained personal and confidential information. Following lengthy discussions with Mr. Parent, it was agreed that no material would be released without Dr. Martin's formal review and that personal and confidential information would not be released. Dr. Martin was left with the belief that no information was to be publicly disclosed.

[15] In January 2013, Mr. Parent contacted Dr. Martin seeking representations about the disclosure of information contained on the now inactive website once managed by the Study Monitor, and which had been captured by Health Canada during the investigation into the clinical trial. Once again, Dr. Martin expressed his belief that the information was inappropriate for public release. Mr. Parent's apparent lack of follow-up and his failure to ask the Study Monitor for representations left Dr. Martin under the impression that the records at issue were no longer being considered for release.

[16] However, in correspondence dated October 16, 2013, Dr. Martin was contacted by Mr. Thomas Dastous, an Advanced ATIP Consultant with Health Canada, and presented with a proposed release package comprised of 46 pages of records.

[17] Dr. Martin contends that the records included in the package contained information which had originally been redacted by Mr. Parent, but now showed confidential and personal information pertaining to Dr. Martin, the Study Monitor, as well as a number of other third-parties.

[18] Dr. Martin again objected to the proposed release package on the basis that the records in question were exempt from disclosure. Nevertheless, he was told by Mr. Dastous that the information at issue was disclosable as it was otherwise already in the public domain and could be gleaned from other sources, such as patent applications that Dr. Martin had previously filed in the United States.

[19] On November 4, 2013, Dr. Martin brought an application for leave and for judicial review of that decision. This is the application in court file number T-1835-13.

[20] On January 30, 2014, upon the motion of Dr. Martin, this Court issued an order instructing Health Canada not to release the information in question until the present application was decided.

F. *T-806-14*

[21] While preparing to respond to Dr. Martin's affidavit in the T-1835-13 application, Mr. Ivan Rashid, now Acting Director of the ATIP Division of Health Canada and the individual responsible for carriage of the file at the time, identified over 100 pages of further records as being relevant to the February 27, 2012 access to information request. The responsive records

were presented to Dr. Martin for consultation on February 12, 2014, and he replied with detailed objections on February 25, 2014.

[22] On March 17, 2014, Mr. Rashid decided that Health Canada would release the documents in question, and responded to Dr. Martin's objections by noting that he had "mostly provided representations or objections that are general in nature." Mr. Rashid also expressed his view that "most of the information objected to is not considered confidential third party information nor would the disclosure be prejudicial sufficient to meet the requirements of s. 20 of the [Access Act]."

[23] On March 31, 2014, Dr. Martin filed an application for leave and for judicial review of that decision with this Court. This is the application in court file number T-806-14.

III. Preliminary

[24] As a preliminary matter, I must note that as part of the relief set out by Dr. Martin, he not only sought that the records at issue be disclosed as per his redactions, but also requested that the 2011 Auditor General's report, as well as any other relevant documents, be amended to remove the phrase "unauthorized" when used in reference to the clinical trial that was being run in Canada. Dr. Martin was adamant that this was a remedy that he was unwilling to concede.

[25] Insofar as this request pertains to the making of an amendment to the 2011 Auditor General's report, I have determined that such a remedy is outside the scope of this judicial review and that such relief will not be granted. My role in considering this application is to

review the records which have been flagged and determine whether the decision to disclose those documents was properly made in accordance with the relevant considerations.

IV. Issue

[26] The issue before me is whether the records identified by Health Canada in response to the February 27, 2012 access to information request, or parts thereof, are exempt from disclosure, pursuant to section 17, subsection 19(1) and paragraphs 20(1)(b) and (c) of the *Access Act*.

V. Relevant Legislation

[27] The following provisions of the *Access Act* are relevant for the purposes of this application for judicial review:

Safety of individuals	**Sécurité des individus**
17 The head of a government institution may refuse to disclose any record requested under this Act that contains information the disclosure of which could reasonably be expected to threaten the safety of individuals.	**17** Le responsable d'une institution fédérale peut refuser la communication de documents contenant des renseignements dont la divulgation risquerait vraisemblablement de nuire à la sécurité des individus
Personal Information	**Renseignements personnels**
19 (1) Subject to subsection (2), the head of a government institution shall refuse to disclose any record requested under this Act that contains personal information as defined in section 3 of the Privacy Act.	**19 (1)** Sous réserve du paragraphe (2), le responsable d'une institution fédérale est tenu de refuser la communication de documents contenant les renseignements personnels visés à l'article 3 de la Loi sur la protection des renseignements personnels.
Where disclosure authorized	**Cas où la divulgation est autorisée**
(2) The head of a government institution may disclose any record requested under this Act that contains personal information if	**(2)** Le responsable d'une institution fédérale peut donner communication de documents contenant des renseignements personnels dans les cas où :
(a) the individual to whom it relates consents to the disclosure;	

(b) the information is publicly available; or

(c) the disclosure is in accordance with section 8 of the Privacy Act.

a) l'individu qu'ils concernent y consent;

b) le public y a accès;

c) la communication est conforme à l'article 8 de la Loi sur la protection des renseignements personnels.

Third party information

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;

(b.1) information that is supplied in confidence to a government institution by a third party for the preparation, maintenance, testing or implementation by the government institution of emergency management plans within the meaning of section 2 of the Emergency Management Act and that concerns the vulnerability of the third party's buildings or other structures, its networks or systems, including its computer or communications networks or systems, or the methods used to protect any of those buildings, structures, networks or systems;

(c) information the disclosure of which could 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

Renseignements de tiers

20 (1) Le responsable d'une institution fédérale est tenu, sous réserve des autres dispositions du présent article, de refuser la communication de documents contenant :

a) des secrets industriels de tiers;

b) des renseignements financiers, commerciaux, scientifiques ou techniques fournis à une institution fédérale par un tiers, qui sont de nature confidentielle et qui sont traités comme tels de façon constante par ce tiers;

b.1) des renseignements qui, d'une part, sont fournis à titre confidentiel à une institution fédérale par un tiers en vue de l'élaboration, de la mise à jour, de la mise à l'essai ou de la mise en oeuvre par celle-ci de plans de gestion des urgences au sens de l'article 2 de la Loi sur la gestion des urgences et, d'autre part, portent sur la vulnérabilité des bâtiments ou autres ouvrages de ce tiers, ou de ses réseaux ou systèmes, y compris ses réseaux ou systèmes informatiques ou de communication, ou sur les méthodes employées pour leur protection;

c) des renseignements dont la divulgation risquerait vraisemblablement de causer des pertes ou profits financiers appréciables à un tiers ou de nuire à sa compétitivité;

d) des renseignements dont la divulgation risquerait vraisemblablement d'entraver des négociations menées par un tiers en vue de contrats ou à d'autres fins.

party.

Third party may apply for a review

44 (1) Any third party to whom the head of a government institution is required under paragraph 28(1)(b) or subsection 29(1) to give a notice of a decision to disclose a record or a part thereof under this Act may, within twenty days after the notice is given, apply to the Court for a review of the matter.

