

NUNAVUT INFORMATION AND PRIVACY COMMISSIONER

Review Decision 00-01
December 13, 2000

Review File: 00-188-5

A. BACKGROUND

On June 12, 2000, the Applicant applied under the *Access to Information and Protection of Privacy Act* (the "Act") to the Deputy Minister of the Department of Sustainable Development for access to a report regarding an incident involving an employee of the Department.

By letter of July 4th from the Deputy Minister to the Applicant, the department refused to release the information on the basis that it was "personal information" as defined in section 2 of the Act and, as such, could not be disclosed except in accordance with one of the provisions for disclosure under the Act. The letter also indicated that the Department took the position that the release of the information in question would constitute an unreasonable invasion of the personal privacy of a third party.

By letter dated July 10th, 2000, the Applicant requested that I review the Department's decision to deny access.

In its reply, the Department took the position that they were unable to confirm or deny the existence of the record in question. They rely on section 9(2) of the Act as their authorization for taking this position. This section reads as follows:

The head of a public body may refuse to confirm or deny the existence of a record.....

- (b) containing personal information respecting a third party, where disclosure of the information would be an unreasonable invasion of the third party's personal privacy.

It is to be noted that, pursuant to section 33 of the Act, the onus in these circumstances is on the head of the public body to establish that the Applicant has no right of access to the record or part of the record or, in this case, no right to know whether or not the document in question exists.

B. ISSUE

The very narrow issue in this recommendation is whether or not the Department has properly applied section 9(2) of the Act.

C. DISCUSSION

Similar provisions to Section 9(2) of the Nunavut *Access to Information and Protection of Privacy Act* exist in most access and privacy legislation throughout Canada and the provision has been considered in many of jurisdictions.

An Order of the Ontario Information and Privacy Commissioner considered their equivalent section (Section 14(5) of the Ontario Act) and described concisely the issue to be determined in this inquiry:

As noted above, the Police rely on Section 14(5) as their basis for refusing to confirm or deny whether any responsive records exist. This section states:

A head may refuse to confirm or deny the existence of a record if disclosure of the record would constitute an unjustified invasion of personal privacy.

A requester in a Section 14(5) situation is in a very different position than other requesters who have been denied access under the Act. By invoking Section 14(5), the Police are denying the requester the right to know whether a record exists, even if one does not.

For this reason, in relying on Section 14(5) the Police must do more than merely indicate that the disclosure of the records would constitute an unjustified invasion of personal privacy. The Police must establish that disclosure of the mere existence or non-existence of the requested records would convey information to the requester, and that the disclosure

of this information would constitute an unjustified invasion of personal privacy (Order M-737, March 20, 1996, re Windsor Police Services Board, p. 1)

The circumstances in which this subsection will apply will be very narrow. It will depend largely on the circumstances of the request itself. In this case, the Department points out that there has been public speculation with respect to the matter in question already in the form of published news reports, although apparently without confirmation from the Department. The request for information is quite detailed and contains a number of serious allegations pertaining to a named individual. If the document in question does exist, and the Department confirms that fact, that, in and of itself, will lend credibility to the news reports. The matter in issue is clearly personal to the individual involved and in my view, for the government to confirm whether or not such a report even exists would be an unreasonable invasion of that individual's privacy.

F. SUMMARY AND RECOMMENDATION

In my opinion, the Department's refusal to confirm whether or not the report in question exists is the appropriate position to take in the very specific circumstances of this request and I recommend that nothing further be done with respect to this request.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner