

**NUNAVUT
INFORMATION AND PRIVACY COMMISSIONER**

Review Decision 03-11

July 7, 2003

Review File: 03-148-5

A. BACKGROUND

By letter dated January 31st, 2003, the Applicants requested from the Department of Sustainable Development access to information related to themselves and their business, including copies of all correspondence sent and received, all meeting minutes and related decisions and the rationale for such decisions, all memos, notes and phone logs. On March 17th, 2003, the Department provided the Applicants with “copies of information related to” the company.

By letter dated April 19th, 2003, the Applicant asked me to review the Department’s response, indicating that they felt that they had not received all of the records responsive to their request. More particularly, they indicated that they had not received records which they knew to have existed and which were likely in the possession of the organization known as “Kivalliq Partners in Development”. They indicated that they felt this organization was an agency of the Government of Nunavut and its records, therefore, should be subject to the provisions of the *Access to Information and Protection of Privacy Act*.

The Department was asked to provide background material on the origins and makeup of the Kivalliq Partners in Development (KPID) in order to assist me in my review. The Department’s response was received on May 20th, 2003 and the Applicants were provided with the opportunity to provide their further comments. No comments were received.

B. ISSUES

The issues that appear to be before me are:

- a) is KPID a public body as that term is defined in the *Access to Information and Protection of Privacy (ATTIP) Act*,
- b) if not, are the records of KPID otherwise subject to the access provisions of the ATIPP Act.

C. DISCUSSION

Section 3(1) of the *Access to Information and Protection of Privacy Act*, provides as follows:

This Act applies to all records in the custody or under the control of a public body, including court administration records, but does not apply to the following:

- (a) a record made from information in a court file, a record of a judge of the Court of Appeal, the Supreme Court or the Territorial Court or a record of a justice of the peace;
- (b) a personal note, communication or draft decision of a person who is acting in a judicial or quasi-judicial capacity;
- (c) a record relating to a prosecution where all proceedings in respect of the prosecution have not been completed;
- (d) a question that is to be used on an examination or test;
- (e) material placed in the Northwest Territories Archives by or for a person other than a public body;
- (f) a record in a registry operated by a public body where public access to the registry is normally permitted.

The term “public body” is defined in section 2 of the act to mean:

- a) a department, branch or office of the Government of Nunavut, or
- b) an agency, board, commission, corporation, office or other body designated in the regulations,

but does not include

- c) the Office of the Legislative Assembly or the office of a member of the Legislative Assembly or a member of the Executive Council

Because of these provisions, it was important to understand the history of the KPID as an organization and its relationship to the Government of Nunavut.

In its submission to me, the Department of Sustainable Development provided me with some historical background of the organization. According to them KPID was originally incorporated prior to division in the Northwest Territories. At the time of incorporation, half of the shares were owned by Sakku Investments Ltd. and the other half by Kivalliq Inuit Association (KIA). In the last couple of years, KIA assumed sole ownership of all of the shares of the organization. KPID was not created as a government agency, but rather by the Kivalliq Inuit Association as a way to ensure cost efficient and effective delivery of economic development programs for the partner organizations. There is no government legislation or regulation which governs KPID. Both the Government of Nunavut, through the Department of Sustainable Development, and the Federal Government, through Indian and Northern Affairs Canada use KPID as a vehicle to help deliver services in the Kivalliq communities. There is an annual contribution agreement between KPID and the Department of Sustainable Resources and a Policy on Program Partnerships which give structure to the relationship between KPID and the Department. The Department provided me with a copy of the policy papers. In the policy, there are several references to “accountability” and acknowledgment that when public funds are being used to foster economic development, there must be a way for the Government to control, at least to some extent, how those funds are being spent. For example, the following comments appear in the policy:

Under the heading “Principles and Values that will be Reflected in Our Programs” :

- Information must be shared between partners on the basis of two-way communication
- The information on which decisions are based will be available to the public in scheduled reporting, and all decision making processes will be fair, explicit and without conflict of interest.

Under the heading “Definitions”:

- **Accountability:** The obligation to answer to a person or group of persons for the implementation of all decisions made on behalf of that group as well as for all of the responsibilities conferred
- **Contribution Agreement:** A contractual agreement between two parties, which outlines the fiduciary obligations and reporting responsibilities of the parties involved;

Under the heading “Authority and Accountability”

- The Financial Management Board (FMB) approves an annual budget for contributions contained within this policy, as well as expenditure additional to those appropriated in the Main Estimates, in the event of unplanned contribution needs
- The Executive Council shall approve program provisions and any exceptions to this policy;

In Schedule “A” under the heading “Partnership Agreement”:

- Any Partnership Agreement shall adhere to the purposes and principles of this policy. In addition all partners shall

- a) have a valid yearly updated business plan, provided on or before the start of each fiscal year of the Partnership;
- b) provide current and accurate data quarterly, and/or upon request in order for the Government of Nunavut to track and monitor services and performance areas where the Partnership is expected to achieve acceptable results;