Recours en révision du tiers

44 (1) Le tiers que le responsable d'une institution fédérale est tenu, en vertu de l'alinéa 28(1)b) ou du paragraphe 29(1), d'aviser de la communication totale ou partielle d'un document peut, dans les vingt jours suivant la transmission de l'avis, exercer un recours en révision devant la Cour

[28] The relevant provisions of the *Privacy Act*, RSC, 1985 c. P-21 [the *Privacy Act*] are:

Definitions

3 In this Act,

[…]

personal information means information about an identifiable individual that is recorded in any form including, without restricting the generality of the foregoing,

(a) information relating to the race, national or ethnic origin, colour, religion, age or marital status of the individual,

(b) information relating to the education or the medical, criminal or employment history of the individual or information relating to financial transactions in which the individual has been involved,

(c) any identifying number, symbol or other particular assigned to the individual,

(d) the address, fingerprints or blood type of the individual,

(e) the personal opinions or views of the individual except where they are about another individual or about a proposal for a

Définitions

3 Les définitions qui suivent s'appliquent à la présente loi.

[…]

renseignements personnels Les renseignements, quels que soient leur forme et leur support, concernant un individu identifiable, notamment:

a) les renseignements relatifs à sa race, à son origine nationale ou ethnique, à sa couleur, à sa religion, à son âge ou à sa situation de famille;

b) les renseignements relatifs à son éducation, à son dossier médical, à son casier judiciaire, à ses antécédents professionnels ou à des opérations financières auxquelles il a participé;

c) tout numéro ou symbole, ou toute autre indication identificatrice, qui lui est propre;

d) son adresse, ses empreintes digitales ou son groupe sanguin;

e) ses opinions ou ses idées personnelles, à

grant, an award or a prize to be made to another individual by a government institution or a part of a government institution specified in the regulations,

(f) correspondence sent to a government institution by the individual that is implicitly or explicitly of a private or confidential nature, and replies to such correspondence that would reveal the contents of the original correspondence,

(g) the views or opinions of another individual about the individual,

(h) the views or opinions of another individual about a proposal for a grant, an award or a prize to be made to the individual by an institution or a part of an institution referred to in paragraph (e), but excluding the name of the other individual where it appears with the views or opinions of the other individual, and

(i) the name of the individual where it appears with other personal information relating to the individual or where the disclosure of the name itself would reveal information about the individual,

but, for the purposes of sections 7, 8 and 26 and section 19 of the Access to Information Act, does not include

(j) information about an individual who is or was an officer or employee of a government institution that relates to the position or functions of the individual including,

(i) the fact that the individual is or was an officer or employee of the government institution,

(ii) the title, business address and telephone number of the individual,

(iii) the classification, salary range and responsibilities of the position held by the

l'exclusion de celles qui portent sur un autre individu ou sur une proposition de subvention, de récompense ou de prix à octroyer à un autre individu par une institution fédérale, ou subdivision de celle-ci visée par règlement;

f) toute correspondance de nature, implicitement ou explicitement, privée ou confidentielle envoyée par lui à une institution fédérale, ainsi que les réponses de l'institution dans la mesure où elles révèlent le contenu de la correspondance de l'expéditeur;

g) les idées ou opinions d'autrui sur lui;

h) les idées ou opinions d'un autre individu qui portent sur une proposition de subvention, de récompense ou de prix à lui octroyer par une institution, ou subdivision de celle-ci, visée à l'alinéa e), à l'exclusion du nom de cet autre individu si ce nom est mentionné avec les idées ou opinions;

i) son nom lorsque celui-ci est mentionné avec d'autres renseignements personnels le concernant ou lorsque la seule divulgation du nom révélerait des renseignements à son sujet;

toutefois, il demeure entendu que, pour l'application des articles 7, 8 et 26, et de l'article 19 de la Loi sur l'accès à l'information, les renseignements personnels ne comprennent pas les renseignements concernant :

j) un cadre ou employé, actuel ou ancien, d'une institution fédérale et portant sur son poste ou ses fonctions, notamment :

(i) le fait même qu'il est ou a été employé par l'institution,

(ii) son titre et les adresse et numéro de téléphone de son lieu de travail,

individual,

(iv) the name of the individual on a document prepared by the individual in the course of employment, and

(v) the personal opinions or views of the individual given in the course of employment,

(iii) la classification, l'éventail des salaires et les attributions de son poste,

(iv) son nom lorsque celui-ci figure sur un document qu'il a établi au cours de son emploi,

(v) les idées et opinions personnelles qu'il a exprimées au cours de son emploi;

(k) information about an individual who is or was performing services under contract for a government institution that relates to the services performed, including the terms of the contract, the name of the individual and the opinions or views of the individual given in the course of the performance of those services,

(l) information relating to any discretionary benefit of a financial nature, including the granting of a licence or permit, conferred on an individual, including the name of the individual and the exact nature of the benefit, and

(m) information about an individual who has been dead for more than twenty years;

k) un individu qui, au titre d'un contrat, assure ou a assuré la prestation de services à une institution fédérale et portant sur la nature de la prestation, notamment les conditions du contrat, le nom de l'individu ainsi que les idées et opinions personnelles qu'il a exprimées

au cours de la prestation;

l) des avantages financiers facultatifs, notamment la délivrance d'un permis ou d'une licence accordés à un individu, y compris le nom de celui-ci et la nature précise de ces avantages;

m) un individu décédé depuis plus de vingt ans. (*personal information*)

VI. Standard of Review

[29] The *Access Act* provides a general right of access to information held by government institutions, subject to certain exemptions. When determining whether the records at issue fall within a statutory exemption to disclosure, the standard of review is always correctness (*Wyeth-Ayerst Canada Inc v Canada (Attorney General)*, 2003 FCA 257 at paras 11-15; *Canada Post Corp v Canada (Minister of Public Works and Government Services)*, 2004 FC 270 at paras 24, 27; *Canada (Information Commissioner) v Royal Canadian Mounted Police Commissioner*, [2003] 1 SCR 66 [*RCMP Commissioner*] at para 19).

[30] Where there remains a residual discretion that falls to the relevant minister or institution head allowing for disclosure after an initial exemption has been found, the standard of review is reasonableness (*Canada (Information Commissioner) v Canada (Minister of Natural Resources)*, 2014 FC 917 [*Natural Resources*] at para 26).

[31] When reviewing decisions on the correctness standard, the decision-maker is not entitled to deference and the Court performs its own analysis, substituting its decision for that of the decision-maker where the two are not in agreement (*Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at para 50).

[32] The reasonableness standard is one of deference; however, the Court must be satisfied that the reasons offered are justifiable, transparent and intelligible, and that the decision falls within a range of possible, acceptable outcomes that are defensible with respect to the facts and law (*Dunsmuir*, above, at para 47).

VII. Analysis

[33] In considering the present applications for judicial review, this Court's role is to determine whether Health Canada has properly applied the exemptions contained in the *Access Act* to the records at issue. While there is some debate as to whether this type of exercise can properly be categorized as a *de novo* review (*Merck Frosst Canada and Co v Canada (Minister of Health)*, 2012 SCC 3 [*Merck Frosst*] at paras 53, 251), it is beyond reproach that the function of the Court is to undertake a review of the records at issue, progressing on a detailed document-

by-document review where necessary, in order to determine what is exempt from disclosure and what is not (*Air Atonabee Ltd v Canada (Minister of Transport*) (1989), 27 FTR 194 at para 31).

[34] The party resisting disclosure bears the burden of proving that the documentation at issue falls within the statutory exemptions (*Merck Frosst*, above, at para 92; *Brainhunter (Ottawa) Inc v Canada*, 2009 FC 1172 [*Brainhunter*] at para 13). When reviewing the decision of the government and assessing whether any of the exemptions are applicable, the standard of proof is the civil standard of a balance of probabilities (*Merck Frosst* at para 94).

[35] It must be noted that at Tab E, Vol. II of III of the Respondent's Record, T-1835-13, and Tab A, Vol. III of V of the Respondent's Record, T-806-14, the Minister has included copies of the proposed disclosure packages in the respective applications. Many of the records at issue already bear redactions as a result of earlier discussions between Dr. Martin and Health Canada and nothing in this decision is intended to reverse or in any way affect those redactions already agreed on. It is my role to decide whether further redactions are warranted (*Janssen-Ortho Inc. v Canada (Minister of Health)*, 2005 FC 1633 at para 22; aff'd 2007 FCA 252). In doing so, I have considered section 25 of the *Access Act* and allowed for the severance and disclosure of any part of a record that does not contain otherwise exempt information or material (*Merck Frosst* at paras 236-239).

A. *Section 17 – Threat to Personal Safety*

[36] Although Dr. Martin only briefly referred to the section 17 exemption in his affidavit evidence and his memorandum of fact and law, he did argue that a number of the documents

flagged for disclosure by Health Canada should be exempt on the basis that they contain information which, if released, could reasonably be expected to threaten his safety, as well as the safety of the Study Monitor.

[37] In his affidavit evidence, Dr. Martin identified one particularly disgruntled parent of a child who had been participating in the clinical trial. The evidence indicates Dr. Martin's belief that it was this parent's complaint that launched the ensuing investigation by Health Canada in 2008, and that it was this same parent who subsequently made the 2012 access to information request. Dr. Martin argued that that the release of certain documents, could "reignite anger and hostility" among parents of those children with the developmental disability at issue and/or sympathizers who might wrongly conclude that the Study Monitor or Dr. Martin had put children at risk through his actions. The fact that Health Canada had proposed to release his address, full name, email and phone number, he argued, gave rise to a reasonable expectation of harm.

[38] In support of his position, Dr. Martin introduced evidence in the form of two (almost identical) online articles commenting on a decision of the Ontario Superior Court, wherein which the suspected disgruntled parent was found guilty of libel in an action brought by the Study Monitor. Dr. Martin's evidence is that the parent was found to have published, forged, created and falsified documents regarding medical conditions in children for the purposes of discrediting the Study Monitor following his involvement in the clinical study. Dr. Martin had provided evidence in support of the Study Monitor in the Ontario Superior Court trial against the parent. Dr. Martin submits that having testified against an individual who had gone to such lengths against the Study Monitor is surely proof that his personal safety is in jeopardy.

[39] The Minister argues that Dr. Martin's submissions do not support his assertion that the disclosure of the un-redacted information could reasonably be expected to threaten his safety. It is submitted that Dr. Martin must do more than simply assert harm and must demonstrate a direct link between disclosure and the alleged harm with detailed and convincing evidence. Relying on jurisprudence of this Court, the Minister states that further evidence must be tendered in order to establish that the harm which Dr. Martin fears is reasonably probable (*Merck Frosst* at paras 192-206, 219; *Saint John Shipbuilding Ltd v Canada (Minister of Supply and Services)*, [1990] FCJ No. 81 (FCA) [*Saint John Shipbuilding Ltd*] at paras 2-8; *Oceans Ltd v Canada-Newfoundland and Labrador Offshore Petroleum Board*, 2009 FC 974 [*Oceans Ltd*] at para 61; *CORADIX Technology Consulting Ltd v Canada (Minister of Public Works and Government Services)*, 2006 FC 1030 [*CORADIX*] at para 30).

[40] Although the jurisprudence cited by the Minister appears to deal exclusively with the reasonable expectation of probable harm in the context of paragraphs 20(1)(b) and (c) of the *Access Act*, I see no reason why to disagree with the Minister's submissions on this point. In order to rely on the exemption contained under section 17, the party resisting disclosure must be able to demonstrate a direct link between disclosure of the documents and the alleged harm with detailed and convincing evidence in order to establish that these outcomes are reasonably probable (*Merck Frosst* at para 219; *CORADIX*, above, at para 30).

[41] Based on the evidence before me, I do not find that Dr. Martin has met the evidentiary threshold necessary to establish, on a balance of probabilities, that he faces a reasonable expectation of probable harm. Neither of the documents submitted by Dr. Martin cites an author

or indicates a date of publication and it must be noted that the written decision from the Ontario Superior Court was not reproduced (although there was an unreported citation in the articles). Therefore, I find that these articles were of little probative value and did not establish that a reasonable expectation of harm would befall Dr. Martin for having testified at the libel trial or otherwise participated in the organization of the clinical trial.

[42] Furthermore, Dr. Martin has not provided a tangible connection between the identity of the disgruntled parent who he identified and the identity of the individual(s) who made the initial 2008 complaint to Health Canada or the individual(s) who made the 2012 access to information request, respectively.

[43] Even if the individual that made the access to information request is the same disgruntled that was found guilty of libel against the Study Monitor, Dr. Martin has submitted no evidence to indicate how the release of the documents in question would place him at risk of probable harm, beyond stating that the dissemination of Health Canada records would have "unforeseen consequences."

[44] While I believe Dr. Martin is sincere in stating he fears for his safety, he has not presented evidence that meets the test to establish the personal safety exemption contained in section 17 of the *Access Act*.

B. *Subsection 19(1) – Personal Information*

[45] A number of the records proposed for release by Health Canada are opposed by Dr. Martin on the basis that they contain personal information, contrary to the exemption contained in subsection 19(1) of the *Access Act*. The records at issue include printouts of webpages from internet sites, as well as other information gathered by Health Canada in the course of its investigation into the clinical trial.

[46] Dr. Martin opposes Health Canada's contention that the records in question are publicly available. In affidavit evidence, he submits that much of the material to be disclosed is from a website that was discontinued in 2009. He argues that access to most of the site was restricted by password requirements and therefore some of the information was never publicly available on the internet, as only the parents participating in the clinical trial, himself and the Study Monitor would have had the password.