Under the heading “Accountability Requirements”

- The Partnership Agreement shall identify a duly authorized official from the Department of Sustainable Development who will represent the Department’s interest in the development and implementation of the Agreement, and shall represent the Department’s interests relating to all funding and programs delivered under this Partnership with a seat on the Partner’s duly constituted governing Board and Executive

- The Partnership Agreement shall reflect the fact that because the Partnership will be delivering established Government programs as well as those on behalf of the contracting organizations, it is essential that all Partners observe the highest standards of ethical conduct to maintain public trust and confidence

- The Partnership Agreement shall reflect the fact that the Minister remains accountable to the people of Nunavut for the ultimate delivery of all programs and services delivered through this Partnership Agreement, in addition to all territorial interests evolving out of this Agreement

- The Partnership Agreement shall ensure that both partners keep proper accounts and records of the revenues and expenditures including all invoices, receipts and vouchers relating to business done under the auspices of this Agreement, as well as ensuring that all financial affairs are conducted according

to generally accepted business and accounting principles.

How does all this relate to the *Access to Information and Protection of Privacy Act*? I have, since assuming this position, tried to take a “common sense” approach to the interpretation of the Act, keeping in mind at all times the purposes stated in the Act. Those purposes appear in Section 1 of the Act:

The purposes of this Act are to make public bodies more accountable to the public and to protect personal privacy by:

- a) giving the public a right of access to records held by public bodies;
- b) giving individuals a right of access to and a right to request correction of personal information about themselves held by public bodies;
- c) specifying limited exceptions to the rights of access;
- d) preventing unauthorized use or disclosure of personal information by public bodies; and
- e) providing for an independent review of decisions made under this Act

The overriding purpose of the Act, then, is to give the public access to records held by “public bodies”. But KPID is not a public body, as that term is defined in the Act. It is clearly is not a department, branch or office of the Government of Nunavut. Nor is it listed as a public body in the regulations to the Act. It is not, therefore, a “public body” directly subject to the Act.

But this does not end the matter. Section 3(1) provides that the Act applies to “all records in the custody **or under the control** of a public body” (emphasis added). The Department of Sustainable Development is a public body and it has some control over the records held by KPID, at least insofar as those records relate to monies disbursed on behalf of the Government of Nunavut. Reading the policy as a whole, it is clear that the Department felt that it was necessary to retain a degree of control over how public monies were spent through the vehicle of KPID, to the extent that a designated official

from the Department was given a position on the Board and Executive of KPID. KPID has a contractual obligation to the Department to be accountable and to report to the Department. The Department has some role in the decisions made by KPID.

If one looks at the situation as a whole, although the Department may not have custody of the records being requested, they certainly have a degree of control over them. Can they compel KPID to provide records in response to a Request for Information? Each case will depend on its own facts and on the specific reporting terms of the agreement between KPID and the Department. I have not had the benefit of seeing the actual Contribution Agreement between KPID and the Department. I anticipate, however, that the Department has the right to receive copies of many records held by KPID as they relate to economic development funding granted by KPID. At the very least, it has the right and authority to request records held by KPID. Alternatively, it could request its partner, KPID, to provide the records directly to the Applicant in this case.

The repeated references to “accountability” in the policy and schedules makes it clear that the Department feels strongly about the way in which its public funds are spent and about the openness of the work that KPID does on its behalf. To my mind, this places some obligation on the Department to assist the Applicant to obtain documents relevant to its programs from KPID. KPID remains accountable to the Department and the Department remains accountable to the public.

C. RECOMMENDATION

As a general statement, it is my opinion that if a public body is going to delegate its public authority to a non-governmental organization, it must take steps to ensure that the non-governmental authority (or municipality) is contractually subject to the provisions of the *Access to Information and Protection of Privacy Act*. The contractual obligation should include the responsibility to safeguard personal information and to provide access to records that would otherwise be in custody of the public body. The fact that records are produced by a private organization in delivering a public program

does not change the nature of the records from public records to private ones. The government remains accountable to the public. The public should still have the protections provided for in the Act insofar as their personal information is concerned. Furthermore, the public should still have access to records produced in the administration of government programs.

In the circumstances of this particular case, it would be my recommendation that the Department work with the Applicants to attempt to assist them in obtaining from KPID the records about themselves and their company which they are seeking. This is a case where a non-governmental body became responsible for the distribution of government funds. As such, the Department owes the Applicant at least that they attempt to obtain the records which will help them to sort out the difficulties they now find themselves in because of what appears to be a refusal by KPID to provide the Applicants with the information they need.

It is further my recommendation that the Department include in its Partnership Policy and in its Contribution Agreements the contractual obligation on the private partners to be subject to the provisions of the *Access to Information and Protection of Privacy Act* in order to ensure that the public's personal information is afforded the protection of the Act and that the public can look to the partners, through the Department, for accountability.

Elaine Keenan Bengts
Nunavut Information and Privacy Commissioner
July 7, 2003