[47] Dr. Martin's submissions on this issue indicate that it is his belief that the relevant passwords, or even the documents themselves, were provided by the Study Monitor or himself to Health Canada in confidence during the investigation. Alternatively, his position is that the passwords may have been provided to Health Canada by one or more of the concerned parents who made the original complaints in 2008.

[48] Dr. Martin further contends that some of the information included in the proposed disclosure package contains the names of parents and children participating in the trial, as well as

clinical diaries of the children's medical progress. He states that it is unfair to include the names of these individuals and the clinical diaries of the children's response to treatment in the proposed release and argues that such an action amounts to "gross-insensitivity" on the part of Health Canada.

[49] Finally, Dr. Martin argues that, given the vagueness of the initial access to information request, and considering the extensive research that Health Canada did to corroborate online records using confidential and personal information provided by Dr. Martin and the Study Monitor during the course of the investigation, the personal information should not be seen as publicly available insofar as the information is not readily ascertainable without using the information that the two men provided.

[50] It is worth noting that the most recent redactions proposed by Health Canada would now exempt Dr. Martin's email address, street address, and phone number, as well as his opinions as expressed in correspondence with Health Canada, and some third-party names. Notwithstanding the proposed redactions, the Minister acknowledges that many of the records still include personal information pertaining to both Dr. Martin and the Study Monitor, and other third-parties.

[51] The Minister argues that the un-redacted information was publicly available at the time that it was captured and posits that much of the information is still publicly available using the website "Archive.org," an online retrieval service and web-archive also commonly referred to as the "Wayback Machine." Accordingly, the Minister proposes to release these records on the

basis that they are publicly available, pursuant to paragraph 19(2)(b) of the *Access Act*. The Minister's position is that Health Canada obtained the documents without a password and therefore the documents were publicly available and should be disclosed.

[52] Subsection 19(1) of the *Access Act* prohibits the disclosure of a record that contains "personal information," as defined in section 3 of the *Privacy Act*. Within the context of the *Privacy Act*, Parliament has broadly defined the concept of personal information as "information about an identifiable individual that is recorded in any form including […]." In a much cited passage from the seminal Supreme Court of Canada decision in *Dagg v Canada (Minister of Finance)*, [1997] 2 SCR 403 [*Dagg*], La Forest J., dissenting but confirmed by the majority on this point, commented on the definition of personal information, at paras 68-69:

> 68 On a plain reading, this definition is undeniably expansive. Notably, it expressly states that the list of specific examples that follows the general definition is not intended to limit the scope of the former. As this Court has recently held, this phraseology indicates that the general opening words are intended to be the primary source of interpretation. The subsequent enumeration merely identifies examples of the type of subject matter encompassed by the general definition; see *Schwartz v Canada*, [1996] 1 SCR 254, at pp. 289-91. Consequently, if a government record is captured by those opening words, it does not matter that it does not fall within any of the specific examples.
>
> 69 As noted by Jerome A.C.J. in *Canada (Information Commissioner) v Canada (Solicitor General)*, supra, at p. 557, the language of this section is "deliberately broad" and "entirely consistent with the great pains that have been taken to safeguard individual identity". Its intent seems to be to capture any information about a specific person, subject only to specific exceptions; see Alan Leadbeater, Deputy Information Commissioner of Canada, "How Much Privacy for Public Officials," Speech to Canadian Bar Association (Ontario), March 25, 1994, at p. 17. Such an interpretation accords with the plain language of the statute, its legislative history and the privileged, foundational position of privacy interests in our social and legal culture.

[Emphasis added]

[53] In light of the relevant jurisprudence that has emerged on this issue, it is clear that the intent of subsection 19(1), and its incorporation of section 3 of the *Privacy Act*, has been interpreted to protect the privacy or identity of individuals who may be mentioned in otherwise releasable material.

[54] Despite the broad definition of personal information employed by the courts and the great lengths that have been taken to safeguard individual identity in legislation, subsection 19(2) of the *Access Act* provides that the head of a government institution may disclose personal information in certain circumstances. The specific use of the word "may" in this carve-out has been found to be indicative of a residual discretion, rather than a statutory duty, that falls to an administrative decision-maker (*Dagg*, above, at para 108).

[55] The Supreme Court has pronounced that this discretion is to be exercised with respect to the purpose of the exemption at issue and all other relevant interests and considerations, on the basis of the facts and circumstances of the particular case. The decision involves two steps. First, it must be determined whether the personal information exemption applies. If it does, then consideration must be had with respect to whether, having regard to all relevant interests, disclosure should be made (*Criminal Lawyers' Assn v Ontario (Ministry of Public Safety and Security)*, 2010 SCC 23 at para 66).

[56] In seeking to release the records pursuant to the exception contained in paragraph 19(2)(b), the onus lies on Health Canada to establish that the personal information at issue was

publicly available (*Canada Jewish Congress v Canada (Minister of Employment and Immigration)*, [1996] 1 FC 268 at para 34; *Yeager v Canada (National Parole Board)*, 2008 FC 113 at para 44).

[57] Although the term "publicly available" is not defined in either the *Access Act* or the *Privacy Act*, in *Lukacs v Canada Transportation Agency*, 2015 FCA 140, the Federal Court of Appeal has indicated that the term should be interpreted in a rather straightforward manner. Writing for the Court, at paragraph 69, Ryer J.A. noted that:

> 69 The term Publicly Available appears to me to be relatively precise and unequivocal. I interpret these words as meaning available to or accessible by the citizenry at large. This interpretation is also consistent with the apparent context and purpose of subsection 69(2) of the *Privacy Act*. That provision is located in a portion of the Privacy *Act*, entitled "Exclusions", that sets out circumstances in which the *Privacy Act*, or sections thereof, do not apply. The purpose of subsection 69(2) of the *Privacy Act* is to render the use and disclosure limitations that are contained in sections 7 and 8 of the *Privacy Act* inapplicable to Personal Information if and to the extent that the citizenry at large otherwise has the ability to access such information.
>
> [Emphasis added]

[58] While Ryer J.A.'s comments came in the interpretive context of subsection 69(2) of the *Privacy Act*, there is no reason to depart from such a definition with respect to the *Access Act*, given that the two pieces of legislation form a "a seamless code with complementary provisions that can and should be interpreted harmoniously" (*RCMP Commissioner*, above, at para 22). As a result, I think this definition would be equally applicable to the definition of publicly available for the purposes of paragraph 19(2)(b) of the *Access Act*.

[59] This definition is also compatible with the meaning employed by Snider J. in *Canada (Information Commissioner) v Canadian Transportation Accident Investigation and Safety Board*, 2005 FC 384; overturned on other grounds, 2006 FCA 157). In that case, which did deal specifically with paragraph 19(2)(b) of the *Access Act*, Snider J. stated at paragraph 47:

> 47 It appears to me that, for information to be in the public domain it must be available on an ongoing basis for use by the "public". For example, in *Timiskaming Indian Band v Canada (Minister of Indian & Northern Affairs)*, [1997] FCJ No 676 (Fed TD) at para. 34, this Court stated that documents that had not been disclosed before were in the public domain because "they have been available to the public who attend at the Registry and conduct searches and make specific requests for them under the existing Registry system". In these cases, there is no public registry or repository where a member of the public can search for these recordings or find the transcripts of these ATC communications.
>
> [Emphasis added]

[60] Therefore, in my view, an administrative decision-maker seeking to disclose personal information, pursuant to paragraph 19(2)(b), must be able to demonstrate, as a condition precedent, that the information at issue was accessible on an ongoing basis by the citizenry at large at the time the decision was made *(Natural Resources*, above, at para 58).

[61] The Minister has not persuaded me that the condition of ongoing availability of the personal information to the public, such that it is not restricted to a subset of the population, was met at the time that the Department made the impugned decisions.

[62] The affidavit evidence submitted by the Minister indicates that the records containing personal information were collected by Health Canada during its investigation into the clinical

trial in late 2008 and early 2009, with much of the same, or substantially similar, information being accessed by way of internet archival tools in September 2014.

[63] In my view, this affidavit evidence is of little probative weight for two reasons. Firstly, no evidence was introduced to indicate that, at the time the decision to disclose the requested documents was made in October 2013 and March 2014, Health Canada was satisfied that this personal information was publicly available. The evidence before me indicates that Health Canada only discovered that the personal information contained in the records apparently continued to be available or accessible to the general public in September 2014; more than six months after the last proposed disclosure package had been presented to Dr. Martin and the two present applications had been filed.

[64] Secondly, in considering the affidavit evidence filed by both parties, as well as the records themselves, I believe, on the balance of probabilities, that much of this personal information was provided by third-parties or otherwise password protected, and thus not otherwise independently accessible at the time the decision to disclose was made.

[65] This view is supported by the fact that many of the records at issue clearly indicate that Dr. Martin, the Study Monitor and other parents involved in the clinical trial provided Health Canada with personal information that the Department included in the proposed release packages. For example, pages 53-57 and 69-71 of the proposed release package in T-806-14 reveal that one concerned parent, with access to the website maintained by the Study Monitor, was sending Health Canada material for the purposes of aiding its investigation into the clinical

trial. These records also included personal information "posted" to the social networking website Facebook. The dissemination of this information was seemingly restricted to those individuals holding membership in a certain group on the website, as indicated in the concerned parent's email to Health Canada. Nonetheless, the records containing this personal information were included in the proposed release package sent to Dr. Martin in March 2014.

[66] Other records contained in the proposed release packages were sent directly to Health Canada by Dr. Martin and the Study Monitor. For example, pages 87-88 and 94-106 of the proposed release package in T-806-14 show that the Study Monitor sent a number of documents to Health Canada in an effort to assist with the Department's compliance verification. Similarly, pages 65-68 of the proposed release package in T-1835-13 show that Dr. Martin also provided information relating to the clinical trial directly to Health Canada. These records include information pertaining to the protocol of the clinical trial and make reference to the developmental disability affecting participants in the trial, the active ingredients in the treatment solution being tested, as well as medical and non-medical devices being used. These records obviously contain personal information insofar as they implicate the medical history of trial participants. The Minister has not provided any evidence that this information was publicly available at the time the decision to disclose was made and the fact that these records were not captured by the Wayback Machine in September 2014 further indicates that these records never were publicly available.

[67] Affidavit evidence filed by the Minister included emails between Mr. Rashid and Ms. Brenda Redmond, an Inspector Manager with Health Canada, indicate that a password was not

required to gain access to this personal information during the course of the compliance verification of the clinical trial and that the records gathered by Health Canada inspectors during the compliance verification were not provided by a third-party.

[68] In direct contrast, affidavit evidence filed by Dr. Martin indicates that portions of the website maintained by the Study Monitor were password-protected and that parents with children participating in the clinical trial were provided with log-in credentials (Exhibit 2 of Dr. Martin's November 10, 2014 affidavit or 146 of Applicant's Confidential Record). Other evidence includes an email from the Study Monitor providing Dr. Martin with log-in credentials (Exhibit 3 of Dr. Martin's November 10, 2014 affidavit or 146 of Applicant's Confidential Record). Furthermore, affidavit evidence submitted by the Minister found at pages 22, 167 and 177 of Vol. I of II of the Respondent's Record, T-1835-13, includes archived material that shows a "Participants Login," indicating that a user name and password were required to gain access to the Study Monitor's website.

[69] Therefore, through the respective parties' submissions and affidavit evidence, including the archived webpages captured through the Wayback Machine, I am satisfied that on the balance of probabilities, much of the personal information at issue was only accessible to Dr. Martin, the Study Monitor and parents participating in the clinical trial through password protected pages on the website.

[70] To the extent that the information at issue was otherwise purportedly accessible by way of the Archive.org website, the Minister presented no evidence as to archiving capabilities of the

Wayback Machine, especially where password protection security on a website is utilized. That evidence would have been very useful to this Court.

[71] Notwithstanding this determination, even if the personal information at issue was publicly available, I find that Health Canada's discretionary decision to disclose it was unreasonable.

[72] As the Minister submits, the overarching purpose of the *Access Act* is to facilitate democracy by helping to both ensure that citizens have the information required to meaningfully participate in the democratic process and that politicians and bureaucrats remain accountable to the citizenry (*Dagg* at para 61).

[73] However, this is not standalone legislation to be applied in a vacuum, especially when considering how the records to be disclosed may implicate the privacy rights of individuals. Rather, the closely related legislative histories of the *Access Act* and the *Privacy Act* require a reviewing court to consider the purposes of both statutes rather than viewing each one in isolation from the other (*HJ Heinz Co of Canada Ltd v Canada (Attorney General)*, 2006 SCC 13 [*Heinz*] at para 25). As noted above, the *Access Act* and *Privacy Act* must be understood to be a seamless code with complementary provisions and a delicate balance must be struck between the competing values of the respective statutes.

[74] The Supreme Court of Canada has addressed the relationship between the two statutes on a number of occasions. While neither the right of access to information nor the right to individual

privacy ought to be given absolute pre-eminence, the Supreme Court has previously recognized that legislation which aims to protect control over personal information should be characterized as "quasi-constitutional". This characterization is because of the fundamental role privacy plays in the preservation of a free and democratic society; thus, it is clear from the legislative scheme established by the *Access Act* and the *Privacy Act* that in a situation involving personal information about an individual, the right to privacy is paramount over the right of access to information (*Lavigne v Canada (Commissioner of Official Languages)*, 2002 SCC 53 at para 24; *Dagg* at paras 65-66; *Heinz*, above, at paras 28-29). Contrary to most other exemptions contained in the *Access Act*, in the context of personal information it cannot be said that any doubt is to be resolved in favour of disclosure.

[75] In considering the discretion exercised by Health Canada with respect to the purpose of the personal information exemption and the facts and circumstances of this particular case, I do not find that the decision to disclose is defensible with respect to the facts and the law.

[76] The access to information request received by Health Canada was general in nature, broadly asking for "[a]ll document and investigation reports relating to an unauthorized clinical trial under way in 2008 in Canada being run by a physician who was not based in Canada but was recruiting Canadian participants…" (translation). In my view, the scope of the request focused on the Department's recognition of, and response to, the clinical trial initially referenced in the 2011 Auditor General's report.

[77] To the extent that the disclosure packages identify records relevant to the role that Health Canada plays in enforcing laws and regulations related to drug trials in Canada, such documents are undoubtedly germane to the request given the overarching purpose of the *Access Act*. However, insofar as the disclosures include personal information relating to Dr. Martin, the Study Monitor, and parents or children participating in the study, I find that the decision of Health Canada to release these records fails to account for the quasi-constitutional protections afforded to personal privacy under the *Privacy Act*. This is especially so when considering the efforts that had been made to remove much of the information from the public domain prior to the November 2012 access request being made, and the fact that the access request made no reference to the developmental disability at issue, the nature of the study, the physician in question, or any of the participants.

[78] In *UFCW, Local 401 v Alberta (Information and Privacy Commissioner),* 2013 SCC 62 [*UFCW, Local 401*], Abella J. and Cromwell J., writing for the unanimous court at paragraph 25, emphasized the importance of the protection of privacy in a vibrant democracy, which in turn depends on the ability of individuals to freely formulate and express unconventional views. In this respect I adopt the *obiter* of Abella J. and Cromwell J. in *UFCW*, above, *Local 401*, at para 27, and conclude that I am reluctant to find that in posting something on the internet, an individual automatically forfeits his or her interest in retaining control over the personal information which is thereby exposed; this is especially so given the developments in technology, such as the Wayback Machine, that make it possible for personal information to be recorded with ease, distributed to an almost infinite audience, and stored indefinitely.

[79] Furthermore, much of the personal information was gratuitously provided to Health Canada by the Study Monitor, and, in my view, the promotion of cooperative efforts in regulatory investigations is best served in keeping this information confidential. Both Dr. Martin and the Study Monitor cooperated fully in furnishing everything and doing everything asked of them by Health Canada, including stopping the trial and putting notices on the website that Canadians could not participate(page 262, Vol. II of III of the Respondent's Record, T-1835-13; pages 43-44, Vol. I of II of the Respondent's Supplemental Record, T-1835-13).

[80] For these reasons, I have concluded that the following records, or portions thereof, are exempt from disclosure pursuant to subsection 19(1) in addition to what is already redacted by Health Canada or will be under subsequent sections in this decision.

(1) T-1835-13

[81] Documents in the proposed release package are found at Tab E, Vol II of Respondent's Record and identified by release package page number not the Respondent's record page number.

65	• All geographic references • Reference to published study • All references to the medical treatments, protocol and solution used in the clinical trial
66	• All references to discussions with the third-party regulator on classification procedures
107	• All references to the developmental disability affecting children participating in the clinical trial
108	• All personal names, except for those of Health Canada employees • All geographic references • All references to the developmental disability affecting children participating in the clinical trial
109	• All references to the developmental disability affecting children

	participating in the clinical trial
110	• All personal names • All references to the developmental disability affecting children participating in the clinical trial • All references to the name of the clinical trial, in any form including the domain name • All references to discussions with the third-party regulator on classification procedure
127	• All references to the treatment solution used in the clinical trial, including in the email subject line
135	• All geographic references • All references to the name of the clinical trial, in any form
276-288	• All personal names and email addresses, as well as references to third-party websites and organizations • All geographic references • All references to the developmental disability affecting children participating in the clinical trial, in any form • All references to the name of the clinical trial, in any form including the domain name • All references to the name of the treatment solution and/or any other pharmaceutical drugs used by individuals participating in the clinical trial • All other references to medical conditions, illnesses or disorders affecting children participating in the clinical trial.
289-301	• All ages, personal names and/or usernames • All geographic references • All references to the developmental disability affecting children participating in the clinical trial, in any form • All references to the name of the clinical trial, in any form including the domain name • All references to the name of the treatment solution and/or any other pharmaceutical drugs used by individuals participating in the clinical trial • All other references to medical conditions, illnesses or disorders affecting children participating in the clinical trial. • All references to study protocol and/or devices used as part of the clinical trial • This could be accomplished by redacting the entire range of records
384	• All personal names, except for those of Health Canada employees. • All references to the developmental disability affecting children participating in the clinical trial • All references to the name of the clinical trial, in any form including in the first line of the second paragraph. • All references to discussions with the third-party regulator on classification procedure

	• All references to study protocol and/or devices used as part of the clinical trial
385	• Entire page

(2) T-806-14

[82] Documents in the proposed release package are found at Tab A, Vol III of V of the Respondent's Record and identified by release package page number not the Respondent's record page number.

4	• All personal names, telephone numbers and email addresses, except for those of Health Canada employees • All geographic references • All references to the developmental disability affecting children participating in the clinical trial, including email subject lines • All references to the name of the clinical trial, in any form including the domain name • All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
11	• All personal names, except for those of Health Canada employees • All geographic references • All references to the developmental disability affecting children participating in the clinical trial • All references to the name of the clinical trial, in any form including the domain name and email subject line • All references to medical conditions or reactions affecting children participating in the clinical trial • All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
12	• All geographic references • All references to the developmental disability affecting children participating in the clinical trial, including in the email subject line
13	• All personal names , except for those of Health Canada employees • All geographic references • All references to the developmental disability affecting children participating in the clinical trial, including in the email subject line • All references to the name of the clinical trial, in any form including the domain name

	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial. • Note: this email is included at page 4
23	• All personal names, except for those of Health Canada employees • All geographic references • All references to the developmental disability affecting children participating in the clinical trial • All references to the name of the clinical trial, in any form including the domain name • All references to study protocol and/or devices used as part of the clinical trial.
53	• All personal names, except for those of Health Canada employees • All references to the name of the clinical trial, in any form & domain name
54	• Entire record
55	• Entire record
56	• Entire record
57	• Entire record
69	• All personal names, except for those of Health Canada employees • All references to the developmental disability affecting children participating in the clinical trial • All references to the name of the clinical trial, in any form including the domain name • Title and content of the included article
70	• Entire record
71	• Entire record
74	• All references to the developmental disability affecting children participating in the clinical trial, including in the email subject lines • All geographic references • All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
75	• All references to the developmental disability affecting children participating in the clinical trial, including in the email subject line • All references to study protocol and/or devices used as part of the clinical trial.
76	• All references to the developmental disability affecting children participating in the clinical trial, including in the email subject lines • All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
77	• All references to the developmental disability affecting children participating in the clinical trial, including in the email subject lines

	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
84	• All references to study protocol and/or devices used as part of the clinical trial.
87	• All geographic references • Entire content of 28/11/2008 email (last two paragraphs on page) • All references to the treatment solution used in the clinical trial
88	• Entire record
94-106	• Entire range of records
117	• All geographic references • All references to the name of the clinical trial, in any form • All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
118	• All geographic references
119	• All personal names • All references to the developmental disability affecting children participating in the clinical trial, including the file name • All references to the name of the clinical trial, in any form and/or combination • All references to study protocol and/or devices used as part of the clinical trial, including fees associated with the procedure
120	• All references to the developmental disability affecting children participating in the clinical trial, including the file name
121	• All references to the developmental disability affecting children participating in the clinical trial, including the file name
122	• Entire record
229	• All geographic references • All references to the name of the clinical trial, in any form and/or combination
235	• All references to the developmental disability affecting children participating in the clinical trial, including the webpage name • All references to the name of the clinical trial, in any form and/or combination
236	• Entire record
237	• All geographic references • All references to the name of the clinical trial, in any form
238	• All geographic references • All references to the name of the clinical trial, in any form
239	• Entire record
243	• Entire record
255	• Entire record
256-262	• Entire range of records

263-265	• Entire range of records
267	• Entire record
268	• Entire record
269-275	• Entire range of records
340	• All personal names, telephone numbers and addresses • All geographic references
417	• All references to the name of the clinical trial, in any form including the file attachment and email subject line • All references to study protocol and/or devices used as part of the clinical trial.
418-442	• Entire range of records

C. *Paragraph 20(1)(b) Confidential Information*

[83] Dr. Martin objects to the disclosure of certain records, arguing that they meet the exemption set out in paragraph 20(1)(b) on the basis that they contain specific and detailed technical information relating to the ingredients of the treatment solution and protocol used in the clinical trial. Dr. Martin contends that some of the information contained in the records in question is of a commercial, scientific, and technical nature and was treated confidentially.

[84] Specifically, he objects to the disclosure of the scientific information including the composition of the treatment solution and the medical treatment protocol; of the treatment. Dr. Martin's evidence is that this information was kept confidential for the purposes of treating the particular developmental disability at issue in the study.

[85] The Minister's position is that the technical information in question is subject to disclosure because the trial was not conducted in confidence as participants were encouraged to share information and results with other persons, and the information was made available to the public on the Study Monitor's website. Furthermore, it is submitted that the scientific

information was included among a broad range of possible alternatives to therapy in subsequent patent filings made in the United States, as well as in academic papers.

[86] Dr. Martin bears the burden of establishing portions or all of the records at issue are confidential and must provide "actual direct evidence of the confidential nature of the remaining information which must disclose a reasonable explanation for exempting each record. Evidence which is vague or speculative in nature cannot be relied upon to justify an exception under subsection 20(1)" (*Brainhunter* at para 25).

[87] For the purposes of the exception created by paragraph 20(1)(b), the exemption from disclosure, as explained in *Brainhunter*, above, at para 21, requires that the information in question meet all four of the following criteria:

> 21 [T]he Act provides for an exemption to disclosure for information which has been supplied by a third party to a government institution, and which is confidential commercial information that has consistently been treated in a confidential manner. The information must be: (1) financial, commercial, scientific or technical information as those terms are commonly understood; (2) confidential in its nature, according to an objective standard which takes into account the content of the information, its purposes and the conditions under which it was prepared and communicated; (3) supplied to a government institution by a third party; and (4) treated consistently in a confidential manner by the third party (citation omitted)."
>
> [Emphasis added]

[88] On these facts there can be no disagreement that the information in question meets the first and third criterion. I am satisfied that the disputed information that Dr. Martin seeks to have exempted can be commonly understood to be technical, where relevant, in that it relates to the

technical details, requirements and processes of the clinical trial that was being conducted. Much of that same information is conversely scientific, where relevant, insofar as it relates to the medical ingredients and properties of the treatment solution and how it was used by the participants in the trial (*Porter Airlines Inc v Canada (Attorney General)*, 2014 FC 392 at para 32).

[89] Furthermore, it is clear to me that much of the information at issue was provided in confidence to Health Canada at their request via email by Dr. Martin and/or the Study Monitor (pages 872-897, Vol. III of V of the Respondent's Record, T-806-14).

[90] Therefore, the next criterion at issue are: whether this information was confidential; and whether the information was consistently treated as such by the third party.

[91] When assessing whether the information contained in the records at issue is confidential, the Federal Court of Appeal in *Canada (Information Commissioner) v Canadian Transportation Accident Investigation and Safety Board*, 2006 FCA 157 [*CTAISB*] at paragraph 72, endorsed an approach that is dependent on an affirmative finding that:

> a) 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) the information originate and be communicated in a reasonable expectation of confidence that it will not be disclosed, and
>
> c) the information be communicated, whether required by law or supplied gratuitously, in a relationship between 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 communication.

[92] The test is an objective one, and merely repeating the words of the statute or asserting confidentiality without concrete evidence of such treatment is not sufficient (*Recall Total Information Management Inc v Minister of National Revenue*, 2015 FC 1128 at para 29).

[93] When I apply the legal test endorsed in *CTAISB*, above, to the information which Dr. Martin seeks to have exempted, it is plain for me to see that the information originated, and was communicated, under the pretenses of confidence and a reasonable expectation that it would not be disclosed. I am further satisfied that the information was supplied gratuitously by Dr. Martin or the Study Monitor to Health Canada.

[94] This view is supported by the evidence on record. For example, in the email dated November 11, 2008, the Study Monitor indicates that the information, or parts thereof, has not yet been released to the public (page 87, Vol. III of V of the Respondent's Record, T-806-14).

[95] It is also apparent through a consideration of Dr. Martin's affidavit evidence, as well as the purportedly archived webpages captured through the Wayback Machine, that this information was only accessible to parents participating in the clinical trial through password protected webpages, as discussed at paragraphs 68-69, above.

[96] However, what remains at issue is whether this information is found in other sources that are accessible by the public acting on their own.

[97] The Minister filed several affidavits sworn by Mr. Rashid in support of its position that the information in question is available from sources otherwise accessible by the public. In those affidavits, Mr. Rashid attests that the information at issue is available from a multitude of other sources, including a number of patent applications filed by Dr. Martin in the United States, as well as a number of academic articles authored by Dr. Martin and a variety of other online sources. Mr. Rashid's affidavit further indicates that the scientific information was not confidential because he was able to find the American patent applications on the internet when he conducted a Google search using "Dr. W. John Martin" and the name of a medical ingredient found in the treatment solution. These United States patent applications were provided as evidence that the information was not confidential and was obtainable by the public.

[98] Respectfully, I do not agree with the Minister's submissions on this issue. It bears reminding that neither the Applicant's name, the website at issue, nor the distinctive name of the treatment solution was ever mentioned in the access to information request. Therefore, I do not find that much of the information which Health Canada seeks to disclose could be accessed by the general population and thus be understood to be in the "public domain."

[99] This information was only found after further research online by Health Canada using information provided in confidence to the Department, or otherwise using information that was found on the password protected website. Dr. Martin provided evidence that it was not until page seven of the Google search of his name that the correct Dr. Martin was even found. As this result was only confirmed by Health Canada's knowledge of personal information in the Department's

possession, I do not believe that it can be said to have been easily be obtained by observation or independent study by a member of the public acting on his own which is the legal test.

[100] Furthermore, the scientific papers and United States patent applications were published and filed for the purposes of treating different medical conditions not directly related to the developmental disability being examined as part of the clinical trial. I do not believe that the publicly disclosed use of the scientific information at issue for the purposes of treating one medical condition excuses the confidentiality of that information in relation to the treatment of another medical condition. A new use for a known compound/drug that has not been disclosed in a public manner is not public by virtue of other publications detailing how that compound may use for a different purpose. As the Supreme Court of Canada has instructed such a new use may well be independently patentable and entitled to confidentiality (*Shell Oil Co v Commissioner of Patents*, [1982] 2 SCR 536).

[101] I support and respect the need for transparency but I do not believe that the jurisprudence supports the lengths that Health Canada has gone in order to support the decision to disclose the proposed package of records. Additionally, the vagueness of the original request distinguishes this case from some of the jurisprudence where the requests under consideration were made in reference to named parties.

[102] I find that the information was confidential and was consistently treated as such by Dr. Martin.

[103] For these reasons I have concluded that the following records, or parts thereof, are exempt from disclosure. Subsection 20(1)b in addition to what is already redacted by Health Canada (para 33) or within this decision

(1) T-1835-13

[104] Documents in the proposed release package are found at Tab E, Vol II of Respondent's Record and identified by release package page number not the Respondent's record page number.

65	• Entire last paragraph
66	• All information not already redacted under other sections
67	• All information not already redacted under other sections
107	• All references to the treatment solution used in the clinical trial, including any constituent ingredients • All references to the use of the study protocol and/or devices used as part of the clinical trial
108	• All references to the treatment solution used in the clinical trial, including any constituent ingredients • All references to the study protocol and/or devices used as part of the clinical trial or application
109	• The entire page
110	• All references to study protocol and/or devices used as part of the clinical trial
127	• All references to the treatment solution used in the clinical trial, including in the email subject line
135	• All references to study protocol and/or devices used as part of the clinical trial
276-288	• The entire article
384	• The entire page
385	• All references to study protocol and/or devices used as part of the clinical trial

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[105] Documents in the proposed release package are found at Tab A, Vol III of V of the Respondent's Record and identified by release package page number not the Respondent's record page number.

4	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial
11	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial.
13	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial • Same email included in 4
23	• All references to the treatment solution used in the clinical trial, including any constituent ingredients • All references to study protocol and/or devices used as part of the clinical trial
74	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial, including in the email subject lines
75	• All references to study protocol and/or devices used as part of the clinical trial, including in the email subject line
76	• All references to study protocol and/or devices used as part of the clinical trial, including in the email subject line • Entire content of 03/12/2008 email (last paragraph on page)
77	• All references to the treatment solution used in the clinical trial • All references to study protocol and/or devices used as part of the clinical trial, including in the email subject line
84	• All references to study protocol and/or devices used as part of the clinical trial
87	• All references to the treatment solution • Entire content of 28/11/2008 email (last two paragraphs on page)
88	• Entire record
94-106	• Entire range of records
117	• All references to the treatment solution used in the clinical trial, • All references to study protocol and/or devices used as part of the clinical trial

119	• All references to study protocol and/or devices, including fees associated with the trial
122	• Entire record
235	• Entire record
236	• Entire record
239	• Entire record
243	• Entire record
263-265	• Entire range of records
266	• Entire record
269-275	• Entire range of records
340	• All references to study protocol and/or devices used as part of the clinical trial
417	• Entire record • All references to trial study protocol and/or devices
418-442	• Entire range of records.

D. *Paragraph 20(1)(c) - Prejudicial Information*

[106] Dr. Martin does not directly cite this provision but argues that the disclosure of the information in question is "contrary to the spirit and intention of the [Access Act]," and proposes that the disclosure of the records in question would "besmirch the names" of the Applicant and the Study Monitor, and may impair future research endeavours that he wishes to pursue.

[107] The Minister takes the position that none of the information in question falls under the exemption provided in paragraph 20(1)(c), which again requires proof of a reasonable expectation of probable harm. The Minister argues that the possibility of material financial loss or prejudice to Dr. Martin's competitive position is not enough and must be established beyond that which is possible or speculative (*Merck Frosst*, at paras 192-206; *Saint John Shipbuilding Ltd* at paras 3-8; *Oceans Ltd*, above, at para 61).

[108] The Minster submits that Dr. Martin has failed to establish this link and that his affidavit attesting to the possibility of harm is not enough to establish a cause between proposed disclosure and the alleged harm with detailed and convincing evidence.

[109] I agree with the Minister's submissions in this respect. A third party claiming an exemption under paragraph 20(1)(c) of the *Access Act* must show that the risk of harm is considerably above a mere possibility, although stops short of having to establish on the balance of probabilities that the harm will in fact occur (*Merck Frosst* at para 199).

[110] With regards to showing that risk of harm is considerably above a mere possibility, the burden imposed on Dr. Martin under this provision was well explained by Phelan J. in *AstraZeneca Canada, Inc v Health Canada,* 2005 FC 1451 at paragraph 46.

> 46 Recognizing the inherently speculative nature of proof of harm does not however relieve a party from putting forward something more than internally held beliefs and fears. Evidence of reasonably expected results, like forecasting evidence, is not unknown to courts and there must be a logical and compelling basis for accepting the forecast. Evidence of past documents of information, expert evidence, evidence of treatment of similar evidence or similar situations is frequently accepted as a logical basis for the expectation of harm and as evidence of the class of documents being considered.

[111] Therefore, it is incontrovertible that there must be a clear and direct linkage between the disclosure of specific information and the harm alleged. In this case, there appears to be little evidence beyond Dr. Martin's own affidavit evidence. As a result, I am not of the opinion that any documents ought to be exempted on this ground.

VIII. Conclusion

[112] The applications will be allowed in part in accordance with these reasons. The confidential records filed in these applications will remain sealed as previously ordered.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applications are granted in accordance with the reasons;

2. Costs are awarded in the amount of $1,000.00 payable forthwith to the Applicant by the Respondent.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	T-1835-13 & T-806-14
STYLE OF CAUSE:	W. JOHN MARTIN v CANADA (MINISTER OF HEALTH) ET AL
PLACE OF HEARING:	CALGARY, ALBERTA
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DATED:	JULY 12, 2016

APPEARANCES:

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